Chapter 1
The Security Council and the Responsibility to Protect in the Age of New Wars

"[T]he United Nations was not created in order to bring us to heaven, but in order to save us from hell."[1] To discuss the role of the Security Council and its members in combating genocide, crimes against humanity, war crimes and ethnic cleansing, one could hardly find a better point of departure than these famous words endorsed by *Dag Hammarskjöld* in 1954.[2] When spoken by the then Secretary-General of the

[1] Dag Hammarskjöld, *Address at the University of California Convocation, Berkeley, CA, 13 May 1954*, reprinted in: Andrew W. Cordier & Wilder Foote, eds., *Public Papers of the Secretaries-General of the United Nations, Volume II: Dag Hammarskjöld 1953-1956* (New York: Columbia University Press, 1972) 295 at 301.

[2] Indeed, the quote has become a popular theme in all forms of statements on the prevention of mass atrocity crimes and on the responsibility to protect, in scholarly publications just like in political debates. One of *Hammarskjöld*'s successors, Secretary-General *Kofi Annan*, recalled these words when he addressed the Security Council on the situation in Sudan and called for urgent action to stop the atrocities committed against civilians in Darfur, see UN SCOR, 5125th Mtg., 16 February 2005, UN Doc. S/PV.5125 at 2. In interstate discussions on the responsibility to protect, the link between the responsibility to protect and this quote has been made e.g. by Costa Rica and Denmark, see Costa Rica, Statement on behalf of Costa Rica and Denmark at the General Assembly Debate on the Responsibility to Protect, UN GAOR, 63rd Sess., 97th Plen. Mtg., UN Doc. A/63/PV.97 (23 July 2009) 22. In scholarship, the quote has also repeatedly been cited in the discourse about the prevention of mass atrocity crimes, see e.g. Henning Melber, "Why normative frameworks? An introduction" in *id.*, ed., *Dealing with crimes against humanity*, (2011) 55 *Development Dialogue* 3 at 3, 7; Henning Melber & Peter Wallensteen, "Preface" in Francis Deng, *Idealism and Realism: Negotiating sovereignty in divided nations, 2010 Dag Hammerskjöld Lecture, Uppsala University* (10 September 2010), online: UN Office of the Special Adviser on the Prevention of Genocide <http://www.un.org/en/preventgenocide/adviser/pdf/DH_Lecture_2010.pdf> 3 at 7; B. Panglosse, *Responsibility to Protect and Responsibility to React – From Doctrine to Practice: The Military Intervention in Libya* (Thesis for the Master International and European Public Law, 2011-2012), online: Tilburg University <arno.uvt.nl/show.cgi?fid=121348> at 4.

A.S. Kolb, *The UN Security Council Members' Responsibility to Protect*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht,
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United Nations, they were a response to disillusionment at the performance of the UN and a call for moderation in expectations towards the organization.[3] At the same time, they resonate with the commitment that states made when they signed the Charter of the United Nations (UN Charter) to "save succeeding generations from the scourge of war" and to "reaffirm faith in […] the dignity and worth of the human person".[4] Half a century later, the world that *Hammarskjöld* and the drafters of the UN Charter knew has changed profoundly and yet their concerns have lost nothing of their topicality. The parameters have been redefined in some respects while the essence of today's challenges bears striking similarities to the constellation in which *Dag Hammarskjöld* reiterated the call upon the United Nations to save humanity from hell. A new notion has been born, stipulating an international "responsibility to protect" and providing an important impetus to the debate on how to save mankind from the scourge of war and defend the most basic precepts of human dignity. *Hammarskjöld*'s successors, Secretaries-General *Kofi Annan* and *Ban Ki-moon*, played a crucial role in the evolution and endorsement of this concept, which was prompted again by a perception that the UN, through the Security Council, had failed to effectively discharge its responsibility. A characteristic difference lies, however, in the nature of the evil with which the international community has found itself faced with increasing frequency and urgency in the post-Cold War era. "New wars", as international relations theorists have labelled the phenomenon, have become the principal form in which violent conflict threatens the dignity of men and women. "Atrocity crimes", i. e. genocide, crimes against humanity, war crimes and ethnic cleansing,[5] have been claiming a heavy toll especially from civilian populations. In this situation, eyes turn back to the UN Security Council in the expectation of effective protection.

The purpose of this thesis is to assess to what extent this expectation has found a legal expression in the form of duties incumbent upon the individual members of the Security Council to take the necessary action for the prevention of such atrocity crimes. By the end of this chapter, I will have provided an introduction to the state of jurisprudential and scholarly opinion on this matter. Before turning attention to specific questions of law, however, it is appropriate to outline the current parameters of the issue. I will hence start with a brief introduction to the notion of "new wars" as a description of the conflicts that the United Nations primarily has to cope

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[3] *Cf*. Brian Urquhart, *Hammarskjold* (New York: Harper & Row, 1972) at 47-48.

[4] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945), online: United Nations <http://www.un.org/en/documents/charter/index.shtml> at preambular paras. 1 and 2 [UN Charter].

[5] See United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A tool for prevention* (New York: 2014), online: United Nations <http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf> at 2; see also David Scheffer, "Atrocity Crimes Framing the Responsibility to Protect" (2007-2008) 40 *Case W. Res. J. Int'l L.* 111 (suggesting that the term "atrocity crimes" was a useful designation of genocide, war crimes, ethnic cleansing and crimes against humanity "both for purposes of accuracy when describing the basket of relevant crimes, and for simplicity as a means of communicating with the global populace").

with in our days. Subsequently, I will sketch the position of the Security Council members in this context, including the tools at their disposal to react to such threats. Following these observations on the institutional framework, I will finally introduce the concept of the responsibility to protect as the emerging normative frame of reference which may have an impact on the international law in this field.

1.1 New Patterns of Warfare as a Challenge to the Traditional Normative System

Coined by international relations theorists such as *Mary Kaldor*, the notion of "new wars" has gradually imposed itself to describe the characteristic phenomena of contemporary warfare.[6] *Kaldor*'s central argument is that the process of globalization led to the emergence of a new type of organized violence during the last decades of the twentieth century.[7] To avoid any misunderstandings that could be caused by the terminology, a clarification may be in order here: when I make reference in this work to "new wars", it is not my intention to distinguish two distinct categories of conflict, with one type qualifying as "old wars" and others being "new".[8] In particular, no distinction is intended between the wars of the Cold War era and those of the post-Cold War era. *Kaldor* herself elucidates that features which are characteristic of "new wars" may have existed in earlier wars and that the phenomenon of "new wars", while reflecting a new reality, had been emerging before the end of the Cold War.[9] The essential contribution that she intends to make by distinguishing "new wars" from "old wars" is to confront customary perceptions of war, namely amongst policy-makers, which stem from an earlier era, with those new realities of conflict that have emerged in the context of the globalization process.[10] In other words, the added value of the "new war" theory lies not in establishing categories or labels for different incidents of warfare, but in identifying the characteristics that distinguish

[6] See especially Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012).

[7] *Ibid*., at 1.

[8] Some authors have indeed voiced doubts as to the appropriateness of the label "new wars". Even *Thomas G. Weiss*, while accepting that change in armed conflict has been so substantial that the label "new" is a justified attribute for many contemporary wars, notes that this "simplistic shorthand can [..] lead to misunderstandings", see Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 70. *Weiss* stresses that the elements which characterize "new" warfare are not totally new themselves. Rather, elements that had existed before but were considered either extinct or only tangential had now come to the fore or been combined in previously unknown ways, *ibid*.

[9] See Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 3.

[10] *Ibid*., at 1-3, 17 (noting that traditional perceptions of armed conflict still profoundly affect our thinking about war and security).

contemporary patterns of violence from what conventional wisdom would suggest. For the present work, such a juxtaposition of "old war" perceptions with "new war" insights into modern or "postmodern"[11] conflicts is particularly valuable in that it explains the traditional legal framework for Security Council action on the one hand and its pitfalls as well as the reasons for the emergence of the concept of a "responsibility to protect" (R2P) on the other.

What exactly characterizes the new wars of our times as contrasted with conventional conceptions of war has been explained in varying terms by different authors.[12] Two developments that are key to understanding the legal issues of the following chapters are the decline of states as a defining parameter of hostilities and the qualitative as well as quantitative leap in atrocities against civilians. Conventional warfare had been intimately related to statehood, as it was in its strictest sense understood as a means employed by states against each other to pursue their respective political ends.[13] "New wars", by contrast, are marked precisely by an erosion of state autonomy, which is reflected in multiple aspects of contemporary conflicts. To begin with the goals of warfare, notions of state interest have increasingly given way to new and different forms of what *Kaldor* calls "identity politics", i. e. claims to power based on particular concepts of identity.[14] Relevant identity politics may refer to such diverse concepts as nationality, clan structures, religion or language.[15] While *Kaldor* acknowledges that wars have always been clashes of different identities, she observes that contemporary identity politics are inherently exclusive, focussing on labels that cause fragmentation of societies rather than integration.[16]

Conflicts marked by such particularistic currents are complex and hence difficult to grasp, including for international law, in terms of both their locus and the belligerent parties.[17] New wars are characterized by the active participation of a

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[11] *Cf.* e.g. Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt and Company, 1997) at 5-6.

[12] *Kaldor*, for instance, specifically mentions three characteristics, namely the goals, the methods and the financing of contemporary warfare, see Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 7-11. *Thomas G. Weiss*, for his part, names four changes that he considers essential, concerning namely the locus of armed conflicts, the main agents, the role of economic interests, and the victims, see Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 70-80. He characterizes "new wars" as "internal armed conflicts waged primarily by nonstate actors who subsist on illicit and parasitic economic behavior, use small arms and other low-technology hardware, and prey upon civilians, including aid workers and journalists", *ibid*. at 80.

[13] See on this "Clausewitzean definition" of war Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 15-17 and c. 2. I should stress, as *Kaldor* herself does, that this notion is stylized and fails to account for nuances and evolutions even in the realities of old wars, *ibid*., at 15-17.

[14] *Ibid*., at 7-8.

[15] *Ibid*., at 7.

[16] *Ibid*., at 7-8.

[17] For details on these two aspects see Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-74.

multitude of diverse entities. Aside from states and clearly defined and well-organized movements, a variety of non-state actors such as militias, paramilitary groups and warlords, criminal gangs and private military companies take part in the conduct of hostilities.[18] Constellations on the ground are often unclear and the lines between belligerents fluctuate, as former or temporary allies split and turn against each other.[19] For wars involving such actors, moreover, international borders are no longer the determinative criterion.[20] In fact, the worst humanitarian disasters since the Cold War were mostly brought about by intrastate crises, such as in Somalia, Liberia, Rwanda, Haiti or East Timor. Others have occurred during conflicts that at least have a history of civil war, despite the fact that they may have developed into international armed conflicts sooner or later.[21] In sum, a state-centric perspective is often inadequate to explain the realities of modern warfare.[22]

Another crucial development is the prevalence in "new wars" of civilian casualties.[23] Civilian populations have always paid a heavy toll when wars were led.

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[18] *Ibid*., at 74. Again, it should be noted that it is its degree and form rather than the involvement of private actors as such that is "new", *ibid*.

[19] Illustrative are the shifting alliances amongst the different warring factions in Bosnia and Herzegovina between 1992 and 1995, see Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility* (London: Cameron May 2008) at 193-194, the multitude of rebel movements in the Democratic Republic of the Congo (DRC), *cf.* Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-72 (estimating "40 or so armed opposition movements in the DRC") and the gradual disintegration of armed groups in Darfur, *cf.* Part 6.3.6 below.

[20] See on the whole Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-74.

[21] In this latter category fall namely the wars accompanying the break-up of the former Socialist Federal Republic of Yugoslavia, which combined elements of international and internal armed conflict at the latest when the United Nations accepted the breakaway republics as new member states in May 1992, *cf*. for Croatia: UN Security Council, Resolution 753 (1992), UN SCOR, 3073rd Mtg., UN Doc. S/Res/753 (18 May 1992) and UN General Assembly, *Admission of the Republic of Croatia to membership in the United Nations*, GA Res. 46/238, UN GAOR, 46th Sess., 86th Plen. Mtg., UN Doc. A/Res/46/238 (22 May 1992) 5, and for Bosnia and Herzegovina: UN Security Council, Resolution 755 (1992), UN SCOR, 3078th Mtg., UN Doc. S/Res/755 (20 May 1992) and UN General Assembly, *Admission of the Republic of Bosnia and Herzegovina to membership in the United Nations*, GA Res. 46/237, UN GAOR, 46th Sess., 86th Plen. Mtg., UN Doc. A/Res/46/237 (22 May 1992) 5. Somewhat different, while leading to similar difficulties of categorization, is the situation in the DRC, which turns around conflicts between the Congolese army and diverse rebel groups and militia operating on and from the territory of the DRC. At the same time, neighbouring states have repeatedly intervened in support of one side to the conflict or the other, turning it into an international armed conflict and indeed into what has been labelled "Africa's World War", see Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009). *Susan Breau* nevertheless treats the conflict in the DRC essentially as a civil war, *cf.* Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility* (London: Cameron May 2008) at 180.

[22] *Cf*. Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 73-74.

[23] See on this aspect of new wars e.g. Thomas G. Weiss, *ibid.* at 75-80.

Alexander B. Downes estimated in 2006 that about half of the war-related casualties of the previous three centuries had been civilians.[24] Already during the Second World War, the absolute number of victims amongst the civilian population may have been almost two-and-a-half times as high as that for soldiers.[25] For the 1990s, however, the percentage of civilians amongst the victims of warfare has been estimated, by different authors, to amount to a staggering 80 or even 95 %.[26] The immediate causes of this excess of civilian casualties are manifold, ranging from direct military targeting to conflict-related preventable disease and starvation.[27] In fact, even diseases and starvation may in some instances be part of a military strategy that deliberately imposes upon a population conditions of life that cause excess deaths.[28] This attests to the new qualitative rather than solely quantitative dimension of violence against civilians in contemporary warfare. Pursuant to *Kaldor*'s theory, this mode of warfare, in which violence is directed not just tangentially but primarily against civilians, is the second characteristic of "new wars" and as such at least partly linked to divisive identity politics.[29] As *Kaldor* recalls, conventional wars were aimed at the conquest of territory through military encounters. The mode of new wars, by contrast, resembles that of guerrilla warfare in that it seeks to control territory through political control of its population. The distinctive feature of new warfare, however, are the means which it employs to ensure such control of the population, and which are drawn from counter-insurgency experience rather than guerrilla theory: instead of attempting "to capture 'hearts and minds'", *Kaldor* suggests, it "borrows […] techniques of destabilization aimed at sowing 'fear and hatred'".[30] Essentially, control is established by instilling terror and ultimately even by getting

[24] See Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War" (2006) 30:4 *International Security* 152 at 152; *Weiss* notes that this estimate may still be too high in the eyes of most observers, see Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 76.

[25] *Cf.* Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 76 (calculating 23 million dead soldiers and 57 million civilian casualties).

[26] See with references to the different studies *ibid*., at 76-77.

[27] On the "prevalence of civilian casualties" as a consequence of the intentional targeting of civilian populations and war-related fatalities, *cf.* e.g. *ibid*., at 75-76.

[28] *Cf.* e.g. Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War" (2006) 30:4 *International Security* 152 at 156 (including deaths by starvation and disease in his enumeration of methods of "civilian victimization"). A pertinent example is the deliberate destruction of resources, installations and utensils essential for water and food supplies in Darfur, *cf.* e.g. United Nations, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005, online: United Nation <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> at paras. 235, 305 (reporting that crops had been burnt and cut down, water pumps, containers and wells destroyed or poisoned, and food processing equipment wrecked).

[29] On the mode of warfare as the second characteristic of new wars, see Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 10 and chap. 5.

[30] *Ibid.,* at 9.

rid of those parts of the population that belong to or support a different identity.[31] From the point of view of international law, this mounts the challenge that strategies which are prohibited under humanitarian law are employed as an essential method of new warfare.[32]

These characteristics of new warfare pose problems for the United Nations and its legal system as it had existed during the Cold War. They explain some modifications that the UN collective security system, with the Security Council at its heart, has already undergone in the post-Cold War era, as well as additional difficulties with which it has to struggle, namely in its peacekeeping practice. As a state-centric perspective is no longer the appropriate approach to contemporary conflicts, the UN, and first and foremost the Security Council, has been compelled to reconsider its toolbox to address threats to international peace and security. When the Charter had been framed against the backdrop of the Second World War, it had primarily envisaged conflicts that could be viewed today as "old wars". As will be seen in the context of the next part of this chapter, the Security Council has reacted to the shifted realities by understanding and applying its competences broadly, gradually considering intrastate conflicts as cases in which it could intervene with the powerful machinery of Chapter VII of the UN Charter.

Even if the international community has a normative basis to get involved, however, it will in practice often face a particularly intricate situation, without the clear lines between states or organized movements fighting for territory, but with a multitude of diverse actors pursuing ideological, economic or power interests, some of which are best achieved by a prolongation of the conflict. On the ground, the actual fighters involved in the combats may sometimes be hard to confront or demobilize, such as in the case of drugged child soldiers that were used, for instance, in Sierra Leone.[33] Moreover, even UN personnel and equipment have been increasingly less respected in recent years.[34] More generally, however, difficulties arise from the high stakes that influential actors tend to have in new wars. Thus, in addition to the complexities caused by the variety of actors involved in combat, new wars are characterized by what *Kaldor* calls a "new 'globalized' war economy".[35] This war economy is based in the need of conflict parties to obtain external resources for their fight, which has on the other side led to different forms of revenue-generating. These frequently consist in control of natural resources or illegal trade, such as in arms, drugs, diamonds, or in human trafficking.[36] Such war economies can be most profitable, yet they depend on the continuation of violence.[37] Modifying the famous

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[31] *Ibid*.

[32] *Ibid*.

[33] *Cf.* Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-72.

[34] *Ibid*., at 77-80.

[35] See Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 10 and chap. 5.

[36] *Ibid*., at 10.

[37] *Cf. ibid*.; Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 74-75.

statement by Prussian military theorist *Carl von Clausewitz*, according to whom war was the continuation of politics, *David Keen* has suggested that today "war may be a continuation of *economics* by other means."[38] Aside from industries whose business is directly linked to and who have thus always benefitted from warfare, such as namely arms manufacturers, many contemporary conflicts and the absence of effective state authority that accompanies them offer opportunities to accumulate wealth for those controlling the relevant items of commerce.[39] The profiteers of war, however, have strong incentives to act as spoilers and undermine attempts at solving the conflict.[40] For *Kaldor*, the key to long-term solutions for regions unsettled by new wars therefore consists in restoring public authorities that act under the rule of law and control organized violence.[41] The normative framework of the responsibility to protect avails itself of such insights, making the responsibility to rebuild post-conflict societies an essential part of a continuum of obligations.[42] Still, international relations theory cautions against the illusion that halting new wars and preventing the crimes that characterize them was amenable to easy solutions. For the following discussion of duties to prevent and react to the commission of atrocity crimes, such insights may shed important light on the difficulties that will be confronted by international actors in implementing any such duties.

1.2 Tools for the Security Council and Its Members to Combat Atrocity Crimes

The international system that has gradually been developed since the Second World War knows a variety of actors that may have a share in the assessment, prevention and solution of conflicts and atrocity crimes. Within this fabric, a central role has been granted to the Security Council which bears "primary responsibility for the maintenance of international peace and security".[43] To allow for an effective discharge of this responsibility, the drafters of the UN Charter endowed the Council with far-reaching powers. Once a situation falls into its area of competence, the

[38] See David Keen, "Incentives and Disincentives for Violence" in Mats Berdal & David M. Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder: Lynne Rienner, 2000) 19 at 27 [emphasis in the original]; see also Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 75.

[39] See Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 74-75.

[40] On "spoiler behavior" motivated by economic interests, see *ibid*., at 75.

[41] See Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 12.

[42] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XI and, for details, *ibid*., chap. 5.

[43] Article 24(1) UN Charter.

Council possesses a broad array of tools that may range, depending on the circumstances, from primarily preventive measures to binding resolutions that impose sanctions, order the deployment of military forces under UN command or authorize military intervention by UN member states. The Security Council itself has interpreted its powers increasingly broadly, especially since the end of the Cold War, in that it has considered intrastate conflicts with massive violations of human rights and humanitarian law as a matter that allows for the use of its sharpest sword, coercive action under Chapter VII of the UN Charter.[44] The various courses of action that are available to the Security Council and the ways in which the individual members influence its decisions give practical meaning to the discourse over a duty to prevent atrocity crimes.

1.2.1 The Competence and Toolbox of the Security Council in Addressing Atrocity Crimes

The first step for the Security Council to formally address a situation is to convene a meeting and place the matter on its agenda. The Security Council itself decides, at the beginning of each meeting, upon its agenda for that particular meeting.[45] While the provisional agenda, which is prepared by the Secretary-General, may include matters that have been submitted for the consideration of the Security Council by other organs of the United Nations or by states,[46] the Council is free to decide on a different agenda. The final agenda may include additional items, omit items provided for by the provisional agenda, or even reject the provisional agenda entirely.[47]

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[44] *Cf.* e.g. Nico Krisch, "Article 39", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. II (Oxford: Oxford University Press, 2012) 1272 at paras. 19-20, 23; High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at para. 202 (noting that "step by step, Security Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a 'threat to international peace and security', not especially difficult when breaches of international law are involved"); *cf.* also International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Dusko Tadić a/k/a "DULE"*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 2005), online: International Criminal Tribunal for the Former Yugoslavia <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> at para. 30 (affirming a "settled practice of the Security Council and the common understanding of the United Nations membership in general" that internal armed conflicts may constitute a "threat to the peace" in the sense of Article 39).

[45] See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 9.

[46] See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 7(1) in conjunction with Rule 6.

[47] See Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 85.

In practice, it has become common for the Security Council to address only one item per meeting, or, put differently, to convene separate meetings for different matters.[48]

Once the Security Council has placed an item on its agenda, it has at its disposal a variety of means to investigate the facts and lay the ground for an informed evaluation of the situation under consideration. Partly, such information may already be available elsewhere in the UN system and only need to be retrieved. According to its Provisional Rules of Procedure, the Security Council may receive information from any member of the Secretariat or other person of competence.[49] The Security Council may also take the initiative and request assessment missions.[50] Under Article 34 of the UN Charter, it can conduct investigations or establish fact-finding missions concerning "any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security."[51] The Security Council may also decide to invite a non-member to participate in its discussion.[52] During so-called "Arria formula" meetings, the members of the Security Council can consult with persons, including representatives of non-members but for instance also relevant non-state parties, in a private and informal setting.[53] Security Council members may also meet to be briefed by NGOs.[54]

If the Security Council arrives at the conclusion that it needs to get actively involved in a situation, the UN Charter places at its disposal different tools. Amongst the first steps taken will be statements exerting diplomatic pressure on the relevant

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[48] *Ibid*.

[49] See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 39.

[50] See e.g. UN Security Council, Resolution 1304 (2000), UN SCOR, 4159th Mtg., UN Doc. S/Res/1304 (16 June 2000) at op. para. 14 (requesting the Secretary-General to submit an assessment of the atrocities committed in Kisangani in the Eastern DRC, which led to the establishment of an inter-agency assessment mission including personnel from the United Nations Development Programme, UNDP, the Office for the Coordination of Humanitarian Affairs, OCHA, the Department of Peacekeeping Operations, DPKO, and the United Nations Organization Mission in the Democratic Republic of the Congo, MONUC, see UN Secretary-General Kofi Annan, *Letter dated 4 December 1992 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2000/1153 (4 December 2000)); *cf.* also Katarina Månsson, "UN Peace Operations and Security Council Resolutions: A Tool for Measuring the Status of International Human Rights Law?" (2008) 26:1 *Netherlands Quarterly of Human Rights* 79 at 93-94.

[51] *Cf*. Article 34 UN Charter; see also UN Secretary-General Ban Ki-moon, *Implementing the responsibility to protect: Report of the Secretary-General*, UN GAOR, 63rd Sess., UN Doc. A/63/677 (2009) at para. 52.

[52] See Articles 31-32 UN Charter; see also Rule 37 of the Provisional Rules of Procedure.

[53] See Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 73.

[54] *Ibid*., at 75 (on the meeting of 12 February 1997, following an initiative by the Chilean Ambassador *Juan Somavía*, noting however that the meeting was eventually convened by the Secretariat rather than taking place under the auspices of the Security Council, and that no formula akin to the Arria procedure has been established yet).

conflict parties, namely the expression of concern or, even stronger, a condemnation of certain acts. Such statements may be issued by the President of the Security Council or they may be formally adopted as a resolution. Under Chapter VI of the UN Charter, the Security Council then has essentially recommendatory powers with a view to international disputes.[55] It may call upon the parties to settle their dispute by pacific means,[56] make recommendations concerning the procedure[57] or, under the conditions of Article 37 or Article 38 of the UN Charter, even concerning the substance of the settlement.[58]

The most powerful tools are provided for, however, by Chapter VII of the UN Charter, which encompasses recommendations and decisions on measures of a non-coercive or even coercive nature. The trigger for action under Chapter VII is a determination by the Security Council of "the existence of any threat to the peace, breach of the peace, or act of aggression" pursuant to Article 39 of the UN Charter. While the threshold criterion of a threat to the peace was originally understood as requiring a conflict between states,[59] it has gradually been interpreted, namely by the Security Council itself, to cover also intrastate conflicts.[60] Initially, the anchor had been the cross-border implications that such conflicts could have, such as the influx of refugees in neighbouring countries.[61] Gradually, however, the efforts made by the Security Council to justify its intervention with such interstate considerations faded. Eventually, Article 39 UN Charter has come to be viewed as allowing for intervention also in intrastate conflicts without immediate international repercussions if these are accompanied by massive violations of human rights.[62] This interpretation

[55] See on this Sir Michael Wood, "United Nations, Security Council" in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) at para. 22.

[56] Article 33(2) UN Charter.

[57] Articles 36, 38 UN Charter.

[58] Articles 37-38 UN Charter.

[59] *Cf.* Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 51-52 (noting that it had been "virtually inconceivable" during the Cold War that civil wars would be considered to constitute threats to international peace and security).

[60] *Cf.* on the "settled practice" of the Security Council and the UN membership at large to treat internal armed conflicts as threats to the peace within the ambit of Article 39 already International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Dusko Tadić a/k/a "DULE"*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 2005), online: International Criminal Tribunal for the Former Yugoslavia <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> at para. 30; William A. Schabas, *Genocide in international law: the crime of crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009) at 530 (noting that "[b]y the late 1990s, it was well accepted that internal crises fell within the ambit of Security Council responsibility for international peace and security"); *cf.* also the other authorities cited in note 44 above.

[61] See Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 52.

[62] See William A. Schabas, *Genocide in international law: the crime of crimes*, 1st ed. (Cambridge: Cambridge University Press, 2000) at 498 (noting the "development in the law on Chapter VII that international peace and security may be threatened by human rights violations within the borders of a sovereign State where there is no perceptible or realistic impact even on neighbouring States").

has not only been accepted in international scholarship,[63] but importantly it has also been endorsed by states that are themselves not, or at least not permanently, members of the Security Council.[64] Pursuant to this extensive reading of Article 39 UN Charter, the tools provided by Chapter VII may be used not only in interstate conflicts but also in intrastate situations that have a massive humanitarian impact.

Under Chapter VII, the Security Council may call upon the parties to comply with provisional measures that it considers necessary or desirable to prevent a situation from aggravating.[65] Moreover, according to Article 41 of the UN Charter, the Security Council may decide on measures short of armed force and call upon the members of the UN to apply them. Article 41 (2) UN Charter mentions as examples the interruption, completely or partly, of economic relations or of diverse means of traffic and communication, as well as the severance of diplomatic relations. In practice, Article 41 will typically be employed as a basis for sanctions such as arms embargoes, broader economic sanctions or, increasingly, so-called "targeted sanctions" concerning particular individuals.[66] Decisions on such measures by the Security Council are binding on all members of the United Nations or on those specifically designated by the Council for their implementation.[67] To monitor the implementation of sanctions, specialized committees may be created by the Security Council as subsidiary organs pursuant to Article 29 of the UN Charter.[68]

Since the first half of the 1990s, the Security Council has also resorted to international criminal law as a means of combating atrocity crimes. In 1993 and 1994, the Council established, based on Chapter VII of the UN Charter, *ad hoc* tribunals

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[63] See e.g. Laurence Boisson de Chazournes & Luigi Condorelli, "De la 'responsabilité de protéger' ou d'une nouvelle parure pour une notion déjà bien établie" (2006) 110 *Revue Générale de Droit International Public* 11 at 13; William A. Schabas, *Genocide in international law: the crime of crimes*, 1st ed. (Cambridge: Cambridge University Press, 2000) at 498 (calling it "[p]erhaps the single most significant development in the law on Chapter VII").

[64] *Cf.* e.g. Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect. The 2009 General Assembly Debate: An Assessment*, August 2009, online: Global Centre for the Responsibility to Protect <http://www.globalr2p.org/media/files/gcr2p_-general-assembly-debate-assessment.pdf> at 2 and 5 (noting that several states, including Benin, Costa Rica, Denmark, Liechtenstein and Lesotho, as well as the EU had used the 2009 General Assembly debate on implementing the responsibility to protect to affirm explicitly that mass atrocities could be considered a threat to international peace and security even if they were committed within the borders of one state); on the recognition which this broad interpretation of the notion of a "threat to international peace and security" has found in the wider international community *cf.* also generally High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at para. 202 (quoted in note 44 above).

[65] Article 40 UN Charter.

[66] See Sir Michael Wood, "United Nations, Security Council" in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) at para. 29.

[67] Articles 25 and 48 of the UN Charter.

[68] For links to current and former sanctions committees, see online: Security Council <http://www.un.org/sc/committees/are>.

to prosecute persons responsible for serious violations of international humanitarian law in the former Yugoslavia and in Rwanda.[69] As such, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are subsidiary organs of the UN Security Council in the sense of Article 29 of the UN Charter. By creating international criminal tribunals, the Security Council notably intended not just to redress past crimes but also to halt the commission of further violations of international humanitarian law.[70] With the entry into force of the Rome Statute of the International Criminal Court (ICC) in 2002, the options available to the Council have been further expanded. Under the Rome Statute, the Security Council has the right to refer situations to the ICC.[71] This power eliminates the need for the creation of further tribunals following the scheme of the ICTY and the ICTR.

Lastly, the collective security system of the UN Charter envisages that the Security Council may resort to armed force as a tool of maintaining or restoring international peace and security.[72] In practice, the Council has developed different types of operations that involve varying degrees of force and can come to bear during different phases of conflict, from conflict prevention through conflict management to post-conflict peace-building.[73] Classical "peacekeeping" missions are based on the consent and the cooperation of the conflict parties and seek to maintain peace with no or only a minimal mandate to use force, which is usually limited to self-defence.[74] Throughout the Cold War, the Security Council by and large confined itself to the deployment of observer missions, which can create transparency and build confidence between the conflict parties, and interposition forces, which are placed as a buffer between them.[75] Yet changing realities and challenges, including the

[69] See for the International Criminal Tribunal for the former Yugoslavia (ICTY): UN Security Council, Resolution 827 (1993), UN SCOR, 3217th Mtg., UN Doc. S/Res/827 (25 May 1993), implementing a decision taken in February 1993, see UN Security Council, Resolution 808 (1993), UN SCOR, 3175th Mtg., UN Doc. S/Res/808 (22 February 1993); see for the International Criminal Tribunal for Rwanda (ICTR): UN Security Council, Resolution 955 (1994), UN SCOR, 3453rd Mtg., UN Doc. S/Res/955 (8 November 1994), following a corresponding request by the government of Rwanda, see Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, UN Doc. S/1994/1115 at 4.

[70] See UN Security Council, Resolution 827 (1993), UN SCOR, 3217th Mtg., UN Doc. S/Res/827 (25 May 1993), preambular paras. 5 and 7; UN Security Council, Resolution 955 (1994), UN SCOR, 3453rd Mtg., UN Doc. S/Res/955 (8 November 1994), preambular paras. 6 and 8.

[71] See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002), Article 13 (b).

[72] Article 42 UN Charter.

[73] On the different phases of conflict and the various functions of UN peacekeeping operations, see generally Michael Bothe, "Peacekeeping" in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I (Oxford: Oxford University Press, 2012) 1171 at para. 15.

[74] *Ibid*., at paras. 1, 4, 15.

[75] On the history of UN peacekeeping until the end of the 1980s, see *ibid*., at paras. 7-8. An exception to the limited peacekeeping practice of the Security Council during the Cold War were the controversial *Opérations des Nations Unies au Congo*, ONUC, *ibid*., at paras. 7, 16.

proliferation of "new wars", called for different concepts of collective military intervention.[76] By the end of the 1980s, the Security Council began to create more complex, multidimensional peacekeeping operations to facilitate the implementation of peace agreements and the return of post-conflict societies to normal conditions.[77] Such missions usually contain major civilian components.[78] Their functions may include verification activities and investigations into human rights violations, the exercise of police functions and the training of police forces, the demobilization, disarmament and reintegration of fighters, demining, or assistance in re-establishing state functions, for instance through preparing and monitoring elections.[79] At the far end of this spectre are the interim UN administration missions in Kosovo and East Timor, which were given quasi-governmental executive and administrative powers.[80] Moreover, the Security Council has deployed so-called "robust peacekeeping" missions into several ongoing conflicts.[81] Their mandates included humanitarian assistance and the protection of humanitarian assistance operations, the maintenance of order in a failed-state situation, and the protection of the civilian population.[82] Such missions have been provided with a broader authorization to use force, going beyond the traditional self-defence provisions.[83] To the extent and for as long as forces are deployed in peacekeeping operations with the consent of the target state, Article 42 UN Charter is not legally required as a basis.[84] Importantly, however, Article 42 UN Charter authorizes the Security Council to take fully

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[76] *Cf.* e.g. Ruth Wedgwood, "United Nations Peacekeeping Operations and the Use of Force" (2001) 5 *Washington University Journal of Law & Policy* 69 at 74 (observing that the ethnic warfare which engaged "non-state actors – single-minded groups lacking the full panoply of interests and linkages that often moderate the behavior of governments", and conflicts "fueled by opportunistic mercantile warlords" were not suited for the traditional concept of interpositional peacekeeping).

[77] See Michael Bothe, "Peacekeeping", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I (Oxford: Oxford University Press, 2012) 1171 at para. 9.

[78] *Ibid*., at paras. 15-16.

[79] *Ibid*., at paras. 9, 15.

[80] *Cf.* UN Security Council, Resolution 1244 (1999), UN SCOR, 4011th Mtg., UN Doc. S/Res/1244 (1999) (10 June 1999) (establishing the United Nations Interim Administration Mission in Kosovo, UNMIK) and UN Security Council, Resolution 1272 (1999), UN SCOR, 4057th Mtg., UN Doc. S/Res/1272 (1999) (25 October 1999) (establishing the UN Transitional Administration in East Timor, UNTAET); *cf.* United Nations, *Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305-S/2000/809 [*Brahimi Report*] at para. 19; 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* (Ottawa: International Development Research Centre, 2001) at 117.

[81] See Michael Bothe, "Peacekeeping", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I (Oxford: Oxford University Press, 2012) 1171 at para. 16.

[82] *Ibid*.

[83] *Ibid*.

[84] See Nico Krisch, "Article 42", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. II (Oxford: Oxford University Press, 2012) 1330 at para. 24.

fledged military enforcement action, i. e. to use armed force to impose its will upon the addressee of the action.[85]

In implementing military action, the UN Security Council depends on the willingness of member states to contribute forces to the specific operation in question. Articles 43 and 47 of the UN Charter envisage a centralized enforcement system in which the member states place forces at the disposal of the Security Council that are directly controlled by the Council through the Military Staff Committee.[86] As no agreements under Article 43 UN Charter have ever been concluded, this centralized enforcement system never materialized.[87] UN peacekeeping operations thus require the conclusion of *ad hoc* agreements with member states on the deployment of forces.[88] They operate under UN command[89] and may be established as subsidiary organs of the Security Council.[90] Since the beginning of the 1990s, the Security Council has also developed a practice of decentralized enforcement action, in which it authorizes member states to use force for a specific purpose.[91] The legal basis for the use of such "mandated forces" can be found in Articles 39, 42 and 48 UN Charter.[92] Both the deployment of peacekeeping forces under UN command and the effective use of decentralized enforcement action through mandated forces presuppose that member states are willing to commit their armed forces to the operation. Where this willingness is uncertain, the Security Council could still proceed by drafting a resolution, on the basis of which the Secretary-General may undertake to assemble the required resources before the resolution is formally adopted.[93]

Each of the different forms of UN peace operations may make an important contribution to suppressing mass atrocities, by preventing the outbreak or resurgence of violence and by supporting the establishment of the necessary structures for lasting

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[85] *Cf.* Articles 39, 42 UN Charter; Michael Bothe, "Peacekeeping", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I (Oxford: Oxford University Press, 2012) 1171 at paras. 1, 3.

[86] *Cf.* Articles 43, 47 UN Charter; Nico Krisch, "Article 42", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. II (Oxford: Oxford University Press, 2012) 1330 at para. 8.

[87] See Nico Krisch, "Article 42", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. II (Oxford: Oxford University Press, 2012) 1330 at para. 8.

[88] *Ibid*., at para. 9.

[89] *Ibid*.

[90] See Michael Bothe, "Peacekeeping", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I (Oxford: Oxford University Press, 2012) 1171 at para. 17.

[91] *Ibid*., at para. 33; Nico Krisch, "Article 42", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. II (Oxford: Oxford University Press, 2012) 1330 at para. 10.

[92] See Michael Bothe, "Peacekeeping", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. I (Oxford: Oxford University Press, 2012) 1171 at para. 33; Nico Krisch, "Article 42", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. II (Oxford: Oxford University Press, 2012) 1330 at para. 10.

[93] *Cf.* the recommendation in United Nations, *Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305-S/2000/809 [*Brahimi Report*] at paras. 60 and 64 (b).

peace. To the extent that they halt or prevent armed conflict, they contribute to combating an environment which is particularly prone to the commission of mass atrocity crimes. Military operations may, however, also directly and specifically serve the prevention of atrocity crimes. The Security Council has thus in recent times included increasingly strong provisions on the protection of civilians in its mandates for UN peace operations.[94] Moreover, as soon as massive violations of human rights are recognized to constitute a threat to international peace and security as such, they may arguably trigger both the use of non-military measures under Chapter VII and the use of military coercion under Article 42 UN Charter.

1.2.2 The Role of Member States in Security Council Deliberations and Decision-Making

To make effective use of its competences, the Security Council as an organ composed of states depends on its members. Its membership is currently limited to 15 members, 5 of which are granted permanent representation under the UN Charter whereas the other 10 are elected for two-year terms.[95] Its collective decision-making is governed by the UN Charter, the Provisional Rules of Procedure and the customary practice of the Security Council.[96] According to these rules and customs, every single member state can influence the work of the Security Council in various ways, from the earliest stages of convening a meeting and adopting an agenda to the substantive decision on the collective measures, if any, to be taken.

In principle, any member state of the Security Council can initiate a meeting on a matter which it considers to require the Council's consideration. According to the Provisional Rules of Procedure, it is for the President of the Security Council to call a meeting "at any time he deems necessary".[97] The presidency rotates amongst the members of the Security Council in a monthly and alphabetical cycle,[98] and the presiding state can arguably convene a meeting at its discretion.[99] Moreover, pursuant to Rule 2(1), any member of the Security Council can request a meeting. The provision that in this case the President "shall" convene a meeting has been construed

[94] This development was commended already in United Nations, *Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305-S/2000/809 [*Brahimi Report*] at para. 62.

[95] See Article 23(1) UN Charter.

[96] On the significant role of custom in the practice of the Security Council, see Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 17-18.

[97] See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 1.

[98] See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 18.

[99] See Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 23-26.

by member states in the sense of an obligation.[100] Hence, according to the letter of the Provisional Rules of Procedure, any permanent or non-permanent member can prompt a meeting of the Security Council. The agenda for the meeting is then decided upon by a procedural vote.[101] Theoretically, a request by one member state to convene a meeting of the Security Council hence need not obtain majority support, or indeed any support at all, from the other members.[102] The practice of the Security Council is, however, that the next formal meeting is agreed upon by its members, or at the very least by a majority, in informal consultations, pursuant to an initiative by the President.[103] Similarly, the members of the Security Council usually agree on the provisional agenda in informal consultations, making debates about the agenda during a formal meeting a rare phenomenon.[104] If a meeting was convened against the will of the majority of the Council's members, its effect would indeed be limited as these could bring their views to bear on the decision on the agenda, by moving for an adjournment or by defeating the substantive proposals submitted in the course of the meeting.[105] In practice, initiating a Security Council meeting has thus been found to be a matter of political manoeuvring.[106] Already at this initial stage of the collective decision-making process, legal norms could be relevant insofar as they may constrain considerations of national interest and demand that a meeting be convened and its agenda adopted with a view to effectively preventing atrocity crimes.

The members of the Security Council can further bring their weight to bear through their participation in the formal and more often informal deliberations, during which the substance of the Council's action is decided upon and the wording of its documents drafted. Any individual Security Council member may submit draft resolutions, which need not be seconded by a second representative to be put

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[100] See the statements by the representatives of New Zealand and the United States following the failure by the representative of Mali as the President of the Security Council in April 1966 to promptly convene an emergency meeting on the question of Rhodesia following a request to this effect by the United Kingdom, *ibid*., at 27-29. As *Bailey* and *Daws* note, the latter statement, according to which the President of the Security Council has no choice but to convene a meeting if a member so requests seems to have been acquiesced in by all the other members of the Council at the time, with the one exception of the representative of Mali, *ibid*., at 29.

[101] See Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 85.

[102] *Ibid*., at 33.

[103] *Ibid*., at 26.

[104] *Ibid*., at 89.

[105] *Cf*. the letter by the US representative to the President of the Council of 21 April 1966, reprinted in: Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) 28 at 29.

[106] See William R. Pace & Nicole Deller, "Preventing Future Genocides: An International Responsibility to Protect" (2005) 36:4 *World Order* 15 at 30 (noting that, since a decision on placing an issue on the Council's agenda is generally taken by consensus, it can in fact be obstructed by every permanent and non-permanent member, with reference to the cases of Nepal, Northern Uganda, Uzbekistan and Zimbabwe as contemporary examples of situations which the Council did not address despite their being recognized as endangering international peace and security).

to a vote (Rule 34 of the Provisional Rules of Procedure).[107] For a draft resolution to be adopted it must, pursuant to Article 27 (3) of the UN Charter, obtain the "affirmative vote" of at least nine members, including the five permanent members.[108] Put differently, any permanent member has the capacity to forestall the adoption of a resolution on a non-procedural matter by casting a negative vote. Although this is technically imprecise, this power has come to be known as the "veto right".[109] In practice, while resolutions have been vetoed on numerous times, the same effect has increasingly often been achieved by the mere threat of a veto, discouraging the sponsors of a draft resolution to even submit it for voting.[110] On the other side, many procedural motions and even some draft resolutions or other substantive decisions have been adopted without a vote or by consensus.[111]

Given the need to achieve consensus at least amongst the five permanent members, and preferably within the Security Council as a whole, utmost importance falls upon the deliberations preceding the actual decision-making process. Since the 1990s, the substantive negotiations have increasingly taken place outside the Council's formal meetings, in informal consultations held by all Security Council members ("consultations of the whole") or varying smaller groups, such as the five permanent members (the "P5"), the three Western permanent members ("P3") or the members of the European Union (EU).[112] Such informal consultations are not provided for in the UN Charter or the Provisional Rules of Procedure, but they have been an

[107] This distinguishes draft resolutions proposed by members of the Security Council from those of other UN members that have been invited to participate in the Council's deliberations, which are only voted upon if another state, namely one with a seat on the Security Council, so requests (Rule 38 of the Provisional Rules of Procedure); see also Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 221.

[108] The wording of Article 27(3) of the UN Charter is ambiguous as regards the effect of abstentions by permanent members. Contrary to the drafting history, which seems to suggest that the framers of the UN Charter imagined decisions being taken with the positive support of all five permanent members, it has become a common practice, recognized also by the International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Rep. 16, online: International Court of Justice <http://www.icj-cij.org/docket/files/53/5595.pdf> at paras. 21-22, not to count abstentions as vetoes, see Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 250-251.

[109] *Cf.* Torsten Stein & Christian von Buttlar, *Völkerrecht*, 13th ed. (Köln: Carl Heymanns, 2012) at para. 411 (noting that, unlike a veto in the technical sense, a negative vote cast by a permanent member of the Security Council already prevents the adoption of a resolution rather than blocking a decision that has previously been taken); *cf.* also Jean Spiropoulos, "L'abus du droit de vote par un Member du Conseil de Sécurité" (1948) 1 *Revue Hellénique de Droit International* 3 at 3 (noting that the term "veto" is nowhere used in the UN Charter but rather constitutes a political qualification of the vote cast by one of the permanent members).

[110] See Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 228.

[111] *Ibid.*, at 259-263 (with a table of Security Council resolutions adopted "without a vote" or "by consensus" between 1946 and 1996).

[112] See in detail on the different forms of informal consultations *ibid.*, at 60-75.

essential part of UN diplomacy since the mid-1970s.[113] They are technically not meetings of the Security Council but "private gatherings" of its members.[114] During these deliberations, every participating delegation can bring its weight to bear on the policies that will be implemented by the Security Council by means of a resolution adopted at a formal meeting or a presidential statement, which may be submitted on behalf of the Security Council or its members.[115] Particularly interested states will take an active part in drafting these texts and may act as sponsors or co-sponsors.

A particularly crucial position is held by the permanent members given their so-called "veto right" in non-procedural decisions. By means of a simple negative vote, the P5 can, according to the UN Charter, the Provisional Rules of Procedure, and the practice of the Security Council, impede the adoption of a resolution on any of the above-mentioned measures. Not surprisingly then, the veto power is at the heart of debates over the need and the avenues to ensure that Security Council decisions live up to its responsibilities and are not constrained by arbitrary state interests. Still, although the veto usefully highlights these tensions, the previous outline of the rights linked to Security Council membership as such demands that the scope of this debate be not confined too narrowly but extended to all members, whether permanent or non-permanent.

1.3 The "Responsibility to Protect": A Concept of Principled Decision-Making

The reality is that the Security Council often acts, or rather fails to act, as a result of political interests of its members rather than due to principled decisions about the gravity of a situation and the most promising means of settlement.[116] For a long time already, the body has been criticized for applying double-standards.

The respective member states themselves, indeed, are rather straightforward in claiming flexibility, emphasizing the political rather than legal nature of the Security Council.[117] Its failure to act decidedly to halt the atrocities committed in Rwanda in 1994, in Bosnia and Herzegovina between 1992 and 1995, and in Kosovo in 1999 fuelled discontent with the Security Council's performance in discharging its responsibilities under the UN Charter and indirectly prompted the emergence of the notion of the "responsibility to protect". In his Millennium Report of 3 April 2000, the then Secretary-General of the United Nations *Kofi Annan* evoked the memories of Rwanda and the Eastern-Bosnian town of Srebrenica to illustrate the

[113] *Ibid*., at 60.

[114] *Ibid*., at 61.

[115] *Cf. ibid*., at 65.

[116] *Ofer Eldar*, for instance, identified several occasions on which votes in the Security Council were supposedly traded in return for votes on other items or other benefits, see Ofer Eldar, "Vote-trading in International Institutions" (2008) 19:1 *European Journal of International Law* 3 at 17-22.

[117] I will discuss and qualify this perceived dichotomy later in this work, see Part 3.2.1 below.

dilemma of how to respond "to gross and systematic violations of human rights that offend every precept of our common humanity".[118] He admitted that the idea of humanitarian intervention was "a sensitive issue, fraught with political difficulty and not susceptible to easy answers" and yet proposed that it was a moral duty for the Security Council where peaceful means had failed.[119] At the Millennium Summit, the issue was taken up by the then Canadian Prime Minister *Jean Chrétien*, who announced that an independent international commission was shortly to be established on questions of intervention and state sovereignty.[120] A week later, then Canada's Foreign Minister *Lloyd Axworthy* launched the "International Commission on Intervention and State Sovereignty (ICISS)" and mandated it with fostering global consensus on how to move towards action, especially through the United Nations.[121] The commission comprised 12 experienced practitioners and scholars of diverse backgrounds, gathering expertise in international law and international relations as well as in diplomacy and the military, and was co-chaired by the former Australian Foreign Minister *Gareth Evans* and the Secretary-General's Special Adviser on Africa, *Mohamed Sahnoun*.[122] With the support of an extensive research programme, and having conducted regional roundtables and national consultations around the world, the ICISS released its final report "The Responsibility to Protect" in late 2001. While the concept is multi-faceted and offers manifold points of interest for further discussion and research, the Security Council is at the heart of the "responsibility to protect".

1.3.1 The Notion of a "Responsibility to Protect": The ICISS Concept and Its Evolution

In formulating the "responsibility to protect", the ICISS partly broke new ground while at the same time treading on conceptual paths that had already been prepared by preceding schools of thought.[123] One of its major achievements indeed lies in having

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[118] See UN Secretary-General Kofi Annan, *We the peoples: the role of the United Nations in the twenty-first century*, UN GAOR, 54th Sess., UN Doc. A/54/2000 (2000) [Millennium Report] at para 217.

[119] *Ibid*., at para. 219.

[120] See Canada, Statement in the General Assembly, UN GAOR, 55th Sess., 6th Plen. Mtg., UN Doc. A/55/PV. 6 (7 September 2000), 16 at 17.

[121] See 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* (Ottawa: International Development Research Centre, 2001) at 341.

[122] For short biographies of the commissioners, see *ibid*., at 345-347.

[123] For an outline of different roots of the "responsibility to protect" notion, see Andreas S. Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Hamburg: Kovač, 2011) at 13-17 and the authorities cited therein.

taken a broader perspective, tying different strands together and shifting the focus of a formerly divisive debate. Thus, as the ICISS originated against the background, *inter alia*, of the recent experience of the Kosovo conflict, there is no denying that the commission was dealing with the problem of humanitarian intervention. Understood in a narrow sense, "humanitarian intervention" refers to military action taken by one or more states in another state, without the consent of its authorities, and with the stated purpose of protecting its population from massive human rights violations.[124] The lawfulness of humanitarian intervention had been controversial already in the era of natural law thinking.[125] During the eighteenth and nineteenth century, the view came to prevail that the relations between a government and its citizens were an internal matter in which third states had no right to intervene.[126] Under the reign of the UN Charter, unilateral humanitarian intervention, i. e. humanitarian intervention undertaken without prior authorization by the Security Council,[127] moreover caused grave concerns with a view to Article 2(4) UN Charter.[128] In the light of the principles of non-intervention and the prohibition of the use of force, two pillars of the modern international system of sovereign states, the notion that foreign armies may have a right to intervene necessarily faces a heavy burden of justification. The first twist that the ICISS gave to this debate was to exchange the state-focussed view, which considered humanitarian intervention as a right of third states vis-à-vis the host state, for one focussing on the imperilled population. The concern was thus shifted from what states are allowed to do to the needs and expectations of the threatened people, entailing responsibilities rather than rights of states.[129] A responsibility to protect, the ICISS suggested, rested primarily with the state whose population was concerned, but also, although only on a subsidiary level, with the international community.[130] The ICISS thus, even though it retained in essence elements of the humanitarian

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[124] *Cf. ibid.*, at 6; *cf.* also Vaughan Lowe & Antonios Tzanakopoulos, "Humanitarian Intervention", in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) at paras. 1-3.

[125] On the natural law discourse on humanitarian intervention, *cf.* already Andreas S. Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Hamburg: Kovač, 2011) at 42-43 and the authorities cited therein.

[126] *Cf. ibid.*, at 42-43 and the authorities cited therein.

[127] For this definition of "unilateral humanitarian intervention", see *ibid.*, at 6 and the authorities cited therein; *cf.* also Vaughan Lowe & Antonios Tzanakopoulos, "Humanitarian Intervention", in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) at para. 8.

[128] On the conflict of Charter principles surrounding the issue of humanitarian intervention, see already Andreas S. Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Hamburg: Kovač, 2011) at 7-8 and the authorities cited therein.

[129] On this shift and the mixed echo which it received in doctrine, see already *ibid.*, at 17-18 and the authorities cited therein.

[130] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XI.

intervention discourse, framed the concept of the responsibility to protect in a way that suggests allies, rather than adversaries, in the foundational principles of the international legal system: the protection of the human rights of the population concerned, and, arguably, the sovereignty of their host state.[131]

The second crucial trait of the R2P concept was that, far from concentrating attention on the divisive tool of coercive force, it was framed broadly as comprising three specific responsibilities: the responsibility to prevent humanitarian emergencies, the responsibility to react to them, and the responsibility to rebuild, especially after a military intervention.[132] To discharge its responsibility to react, in turn, the international community was found to dispose of a range of tools, ranging from political, economic and judicial measures to, in extreme cases, military intervention.[133] Moreover, military action, and this is a third crucial part of the ICISS report, is a last resort under a number of additional conditions only. These require namely that a just cause threshold is met, which the commission defines as actual or apprehended large-scale loss of life or ethnic cleansing, that the intervention is undertaken with the "right intention" of halting or averting human suffering, that it is proportional and has reasonable prospects of success.[134] Finally, and this is where the Security Council comes in again, the ICISS demands that the interveners have proper authority to employ military force. Although the commission notably refrains from limiting legitimate intervention to such which has been authorized by the Security Council, it conditions its legitimacy on prior attempts to obtain such authorization.[135] Somewhat ambiguously, the ICISS both renounces looking for alternative sources of authority and mentions as such the General Assembly, under the "Uniting for Peace" procedure, as well as regional and sub-regional organizations, under Chapter VIII and if subsequent authorization from the Security Council is sought.[136]

Following its release in late 2001 and an initial period during which it drew little attention, the R2P returned to the stage in the run-up to the 2005 World Summit.[137]

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[131] *Cf.* e.g. UN Secretary-General Ban Ki-moon, *Implementing the responsibility to protect: Report of the Secretary-General*, UN GAOR, 63rd Sess., UN Doc. A/63/677 (2009) at para. 10 (a) (observing that the assembled heads of state and government had made "absolutely clear" in the World Summit Outcome document that the responsibility to protect was "an ally of sovereignty, not an adversary").

[132] See generally International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XI and for details *ibid*., chap. 3-5.

[133] *Ibid*., chap. 4.

[134] *Ibid*., at XII and paras. 4.10-4.43.

[135] *Ibid*., at XII-XIII and para. 4.17, and, for details, chap. 6.

[136] *Ibid*., at XIII and at paras. 6.28-6.35.

[137] The low level of attention that the "responsibility to protect" initially received was primarily due to a preoccupation of the international community with the fight against terrorism following the terrorist attacks in the US on 11 September 2001, see Gareth Evans, "From Humanitarian Intervention to the Responsibility to Protect" (2006) 24 *Wisconsin International Law Journal* 703 at 712; see also already Andreas S. Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Hamburg: Kovač, 2011) at 118.

The High-level Panel on Threats, Challenges and Change, mandated by Secretary-General *Annan* to consider current threats in the field of peace and security and to make recommendations for an effective collective response,[138] referred to the concept,[139] and so did the Secretary-General himself in his report "In larger freedom: towards development, security and human rights for all", which was to serve as a basis for the World Summit.[140]

The UN World Summit, during which R2P was a matter of some controversy, turned out to be the crucial moment for the establishment and further evolution of the concept.[141] In the end, the responsibility to protect found its way under a separate heading into the Outcome Document, which was adopted unanimously by the General Assembly sitting at the level of heads of state and government in Resolution 60/1.[142] This sub-section, circumscribing arguably the international consensus on the content and scope of the responsibility to protect, has since become the point of reference for subsequent resolutions:

> **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 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

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[138] See UN Secretary-General Kofi Annan, Press Release, UN Doc. SG/A/857, "Secretary-General Names High-level Panel to Study Global Security Threats, and Recommend Necessary Changes" (4 November 2003), online: United Nations <http://www.un.org/News/Press/docs/2003/sga857.doc.htm>; *id., Note by the Secretary-General*, UN Doc. A/59/565 (2 December 2004) at para. 3.

[139] See High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at paras. 36, 232 and especially at paras. 199-203 and at 106.

[140] See UN Secretary-General Kofi Annan, *In larger freedom: towards development, security and human rights for all*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (21 March 2005) at paras. 132, 135 and at 59.

[141] See Part 5.2.1 below.

[142] UN General Assembly, *2005 World Summit Outcome*, UN GAOR, 60th Sess., 8th Plen. Mtg., UN Doc. A/Res/60/1 (16 September 2005) at paras. 138-140.

> 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.
>
> 140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

With this extensive mention in the World Summit Outcome Document, R2P was endorsed and given shape as a concept on the UN agenda. In the years thereafter, the focus shifted to its implementation.[143] Secretary-General *Ban Ki-moon* undertook in January 2009 to describe in more detail the meaning of the "responsibility to protect" as it had emerged from the World Summit, so as to prepare the ground for its implementation in practice.[144] In his report "Implementing the responsibility to protect", he portrayed R2P as resting on three pillars: the "protection responsibilities of the State" (pillar one), "international assistance and capacity-building" (pillar two), and "timely and decisive response" (pillar three).[145] This model was well received in both intergovernmental debates and scholarly commentary and provides thus a useful starting point for any further discussion of the responsibility to protect.

Since the 2005 World Summit, states have with increasing frequency and intensity discussed R2P in the framework of the United Nations. On 28 April 2006, the Security Council for its part endorsed the responsibility to protect in Resolution 1674 on the protection of civilians in armed conflict, "[reaffirming] 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".[146] Since then, it has referred directly or indirectly to the concept in an ever growing number of resolutions.[147] The General Assembly, in turn, took note of the *Ban* report in one of the largest plenary debates of its 63rd session, which showed strong support for the Secretary-General's three-pillar approach, and decided to continue consideration of the concept.[148] Meanwhile, R2P

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[143] For a distinction between a "recognition phase" (from 2001 to 2005) and an "operationalization phase" (since the World Summit 2005), see already Andreas S. Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Hamburg: Kovač, 2011) at 117.

[144] See UN Secretary-General Ban Ki-moon, *Implementing the responsibility to protect: Report of the Secretary-General*, UN GAOR, 63rd Sess., UN Doc. A/63/677 (2009).

[145] *Ibid*., at para. 11.

[146] See UN Security Council, Resolution 1674 (2006), UN SCOR, 5430th Mtg., UN Doc. S/Res/1674 (28 April 2006) at para. 4.

[147] *Cf.* the review of international practice of atrocity crime prevention in Part 6.3.10, especially 6.3.10.3.2 below.

[148] See UN General Assembly, *The responsibility to protect*, GA Res. 63/308, UN GAOR, 63rd Sess., 105th Plen. Mtg. (14 September 2009); *cf.* also Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect. The 2009 General Assembly Debate: An Assessment*, August 2009, online: Global Centre for the Responsibility to Protect <http://www.globalr2p.org/media/files/gcr2p_-general-assembly-debate-assessment.pdf> at 1.

has become a constant topic for both organs: it has regularly been raised by states in the open debates on the protection of civilians held semi-annually by the Security Council,[149] and Secretary-General *Ban* followed up on his 2009 report on implementing the responsibility to protect with annual reports covering various aspects of the concept.[150] Each of these reports was followed by an informal interactive dialogue of the General Assembly.[151] As a consequence of such exchanges of views, evidence of state views that may be used as material for legal analysis has proliferated over the past years.

1.3.2 The Security Council and Its Members in the R2P Concept

Throughout the evolution of the R2P concept, the role of the Security Council in the face of man-made humanitarian disasters has been a central point of concern. The very first paragraphs of the ICISS report, which refer to Somalia, Rwanda, Bosnia and Herzegovina as well as to Kosovo, recall that the commission had been established precisely under the impression of situations in which the UN and namely the Security Council had failed to ensure effective protection of the imperilled populations.[152] In setting out the dilemma of humanitarian intervention, the ICISS first of all recalled Rwanda as a case in which the Security Council, due to "a failure of international will – of civic courage – at the highest level", had refused to take the required measures, thereby allowing a genocide to be committed which continues

[149] For an overview of the Security Council's open debates on the protection of civilians and the references that have been made on these occasions to R2P, see online: International Coalition for the Responsibility to Protect <http://www.responsibilitytoprotect.org/index.php?option=com_content&view=article&id=2449>; for an evaluation of these debates with a view to the legal nature of the R2P concept, see Part 5.2.2 below.

[150] See UN Secretary-General Ban Ki-moon, *Early warning, assessment and the responsibility to protect: Report of the Secretary-General*, UN Doc. A/64/864 (14 July 2010); *id., The role of regional and sub-regional arrangements in implementing the responsibility to protect: Report of the Secretary-General*, UN Doc. A/65/877-S/2011/393 (27 June 2011); *id., Responsibility to protect: timely and decisive response: Report of the Secretary-General*, UN Doc. A/66/874–S/2012/578 (25 July 2012); *id., Responsibility to protect: State responsibility and prevention – Report of the Secretary-General*, UN Doc. A/67/929–S/2013/399 (9 July 2013); *id., Fulfilling our collective responsibility: international assistance and the responsibility to protect – Report of the Secretary-General*, UN Doc. A/68/974–S/2014/449 (11 July 2014); *id., A vital and enduring commitment: implementing the responsibility to protect – Report of the Secretary-General*, UN Doc. A/69/981–S/2015/500 (13 July 2015).

[151] See International Coalition for the Responsibility to Protect, online: <http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop> (with summaries of the General Assembly's annual dialogues).

[152] *Cf.* International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at paras. 1.1-1.6, quoting specifically the Secretary-General's call for a response to situations such as those that had been created in Rwanda and Srebrenica, *ibid*. at para. 1.6.

to haunt the international community as a destabilizing factor for the entire Great Lakes region to the present day.[153] With a view to Kosovo, the commissioners noted the marginalization that the UN system had experienced because of the military action of the North Atlantic Treaty Organization (NATO), wondering at the same time whether this unilateral intervention may have been the only factor that prevented another genocide.[154]

This latter consideration could have prompted increased attention to action not authorized beforehand by the Security Council. Nonetheless, the evolution of R2P has focussed on ways to avoid any future need for this course of action. To begin with, advocates of R2P tirelessly stress that the most important dimension of the responsibility to protect is prevention.[155] Moreover, where prevention fails and the responsibility to protect requires reaction to an ongoing crisis, with military intervention as the last resort, the framers of R2P explicitly sought "not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has."[156] While the ICISS still addressed other potential sources of authority, namely an Emergency Special Session of the UN General Assembly under the "Uniting for Peace" procedure or action by regional or sub-regional organizations under Chapter VIII of the UN Charter,[157] such references were by and large omitted by the High-level Panel and by Secretary-General *Annan*.[158]

Focussing on the Security Council rather than on alternative avenues can, indeed, be considered as key to the endorsement of the responsibility to protect in the international agenda. The ICISS thereby found a common denominator that is reflected in international law and practice: Article 24 of the UN Charter establishes the Council's primary responsibility for the maintenance and restoration of international peace and security, and the states and the Security Council itself have

[153] *Ibid*., at para. 1.1.

[154] *Ibid*., at para. 1.2.

[155] See already very strongly *ibid*., at XI and at para. 3.1.

[156] *Ibid*., at para. 6.14. This statement was adopted almost verbatim by the High-level Panel in its rules and guidelines on the use of force, see High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at para. 198, as well as by the UN Secretary-General, see UN Secretary-General Kofi Annan, *In larger freedom: towards development, security and human rights for all*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (21 March 2005) at para. 126.

[157] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XII and paras. 6.28-6.35.

[158] The only cautious reference that I have found in these reports to either one of these two alternatives to military action authorized by the Security Council is in the section on regional organizations in the HLP report. With a view to the role of regional organizations in the area of maintaining international peace and security, the HLP first affirmed that "[a]uthorization from the Security Council should in all cases be sought for regional peace operations" but "recogniz[ed] that in some urgent situations that authorization may be sought after such operations have commenced", see High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at para. 272 (a).

gradually come to accept that the Council has the competence to intervene also in internal conflicts.[159]

The more the matter is referred back to the Security Council, however, the greater is the need to ensure that the body copes better with the threat of mass atrocities than it has done in the past, namely in the conflicts cited by the ICISS. The primary objective of the drafters of R2P thus was to avoid situations in which it could become necessary to consider turning to other bodies than the Security Council. Nowhere does the ICISS report explicitly speak of a "duty" or an "obligation", let alone one of a legal nature, of the Security Council or its members to respond in any way to situations meeting the threshold criteria.[160] Yet it contains several elements with the potential to create a normative framework for Security Council action. To begin with, the criteria for legitimate military intervention were primarily to guide the Security Council, which the ICISS regarded as the body having the best authority to adopt a decision on such action. The ICISS further appealed to the Security Council to take into consideration the harm that would be done to the stature and credibility of the UN if it failed to live up to its responsibility to protect. It hence demanded that any request made for the Security Council to authorize intervention should be dealt with promptly and that facts or conditions calling for military intervention should be verified where there were allegations that the just cause thresholds were triggered.[161] In addition, the commission alluded to the idea of a "constructive abstention", calling for the permanent Security Council members to agree on abstaining from using their veto power on resolutions that would authorize military intervention for the purpose of human protection which enjoyed otherwise majority support and did not involve vital state interests of the respective permanent member.[162]

Similar proposals concerning mechanisms to enhance the Security Council's effectiveness in responding to cases of violence can be found in subsequent UN reports. The High-level Panel broadly "endorse[d] the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international

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[159] The ICISS thus mentions Article 24 of the UN Charter, state practice and Security Council precedent as foundations of the "responsibility to protect", alongside the concept of state sovereignty and specific legal norms of human rights and humanitarian law, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XI. On the increasingly broad understanding of Article 39 UN Charter with a view to the Security Council's competence to address internal armed conflicts, see the references in note 44 above.

[160] *Cf.* Christopher Verlage, *Responsibility to Protect* (Tübingen: Mohr Siebeck, 2009) at 198 (noting that neither the ICISS report nor that of the High-level Panel or the resolutions of Security Council and General Assembly expressed beyond doubt that the responsibility to protect was to impose a duty of intervention).

[161] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XII-XIII and at paras. 6.15 and 6.40.

[162] *Ibid.*, at XIII and at para. 6.21.

humanitarian law which sovereign Governments have proved powerless or unwilling to prevent".[163] It also adopted the specific instruments proposed by the ICISS, the criteria on the use of force and the call for an agreement on constructive abstention. Thus, the panel proposed guidelines to be adopted and systematically addressed by the Security Council, indicating whether "as a matter of good conscience and good sense" the use of force should be authorized in a given case.[164] These guidelines for the authorization of a use of force, which corresponded to those of the R2P report,[165] were to be endorsed by the General Assembly and the Security Council in declaratory resolutions.[166] Also, in its general section on enhancing the effectiveness of the Security Council, the panel not only urged that the use of the veto "be limited to matters where vital interests are genuinely at stake", but also appealed to the permanent members "in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses."[167] Secretary-General *Annan*, in turn, recommended also that the Security Council adopt a resolution setting out as guidelines for its decisions on the use of force the seriousness of the threat to be confronted, the proper purpose of the proposed military action, its necessity as an ultima ratio, its proportionality to the threat at hand, and the prospects of success.[168] Yet he omitted reference to the idea of a constructive abstention. His successor, Secretary-General *Ban*, again referred to both concepts, guidelines on the use of force and constructive abstention, in his 2009 report on implementing R2P. Pointing to the particular responsibility borne by the P5 due to their permanent membership and veto power under the Charter, *Ban* urged them to reach a mutual understanding to the effect that they would not employ or threaten the use of a veto in the face of a manifest failure of compliance with R2P obligations.[169] Moreover, with a view to ensuring consistency in the Security Council's practice of authorizing the use of force, *Ban* suggested that the member states "may want to consider the principles, rules and doctrine that should guide the application of coercive force in extreme situations relating to the responsibility to protect".[170]

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[163] See High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at para. 203.

[164] *Ibid*., at paras. 204-209.

[165] *Cf. ibid*., at para. 207, and International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XII; *cf.* also Andreas S. Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Hamburg: Kovač, 2011) at 121 and the authorities cited therein.

[166] See High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at paras. 208.

[167] *Ibid*., at para. 256.

[168] See UN Secretary-General Kofi Annan, *In larger freedom: towards development, security and human rights for all*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (21 March 2005) at para. 126.

[169] See UN Secretary-General Ban Ki-moon, *Implementing the responsibility to protect: Report of the Secretary-General*, UN GAOR, 63rd Sess., UN Doc. A/63/677 (2009) at para. 61.

[170] *Ibid*., at para. 62.

1.3.3 R2P and International Law

In "The Responsibility to Protect", the ICISS thus presented a framework which aimed at promoting consensus and providing guidance on how to respond to cases of avoidable humanitarian disasters in practice.[171] The commissioners refrained, however, from attributing to this framework a specific normative quality, be it that of law or morality. Rather, they understood their work as covering a wide range of questions which were not exclusively of a legal or moral nature, but also involved operational and political issues.[172] In the end, they viewed the responsibility to protect as a "guiding principle" emerging in practice, which, however, had not yet a sufficiently strong basis to be considered as an emerging new principle of customary international law.[173] Notwithstanding this guarded assessment by the ICISS itself, legal scholars soon began to discuss what legal quality the responsibility to protect had. From outright rejection to wholesale endorsement of R2P as a concept of law, all perceivable views have been defended.[174]

The prospects that the responsibility to protect could crystallize as a doctrine of customary international law have received some attention, and some evidence of an evolution in this direction has been identified, but the prevailing view seems to be that R2P remains a mere candidate norm.[175] Most observers thus appear to agree that the responsibility to protect has not, or at least not yet, created a new norm

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[171] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at VIII.

[172] *Ibid*., at VII; see also Jerry S.T. Pitzul, Kirby Abbott & Christopher K. Penny, "The Responsibility to Protect: A Military Legal Comment" (2004-2005) 5:4 *Canadian Military Journal* 31 at 32 (noting that the ambiguity created by mixing morality, ethics, policy and law allowed the ICISS to construct a powerful framework that would probably not have been possible within any single one of these disciplines).

[173] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at para. 2.24.

[174] For the extreme positions see notably David Aronofsky, "The International Legal Responsibility to Protect Against Genocide, War Crimes and Crimes Against Humanity: Why National Sovereignty Does Not Pre-clude Its Exercise" (2007) 13 *ILSA Journal of International & Comparative Law* 317 (submitting that international law imposes a duty and responsibility on all states and the Security Council to protect the victims of genocide, war crimes and crimes against humanity, and even endorsing the proposition that a state which fails to afford protection to its own population waives its sovereignty and may be the target of intervention both with and without Security Council authorization) and Mohammed Ayoob, "Humanitarian Intervention and State Sovereignty" (2002) 6:1 *International Journal of Human Rights* 81 at 83-85 (criticizing, though without reference to the most recently released ICISS report, both the "new interventionism" of the 1990s and the use of the notion of "sovereignty as responsibility").

[175] See e.g. Jutta Brunnée & Stephen J. Toope, "Norms, Institutions and UN Reform: The Responsibility to Protect" (2005-2006) 2 *Journal of International Law & International Relations* 121 at 133; Susan C. Breau, "The Impact of the Responsibility to Protect on Peacekeeping" (2006) 11:3 *Journal of Conflict & Security Law* 429 at 445-446, 463-464; Max Matthews, "Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur" (2008) 31 *Boston*

of international law.[176] At the same time, as the debate went on, legal arguments on the responsibility to protect have become increasingly nuanced, acknowledging that the concept consisted of several components, some of which already had a basis in existing international law.[177] The ICISS itself had already referred to several legal regimes as foundations of R2P, including the principle of state sovereignty, the primary responsibility of the Security Council for the maintenance of peace and

College International & Comparative Law Review 137 at 147-148, 152; Ekkehard Strauss, "A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect" (2009) 1 *Global Responsibility to Protect* 291 at 320-323. The ICISS itself had submitted that the "responsibility to protect" was an "emerging guiding principle" which had no sufficiently strong basis yet to qualify as a new principle of customary international law but which was supported by a growing practice of states and the Security Council, and which had roots in miscellaneous legal foundations, including human rights treaties, the 1948 Genocide Convention, the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at paras. 2.24-2.27, 6.17. Similarly, the HLP spoke of an "emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent", see High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at para. 203 and almost verbatim at para. 55, in the section on rules and guidelines on the use of force. The qualification of the responsibility to protect as an emerging norm was in turn cited by UN Secretary-General Kofi Annan, *In larger freedom: towards development, security and human rights for all*, UN GAOR, 59th Sess., UN Doc. A/59/2005 (21 March 2005) at para. 135.

[176] See e.g. Max Matthews, "Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur" (2008) 31 *Boston College International & Comparative Law Review* 137 at 147-148 (acknowledging that "further codification or implementation of R2P would be necessary before the principle crystallizes into 'binding' international law"); Jutta Brunnée & Stephen J. Toope, "The Responsibility to Protect and the Use of Force: Building Legality" (2010) 2 *Global Responsibility to Protect* 191 at 192-193; Alex J. Bellamy & Ruben Reike, "The Responsibility to Protect and International Law" (2010) 2 *Global Responsibility to Protect* 267 at 269; Ekkehard Strauss, "A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect" (2009) 1 *Global Responsibility to Protect* 291 at 291-292.

[177] See e.g. Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 *American Journal of International Law* 99 at 118-119 (considering R2P as "a political catchword rather than a legal norm", comprising different propositions that have attained different levels of support); Alex J. Bellamy & Ruben Reike, "The Responsibility to Protect and International Law" (2010) 2 *Global Responsibility to Protect* 267 at 269 (suggesting that R2P "is best understood [..] as a political commitment to act upon shared moral beliefs, much of which is embedded already in international law"); Ekkehard Strauss, "A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect" (2009) 1 *Global Responsibility to Protect* 291 at 314-320; Jutta Brunnée & Stephen J. Toope, "The Responsibility to Protect and the Use of Force: Building Legality" (2010) 2 *Global Responsibility to Protect* 191 at 207 (submitting with a view to third states' obligations that "the responsibility to protect concept only makes explicit what international law already requires", namely as far as the law of state responsibility demands action against jus cogens violations pursuant to Article 41 of the 2001 ILC Draft Articles); Ekkehard Strauss, *The Emperor's New Clothes? The United Nations and the implementation of the responsibility to protect* (Baden-Baden: Nomos, 2009) at 40 (submitting that R2P "could make existing legal obligations more effective").

security under the UN Charter, as well as human rights and humanitarian law.[178] Subsequent developments in the international community have furthered this trend to avoid a narrow view of R2P as a new concept but to take into consideration existing international law. An important impetus to this effect was the World Summit 2005. In the Outcome Document, the heads of state and government readjusted the responsibility to protect to focus on four core crimes, namely genocide, war crimes, crimes against humanity, and ethnic cleansing, the first three of which are well-defined under international law, rather than on the more abstract notions of "large scale loss of life" and "large scale 'ethnic cleansing'" that had been proposed by the ICISS.[179] Moreover, amidst renewed interest in the responsibility to protect

[178] See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XI.

[179] For an identical definition of genocide see *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) [*Genocide Convention*], Article II, and *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002), Article 6. For definitions of crimes against humanity and war crimes see *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002), Articles 7-8. The only one of the four core crimes that has not been defined as a legal concept is "ethnic cleansing". Difficulties pertain namely to the relationship between the notion of ethnic cleansing and genocide as a concept of international law, see on this e.g. Drazen Petrovic, "Ethnic Cleansing – An Attempt at Methodology" (1994) 5 *European Journal of International Law* 342 at 354-359 (suggesting that policies of ethnic cleansing only amount to genocide if the means and methods used constitute genocidal acts enumerated in Article II of the Genocide Convention and are committed with the intent to destroy a protected group); John Webb, "Genocide Treaty – Ethnic Cleansing – Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia" (1993) 23 *Georgia Journal of International & Comparative Law* 377 at 402-403 (submitting very broadly that "there can be little doubt that acts of 'ethnic cleansing' directed at an identifiable 'group' within the meaning of the Genocide Convention also contain the necessary element of intent to qualify these actions as genocide within the meaning of Article II of the Convention"); see notably also the precedents in the jurisprudence of the ICTY for the finding that the forcible transfer of a population may amount to the destruction of a protected group and thus suffice for the special intent required by the definition of genocide, see International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Radislav Krstić*, IT-98-33-A, Judgment (19 April 2004), partial dissenting opinion of Judge Shahabuddeen, online: International Criminal Tribunal for the Former Yugoslavia <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf> at paras. 45-54, and International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Section A, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Judgment (17 January 2005), online: International Criminal Tribunal for the Former Yugoslavia <http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf> at paras. 659-666. In the *Bosnian Genocide Case*, the ICJ upheld a clear distinction, stressing that a policy of rendering an area "ethnically homogeneous" or the operations to implement such a policy could not "*as such* be designated as genocide", since "deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement", see International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, online: International Court of

in the post-World Summit phase, the International Court of Justice (ICJ) passed its judgment on the merits of the case *Bosnia and Herzegovina v. Serbia and Montenegro* [also referred to in the following as *"Bosnian Genocide Case"*]. The ICJ's broad interpretation of the duty to prevent genocide under Article I of the Genocide Convention led commentators to emphasize the link between the new notion of R2P and older regimes of international law.[180]

Two provisos must hence be made when alluding to the concept of a responsibility to protect in the legal discourse: firstly, while the label "responsibility to protect" as proposed by the ICISS is innovative in this form, relevant protection duties need not be of similarly recent origin. Existing legal regimes may provide a sound basis for some of the ideas that R2P encapsulates.[181] This finding that R2P is not, or at least not in every respect, a new concept correlates with the second proviso, which has most usefully been developed by *Carsten Stahn*, namely that R2P is no monolithic norm but a "multifaceted concept with various

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Justice <http://www.icj-cij.org/docket/files/91/13685.pdf> at para. 190 [emphasis in the original]. Certain practices conducted in the course of what is labelled "ethnic cleansing" may, however, amount to crimes against humanity, war crimes or even to acts of genocide, *cf.* also International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13685.pdf> at para. 190 (acknowledging that the distinction to be drawn between ethnic cleansing and genocide "is not to say that acts described as 'ethnic cleansing' may never constitute genocide"). See generally on this debate and the necessary distinction between genocide and ethnic cleansing William A. Schabas, "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes" (2007) 2:2 *Genocide Studies and Prevention* 101 at 102, 109 (suggesting that the 2007 pronouncement by the ICJ "should largely resolve the debate").

[180] See e.g. William A. Schabas, "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes" (2007) 2:2 *Genocide Studies and Prevention* 101 (noting that the Court's pronouncement on the duty to prevent genocide pursuant to Article I of the Genocide Convention "dovetails neatly with recent developments in the political bodies of the United Nations recognizing a 'responsibility to protect,' and [..] provides further support for the entrenchment of this doctrine within customary international law," *ibid*., at 101, and that it reinforces the responsibility to protect as set out in the World Summit Outcome Document, even "elevating the duty to a treaty obligation, and one that is actionable before the ICJ for those states that have ratified the [Genocide Convention] without reservation to art. 9", *ibid*. at 115).

[181] See e.g. Laurence Boisson de Chazournes & Luigi Condorelli, "De la 'responsabilité de protéger' ou d'une nouvelle parure pour une notion déjà bien établie" (2006) 110 *Revue Générale de Droit International Public* 11 at 13-16; Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 447-450 (suggesting that "the responsibility to protect norm […] is anchored in existing law, in institutions and in lessons learned from practice" and noting specifically at a minimum a duty of states under both the Genocide Convention and customary law to prevent genocide). At the far end, *Weckel* even fears that the emergence of the concept of a collective responsibility to protect exercisable through the UN might decrease the scope of obligations to protect that are already incumbent upon individual states under existing international law, see Philippe Weckel, "L'Arrêt sur le génocide: le souffle de l'Avis de 1951 n'a pas transporté la Cour" (2007) 111 *RGDIP* 305 at 324.

elements".[182] Indeed, one of the characteristics of the concept is that it combines a variety of means of protection, which raise a myriad of different legal issues. The responsibility to react, for instance, which includes military intervention as a last resort, cannot be dissociated from the debate over the legality of multilateral or even unilateral humanitarian intervention. Entirely different problems may relate to the primary responsibility to protect of sovereign states or the responsibility to rebuild. In addition, a clear distinction must be made between courses of action which R2P entitles states to take and those that it makes mandatory, i. e. between the permissive and the prescriptive dimension of R2P. For *Stahn*, R2P is hence in reality a political catchword for a variety of propositions, some of which are rooted in legal concepts while others could prompt a progressive evolution of international law and again others may not even have been meant to ever achieve this status.[183] It is thus necessary, in appraising the legal quality of "the responsibility to protect", to distinguish between its different aspects. This has been confirmed not least by the report of Secretary-General *Ban* on "Implementing the responsibility to protect" and the echo that his three-pillar approach caused in the General Assembly, which was overwhelmingly positive on the first two pillars, yet much more differentiated on the third.[184]

The bottom line of these observations is that the responsibility to protect must not be analysed in isolation, as an idea grounded exclusively in the work of the ICISS and subsequent norm entrepreneurs, but with a view to the mutually reinforcing effects that the R2P discourse and longstanding regimes of international law may have. Against this backdrop, I will limit the following review of jurisprudential and scholarly opinion, just like the analysis in Chaps. 4–6, to considerations that are relevant precisely to the question of duties to collectively prevent atrocity crimes, but not to only those that have explicitly been linked to the label "R2P".

1.4 Judicial and Scholarly Opinions on Legal Duties to Protect and the Security Council

The proposition that states were under legal duties to use their powers and influence as members of the Security Council to prevent the commission of atrocity crimes in third states rests on two premises: first, international law has to establish

[182] See Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 *American Journal of International Law* 99 at 118; see also Andreas S. Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Hamburg: Kovač, 2011) at 132.

[183] See Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 *American Journal of International Law* 99 at 101-102, 110-120.

[184] *Cf.* e.g. Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect. The 2009 General Assembly Debate: An Assessment*, August 2009, online: Global Centre for the Responsibility to Protect <http://www.globalr2p.org/media/files/gcr2p_-general-assembly-debate-assessment.pdf> at 5-7.

extraterritorial obligations of prevention and, second, these must be applicable within the Security Council and to the conduct of its members.[185] This latter argument has in turn two facets and can, and indeed must, be approached from two different angles: on the one hand, it is a matter of defining the scope and contents of the relevant substantive duty to protect whether and in what form it purports to regulate the acts and omissions of Security Council members. On the other hand, Security Council process must be susceptible to regulation by such a legal framework at all. Whether such is the case depends on a whole complex of considerations and ultimately links the issue of duties to prevent to a distinct debate, namely that of the relationship between the Security Council and international law. Until recently, neither of the two basic premises, the existence of extraterritorial duties to protect or the applicability of such duties to Security Council process, had garnered much support in international opinion. Yet the emergence of the "responsibility to protect" concept and the 2007 decision of the ICJ in the case of Bosnia and Herzegovina v. Serbia and Montenegro have prompted gradually increasing attention to the matter.

1.4.1 Duties of Prevention in the Jurisprudence of the ICJ

The most prominent pronouncement by the ICJ on extraterritorial duties to prevent atrocity crimes has been made in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The decisions and opinions delivered by the Court and individual judges in this dispute have had a profound impact going far beyond the case at hand, affecting notably the academic work not only on the Genocide Convention but also on the responsibility to protect, including the emerging discourse on duties borne by the Security Council members. Indeed, the Court's substantive findings and their phrasing have partly even been treated as a basis from which to develop farther-reaching propositions.[186] The Court also addressed in few but remarkable sentences the duty of states parties of the fourth Geneva Convention to ensure compliance with the provisions of the Convention in its Advisory Opinion on the *Legal Consequences of the Construction of a*

[185] These two premises can coincide where the proposition is that states have duties to prevent atrocity crimes specifically as and because of their position as Security Council members. This proviso applies namely to arguments based on the UN Charter and duties that may be incumbent on Security Council members due to the primary responsibility for the maintenance of international peace and security. Many candidate norms originate, however, in more general regimes outside the UN Charter, including namely the 1948 Genocide Convention, the 1949 Geneva Conventions and customary international law, see Parts 4.1-4.2 and 4.4 below.

[186] *Cf.* e.g. Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 451-455 (discussing the 2007 ICJ judgment and building upon the criteria which the Court applies to the duty to prevent genocide under Article I of the Genocide Convention).

Wall in the Occupied Palestinian Territory.[187] In this decision, the Court briefly touched upon the legal consequences that a violation of humanitarian law by one state entailed for the UN Security Council.[188] The closest that it ever came to considering the obligations carried by individual Security Council members to prevent atrocity crimes was, however, in November 1993, when the government of Bosnia and Herzegovina announced that it would file charges against the United Kingdom in relation to the arms embargo that the Council had imposed upon Yugoslavia.

1.4.1.1 The Law Suit Announced by the Government of Bosnia and Herzegovina Against the United Kingdom for Its Conduct on the Security Council

In November 1993, the government of Bosnia and Herzegovina informed the UN Secretary-General of its "solemn intention to institute legal proceedings against the United Kingdom before the International Court of Justice for violating the terms of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide […]."[189] In this statement of intention, the government of Bosnia and Herzegovina announced that it had instructed its lawyers to file an Application and a Request for Provisional Measures against the United Kingdom, claiming *inter alia* that the United Kingdom had "failed in their affirmative obligation and refused 'to prevent' genocide against the People and State of Bosnia and Herzegovina in violation of Article I of the Genocide Convention […]".[190] Moreover, it would sue the United Kingdom as an aider and abettor of genocide under Article III, paragraph (e) of the Genocide Convention, based on the grounds that it had "actively oppos[ed] all of the efforts by other States" to lift the arms embargo which had been "illegally imposed and maintained […] upon the Republic of Bosnia and Herzegovina in violation of U.N. Charter Article 51" by the Security Council.[191] On 21 December 1993, however, the government of Bosnia and Herzegovina informed the President of the Security Council that it had "decided not to proceed with respect to the United Kingdom of Great Britain and Northern Ireland on an action before the International Court of

[187] See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136, online: International Court of Justice <http://www.icj-cij.org/docket/files/131/1671.pdf> at paras. 158-159, 163(3)(D).

[188] *Ibid*., at paras. 160, 163(3)(E).

[189] See Bosnia and Herzegovina, *Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings Against the United Kingdom before the International Court of Justice* (15 November 1993), *Letter dated 24 November 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the Secretary-General*, UN Doc A/48/659-S/26806, Annex, 2 at 2.

[190] *Ibid*.

[191] *Ibid*., at 2-3.

Justice".[192] Consequently, the Court was ultimately not requested to decide whether the United Kingdom had failed a conventional obligation to prevent genocide under Article I of the Genocide Convention or could even be held liable for complicity in genocide under Article III, paragraph (e) of that convention because of its acts as a member of the Security Council.

1.4.1.2 The Duty to Prevent Genocide in the Law Suit against Serbia and Montenegro

While the government of Bosnia and Herzegovina thus eventually refrained from bringing a claim before the ICJ against the United Kingdom, it had already on 20 March 1993 filed an application against Yugoslavia (Serbia and Montenegro)[193] and requested interim measures of protection to be indicated by the Court.[194] In its application, Bosnia and Herzegovina claimed, *inter alia*, that Yugoslavia had violated a contractual obligation to prevent genocide under Article I of the Genocide Convention:

> Article I of the Genocide Convention provides that the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish. Bosnia and Herzegovina claims that Yugoslavia (Serbia and Montenegro) has breached its solemn obligations under Article I. The Respondent has planned, prepared, conspired, promoted, encouraged, aided and abetted and committed genocide against the People and State of Bosnia and Herzegovina. The Respondent has refused to prevent or to punish those who are responsible for such acts. By performing such unlawful and criminal activities, Yugoslavia (Serbia and Montenegro) has incurred an international legal responsibility and is bound to cease and desist from such activities immediately and to pay Bosnia and Herzegovina reparations for the damage and prejudice suffered.[195]

In addition, on 27 July 1993, Bosnia and Herzegovina filed another request with the ICJ for additional provisional measures to be indicated by the Court. This request

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[192] See Bosnia and Herzegovina, *Letter dated 17 December 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council*, UN Doc. S/26908.

[193] See Bosnia and Herzegovina, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Application, 20 March 1993, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13275.pdf>, Annex 1.

[194] See Bosnia and Herzegovina, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Bosnia and Herzegovina, 20 March 1993, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13275.pdf>, Annex 2.

[195] See Bosnia and Herzegovina, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Application, 20 March 1993, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13275.pdf>, Annex 1 at para. 103.

included the finding "[t]hat all Contracting Parties to the Genocide Convention are obliged by Article I thereof 'to prevent' the commission of acts of genocide against the People and State of Bosnia and Herzegovina."[196]

The ICJ and its judges, several amongst whom made use of their right under Article 57 of the ICJ Statute to deliver separate opinions, considered obligations to prevent genocide flowing from Article I of the Genocide Convention at different stages throughout this law suit, which was to be pending before the Court for almost 14 years. Due to the constraints placed on its jurisdiction, which was based on Article IX of the Genocide Convention, the ICJ was confined to a discussion of duties arising under this treaty.[197] It had thus no power to rule on any other duties to afford protection, namely under international humanitarian law.[198]

While the *Bosnian Genocide Case* meanwhile tends to be equated with the decision of the majority of the Court on the merits, influential statements had already been made during earlier stages of the proceedings, and separate opinions account for continuing controversies amongst the judges. Particularly instructive and of special importance in subsequent state practice and scholarly opinion has been the analysis by Judge ad hoc *Elihu Lauterpacht* at the provisional measures stage.[199] *Lauterpacht J.* felt unable at that stage and "in the absence of a full treatment of this subject by both sides" to find an individual and collective responsibility to prevent genocide "wherever it may occur" and to accede to the Bosnian request for a finding that all states were under an obligation to prevent the commission of

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[196] See Bosnia and Herzegovina, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Bosnia and Herzegovina, 27 July 1993, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/10845.pdf> at 52, request no. 5.

[197] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, [1996] I.C.J. Rep. 595, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/7349.pdf>, operative clause (2); International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13685.pdf> at paras. 147-149.

[198] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13685.pdf> at para. 147.

[199] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, [1993] I.C.J. Rep. 325, Lauterpacht J., separate opinion, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/7323.pdf> 407 at paras. 108-115. In academic literature, *Lauterpacht*'s view has namely been taken up by *William A. Schabas* in his comprehensive monograph on genocide in international law, see especially William A. Schabas, *Genocide in international law: the crime of crimes*, 1st ed. (Cambridge: Cambridge University Press, 2000) at 493-495; see also *id*., *Genocide in international law: the crime of crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009) at 527-528. See in further detail on Lauterpacht's and other opinions at the provisional measures stage Part 4.1.1.1 below.

genocide against the people of Bosnia and Herzegovina.[200] At the same time, he expressed sympathy in principle for such an obligation and affirmed at least some extraterritorial effects of Article I of the Genocide Convention in that a state bound by the Convention was obligated "to concern itself with the prevention of genocide outside of its territory" where it was involved in a conflict.[201]

On 11 July 1996, the Court dismissed the preliminary objections advanced by the Federal Republic of Yugoslavia (Serbia and Montenegro), established its jurisdiction on the basis of Article IX of the Genocide Convention and held the application filed by the Republic of Bosnia and Herzegovina to be admissible.[202] Yugoslavia objected to the Court's jurisdiction on the grounds, *inter alia*, that the conflict in question had occurred on the territory of Bosnia and Herzegovina, that Yugoslavia had not been part to the conflict and neither had exercised jurisdiction over that territory at the relevant point in time.[203] In dismissing this objection, the Court submitted that "the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention".[204]

For 13 years, the Court's decision on the preliminary objections and the separate opinion by *Lauterpacht J.* at the provisional measures stage were to remain the leading jurisprudential references to the duty to prevent genocide under Article I of the Genocide Convention. On 26 February 2007, however, the ICJ returned to the question in its judgment on the merits.[205] The Court felt compelled to discuss Article I in some detail as it had not found Serbia – which had remained the only respondent in the case after Montenegro had left the state union with Serbia that had been the Federal Republic of Yugoslavia[206] – responsible for an act of genocide or for one of the acts enumerated in Article III of the Genocide Convention.[207] The majority of the Court held Article I of the Genocide Convention to establish a legal duty of

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[200] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, [1993] I.C.J. Rep. 325, Lauterpacht J., separate opinion, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/7323.pdf> 407 at para. 115.

[201] *Ibid*., at paras. 114-115.

[202] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, [1996] I.C.J. Rep. 595, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/7349.pdf> at para. 47.

[203] *Cf. ibid*., at para. 30.

[204] *Ibid*., at para. 31.

[205] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13685.pdf>.

[206] *Ibid*., at paras. 67-79.

[207] *Ibid*., at para. 382 and operative clauses (2) to (4).

all contracting parties "to employ all means reasonably available to them, so as to prevent genocide as far as possible".[208] A majority of 12 to 3 judges thus found that Serbia had "violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995".[209] In the majority's opinion, Serbia had breached the Convention since it had done nothing to prevent the massacres at Srebrenica even though it had been in a position of influence over the Bosnian Serbs who had been responsible for the genocide.[210]

With a view to the conceptualization of the duty to prevent, the submissions made in the majority opinion met, however, not only with significant criticism from the dissenting judges, but were also not endorsed without qualification by all of the judges who eventually voted in favour of the finding that Serbia had violated this duty. The interpretations of Article I of the Genocide Convention on the bench ranged from the majority's understanding as a duty of conduct that requires extra-territorial action depending on a state's capacity to influence the course of events[211] to the concept of a duty of result that applies, then again, only where a state exercises territorial jurisdiction or control.[212] Overall, the decision of the Court and the separate opinions delivered by individual judges in the *Bosnian Genocide Case* indicate some degree of agreement within the ICJ on the basic understanding of Article I of the Genocide Convention as establishing a legally binding duty to prevent genocide, but continuing disagreement on the nature, scope and contents of this duty.[213]

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[208] *Ibid*., at para. 430 and generally at paras. 425-432; for further detail on the ICJ's findings on Article I of the Genocide Convention, see Parts 4.1.1.1 and 4.1.3.1 below.

[209] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13685.pdf> at para. 471, operative Clause No. 5.

[210] *Ibid*., at paras. 434 and 438.

[211] *Ibid*., at para. 428.

[212] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, Skotnikov J., Declaration, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13705.pdf> 366 at 379. On the different approaches of the judges to Article I of the Genocide Convention in the *Bosnian Genocide Case*, see also Part 4.1.1.1 below.

[213] See e.g. also the assessment by *Ranjeva* J., who found the judgment to put an end to the ideological dispute of whether the duty to prevent was part of positive law but considered as awkward the description that had been used to describe the contents of that duty, see International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, Ranjeva J., Separate Opinion, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13693.pdf> 276 at para. 3.

1.4.1.3 The Duty to Ensure Compliance with the Fourth Geneva Convention in the Israeli Wall Opinion

In the *Israeli Wall Case*, the Court found by 14 votes to one that the construction of the wall in the Occupied Palestinian Territory had been contrary to international law and examined what legal consequences this finding entailed not only for Israel but also for third states and potentially for the Security Council.[214] In this context, it made specific reference to Article 1 of the Fourth Geneva Convention, pursuant to which the contracting parties undertake to ensure respect for the convention in all circumstances.[215] From this provision, a majority of 13 judges concluded, it followed that the states parties to the convention were obligated to ensure that the requirements of the convention were complied with, regardless of whether these states were themselves involved in the conflict or not.[216] In addition to their duties not to recognize the illegal situation or to aid or assist in maintaining it, they had to ensure, within the limits set by international law and the UN Charter in particular, that Israel fulfilled its obligations under the convention.[217]

This pronouncement is remarkable in several respects, beginning with the fact that a large majority of the Court stipulated in just two paragraphs a potentially very far-reaching duty for states to ensure compliance with humanitarian law in a conflict between third parties. It is also worthy of note that, in the following paragraph, the Court opted for weaker language when it turned to the Security Council, which, just like the General Assembly "*should* consider what further action is required to bring to an end the illegal situation".[218] Despite the support by 13 judges, this part of the judgment was the most controversial one. On any other point, opposition had been registered at most by *Buergenthal J.*, who had accepted the Court's jurisdiction but voted against its findings on the merits due to what he considered a lack of factual evidence.[219] As far as operative paragraph 3(D) was concerned, which includes the proposition that other states had an obligation to ensure compliance by Israel with its obligations under the Fourth Geneva Convention, however, *Kooijmans J.* also felt unable to concur with the majority.[220] In his separate opinion, he explained in detail the reasons for which he "simply [did] not know whether the scope given by

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[214] See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136, online: International Court of Justice <http://www.icj-cij.org/docket/files/131/1671.pdf> at paras. 147-162, 163(3).

[215] *Ibid*., at para. 158.

[216] *Ibid*., at paras. 158-159.

[217] *Ibid*., at para. 159.

[218] *Ibid*., at para. 160 [emphasis added].

[219] *Ibid*., at para. 163(3); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136, Buergenthal J., Declaration, online: International Court of Justice <http://www.icj-cij.org/docket/files/131/1683.pdf> 240.

[220] See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136, online: International Court of Justice <http://www.icj-cij.org/docket/files/131/1671.pdf> at para. 163(3)(D).

the Court to this Article [1 of the Fourth Geneva Convention] in the present Opinion [was] correct as a statement of positive law."[221] *Kooijmans J.* aptly highlights the criticism which the majority's opinion is bound to confront, namely that its interpretation is incompatible with the much more restrictive meaning of Article 1 as it would have emerged from the preparatory works to the 1949 Geneva Conventions and that it fails to adduce any evidence of as broad a change of meaning as is proposed in the judgment.[222]

1.4.2 Scholarly Debate on Legal Duties of Protection

Although it did not raise this issue itself, the ICJ's decision in the *Bosnian Genocide Case* was an impetus to a scholarly debate on obligations that the members of the Security Council might have in the face of genocide and other mass atrocities. By affirming a duty to prevent genocide and stipulating criteria for its scope, namely the capacity of a state to influence the course of events, the ICJ broke important ground on extraterritorial duties to protect, which are the first premise of Security Council members' obligations in this regard. From here, academic commentary started to slowly take the matter to the second level of analysis. Approaching the issue from the angle of the responsibility to protect discourse, focussing thus initially on the scope of the relevant duties of protection, scholarship showed increasing interest in the role and potential obligations of Security Council members.

This trend in scholarship to engage with duties of Security Council members to prevent atrocity crimes could have found its historic point of departure in the pioneering argument that was made by *Brian D. Lepard* already in his 2002 monograph on humanitarian intervention.[223] Even though his work was conceived irrespectively of the "Responsibility to Protect" report, *Lepard* performed a change in perspective alike to that of the ICISS, devoting one chapter to the prescriptive dimension of the issue, i. e. the existence of duties rather than merely rights to intervene.[224] Within this context, he specifically addressed the existence, contents and limits of obligations bearing upon the Security Council and its permanent as well as non-permanent members.[225] Yet the issue remained dormant for another 5 years, and it was for *Louise Arbour* to break the path for a broader debate with

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[221] See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136, Kooijmans J., Separate Opinion, online: International Court of Justice <http://www.icj-cij.org/docket/files/131/1683.pdf> 219 at paras. 46-50.

[222] *Ibid*., at paras. 47-50.

[223] Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University, 2002).

[224] *Ibid*., chapter 8.

[225] *Ibid*., at 257-258, 261-264 and 270-276.

her commentary on the ICJ decision on the merits of the *Bosnian Genocide Case. Arbour's* claim that the responsibility to protect, read in light of the criteria which the ICJ had spelled out for the duty to prevent genocide, extended to the members of the Security Council founded a line of reasoning that was to spark controversies and receive broad attention.[226]

Scholars have suggested a number of different sources from which obligations for Security Council members arguably arise, first amongst them the Genocide Convention.[227] *Arbour* has moreover submitted not only that the norms of the Genocide Convention also enjoy the status of customary international law, but also that the reference to war crimes and crimes against humanity in the World Summit agreement implies an obligation of the same kind as the duty to prevent genocide with regard to these crimes.[228] For *Lepard*, the members of the Security Council moreover bear special duties under the UN Charter, since they act as trustees for the UN membership at large in the organ which is obligated under Article 39 UN Charter to respond to threats to or breaches of international peace.[229] Furthermore, he develops

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[226] See Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 453-455 (arguing that "the members of the Security Council, particularly the Permanent Five Members (P5) hold an even heavier responsibility than other States to ensure the protection of civilians everywhere", and that "[i]f their responsibility were to be measured in accordance with the International Court of Justice's analysis, it would seem to be logical to assume that a failure to act could carry legal consequences and even more so when the exercise or threat of a veto would block action that is deemed necessary by other members to avert genocide, or crimes against humanity", *ibid*. at 453).

[227] See e.g. Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 449-455. A very broad approach has been taken by *David Aronofsky*, who affirms duties and responsibilities to prevent genocide, crimes against humanity and war crimes, bearing upon both individual states and the Security Council, with reference to multiple international human rights and humanitarian law conventions as well as resolutions of the General Assembly and the Security Council, see David Aronofsky, "The International Legal Responsibility to Protect Against Genocide, War Crimes and Crimes Against Humanity: Why National Sovereignty Does Not Pre-clude Its Exercise" (2007) 13 *ILSA Journal of International & Comparative Law* 317 at 317-318 (arguing specifically that the rights to be free from atrocities which are guaranteed by the Geneva Conventions, the Genocide Convention, the Universal Declaration of Human Rights as well as various regional human rights conventions and the International Convention on Civil and Political Rights become meaningless if they are not enforced with military intervention, and that therefore a duty to protect the targeted victims must at least be inferred from these documents).

[228] See Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 449-451. For a customary norm requiring the Security Council and its members to prevent genocide, see also Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University, 2002) at 272-274, 276.

[229] See Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University, 2002) at 275-276 (arguing that genocide and human rights violations which threaten to escalate into genocide or civil or international war qualify as threats to or breaches of the peace, *ibid*. at 273). The notion of a fiduciary duty of states serving on the Security

an argument from his particular approach to general principles of law, which he understands to incorporate "general principles of moral law".[230]

Where obligations are derived from more general norms that are not specifically concerned with the Security Council, as is the case for most of the aforementioned concepts, the central proposition is that these also apply where states serve as members of this body. The basis of this argument is a broad conception of the relevant duties, requiring states to take all means legally and reasonably available to them to prevent genocide or any other crime covered by the respective rule.[231] In essence, they are, as has been indicated both by the International Court of Justice and in scholarship, duties of "due diligence".[232] What specific act or omission is required in a given case must be determined for each individual state in light of the particular tools which it has at its disposal to make an impact on the situation. These tools, the argument goes, include those which states possess due to their capacity as Security Council members.[233] According to this view, Security Council members may be obligated to address relevant situations and to promote protective action by adopting the required resolutions.[234] A failure to act would be a breach of the

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Council is also employed by *Matthias Herdegen*, who advocates a duty of the Security Council members in the face of genocide and similarly grave human rights violations to at least consider potential courses of action and to assess the relevant factors for their decision, see Matthias Herdegen, *Völkerrecht*, 13th ed. (München: C. H. Beck, 2014), § 40 at para. 16.

[230] See Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University, 2002) at 273-274.

[231] See e.g. Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University, 2002) at 272 (interpreting the undertaking to prevent genocide in Article I of the Genocide Convention as a duty to "take every step legally possible to prevent genocide, including referral of the matter to the Security Council and encouragement of the Council to act"); Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 451-453 (submitting, on the basis of the ICJ decision of 2007 in the *Bosnian Genocide Case*, that states are obligated to utilize reasonably and consistently with international law all tools that are at their disposal).

[232] See International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] I.C.J. Rep. 43, online: International Court of Justice <http://www.icj-cij.org/docket/files/91/13685.pdf> at para. 430; see also Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 452.

[233] *Cf.* Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 452-455.

[234] *Cf.* e.g. Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University, 2002) at 272, 275-276 (also finding a broader duty to "seek to encourage the entire Council to take some reasonable action in response to widespread and severe violations of human rights, including through the introduction of appropriate resolutions"); Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 453.

respective duty of prevention, as would, *a fortiori*, the threat or use of the veto by a permanent member to obstruct the adoption of such a resolution.[235]

This construction of duties to prevent genocide and other crimes has been considered as too broad by other authors. These scholars disagree on the scope of the relevant substantive duties as far as the Security Council is concerned. *Christopher Verlage*, for instance, rejects a duty of each and every member of the international community to protect foreign citizens whereas he finds in the responsibility to protect a "special call for action" by those states that have specific links with the state concerned.[236] According to this view, at least neighbouring states must take possible and reasonable measures to prevent atrocities, which includes notably pushing for action by the Security Council.[237] Applied to the members of the Security Council themselves, this view would seem to engage those amongst them that dispose of the required ties to the target state, whereas the others would not be bound to support intervention.[238] While *Verlage* qualifies the duty of prevention as such, irrespective of whether Security Council action is in question, other scholars have drawn a line precisely because of the nature of this body. For them, the Security Council is a political body, for whose decisions under Chapter VII there is and can be no firm legal standard, but which is guided simply by the interests of its members.[239] Put

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[235] See e.g. Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 453-454; Anne Peters, "The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and Its Members" in: Ulrich Fastenrath et al., eds., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011) 297 at 316-319, 321-322 (arguing that especially the use of the veto by a permanent member in an R2P situation could be abusive and lead to responsibility for wrongful conduct if the responsibility to protect was to emerge as a hard norm of international law); see also Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park, PA: Pennsylvania State University, 2002) at 276 (submitting that the permanent members are required "to refrain from using their veto power in bad faith in a way that would frustrate effective Council action against genocide or similarly egregious systematic violations").

[236] See Christopher Verlage, *Responsibility to Protect* (Tübingen: Mohr Siebeck, 2009) at 222-224 [my translation].

[237] *Ibid*.

[238] Even for these states, however, *Verlage* acknowledges that the endorsement of R2P at the 2005 World Summit constituted an "increased call for action", *ibid*., at 223 [my translation].

[239] See e.g. Christian Schaller, "Die völkerrechtliche Dimension der 'Responsibility to Protect'" (2008) 46 *SWP-Aktuell*, online: Stiftung Wissenschaft und Politik <http://www.swp-berlin.org/fileadmin/contents/products/aktuell/2008A46_slr_ks.pdf> at 7; *id.*, "Ausschuss für Menschenrechte und humanitäre Hilfe, Öffentliche Anhörung, 11. Februar 2009. 'Responsibility to Protect': Völkerrechtliche Aspekte der Schutzverantwortung", 11 February 2009, online: Deutscher Bundestag <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1366&id=1136> at 5 (calling the Security Council a "political organ, the freedom of action of which in any given case is determined exclusively by the interests of its members" [my translation]); Kirsten Schmalenbach, "Recht und Gerechtigkeit im Völkerrecht" (2005) 60 *JuristenZeitung* 637 at 642-644 (arguing that the Security Council has a monopoly to make political decisions in the area of collective maintenance of peace which are free of judicial control and must be accepted by the member states); but see Sabine Schorlemer, for whom the political discretion enjoyed by the body in determining whether a given case warrants the application of forceful measures could be restricted by the crystallization of R2P

differently, according to this view, which correlates with a traditional reading of the UN Charter, "the decisions or non-decisions of the Council, including the exercise of the veto, [are] considered to be in a law-free zone".[240]

This latter form of criticism points to the second perspective on Security Council members' duties of prevention which indeed must be taken into consideration, namely one considering the issue from the angle of the UN Charter system on collective security and the role that it grants to political considerations on the one hand and legal standards on the other. The idea that its members may in certain circumstances be obligated to act raises complex issues pertaining to the powers and the position of the Security Council. These issues have been sketched in some detail in a "thought experiment" by *Anne Peters*.[241] *Peters* argues notably that the Security Council is no body "*legibus absolutus*", acting in a law-free zone, but that both its actions and omissions are subject to legal limits.[242] Similarly, she submits, the individual members of the Security Council are bound by international law when casting their votes on resolutions.[243] Especially the use of the veto by a permanent member in an R2P situation may, in the view of *Peters*, be abusive and lead to the state's responsibility for wrongful conduct.[244] While she thus theoretically clears the way for the finding that at least the permanent members of the Security Council may incur state responsibility if they vote against a resolution taking action in the face of atrocity crimes, *Peters* stresses that her argument is concerned not with the international *lex lata*, but with the law as it may develop if R2P further hardens into a duty of the Security Council members to vote in favour of certain resolutions. At the time, however, she found no sufficient governmental support for such a substantive obligation.[245]

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as a legal norm, see Sabine von Schorlemer, "Anhörung zum Thema 'Internationale Staatenverantwortung' ('Responsibility to Protect')", 11 February 2009, online: Deutscher Bundestag, <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1366&id=1136> at 10 (submitting, however, also that principles on the application of coercive measures could only constrain the Security Council's discretion if the Council itself accepted them as binding).

[240] *Cf.* Anne Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20:3 *E.J.I.L.* 513 at 538-539 (herself considering this view as untenable in a constitutionalised international order).

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

[242] *Ibid*., at 307-310.

[243] *Ibid*., at 314.

[244] *Ibid*., at 316-319, 321-322. In addition, *Peters* has suggested that the illegality of a veto cast in an R2P situation, provided again that there was a hard R2P norm of law in the future, could make the vote legally irrelevant, in which case it would be incapable of impeding the adoption of the resolution on which the vote is taken, see Anne Peters, "Humanity as the A and Ω of Sovereignty" (2009) 20:3 *E.J.I.L.* 513 at 539-540.

[245] See Anne Peters, "The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and Its Members" in: Ulrich Fastenrath et al., eds., *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011) 297 at 323-325. *Peters* submits, however, that contemporary international law, though not prescribing the content of the decisions to be taken by Security Council members, may yet impose upon the permanent members a procedural duty to state the reasons for a veto, *ibid*.

In opposition to the previous critics of the idea that members of the Security Council may be legally constrained by duties to prevent atrocity crimes, *Peters* hence does not doubt the second but the first premise of such duties. In her view, the reason to deny their existence, as of today, is not that prevention obligations could as a matter of principle not have meaning for Security Council process, but simply that currently no such obligations exist. This assessment indeed seems to correlate with the overall still prevailing perception in legal scholarship generally.[246] Yet already before the "responsibility to protect" appeared on the scene, there had been currents in some parts of legal science that advocated, with some success, duties to prevent atrocities, namely under common Article 1 of the 1949 Geneva Conventions.[247] In light of the World Summit outcome and the cumulative references to the responsibility to protect in UN resolutions, scholars show themselves increasingly willing to reconsider potential duties under customary international law.[248] Moreover, as has been indicated before, the ICJ decision in the *Bosnian Genocide Case* has fuelled discussions about the duty to prevent genocide, which for many is the legal core of R2P.[249]

1.5 Outlook: Two Pillars and a Common Foundation for Duties of Security Council Members to Prevent or Halt Atrocity Crimes

The following chapters reflect the previous observations on the necessary two elements of a legal analysis of duties for Security Council members to prevent atrocity crimes. In Chap. 3, I will develop in further detail the various arguments that could

[246] *Cf.* generally e.g. Christopher Verlage, *Responsibility to Protect* (Tübingen: Mohr Siebeck, 2009) at 186-187 (submitting that international scholarship is predominantly opposed to the existence of duties of intervention to prevent massive and systematic human rights violations); Sabine von Schorlemer, "Anhörung zum Thema 'Internationale Staatenverantwortung' ('Responsibility to Protect')", 11 February 2009, online: Deutscher Bundestag, <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1366&id=1136> at 1.

[247] See Part 4.2.1.1 below.

[248] It is worthy of note that in this context not only new developments in international custom under the heading of the responsibility to protect have gained attention, but also other customary law regimes, such as the law of state responsibility with its purported obligation to cooperate in the face of breaches of jus cogens pursuant to Article 41 of the 2001 ILC Draft on State Responsibility, *cf.* e.g. Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 *American Journal of International Law* 99 at 120; Matthias Wenzel, *Schutzverantwortung im Völkerrecht: Zu Möglichkeiten und Grenzen der 'Responsibility to Protect'-Konzeption* (Hamburg: Kovač, 2010) at 103-104.

[249] See namely Louise Arbour, "The responsibility to protect as a duty of care in international law and practice" (2008) 34 *Review of International Studies* 445 at 450; William A. Schabas "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes" (2007) 2:2 *Genocide Studies and Prevention* 101 at 102, 115 (noting the reinforcement of R2P through the ICJ judgment in the *Bosnian Genocide Case* both with a view to its evolution in customary law

be brought, and indeed have been brought, against the proposition that processes within the Security Council, including namely the voting on resolutions, could be subject to legal constraints. In Chaps. 4–6, I will then analyse to what extent different regimes of international law, including namely the Genocide Convention, but also the Geneva Conventions and customary international law, contain duties that could require states to use their power as Security Council members for the protection of imperilled populations. Recalling the context of this question, namely the new challenges that have become most apparent over the past decades, the new responses that the Security Council has found, and the new normative framework that the international community has endorsed with the R2P, the period since the end of the Cold War and, in particular, the years since the World Summit will provide crucial material for this analysis. Before turning to these substantive issues, however, I will demonstrate that it is necessary to address some questions of legal methodology and theory, and develop methodological guidelines for the subsequent analysis. At the risk of labouring an analogy that has already been used excessively in the past, Chap. 2 provides the foundation, while Chaps. 3–6 describe the pillars on which such obligations for Security Council members rest.

and by elevating it into a treaty obligation). *Cf.* also Marko Milanović, "State Responsibility for Genocide: A Follow-Up" (2007) 18:4 *European Journal of International Law* 669 at 687 (submitting that the approach taken by the ICJ in the *Bosnian Genocide Case* "comes closer to the 'responsibility to protect' than any other judicial pronouncement so far").

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