R.I.P. R2P – AND YET IT MOVES: IT IS PREMATURE TO DECLARE THE RESPONSIBILITY TO PROTECT DEAD – NO, IT NEEDS CPR IN THE DARK AGES OF THE 2020S! *

By Lily Katinka Svanberg

ABSTRACT

This work is about R2P and the responsibility to protect. Currently, the R2P doctrine is under serious pressure. The world climate has changed rapidly since the days of the launch of the R2P principle in 2001, and its most frequent references in 2011–2014, culminating in "responsibility not to veto" (RNVT) proposals in 2015. Recent grave violations of international law in the 2020s, resulting in alleged mass atrocities, have resulted in pessimism about the feasibility of R2P, and the declaration of its death. This article evaluates the 2000s decline in UNSC-mandated military action taken under Chapter VII from the perspective of R2P. Russian and Chinese vetoes in the UNSC have practically deadlocked the UNSC since the mid-2010s. Russia's annexation of Crimea, and the Syrian war, the Yemen conflict, are all conflicts where calls for R2P could not be translated into action. The imminent problem is that the veto powers make the UNSC ill-equipped to respond to mass atrocity situations.

In the 2020s there is a return to the Dark Ages of the Cold War and Just War theories. Since the Russian invasion of Ukraine on February 24, 2022, the Westphalian concept of State sovereignty has been sacred. Thus, unheard went Ukrainian President Zelensky's call for a limited R2P intervention in the form of a NATO-enforced no-fly zone to save civilian lives. The unfolding in the Fall of 2023 of two other major humanitarian crises: on the 7th of October the Hamas large-scale terrorist attacks on Israel and hostage-taking with 1400 Israel casualties, and the ensuing large-scale Gaza war leaving nearly 45,000 civilians dead at the end of 2024; the forced expulsion of the Armenian-majority from the enclave of Nagorno-Karabakh in Azerbaijan, forcing 100,000 civilians to flee their homes. They were all

* Doctor of Law (J.D.) Lily Katinka Svanberg, Stockholm University, Sweden, L.L.M from New York University and a visiting lecturer at West Virginia College of Law, 2023/24, and former visiting scholar at University of Miami Law School. I would like to thank Professor Cody Corliss and the Avengers Workshop, at West Virginia College of Law, for inspiring review and comments on earlier drafts of my article, and Professor and Associate Dean John Taylor for all support. Also, Professor and former Dean, Stephen J. Schnably at the University of Miami Law School, have inspired early drafts during my international post doc on R2P at the University of Miami.

textbook examples of mass atrocities, but the international community did not invoke the R2P doctrine. Also, the Taliban government's takeover in the Fall of 2020 in Afghanistan, forcing a chaotic pull-out of U.S. troops, resulted in a return to the Taliban practice of "gender apartheid," and other severe human rights and international humanitarian law violations, as investigated by the International Criminal Court (ICC). All these situations ought to have qualified for R2P interventions. Instead, they were routinely transferred only to the ICC for investigation, a process that is important but might take years.

This work aims to revitalize R2P as a concept that is appropriate and ready to use instantly as a remedy for mass atrocities. I question whether the ICC alone should shoulder the burden of accounting for mass atrocities. Should it become a backup outlet when genocide and other serious international crimes are committed against a population? The final part shows how the current normative framework in the UN Charter can be interpreted to accommodate R2P interventions without any formal amendments and without any agreement on a responsibility not to veto.

My work is divided into three parts. Part 1 describes the normative framework of R2P and analyzes relevant Articles in the United Nations Charter. Part 2 contains a case study of military conflicts from Kosovo in 1999 up to the present, where the UNSC was bypassed but R2P could be considered. Part 3 analyzes the legal options available to enforce an emerging R2P responsibility.

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INTRODUCTION

The Responsibility to Protect (R2P) principle is tailored for situations where mass atrocities occur. The United Nations Security Council (UNSC) should shoulder this responsibility when large-scale human suffering occurs. The imminent problem is that the veto powers make the UNSC ill-equipped to do so. Alternatively, states, collectively or individually, need to respond to conflicts where people are exposed to serious international crimes and their government is unable to prevent these crimes or is itself responsible or is the perpetrator.[1] Recent research advocates that the veto in its present form is an outdated formula that needs to adjust to current developments in international law such as the Responsibility to Protect doctrine (R2P).[2] There are proposals to reform the veto powers in the UNSC, called "the responsibility not to veto" (RN2V), to better equip the UNSC to handle an acute R2P situation, through the commitment by the P-5 not to use a veto in an immediate humanitarian crisis.[3]

In a situation when no intervention is forthcoming from the UNSC, a highly debated question is whether regional organizations and states should shoulder a responsibility to protect outside of the UNSC based on R2P.

Currently, the R2P-doctrine is under serious pressure. The world climate has changed rapidly since the days of the launch of the R2P principle in 2001, and its most frequent references in 2011–2014, culminating in the RN2V proposals in 2015. Recent grave violations of international law in the 2020s, resulting in mass atrocities, have resulted in pessimism about the feasibility of R2P, as well as RN2V. The 2000s have seen a decline in UNSC-mandated military action taken under Chapter VII, ever since NATO had to cite the

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[1] G. Gareth Evans & M. Mohamed Sahnoun, *The R2P: Report of Responsibility to Protect: The International Commission on Intervention and State Sovereignty*, OTTAWA: INT'L DEV. RES. CENTRE, at ¶ 2.14 (2001).

[2] Zamaris Saxon & Lara Pratt, *From Cause to Responsibility: R2P as a Modern Just War*, 17 U. NOTRE DAME AUSTL. L. REV. 135, 135–72 (2015). *See also* Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria*, 19(3) J. CONFLICT & SEC. L. 471–88 (2014); Irmgard Marboe, *R2P and the 'Abusive' Veto – The Legal Nature of R2P and its Consequences for the Security Council and its Members*, 16(1) AUSTRIAN REV. INT'L & EURO. L. ONLINE 115–35 (2014); Jean-Baptiste Jeangene Vilmer, *The Responsibility Not to Veto: A Genealogy*, 24(4) GLOBAL GOVERNANCE 331, 331–49 (2018); *and* N. Tüzgen & G. O. Gök, *Understanding the Policies of the Brics Countries in R2P Cases: An English School Perspective*, 15(1) GLOBAL RESPONSIBILITY TO PROTECT 1, 3–29 (2022).

[3] Ariela Blätter & Paul D. Williams, *The Responsibility Not To Veto,* 3(3) GLOBAL RESPONSIBILITY TO PROTECT 301–02 (2011).

right to a collective "humanitarian intervention" in the case of Kosovo in 1999. Russian and Chinese vetoes in the UNSC have practically deadlocked the UNSC since the mid-2010's. Russia's annexation of Crimea, the Syrian war, and the Yemen conflict are all conflicts where the call for R2P could not be enforced. In the 2020s, no one hardly referred to forceful R2P intervention anymore, notwithstanding that early in the decennium conflicts that needed R2P more than ever erupted.

In 2021 the Taliban regained power in Afghanistan after an agreement with the United States that made for a chaotic pullout of U.S. troops after the collapse of the U.S.-backed Afghan government. The Taliban is an Islamist extremist movement, that was deemed co-responsible for the Al-Qaida terrorist attacks on 9/11 and ruled Afghanistan 1995–2001. Soon, the Taliban's practice of so-called 'gender apartheid' against women and girls.[4] Other severe human rights and international humanitarian law violations returned, as investigated by the International Criminal Court (ICC).[5]

The spiral of violence against civilians escalated with the Russian invasion of Ukraine on February 24, 2022, when Russia aimed to take control of the whole of Ukraine under the pretext of an R2P intervention with a forced regime change. Yet, Ukrainian president Zelensky's calls for a limited R2P intervention from NATO, in the form of a no-fly zone to protect civilians from Russian onslaught, went unheard. The unfolding in the fall of 2023 of two other major humanitarian crises: the Hamas large-scale terrorist attacks on Israel leaving 1,400 people dead and several hundred civilians taken hostages leading to the ensuing horrific Gaza war. The fall of the Armenian-majority enclave of Nagorno-Karabakh to Azerbaijani troops in September 2023 and Azerbaijan's declaration of its dissolution, led to the exodus of most of its population from Azerbaijan to Armenia.[6]

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[4] 'Gender apartheid' is described *infra* in Part II: 2.2.2 Afghanistan. It is seen in a series of policies and daily abuses that bar women and girls from engaging in public life and having hopes of financial autonomy. It is designed and enacted as a system of governance that aims to compress and relegate women and girls into narrow roles., *see* Nia Gissou, *Gender Apartheid is a Horror. Now the UN Can Make It a Crime Against Humanity,* New Atlanticist, Atlantic Council (Oct. 5, 2023), https://www.atlanticcouncil.org/blogs/new-atlanticist/gender-apartheid-is-a-horror-now-the-united-nations-can-make-it-a-crime-against-humanity/.

[5] Situation in the Islamic Republic of Afghanistan ICC-02/17 (Mar. 26, 2017), and the Prosecution authorization to resume its investigation under article 18(2) of the Rome Statute (Oct. 31, 2022).

[6] On February 25, 2022, a draft resolution deploring the "Russian Federation's

During all those conflicts, the UNSC has been deadlocked by vetoes. A Russian veto defeated a draft resolution that sought to condemn Russia's intervention in Ukraine, and Russian vetoes have deadlocked the UNSC on the situation in Ukraine ever since.[7] Neither has the UNSC acted under R2P in the current Nagorno-Karabakh crisis because Russia almost certainly would block any such action. Still, NATO states Turkey helped Azerbaijan in its war against the Nagorno-Karabakh Armenians while Europe supported oil being imported from Azerbaijan.[8] In the Israel-Gaza war, the UNSC was able only after several failed attempts—due to U.S. vetoes—to adopt a non-binding UNSC resolution in November 2023.[9] Subsequent attempts to adopt a ceasefire resolution failed several times because of a single U.S. veto.[10] Finally, in March 2024, The U.S. abstained in an otherwise unanimous vote for Resolution 2728 that 'demands an immediate ceasefire for the month of Ramadan,' as the Netanyahu government was planning an invasion of Rafah, that later was carried out in May.[11] The resolution also demanded the release of hostages by Hamas but did not make the ceasefire dependent on hostage release, a linkage the U.S. had previously insisted on.[12] However, in January 2025, a joint effort by the Biden and incoming Trump administrations paved the way for a cease-fire with the release of some of the Israeli hostages in exchange for the release of several Palestinian women held prisoner in Israeli prisons.[13]

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aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter" obtained 11 votes in favor, 1 against and 3 abstentions, 'Draft resolution', UN S.C. Res. Doc. S/2022/155 (Feb. 25, 2022).

[7] Anne Peters, *The war in Ukraine and the curtailment of the veto in the Security Council*, 5 REVUE EUROPÉENNE DU DROIT 1 (2022).

[8] David J. Scheffer, *Ethnic Cleansing Is Happening in Nagorno-Karabakh. How Can the World Respond?*, COUNCIL ON FOREIGN RELATIONS (Oct. 4, 2023)

[9] S.C. Res. 2712 (Nov. 15, 2023).

[10] In February 2024, the U.S. again vetoed a UNSC resolution that had received 13 votes and would have demanded an immediate humanitarian ceasefire. The U.S. signaled it would rather wait for the result of multilateral negotiations over the hostages. Michelle Nichols, *Us Blocks Ceasefire Call with Third UN Veto In Israel Hamas War,* REUTERS, (Feb. 20, 2024). All other 14 members in the UNSC voted in favor of the resolution.

[11] S.C. Res. 2728 (Mar. 25, 2024).

[12] Gaza: Security Council passes resolution demanding 'an immediate ceasefire' during Ramadan, UN NEWS, (Mar. 25, 2024).

[13] Emma Graham-Harrison & Andrew Roth, *The Inside Story of How an Unlikely Alliance of Trump and Biden Led to Historic Gaza Ceasefire Deal*, THE GUARDIAN (Jan. 18, 2025).

The UNSC's referral authority to the ICC significantly extends accountability for grave international crimes, forcing non-member states to the ICC to cooperate with the court and compel them to arrest wanted suspects. This is because Art. 13(b) of the Rome Statute provides that the preconditions of Art. 12 (2)—territoriality or active nationality—do not apply if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the UN Charter.[14] Thus, states *not* parties to the ICC, can be legally forced only by the UNSC to extradite an individual indicted by the ICC.[15] Hence, when a veto in an R2P situation paralyzes the UNSC, this possibility for the UNSC is hampered.[16] Also, the UNSC is the only solution to refer the delict—the crime of aggression—to the ICC under Art. 15 irrespective of whether the states concerned have accepted the jurisdiction of the ICC.[17] Such a referral under Art. 15 of the Rome Statute is inconceivable in the context of Ukraine, owing to the Russian veto.[18]

The 2020 wars and humanitarian suffering in Ukraine, Israel-Gaza, Nagorno-Karabakh, and Afghanistan all show a remarkable shift in focus in international politics. In the current state of world affairs, it is *war* and the right to self-defense, retaliation, revenge, and imperialism. that are at the forefront. The right to resort to all-out war, as a justified tool to pursue military and political objectives, is the goal, not to alleviate suffering. Rather, it is throwing us back to times like those before World War II and the Cold War. It can be seen as a concession to modern just war revisionists who argue for an expanded definition of the just war theory just as they "argued for expanded permissions for military intervention; questioned civilian immunity,"[19] to cite Seth Lazar.[20] Today's new era of geostrategic

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[14] Alexandre Skander Galand, *Introduction*, *in* UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT: LEGAL NATURE, EFFECTS AND LIMITS, 1–11 (ed. Brill 2019).

[15] Human Rights Watch, *UN Security Council Discuss Inconsistency in ICC Referrals*, HUMAN RIGHTS WATCH (Oct. 16, 2012).

[16] *Id.*

[17] Brittney A. Dimond, *When the ICC Comes Knocking, the United States Should Welcome It with Open Arms*, Comment, 28 WASH. INT'L L. J. 181, 189 (2019).

[18] Olivier Corten & Vaios Koutroulis, *Tribunal for the crime of aggression against Ukraine - a legal assessment*, In-depth analysis Requested by the DROI Subcommittee, European Parliament, [(Dec. 2022) [EP/EXPO/DROI./FWC/2019_01/Lot6/1/C/21 EN December 2022 -PE 702.574].

[19] The just war theory is about the legitimacy of war and the justness of the causes for which they are fighting. *What are jus ad bellum and jus in bello?,* INT'L COMM. RED CROSS, (Jan. 22, 2015). For more on just war theory, *see infra* at Just War Theory in Part II D.

[20] Seth Lazar, *Just War Theory: Revisionists Versus Traditionalists*, 20(1) ANNUAL REV. POL. SCI. 37, 38–54 (2017).

competition and superpower polarization is a big obstacle to enforcing R2P. The challenging question of a collectively acceptable humanitarian order can still emerge.

Do we need to declare the R2P doctrine dead, buried, and grieved under a tombstone with the inscription: 'R.I.P. R2P (2001–2021)'? Or is the death of R2P "greatly exaggerated," alluding to Louis Henkin's famous article on Art. 2(4) in the UN Charter?[21] The R2P doctrine might be declared dead by many: "And yet it moves," to use a well-known quote attributed to the Italian mathematician, physicist, and philosopher Galileo Galilei.[22]

My focus is to bring back to life the idea that the R2P doctrine is a powerful tool that should be used in current conflicts, such as in Ukraine, Gaza, and Nagorno-Karabakh. R2P is not a dead letter but a living legal concept. However, it might need CPR to make it more tempting as a legal alternative. I will evaluate how the UN and states can shoulder an interventionist R2P responsibility. This is done from a public international legal perspective using a case study of major military interventions from Kosovo 1999 until today when made outside the ambit of the UNSC. A breaking point came around the start of the millennium when external interventions by the UNSC were no longer in fashion when the momentum of the end of the Cold War had passed.[23]

My thesis is that the veto in its present form is an obstacle to R2P interventions. The aim is to consider what possibilities could work as an alternative to the RN2V formula. This is done through the case study, to see if its conflicts qualify as situations mandating an R2P intervention. Those interventions were mostly based on other international legal norms, such as the right to self-defense, international terrorism, or the protection of minorities.

Second, what obligations on behalf of the UN and the international

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[21] Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65(3) AM. J. INT'L L. 544–48 (1971)

[22] "*E pur si muove*" or "*Eppur si muove.*" This famous quote is supposed to have been made in 1633 after Galileo Galilei was forced to recant his claims that the Earth moves around the Sun, rather than the converse. If the anecdote ever happened is, however, unclear. STEPHEN HAWKING, ON THE SHOULDERS OF GIANTS: THE GREAT WORKS OF PHYSICS AND ASTRONOMY 396–97 (Running Press 2003).

[23] Marcus Lütticke, *Missions without a UN mandate*, DW, (Aug. 28, 2013). *See also* Ramesh Thakur, *R2P After Libya and Syria: Engaging Emerging Powers*, 36(2) THE WASH. QUARTERLY 6, 61–76 (2016).

community of states could come into question to justify R2P interventions under the current normative framework in today's era of deep-frozen real politics?

Third, the fact that the cases in the case study often resulted in an ICC investigation is used as evidence of the need for an R2P intervention, establishing the link between international crimes as a prerequisite that ought to trigger R2P intervention. However, what would happen if the ICC and the established link to atrocity crimes were routinely chosen instead of an R2P intervention?

I proceed as follows, divided into three parts and a conclusion:

Part 1 focuses on the normative framework. It starts with an introduction to the R2P principle. The concept of an RN2V is covered, as well as, the doctrine of Responsibility while Protecting (RwP). R2P will be set against pertinent norms in the UN Charter, the veto in Art. 27, and the prohibition of the use of force in Art. 2(4), the sovereignty of states in Art. 2(1), and the UNSC mandate under Chapter VII.

Part 2 presents a case study of cases from the 2000s, all where the UNSC was unable to intervene. A review of the major military interventions is done from Kosovo 1999 up to date. The focus is on the current conflicts in Ukraine, Nagorno-Karabakh, and Israel-Gaza, but also the situation in Afghanistan, with the Taliban take-over in 2021. They are set against the background of cases in UNSC practice—the major interventions done from 1999 – 2019 outside the ambit of the UNSC. The aim is to investigate if the conflicts qualified as a basis for an R2P intervention, and why R2P was not the major justification. The Just War theory is then introduced to assess its influence in today's post-liberal world order.

Part 3 presents alternatives to RN2V when the UNSC is paralyzed by a veto in an R2P situation. First, there is a focus on four possible reforms in interpretations of the UN Charter. The possibility to use remedial self-determination and remedial secession for a severely oppressed minority. Another option is reviving the "Uniting for Peace" resolution from 1950. Here, the General Assembly (UNGA)—with a two-thirds majority—could recommend enforcement action when the UNSC is paralyzed by a veto.[24] A possibility is also to bypass a sole veto made by a state with vital interests in

[24] G.A. Res. 377 (V), Uniting for Peace (Nov. 3, 1950).

the conflict. A possibility is a method with *ex post facto* UNSC authorization done by regional organizations under Art. 53 in the UN Charter. Then, the suggestion is made to use the right to self-defense found in Art. 51 in the UN Charter and reinterpret it under the doctrine of "piercing the sovereignty veil of the state." This will bypass the government as an agent of the state and let the decision to invite in collective self-defense rest with the "people" or minority suffering mass atrocities when its government is unwilling or helpless in responding or is itself the perpetrator.[25]

The Conclusions list the most appealing alternatives to an RN2V based on Part 3. They highlight that inventive UN practice can be superior to agreeing on formal new procedures and hinting at the best solutions to revive a strong R2P commitment.

PART I. THE NORMATIVE FRAMEWORK

A. DEFINITION OF HUMANITARIAN INTERVENTION V. R2P

Humanitarian intervention is a much broader definition than R2P. Rather, R2P should be seen as a subdivision of humanitarian intervention and is used as such throughout this article.

An analysis of the R2P formula suggests that a forceful R2P intervention is not, by definition, the same as a humanitarian intervention. The two concepts are strictly speaking not synonymous, there is a conceptual difference. R2P has its definition. It has a non-violent as well as, a use of forceful part, as shown in its three pillars to respond, react, and rebuild.[26] Most support in UN practice is the non-interventionist part of R2P, which deals with the state's primary responsibility to protect its population, which is consistently referred to in all UNSC resolutions citing R2P.[27] In this respect, R2P is broader than a humanitarian intervention that implies using force from outside.

However, an armed R2P intervention is a subcategory of humanitarian intervention. It involves an obligation to protect individuals against certain defined mass-atrocity crimes, that are gross, extensive, and systematic violations, such as genocide, crimes against humanity, and war crimes. These

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[25] Ian Hurd, *If I Had a Rocket-Launcher: Self-Defense and Forever War in International Law*, 56 HOUS. L. REV. 821, 821–40 (2019).

[26] *See infra* in Part I A.

[27] *See* Thakur, *supra* note 23 at 423.

are crimes with universal jurisdiction and are inserted in the Rome statute of the ICC. R2P forms the basis for a collective responsibility by states to consider military intervention as a last resort when the state is unable or unwilling to protect its population or is the perpetrator of such crimes. One could say that R2P triggers the responsibility of the international community to enforce obligations *erga omnes,* the obligation to intervene based on universal jurisdiction when *jus cogens* norms are violated.

A humanitarian intervention, on the other hand, is defined as an *armed intervention* to stop or prevent large-scale human suffering; regardless of whether it is famine, natural disasters, an epidemic, or gross systematic abuses of which a state is guilty, and also regardless of who is to be saved, own nationals, or other populations. Humanitarian intervention does not necessarily have to be conditional on a state not shouldering its responsibility to protect its population and is not linked to a direct responsibility to protect a population against certain international crimes. Moreover, a humanitarian intervention does not contain any direct reference to the four precautionary principles to limit and guide R2P intervention: proper purpose, last resort, proportional means, and balance of consequences.

B. THE EVOLUTION OF R2P

When the collective security system began to work again in the 1990s, after being deep-frozen during the Cold War, it emerged that many situations that needed intervention were internal and concerned large-scale human suffering. This highlighted that the UNSC should not be restricted to dealing only with traditional international conflicts but should be obliged to respond to humanitarian crises within states.

The R2P formula has two different pillars. The first is less controversial: a state's government is responsible for protecting its population against grave atrocities. The second more controversial idea, is that the international community has a residual responsibility to intervene through coercive measures such as sanctions and then military intervention as a last resort to protect populations endangered by mass atrocities.[28]

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[28] "... to ensure that the international community never again fails to act in the face of genocide and other gross forms of human rights abuse", to cite from *Background Briefing*, Global Centre for the Responsibility to Protect was set up by the United Nations (UN) in 2008, [https://www.globalr2p.org/publications/the-responsibility-to-protect-a-background-briefing/].

The R2P formula stems from the new Millenia. It was formulated against the background of situations of large-scale human distress witnessed in the 1990s, such as the repression of the Kurds in Northern Iraq in 1991; the famine disaster and civil war that plagued Somalia in 1992; the genocide in Rwanda in 1994, and the refugee crisis in Haiti the same year; the Kosovo intervention made by NATO to protect the Kosovars from Serbian repression and expulsion.[29] In most of those cases, the inability of the UNSC to respond as forcefully as needed had been a concern, why the debate on the right to humanitarian intervention came to focus and the former UN Secretary-General, Kofi Annan, asked for a principled approach.[30] This resulted in the creation of the International Commission on Intervention and State Sovereignty (ICISS) by the Canadian Government, which, in 2001, issued a report[31] that built on the idea of "[s]tate sovereignty as a responsibility."[32]

The ICISS report concluded that R2P involves three stages: prevent, react, and rebuild.[33] Hence, R2P is primarily focused on non-violent methods. The most controversial aspect of the ICISS report was the proposition that R2P responsibility may ultimately take the form of a military intervention when the state in question is reluctant or unable to intervene or is itself the perpetrator, stating:

> that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling

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[29] *See* the case-study on Kosovo, *infra* in Part II, at 2.2.1.

[30] Press Release, UN Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136 GA/9596 (Sep. 20, 1999).

[31] G. Evans & M. Sahnoun, *The R2P: Report of The International Commission on Intervention and State Sovereignty*, [hereinafter ICISS Report], OTTAWA: INT'L DEVELOPMENT RES. CENTRE, (2001).

[32] The idea was launched by Francis M. Deng, as representative of the Secretary-General for internally displaced persons. FRANCIS M. DENG, ET. AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA, Washington: Brookings Institution Press (1996); *see also* Francis M. Deng, *From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'*, 2(4) GLOBAL RESPONSIBILITY TO PROTECT 353–70 (2010).

[33] "The ICISS report was built on three dimensions of R2P – the responsibility to prevent, the responsibility to react and the responsibility to rebuild, meanwhile the UN Summit Outcome suggests that the R2P rests on three Pillars: *Pillar one* – The protection responsibilities of the state, *Pillar two* – International assistance and capacity-building and *Pillar three* – Timely and decisive response." Aurora Martin, *Responsibility to Protect (R2P) in Theory and Practice – Flaws and Challenges*, HUMAN SECURITY ORG. (2021)

to end the harm or is itself the perpetrator.[34]

The ICISS Report introduced four precautionary principles to limit and guide intervention: proper purpose (right intention), last resort, proportional means, and balance of consequences (likelihood of success). The just cause thresholds and precautionary principles constituted an important barrier to abuse.[35] Also, it did separate R2P from the broader concept of "human security," within International Relations.[36]

The ICISS report and the subsequent adoption by the UN of R2P as a principle to guide states' conduct followed the trend in world policy that seemed to show an attitude change to humanitarian intervention that trumps national sovereignty. Suddenly, the focus on national sovereignty was not in vogue anymore (although it still constituted a prerequisite for international law). Instead, human rights and human security weighed more heavily on sovereignty.

The R2P doctrine has gained strong support in many circles, such as in Canada, Europe, the United States, and Africa, which have inserted a right to humanitarian intervention in the Charter of the African Union.[37] At the UN is the Group of Friends of the Responsibility to Protect, consisting of fifty-five member-states and the European Union.[38]

The R2P principle was adopted by Heads of State and Government in the 2005 World Summit Outcome Document at the UN World Summit on the 60th anniversary of the UN with the overwhelming support of 150 states. In paragraphs 138 and 139, in the so-called "protection clause," states affirmed their responsibility to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity:

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[34] *ICISS Report,* at 2.14.

[35] Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit.* 20 ETHICS & INT'L AFFAIRS 143, 146 (2006). *See also* Ramesh Thakur, *No More Rwanda's: Intervention, Sovereignty and the Responsibility to Protect*, HUMANITARIAN EXCHANGE (London: Humanitarian Protection Network, 2003).

[36] The term "human security" was coined in 1994 in the UN Human Development Report (HDR), New Dimensions of Human Security, by UNDP. It received great attention. Human security rests, according to the HDR report, on two pillars: "freedom from fear" and "freedom from want."

[37] *See infra* on AU and ECOWAS Charters.

[38] *Statement by the Group of Friends Responsibility to Protect in the UN Security Council Open Debate on Protection of Civilians*, Norwegian Ministry of Foreign Affairs, (May 23, 2023).

> In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, by 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.[39]

The focus has been on three international crimes: genocide, war crimes, and crimes against humanity, that a state has a responsibility to protect its population from, *inter alia*, the same crimes that the ICC has jurisdiction over.[40] Those crimes would trigger, on an *ad hoc* basis, intervention from the UNSC under Chapter VII when the state itself does not protect its population. The R2P principle has resulted in the set-up of institutions and offices, such as the Global Centre for the Responsibility to Protect in 2008, and the UN Office on Genocide Prevention and the Responsibility to Protect.[41] The UN Secretary-General, starting with Ban-Ki Moon, has since 2009 published annual reports regarding different aspects of R2P.[42] The latest from 2024, the 16th report on the Responsibility to Protect (R2P), entitled *"Responsibility to Protect: The commitment to prevent and protect populations from atrocity crimes,"* underscores today's backlash and the Secretary-General issues a stark warning about worrying global trends, including increasing violations and abuses of International Humanitarian Law and International Human Rights Law. However, the Secretary-General asserts that there are still opportunities to shift the current course of events through a more nuanced and strategic approach to prevention and protection by actors across all levels.[43]

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[39] U.N.G.A., *2005 Summit Outcome*, U.N. Doc. A/60/L.1, 138–39 (Sept. 20, 2005).

[40] *See* Art. 5 (1) in the Rome-statute.

[41] *Responsibility to Protect*, UN Office on Genocide Prevention and the Responsibility to Protect.

[42] The former UN Secretary-General Ban-Ki Moon issued Annual reports on R2P between 2009 and 2016. *See* Follow-up to the Outcome of the Millennium Summit Implementing the Responsibility to Protect, U.N. Doc. A/63/677, (Jan. 12, 2009); U.N. Secretary General, *Mobilizing collective action: the next decade of the responsibility to protect*, U.N. Doc. A/70/999–S/2016/620, (2016).

[43] REPORT OF THE SECRETARY-GENERAL, RESPONSIBILITY TO PROTECT: THE *COMMITMENT TO PREVENT AND PROTECT POPULATIONS FROM ATROCITY CRIMES*, GENERAL ASSEMBLY SEVENTY-EIGHTH SESSION AGENDA ITEMS 13, 117, 129, A/78/901-S/2024/434*(3 JUNE. 2024)*.

The World Summit Outcome Document seems to reserve the right to R2P-motivated interventions to the UNSC. While the Summit Outcome Document did not support the unilateral option that had been relied upon by NATO in Kosovo in 1999; it did not *outlaw* such a unilateral option either.[44] The UNSC's responsibility to protect has been confirmed by the UNSC in resolutions on *the Protection of Civilians in Armed Conflict*, 1674 (2006); 1894 (2009); 2286 (2016); 2417 (2018); 2474 (2019); 2475 (2019); 2573 (2021). Resolution 2220 on *Small Arms and Light Weapons* (2015) confirms the link to R2P with a reference to "the relevant provisions of the 2005 World Summit Outcome Document regarding the protection of civilians in armed conflict, including paragraphs 138 and 139."[45] The same is true for Resolution 2419 (2018), about the "*Maintenance of international peace and security*," and Resolution 2250 (2016) which deals with "*Youth participation in the maintenance of international peace and security.*"[46] In Resolution 2457 (2019), *Silencing the Guns in Africa,* the UNSC emphasized that:

> the responsibility to protect civilians and to respect human rights, as provided for by *relevant international law*, and further reaffirms the responsibility of each *individual state to protect its populations from genocide, war-crimes, ethnic cleansing, and crimes against humanity*.[47]

In its practice, the UNSC has explicitly referred to R2P as a basis for intervention in some of its mandatory Chapter VII Resolutions. It did so for the first time in 2004, in its Resolution 1556 (2004) on Darfur in Sudan. Although, it did not take any forceful action against the acts of genocide claimed to take place. It was not until 2011 that the UNSC started to refer to R2P as a cause for its military humanitarian interventions. The breakthrough came in UNSC Resolutions 1970 and 1973 (2011) on Libya, which for the first time mobilized the UNSC to take collective coercive action by military intervention under its mandatory Chapter VII authority against a UN member state to ensure the protection of civilians at grave risk of mass atrocities.[48] The same year, the UNSC also mandated a limited R2P-intervention in Ivory

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[44] *Humanitarian Intervention in Syria*, PUB. INT'L L. AND POL'Y GROUP (2012).

[45] S.C. Res. 2220 (Dec. 9, 2015), on *Small Arms and Light Weapons.*

[46] *Id.*, *On Youth Participation in The Maintenance of International Peace And Security*, preamble.

[47] S.C. Res. 2457 (Feb. 27, 2019), preamble (emphasis added).

[48] *Libya and the Responsibility to Protect,* Occasional Paper, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (Oct. 5, 2012).

Coast, in UNSC Resolution 1975 (2011), with the same reference to the responsibility to protect as that in Libya, thus, to use "*all necessary means* to . . . protect civilians under imminent threat of physical violence," citing R2P.[49]

From 2011 to 2014, the UNSC's references to R2P in resolutions increased sharply. After only using the R2P language once in the four years before 2011, the UNSC referred to R2P in 26 resolutions between 2011 and 2014. [50] This practice has since been applied in the next cases.[51] However, all are situated in Africa and one in the Middle East: Libya, Sudan, Ivory Coast, South Sudan, Mali, the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Liberia, and Yemen. Between 2015 and 2023, R2P was cited in 58 UNSC Resolutions.[52] During the period from 2015 to 2018, there were most cases of R2P, also involved more states, that is, 40 references to R2P concerning eight states and two regions.[53] Then there was a sharp decline in 2019–2023, with 18 references to R2P, and only towards the three African states of South Sudan, CAR, and DRC.[54] In 2024 there were only

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[49] S.C. Res. 1975 (Mar. 30, 2011), op.6, *See* Marjorie Cohn, *The Responsibility to Protect – The Cases of Libya and Ivory Coast*, Paper, E-International relations, (2011).

[50] J. Gifkins, *R2P in the UN Security Council: Darfur, Libya and beyond,* 51(2) COOPERATION & CONFLICT 148, 152–65 (2016).

[51] Alex J. Bellamy, *The Responsibility to Protect: Towards a "Living Reality",* Report written for the United Nations Association-UK, 19 (2013).

[52] Between the years 2015 and 2023, R2P was cited in UNSC Resolutions 58 times, *See* GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, (UN Resolutions referencing R2P: 2015–2023).

[53] During 2015 – 2018, the UNSC adopted the 40 following resolutions citing R2P. In Syria: S.C. Res. 2449 (Dec. 13, 2018), 2393 (Dec. 19, 2017), 2332 (Dec. 21, 2016), and 2258 (Dec. 22, 2015). In Somalia: S.C. Res. 2444 (Nov. 14, 2018), 2385 (Nov. 14, 2017), and 2317 (Nov 10, 2016). In DRC: S.C. Res. 2439 (Oct. 30, 2018), 2409 (Mar. 27, 2018), 2360 (June 21, 2017), 2348 (Mar. 31, 2017), and 2211 (Mar. 26, 2015). In Mali: S.C. Res. 2423 (June 28, 2018), 2374 (Sept. 5, 2017), 2364 (June 29, 2017), and 2295 (June 29, 2016). In Sudan: S.C. Res. 2428 (July 13, 2018), 2429 (July 13, 2018), 2363 (June 29, 2017), 2340 (Feb. 8, 2017), 2327 (Dec. 16, 2016), 2304 (Aug. 12, 2016), 2206 (Mar. 3, 2015), 2296 (June 29, 2016), 2228 (June 29, 2015). In South Sudan: S.C. Res. 2290 (May 31, 2016), 2252 (Dec. 15, 2015), 2241 (Oct. 9, 2015), and 2223 (May 28, 2015). In Central African Republic: S.C. Res. 2399 (Jan. 30, 2018), 2387 (Nov. 15, 2017), 2339 (Jan. 27, 2017), 2301 (July 26, 2016), 2262 (Jan. 27, 2016), 2217 (Apr. 28, 2015), and 2196 (Jan. 22, 2015). In Liberia: S.C. Res. 2288 (May 25, 2016) and S.C. Res. 2237 (Sept. 2, 2015). In the Great Lakes Region: S.C. Res. 2389 (Dec. 8, 2017). In Lake Chad Basin: S.C. Res. 2349 (Mar. 31, 2017). *See* GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, UN resolutions referencing R2P: 2015-2018.

[54] During 2019 – 2023, the UNSC adopted far less resolutions (18) and dealt with only three conflicts: South Sudan: S.C. Res. 2683 (May 30, 2023), 2677 (Mar. 8, 2023), 2633 (May 26, 2022), 2625 (Mar. 15, 2022), 2577 (May 28, 2021), 2567 (Mar. 12, 2021), 2514

three references to R2P, one each in the case of DRC, Resolution 2765, (Dec. 20, 2024); CAR, Resolution 2759, (Nov. 14, 2024); and South Sudan, Resolution 2731, (May 30, 2024).

In this context, it should be emphasized that two regional African organizations, the African Union (AU) and the Economic Community of West African States (ECOWAS), have introduced a right to humanitarian intervention *without a prior UNSC authorization* in their Charters. The AU-Charter from 2000, in its Constitutive Act, provides a right for the AU to make a humanitarian intervention in member states, in its Art. 4(h), as will be described in Part III.[55] The scope of this provision was expanded in 2003 to include "the right of Member States to request intervention from the Union to restore peace and security" in Article 4(j) which formalized the right of a state to *request* an intervention by the AU.[56] ECOWAS has introduced the right to humanitarian intervention through Art. 22(c) of the *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping, and Security.* ECOWAS has been diligent in undertaking regional interventions in West Africa without any existing UNSC mandate but has sought and received the UNSC's approval afterward.[57]

Against this background, it is fair to say that R2P has gone from a lofty idea to a soft law character. It became an emerging norm in international law in the 2000s, culminating in the RNTV proposals in 2015. But R2P as an emerging norm is now endangered, and there are even claims it is on a path

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(Mar. 12, 2020), 2459 (Mar. 15, 2019); Central African Republic: S.C. Res. 2659 (Nov. 14, 2022), 2709 (Nov. 15, 2022), 2605 (Nov. 12, 2021), 2552 (Nov. 12, 2020), 2499 (Nov. 15, 2019); Democratic Republic of the Congo: S.C. Res. 2666 (Dec. 20, 2022), 2612 (Dec. 20, 2021), 2556 (Dec. 18, 2020), 2502 (Dec. 19, 2019), 2463 (Mar. 29, 2019). *See also* GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, UN resolutions referencing R2P: 2019–2023.

[55] Article 4(h) establishes "the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity."

[56] Constitutive Act of the African Union, July 1, 2000, as amended in 2003.

[57] Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, White Paper on the Responsibility to Protect 162 (2006); Jared Genser, *The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement*, 18(2) CHICAGO J. INT'L L 420–501 (2018); Alex J. Bellamy, Sara E. Davies, & Luke Glanville, *Global R2P at Ten and beyond*, 10(4) GLOBAL RESPONSIBILITY TO PROTECT 389–92 (2018); Jonathan Graubart, *R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests*, 35(1) HUMAN RIGHTS QUARTERLY 69–90 (2013).

to extinction in the 2020s.[58] To quote the International Red Cross Committee, many did not perceive R2P as a binding legal principle in the first place: "Although R2P is referred to sometimes as an 'emerging norm,' it is not a binding legal obligation committing the international community, but a political instrument."[59] Professor Bellamy, a famous champion for R2P, remarks that the UN in recent years has shunned away from "so much as imply that force may be occasionally needed to protect populations."[60] Instead the UN Secretary General, in his R2P reports, has focused only on prevention. If R2P is seen as just a political instrument it is easy to discard it, when convenient for great power politics and state interests. The scene is set for bias and accusations of cultural relativism when only certain regions will be the target for R2P interventions. It will be the Global North and most often "Western" states intervening in the Global South.[61]

C. R2P INTERVENTIONS WITH OR WITHOUT A UNSC MANDATE?

States' actions on the territory of other states (without the territorial state's consent) will always be suspect, even though the purpose of the effort is declared to be exclusively humanitarian. Thus, it is doubtful whether the international society is ripe for such a clear devaluation of the national sovereignty's dogma that an unqualified responsibility to protect as suggested by the ICISS Report would allow states to use force *outside of the UNSC* for humanitarian purposes.[62]

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[58] Mohammed Nuruzzaman, *"Responsibility to Protect" and the BRICS: A Decade after the Intervention in Libya*, 2(4) GLOBAL STUDS. QUARTERLY 1, 1–12, (2022); M. Mennecke & E. E. Stensrud, *The Failure of the International Community to Apply R2P and Atrocity Prevention in Myanmar*, 13(2-3) GLOBAL RESPONSIBILITY TO PROTECT 111–30 (2021); Mina Al-Oraibi, *Responsibility to Protect' Is One More Casualty of the Syrian War*, FOREIGN POLICY (2021).

[59] ICRC's Legal Team, *Occupation and International Humanitarian Law: Answers to Your Questions*, INTERNATIONAL RED CROSS, (2014).

[60] Alex J. Bellamy, *R2P and the Use of Force*, 14 GLOBAL RESPONSIBILITY TO PROTECT 277, 278–280 (2022): "The UN Secretary-General's recent reports have 'advancing atrocity prevention' (2021), 'prioritizing prevention' (2020), 'learning lessons from prevention' (2019), and 'accountability for prevention' (2017)".

[61] Pison Hindawi, *Decolonizing the Responsibility to Protect: On pervasive Eurocentrism, Southern agency and struggles over universals*, 53(1) SEC. DIALOGUE 38–56 (2022). On cultural relativism, *see* Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, 20(2) CALIFORNIA WESTERN INT'L L. J. (1990).

[62] Ove Bring & Katinka Svanberg, *The UN Charter in World Politics, (FN-stadgan och Varldspolitiken)*, 5 NORSTEDTS JURIDIK, 312 (2019).

The NATO intervention in Kosovo in 1999 without a UNSC mandate, due to Russian and Chinese vetoes, was met with criticism in the discussion of the issue *ex post facto* in the United Nations General Assembly's (UNGA) General Debate in September 1999, where the majority of states denied that it would be seen as a precedent that would allow a right to humanitarian intervention.[63] After R2P was launched, states have continued to reject humanitarian interventions in the form of an R2P responsibility for states outside of a UNSC mandate under Chapter VII of the UN Charter. The World Summit Outcome Document of 2005 also reserves the right to armed R2P intervention to the UNSC.

There are instances from 2000 to 2015 when regional organizations or an individual state intervened. As far as unilateral intervention is concerned, it is mainly France that has intervened under the invocation of humanitarian grounds in some of its former colonies in Africa, but only after an invitation of the sitting government.[64] However, humanitarian intervention and R2P have been cited by the French government as the main cause of intervention. This is because the status of the invitation was doubtful on a legal basis. After all, when the outcome of the civil war is uncertain, a hard-pressed government forfeits the right to invite, such as when the government has lost factual control over large parts of its territory or is itself a terror to its people.[65] Thus, in CAR, France based its action not only on an invitation by the transitional government but also motivated its intervention with the large refugee flows that had destabilized CAR. Its intervention was retrospectively welcomed by the UNSC in Resolution 2134 (2014). In Mali, both ECOWAS and France intervened after an invitation from the Mali government. The dire human rights situation and ongoing violence launched by the extremist fraction Ansar Dine, made the UNSC cite R2P and "welcomed" the French intervention 2013 against Ansar Dine *ex post facto* in Resolution 2100 (2013). Hence, the humanitarian situation appears to have been the decisive factor for the interventions and France subsequently received welcomes *ex post facto* by the UNSC.

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[63] The UN General Assembly General Debate, GA/9608 (1999); *see also* Declaration of the South Summit of the Group of G77 No. 54 (2000) (describing 130 of the UN member states declaring themselves against a right to humanitarian intervention without a UNSC mandate).

[64] Sudarshan Pujari, *French Intervention in West Africa: Interests and Strategies (2013–2020)*, E-INT'L RELATIONS (2020).

[65] Bring & Svanberg, *supra* note 62 at 170.

Only African regional organizations made claims to carry out humanitarian interventions.[66] ECOWAS has continued its regional interventions in West Africa, by invoking the invitation by a pressured government citing a humanitarian emergency, or the lack of democratic governance.[67] AU has also intervened citing invitation and dire humanitarian consequences, in several instances in the 2000s.[68] The humanitarian ambition has come to the fore through the problem of whether a hard-pressed or ousted government managed to invite them. As noted *supra*, both organizations have inserted a right to humanitarian intervention in their Charter.[69] The intervention's legitimacy was enforced by the UNSC when it, in retrospect, welcomed several of the AU and Economic Community of West African States Monitoring Group (ECOMOG) interventions, giving *ex post facto* authorizations. Examples are Mali, CAR, Sudan, and South Sudan. Another example of an R2P-motivated regional intervention with international support was the intervention against the Lord Resistance Army (LRA), the notorious terrorist sect led by Joseph Kony and infamous for its kidnapping and sexual violence against children and girls to become sex slaves and child soldiers.[70]

Outside of Africa, R2P-motivated interventions were sparser. In Yemen, a multinational coalition led by Saudi Arabia began "Operation Decisive Storm" in 2015 and intervened against the Houthi rebels that had forced the elected government to flee. It framed its military action in rhetoric that invoked humanitarian and R2P norms, among other supportive arguments, such as international terrorism and invitation, to create scope for the international community to support the intervention.[71] In Syria, in 2012, a U.S.-led coalition intervened against the Assad government's denials of democracy after an Arabic Spring uprising in 2011. The alleged use by the Assad government and its supporting factions of poison gas led to some of the coalition members citing R2P as a basis for retaliatory strikes. The intervention in Syria lacked a UNSC mandate due to Russian and Chinese vetoes.[72]

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[66] *See infra*, in Part III D, Regional Organizations Humanitarian Interventions Under Article 53 in the UN Charter Without UNSC Prior Consent.

[67] E. de Wet, *Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle*, 111 AJIL UNBOUND 307–11 (2017)

[68] *Id.*

[69] *See supra,* at notes 57–59.

[70] *See infra*, in Part II, at 2.2.8.

[71] *See infra*, on Yemen in Part II, 2.2.6.

[72] *See infra,* on Syria in Part II, 2.2.5.

The controversial R2P intervention without a UNSC mandate has been rejected by much of the international society. Since NATO's Kosovo intervention in 1999, states have again and again continued to reject a right to collective and unilateral humanitarian interventions without a UNSC mandate.[73] The norm of non-intervention and the primacy of sovereign equality is something still cherished by the vast majority of states, which see humanitarian intervention not as a growing awareness of human rights, but as a regression to the selective adherence to the sovereignty of the pre–UN Charter world.[74] Also, when it comes to UNSC-mandated humanitarian interventions the UNSC mandates in Libya and Cote D' Ívoir showed that the BRICS countries (Brazil, Russia, India, China, and South Africa) were skeptical against UNSC-mandated interventions, especially when aimed at regime change.[75] Bellamy wrote that in 2022 there were practical and political reasons for denial of the R2P interventionist part on behalf of the international community: "It may be thought necessary to downplay this troublesome part of R2P to make the principle fit more comfortably into a post-liberal order where human rights must subsist beneath sovereign rights."[76]

However, some proponents of R2P interventions without a UNSC mandate emphasize that the World Summit Outcome Document did not definitively close the door to R2P interventions lacking UNSC approval. In the ICISS Report of 2001, the question is left open through a rhetorical question: "What is worst; to intervene without a UNSC mandate when large-scale human suffering takes place or to follow the 'law' and stand by and watch as civilians are slaughtered?"[77] This is especially true when the UNSC in the last decade has been "in a virtually permanent state of paralysis when faced with mass atrocity scenarios," to quote Federica D'Alessandra and

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[73] *The Declaration of the South Summit of the G77 Group*, Art. 54, Havana, Cuba, (April 10–14, 2000)., where 130 of the UN member states declare themselves opposed to humanitarian intervention without UNSC authorization: "We reject the so-called 'right' of humanitarian intervention, which have no legal basis in the United Nations Charter or in the general principles of international law.").

[74] Aidan Hehir, *Institutionalizing Impermanence: Kosovo and the Limits of Intervention*, GLOBAL DIALOGUE, 115 (2005).

[75] Chris Keeler, *The End of the Responsibility to Protect*, FOREIGN POL'Y J. (2011).

[76] Bellamy, *supra* note 60, at 278–80 (2022).

[77] ICISS Report, 55, para 6.37.

Gwendolyn Whidden.[78]

D. THE RESPONSIBILITY WHILE PROTECTING (RWP)

There is yet another proposal tabled by Brazil, known as "*Responsibility while Protecting*" (RwP).[79] The initiative taken in the aftermath of the 2011 NATO intervention in Libya, that Brazil considered could have a potentially disastrous effect on the credibility of R2P. While essentially reiterating the endorsement of key principles of R2P, Brazil admonished R2P implementing states to avoid discrediting the norm by exercising restraint while operationalizing R2P.[80] The RwP proposes a set of criteria for R2P military intervention, such as a monitoring-and-review mechanism to assess the implementation of UNSC mandates, and a renewed emphasis on capacity building to avert crises. The RwP opposes regime change in connection with R2P interventions. It attempted to limit the military R2P option to a minimum and appropriate "no harm" principle, known from the *Hippocratic oath*, emphasizing that even one death from an intervention is one too many.[81]

The RwP initiative was met with severe criticism both from Western pro-R2P states, as well as from the Global South. The former found that it limited Western powers' autonomy and prevented the further institutionalization of R2P. The latter saw the initiative to sell in R2P.

The RwP has had an impact on the crafting of R2P's future contours in its establishment of a set of guidelines to orient the UNSC in contemplating R2P-based intervention. They focus on two main topics: limiting the use of force, and the strict chronological sequencing of R2P's three pillars.[82] Brazil has maintained a RwP focus, with careful limits on R2P action, to quote their RwP advocate Mauro Vieira:

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[78] Federica D'Alessandra & Gwendolyn Whidden, *Whither Atrocity Prevention at the UN? Look Beyond R2P and the Security Council, Protection of Civilians*, SSUE BRIEF, HUMAN SECURITY & GOVERNANCE (2023).

[79] Brazil 2011a: Statement at the U.N. Secretary-General, GAOR, 66 Sess. Opening of the General Debate of the 66th Session of the United Nations General Assembly (2011); Andreas S. Kolb, *The Responsibility to Protect (R2P) and the Responsibility while Protecting (RwP): Friends or Foes?*, GGI ANALYSIS PAPER 6 (2012).

[80] Kai Michael Kenkel, & Cristina Stefan, *Brazil and the 'responsibility while protecting' initiative: norms and the timing of diplomatic support*, 22(141) GLOBAL GOVERNANCE, 41, 42 (2016).

[81] *Id.*

[82] *Id.*

> The Security Council's exceptional authorization of military intervention must be carried out responsibly so as not to harm those whose protection was being invoked. Urging the Council to draw inspiration from the peacekeeping and sanctions regimes to ensure that resolutions included sunset clauses, demanded adequate reporting, and established panels of experts to monitor implementation.[83]

China has added to RwP through its *Responsible Protection*, a proposal made in 2012.[84] The proposal stresses: (1) the object of protection must be clear—civilians must be the core of the protection by every possible means; (2) the UN must supervise the protection; (3) those who intervened must pay for the reconstruction; and (4) they shall not leave until stability is achieved.[85] The premise behind this idea is that the countries carrying the intervention must reconstruct the place afterward.[86] However, China in mid-2010 appears to have preferred to support Brazil's proposal.[87]

E. THE VETO POWERS

The composition of the UNSC is found in Art. 23 of the UN Charter and the veto is found in Art. 27. The UNSC is made up of fifteen members. Here sits ten non-permanent members elected for two-year terms and five permanent members: (Russia, China, the United States, France, and Britain. The permanent members (P-5) have a right to veto on substantive matters. For a UNSC resolution to be adopted, an affirmative vote of nine UNSC members is required, including the concurring vote of each of the P-5. The veto is found in Art. 27(3) in the UN Charter:

> Decisions of the Security Council on all other matters [i.e. substantive matters v. procedural, where vetoes do not apply according to Art. 27(2)] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.

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[83] Open Debate on Working Methods, U.N. SCOR, 72d Sess., 8175th mtg. at 10, U.N. Doc. SC/13197 (Feb. 6, 2018).

[84] Ruan Zongze, *Responsible Protection*, CHINA DAILY (March 15, 2012).

[85] *Id.*

[86] Courtney J. FUNG, *China and the Responsibility to Protect: From Opposition to Advocacy,* UNITED STATES INSTITUTE OF PEACE (2016).

[87] *Id.*

The special position of the permanent members with the right of veto underlines the UNSC's status as a political body. Throughout the negotiations of the UN Charter, the veto power was a contentious issue and one that met with the most opposition from the other founding states.[88] The major powers were insistent on its inclusion because they would shoulder the main responsibility for the maintenance of international peace and security, as they recently had during WWII, why it was only fair that they would have the right to veto any action taken against their vital interests.[89] It was emphasized that a war between them might endanger world peace and start WWIII.[90] Their ultimatum was clear—without the veto, there would be no United Nations, thus the small and medium states had to accept their veto powers! Many commentators observed that the veto powers would obstruct the functioning of the UNSC.[91]

In the early years of the UN, the P-5 agreed that their abstention from a decision in the UNSC on non-procedural matters would not be perceived as a veto, opening the door for UNSC decisions that the P-5 did not support but not dislike so much that they would veto them.[92] This was an important development as an amendment by interpretation of the veto powers. Soon after its inception, the Cold War and the rivalry between the two superpowers with the formation of opposing blocs of states, made the security system in

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[88] XI UNCIO Proceedings, *UNCIO Documents*, UNX.341.13 U51, 699–709 (1945).

[89] XI UNCIO Proceedings, *Verbatim Minutes of Fourth Meeting of Commission III*, UNCIO, 103, 108 (1945); Statement by the UK Delegate, Summary Report of Ninth Meeting of Committee III/1, UNCIO, 313–22 (1945). The permanent members have special responsibility to take enforcement action for the maintenance of international peace and security is mirrored in Article 106, which gives them powers to take enforcement action on behalf of the organization pending the coming into force of the UN's collective security system.

[90] E. Jimenez de Ardchaga, *Chapter V: Collective Measures for the Maintenance of Peace and Security*, 159 RECUEIL DES COURS 117, 118 (1978). *See also* San Francisco Statement of the Sponsoring Governments on the "Yalta Formula" on Voting in the Security Council (June 8, 1945); Leo Gross, *The Double Veto and the Four-Power Statement on Voting in the Security Council*, 67 HARV. L. REV. 251 (1953).

[91] Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087, 1111 (1946). *See also* J. L. Brierly, *The Covenant and the Charter*, 23 BRIT. Y. B. INT'L L. 83, 89–91 (1946).

[92] *See e.g.* Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, at 22 (June 21). Especially Russia under Stalin, was set on an empowering veto power without any exceptions, such as on procedural questions, but had to finally give in; Robert A. James, *The San Francisco Conference and the Evitable UN Vetoes*, 14:97 J. NAT. SEC. L. & POL'Y (2024).

the UN Charter inoperative.[93]

The end of the Cold War in the early 1990s saw a revitalization of the security system. The new political climate made possible legal developments designed to remedy some of the main flaws apparent in the security system. Now was did away with a perceived obstacle to UNSC enforcement action by the fact that the agreements foreseen in Art. 43, designed to place armed forces at the disposal of the UNSC had never been concluded, due to opposition and disagreement between the permanent members and their blocs. Without superpower rivalry, the absence of those agreements could no longer prevent the UNSC from acting under Chapter VII of the UN Charter! In the post-cold-war world enforcement action now became based on "an authorization to *use all necessary measures*" (implying force), given to the states or regional organizations willing to use force on behalf of the UNSC.[94] This practice led to a multiplication of UNSC military sanctions in the post-Cold War world.

The revitalization of the UNSC also brought about a broader interpretation of the notion of "peace" to encompass "positive peace" which in turn gave the UNSC a much larger agenda, urging it to intervene also in internal conflicts and to react to large-scale human suffering inside states' borders. All those new legal developments—which bear witness to the flexibility of the Charter to adapt itself to new circumstances, were made possible by the P-5 *voluntarily refraining from their veto*. If they disliked a resolution, they would rather abstain from it than use their veto.

But those are bygone days, now there is a backlash to P-5-cooperation. It is not unlike the Cold War days, making historian Professor Niall Ferguson tell us that Cold War II has already begun, in the last five years.[95] Not least has the frozen international climate affected R2P-interventions. Already soon after the UNSC acclaimed R2P interventions in Libya and CAR in 2011, a dwindling decline in R2P-motivated interventions was clear in 2015–2024.[96] Increasingly in recent years, P-5 members have utilized and threatened to

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[93] Jimenez de Ardchaga, *supra* note 90, at 117.

[94] This method was invented in S.C. Res. 678 (Nov. 29, 1990) which authorized the Gulf War in 1991.

[95] Interview with Niall Ferguson, PETER ROBINSON, COLD *WAR II: NIALL FERGUSON, ON THE EMERGING CONFLICT WITH CHINA*, INTERVIEW IN UNCOMMON KNOWLEDGE, Hoover Institute (2023).

[96] *See* UNSC resolutions referring to R2P in 2015 -2023, S.C. Res. 2250 (Dec. 9, 2015), *supra* notes 52–54

utilize vetoes to stand in the way of actions in response to international crises.[97] Thus, vetoes can be used by a member of the P-5 both to shield another aggressor state " . . . and to shield itself when it is the aggressor," to cite Chelsea Koester.[98] As the case study will show, this has been a problem, e.g. in the case of Syria, Palestine, Burma,[99] and Bosnia-Herzegovina:[100]

Since the UNSC expanded its membership to 15 members in 1965, no further reform of the UNSC composition nor the veto has happened. Changing the right of veto is difficult as the P-5 is also given the right of veto on any revision of the UN Charter, according to Arts. 108 and 109. UN Secretary-General Kofi Annan tabled a proposal for the expansion of the UNSC membership in 2005 to enlarge it to 24 members divided between both permanent and non-permanent members, but the proposal was not adopted.[101] Hot candidates are India, Japan, Brazil, Nigeria, and South Africa.[102] Today, with 2020's return to Cold War politics, any official reform of the UNSC seems illusional.[103]

F. THE PROHIBITION ON THE USE OF FORCE

Article 2(4) in the UN Charter establishes a prohibition on the use of force:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

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[97] *Id.*

[98] Chelsea Koester, *Looking Beyond R2P for an Answer to Inaction in the Security Council*, 27 FLA. J. INT'L L. 377, 382 (2015).

[99] "The military government changed the country's name to "Myanmar" in 1989. The United States government continues to use the name "Burma", *U.S. Relations with Burma*, Factsheet, U.S. DEPARTMENT OF STATE, (Jan. 20, 2025).

[100] Gareth Evans, *R2P down but not out after Libya and Syria*, OPEN DEMOCRACY (2013); Andreia Soares e Castro, *Responsibility to Protect and the International Community's Limitations*, POLITICAL INSIGHTS (2018).

[101] U.N. Secretary-General, *In larger freedom: towards development, security and human rights for all*, U.N. Doc. A/59/2005 (2005)

[102] G.A. Res. 62/557, Question of equitable representation on and increase in the membership of the Security Council and related matters (2008). *See* Alischa Kugel, *Reform of the Security Council – A New Approach? Dialogue and Globalization,* FES, BRIEFING PAPER 12, 4 (Sept. 2009).

[103] Srinivas Mazumdaru, *Will the UN Security Council ever be Reformed?*, DW ACADEMY (2017).

The paragraph has been invoked as a cornerstone of the UN Charter.[104] It is widely considered to be an *erga omnes* and *jus cogens* norm.[105] The International Court of Justice (ICJ) noted in the *Nicaragua Case,* that the prohibition of the use of force in Art. 2(4) corresponded to a customary law prohibition, which after 1945 was manifested through the consensus adoption of the Friendly Relations Declaration in the UNGA in 1970.[106]

The most common and widely supported interpretation of Art. 2(4) is that it sets up an extensive prohibition on the use of force with only a few, Charter-based exceptions, as supported by the UN preparatory works, [107] and by the ICJ in the *Corfu Channel Case.*[108] These exceptions are; the collective security system under Chapter VII; the authorization of the UNSC to regional organizations to use force in Art. 53 (1); the transitional provisions in Art. 106; and the right to self-defense in Art. 51. Such a strict, extensive interpretation leaves no room for humanitarian interventions, and thus neither R2P interventions, without a UNSC mandate under Chapter VII. The ICJ has taken the same path by establishing an extensive interpretation of the prohibition in its Nicaragua case.[109] This interpretation converges with a narrow definition of the right to self-defense, as supported by the ICJ in its Wall Decision from 2004.[110]

On the contrary, a permissive interpretation is embraced by realists and other value-oriented scholars, like the New Haven School.[111] The permissive interpretation considers that the use of force is acceptable if not contrary to

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[104] Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment, 2005 I.C.J. 201, ¶ 148 (Dec. 19).

[105] *See e.g.* Dinah Shelton, *Normative Hierarchy in International Law*, 100(2) A.J.I.L. 291–323 (2006); Christian J. Tams, *The Use of Force against Terrorists*, 20(2) E.J.I.L. 359 (2009) ("The ban on the use of force is widely held to be peremptory in nature, and has often been described as the 'cornerstone' of the modern international system.").

[106] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶ 186.

[107] The extensive interpretation has support from the UN preparatory works, *United Nations Conference on International Organization* (UNCIO), 556 U.N. Doc. G/14 (1945).

[108] Corfu Channel Case: United Kingdom (U.K. v Alb.), Judgment, 1949 I.C.J. 4 (April 9).

[109] Nicar. v. U.S., 1986 I.C.J. at 193.

[110] Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

[111] MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 72 (Yale Univ. Press 1961).

"the territorial integrity or political dependence of any state," or that is not "[i]n any other manner inconsistent with the Purposes of the United Nations."[112] Military potent states, such as the U.S., U.K., Israel, and Russia, support the permissive interpretation.[113]

With a permissive interpretation, humanitarian intervention would be legal because it does not contradict, but supports, the UN's purpose to work for human rights—as laid down in Arts. 1(3) and 55 in the UN Charter—nor is it intended to disturb a state's territorial integrity. The use of force to remedy serious human rights deprivations, far from being 'against the purposes' of the UN Charter, serves one of its main purposes.[114] "Saving lives, may actually further one of the UN's major objectives," to quote Professor Fernando Téson, one of the 20th century's most famous proponents of humanitarian intervention.[115]

The "New, New Haven School" believes that the prohibition on the use of force should take account of the development of R2P.[116] This makes for exemption from the prohibition on the use of force in Art. 2(4) when it comes to R2P-interventions. Thakur finds that R2P fills a legal vacuum: "Consequently[,] military intervention under R2P has much better prospects of a convergence of legality and legitimacy in the use of force."[117]

The permissive interpretation does not have the same comprehensive support as the extensive interpretation, neither in the doctrine nor in the international community. A clear majority in the international community still supports an extensive interpretation of Art. 2(4). As *lege lata*, they consider any humanitarian intervention without a distinct UNSC mandate illegal, and they do not see any prospect for an emerging R2P responsibility

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[112] ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 58 (Dobbs Ferry, New York 1987); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642–45 (1984).

[113] Ian Hurd, *Permissive Law on the International Use of Force, Proceedings of the American Society of International,* PROC. AM. SOC'Y IN'L LAW 2015, (2016).

[114] FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 151 (Brill Nijhoff, 2005).

[115] James P. Terry, *Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism*, *ARMY LAW* 36, 38. (Judge Advoc. Gen's Legal Ctr. & Sch., Charlottesville, V.A.) (2004).

[116] Koh, Harold Hongju Koh, Commentary, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 573 (2007).

[117] Ramesh Thakur, *The Responsibility to Protect at 15,* 92 INT'L AFFS. 415, 433 (2016).

to intervene outside of the UNSC.[118]

At least this was true in the 20th century. The war on terrorism, which was launched after the 9/11 attacks in 2001, has paved the way for inroads into the prohibition on the use of force through an extensive interpretation of the right to self-defense in Art. 51.[119] Another inroad was the invention of R2P in 2001, which has a use of force component that opens for unilateral humanitarian interventions as a responsibility of states. Remember that the ICISS Report in Part XIII supports an organic, value-based, and purpose-driven interpretation of the UN Charter, where the UN members need to act in conformity with all UN purposes in Art. 1, so that if the UNSC:

> [f]ails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation that the stature and credibility of the United Nations may suffer thereby.[120]

G. STATE SOVEREIGNTY

To enforce R2P, sovereignty needs to give way to be able to intervene when gross atrocities are committed, but state sovereignty is another cornerstone in the international legal system—the foundation for its sources of law.[121] The role of the United Nations (UN) Charter is to both limit and promote sovereignty in modern international law.[122] Sovereignty is embodied in three central articles found in the Principles of the UN Charter: in Art. 2(1) on the sovereign equality of states; in the prohibition of the use of force in Art. 2(4); and the prohibition of intervention in the internal affairs of states in Art. 2(7). It is usually said that sovereignty implies that a state in a formal

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[118] Christian J. Tams, *The Use of Force Against Terrorists: A Rejoinder to Federico Sperotto and Kimberly N. Trapp*, 20(4) EUR. J. INT'L L. 1057 (2009); Ramesh Thakur, *supra* note 117, at 433 (finding that there is also missing scholarly debate on R2P from the Global South).

[119] *See infra,* Part III: E *Collective Self-defense.*

[120] Evans & Sahnoun, ICISS Report, *supra* note 31; *Right Authority,* at p. XIII.

[121] Nancy D. Arnison, *The International Law and Non-Intervention: When do Humanitarian Concerns Supersede Sovereignty?,* 17(2) FLETCHER FORUM OF WORLD AFFAIRS 199, 199–211 (1993).

[122] Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations,* 43 COLUM. J. TRANSNAT'L L. 141–87 (2004), http://scholarship.law.ufl.edu/facultypub/595.

and legal sense is neither superior nor inferior vis-à-vis another state.[123]

The sovereignty of the states was originally the "zero position" in the international system that preceded any development of international law norms. Hence, sovereignty as a form of original freedom of action does not in itself constitute a principle of international law.[124] On the contrary, the successive acceptance of international law norms and obligations implies the relinquishment of sovereignty in certain intergovernmental relations.

From a dynamic perspective, international law can stand for more truncated sovereignty in favor of what the advantages of an increasingly developed international cooperation offer. What is meant by sovereignty can therefore be defined as a collective umbrella of rights that applies at a certain time.[125] To cite Hans Kelsen: "[s]overeignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law."[126]

The sovereignty of states in modern international law has increasingly come into collision with other norms of international law that encroach on it, such as the demand for consideration of human rights and peoples' right to self-determination—which are also *erga omnes* and to their core value *jus cogens* norms.[127]

Hence, the content of the concept of sovereignty fluctuates over time. I propose that it can be described as a curve that follows perceived threats to the Global North and foremost to the Western powers. So, when there is a threat of use of force against the Global North or their world order, their sovereignty is at its peak! At the other end, the Global South states or other subjects in international law, such as fractions, freedom fighters, peoples with self-determination claims, minorities, and territories, but also terrorists and pirates that are perceived to threaten the current world order, should be

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[123] G. J. H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 64 (Deventer 1983).

[124] GAETANO ARANGIO-RUIZ, THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF SOURCES OF INTERNATIONAL LAW 144 (Alphen van den Rijn 1979).

[125] BARDO FASSBENDER & ALBERT BLECKMANN, ARTICLE 2(1), IN THE CHARTER OF THE UNITED NATIONS – A COMMENTARY 84 (Simma Bruno, et al. eds, Oxford University Press 2d ed. 2012) (2002).

[126] Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L. J. 207–20, 208 (1944).

[127] Bring & Svanberg, *supra* note 62 at 209. *See also supra* at Art. 2(4).

prepared for an interventionist approach. This is why almost no interventions take place between Global North states or from a Global South state towards the Global North and if it happens, the sovereignty of the Global North is at its peak!

This could be observed in the 1990s–2001, after the end of the Cold War, the right to a humanitarian intervention was described in terms of sovereignty as a responsibility. After 9/11 in 2001, sovereignty came back to be seen as a cornerstone, giving the right to extensive self-defense in a new interpretation of Art.51 in the UN Charter against everything that was perceived as international terrorism threatening the nation-state. However, in 2005–2014, the pendulum swung back towards a narrower interpretation of sovereignty, where a right to R2P took a step forward again. But in 2016–2021, there was again a steady decline in citing R2P as a basis for action.[128]

Then came a complete backlash in 2022 with Russia's invasion of Ukraine, with a return to the Westphalian concept of the nation-state's sovereignty as central and up-play of the inviolability of the territorial integrity and political independence of states. The same could be said after Hamas attacks on Israeli citizens in October 2023. Many states perceive the ensuing Gaza war as a rightful response in self-defense and there is an argument supporting Israel's claim that Gaza is lawful Israeli territory, even though the ICJ in July 2024 made an advisory opinion that Gaza is an occupied territory that has a right to self-determination, and that "Israel's excessive use of force against Palestinians is inconsistent with its obligations."[129] These obligations are:

> The Court recalls that the right to life of protected persons in the occupied territory is guaranteed under the rule reflected in Article 46 of the Hague Regulations. This rule is complemented by the first paragraph of Article 27 of the Fourth Geneva Convention, which provides that protected persons shall be humanely treated and protected against all threats or acts of violence. Furthermore, the rights to life and

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[128] *See supra* note 52–54, for UNSC resolutions from 2016–2022.

[129] *Legal Consequences Arising From The Policies And Practices Of Israel In The Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 2024 I.C.J. (July 19), ¶ 154 .The ICJ also notes in *id.*, ¶ 264: "*Responding* to an argument made by three participants, the Court observes that the Oslo Accords do not permit Israel to annex parts of the Occupied Palestinian Territory in order to meet its security needs. Nor do they authorize Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs."

> to protection against violence are guaranteed by Article 6, paragraph 1, and Article 7 of the ICCPR.[130]

The third example is the expulsion of the Armenian minority in Nagorno-Karabakh in Azerbaijan in 2023, without any intervention or sanctions from the international community. It shows how the Westphalian concept of sovereignty at its prime trumps minority rights and the responsibility to protect them, as it is the nation-state's ethnic majority within those borders that rule unimpeded.

Today, a post-liberal order reigns where human rights must exist ranked beneath sovereign rights.[131] Sovereignty is again at its peak with a strong focus on the inviolability of states' borders (*uti possidetis)* and an extensive right to self-defense of those borders.[132] The idea is that the principle of non-intervention trumps human rights violations and works as a bar against self-determination claims.

H. THE RESPONSIBILITY NOT TO VETO (RNTV)

The only obstacle to humanitarian interventions and a commitment to R2P is the *political willingness* of UNSC members to commit to a responsibility to protect. An important way to tackle this obstacle is to get at the voting procedures in the UNSC to prod its members into action when large-scale human suffering occurs. The right to veto in the UNSC has put obstacles in the way of a harmonious UNSC practice on behalf of R2P. In 2010, the problem was again highlighted when several double vetoes from Russia and China blocked the UNSC from intervening in the Syrian Civil War.[133] This pessimism is confirmed in the last four years of UNSC practice which saw a sharp decline in UNSC resolutions citing R2P. During 2019–2024, the UNSC adopted only 21 resolutions citing R2P and dealing with only three conflicts.[134] Sadly, the UNSC has been paralyzed by vetoes in the

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[130] *Id.* at ¶ 149.

[131] Bellamy, *supra* note 60, at 278 (2022).

[132] *Uti possidetes* in international law refers to sovereignty over territory and is a doctrine for drawing international boundaries. It serves to preserve the boundaries of colonies or other emerging as states, Cornell Legal Information Institute, Cornell Law School, [https://www.law.cornell.edu/wex/uti_possidetis_juris].

[133] Mona Yacoubian, *Syria's Stalemate Has Only Benefitted Assad and His Backers,* UNITED STATES INSTITUTE OF PEACE (Mar. 14, 2023), https://www.usip.org/publications/2023/03/syrias-stalemate-has-only-benefitted-assad-and-his-backers, (last visited 12/01/23).

[134] *See supra* note 54.

main conflicts where massive civilian suffering occurred from 2015 to 2024. Not least in cases where the four international crimes inherent in R2P, that is genocide, crimes against humanity, war crimes, and ethnic cleansing, have allegedly occurred, such as in Syria, Burma, and now in Ukraine, the Azerbaijan territory of Nagorno-Karabakh, and the Israel-Gaza conflicts. Already the ICISS Report proposed that the P-5 would voluntarily abstain from using their veto in R2P situations and implored them to observe a voluntary code of conduct.[135] Elaborating, the ICISS report stated: "The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution."[136] The UNSC members would be obliged to justify their positions publicly.[137]

However, in the Outcome Document of the 2005 World Summit, the ICISS's recommendation that the P-5 consider limiting their use of the veto was omitted due to Russian, Chinese, and American opposition, as they found it constituted an unacceptable constraint.[138] Instead, the Outcome Document appears to introduce a higher threshold for UNSC-mandated R2P intervention by limiting it to instances of four international crimes: war crimes, genocide, crimes against humanity, and ethnic cleansing.[139]

UN Secretary-General Ban-Ki Moon suggested in his 2009 report, *Follow-up to the Outcome of the Millennium Summit Implementing the Responsibility to Protect*, that the P-5 should refrain from using their veto in situations of manifest failure to meet obligations relating to R2P and act in good faith to reach a consensus in such cases.[140]

A prominent reform proposal is known as the *Responsibility Not to Veto* (RN2V), made on the initiative of several UN members in the 2010s and

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[135] Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81:6 FOREIGN AFFAIRS 99–110 (2002).

[136] Evans & Sahnoun, ICISS Report, *supra* note 31, at 6.19, 6.20–6.21.

[137] "On the other hand, by forcing states to publicly defend their positions by reference to the just cause thresholds and precautionary principles (right intention, last resort, proportional means, reasonable prospects), the ICISS's proposals would constrain states that may wish to oppose intervention for selfish reasons," to quote Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit,* 20 ETHICS & INTERNATIONAL AFFAIRS, 143, 146 (2006).

[138] *Id.* at 167.

[139] *Id.* at 166.

[140] U.N. Secretary-General, Follow-up to the outcome of the Millennium Summit: Implementing the responsibility to protect, U.N. Doc. A/63/677, 61 (Jan. 12, 2009).

finalized in 2015.[141] Its focus is on how the veto powers given to the UNSC's five permanent members, (P-5), in Article 27(3) of the UN Charter may be reformed to ensure that the UNSC will respond forcefully against grave atrocities committed against populations. It was launched following the four double vetoes that blocked UNSC action to respond to the situation in Syria[142] when French Foreign Minister Laurent Fabius tabled his idea for a "code of conduct" on the use of the veto in 2013.[143] His proposed regulation of the use of the veto would mean that the five permanent members of the UNSC would voluntarily and collectively undertake not to use their veto where a mass atrocity has been ascertained. The proposal emphasizes that an understanding needs to be reached on the definition of mass atrocities and how self-regulation would be activated. The proposal gives the UN Secretary-General the power to decide on the possible referral of the matter to the UNSC.

Since then, two groups of UN member states have elaborated informally on such a code of conduct. Two prominent and widely supported reform proposals have been on the table since 2015.

One is the French and Mexican *Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities*, aimed at securing voluntary restraint on the use of the veto by the permanent members of the UN Security Council when faced with mass atrocities. [144] This is the idea that the P-5 should enter into a "*collective and voluntary agreement*" not to use their veto power to

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[141] ACT GROUP, Code of Conduct regarding Security Council action against genocide, crimes against humanity or war-crimes, (Dec. 14, 2015), https://www.globalr2p.org/resources/code-of-conduct-regarding-security-council-action-against-genocide-crimes-against-humanity-or-war-crimes/; U.N. Accountability, Coherence and Transparency Group, Annex I to the Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations Addressed to the Secretary-General: Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity or War-crimes, U.N. Doc. A/70/621-S/2015/978 (Oct. 23, 2015).

[142] Ved P. Nanda, *The Future Under International Law of The Responsibility to Protect After Libya And Syria*, 21:1 MICH. ST. U. J. INT'L L. 211, at 1 (2013).

[143] Laurent Fabius, *A Call for Self-Restraint at the U.N.,* N.Y. TIMES (Oct. 4, 2013), https://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html.

[144] U.N. G.A., Political Statement on the Suspension of the Veto in Case of Mass Atrocities: Presented by France and Mexico: Open to Signature to the Members of the United Nations, 70th General Assembly of the United Nations, (Aug. 1, 2015), [https://onu.delegfrance.org/IMG/pdf/2015_08_07_veto_political_declaration_en.pdf]. *See also*, Blätter, Ariela and Williams, Paul, D., Ariela Blätter & Paul D. Williams, *The Responsibility Not To Veto, Global Responsibility to Protect*, 3(3) GLOBAL RESPONSIBILITY TO PROTECT 301, 301–22 (2011).

block action in response to mass atrocities in the form of crimes of genocide, crimes against humanity, or war crimes on a grand scale. [145] A problem is that it makes an exception for situations where a P-5 has a political interest. As of 2024, 104 UN member states and two UN observers had signed the declaration, including one permanent UNSC member: France.[146]

The other proposal is from the Accountability, Coherence, and Transparency Group of the UNSC (ACT), which comprises twenty-seven small and mid-sized countries from all continents.[147] Their final text of a *Code of Conduct Regarding Security Council Action Against Genocide, Crimes Against Humanity, or War-crimes* was launched in 2015 as well.[148] The Code of Conduct calls upon all members of the UNSC—elected and permanent—to not vote against any credible draft resolution intended to prevent UNSC action against genocide, crimes against humanity, or war crimes.[149] It modifies the Mexican-French proposal in two important aspects: (1) the code is not only for permanent members, and (2) there is no procedural trigger for the code to apply. [150] As of 2024, signed by 120 States, thus a

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[145] "[We believe therefore consider that the Security Council should not be, prevented by recourse to the use of veto, from acting in order to prevent action with the aim or bringing an end to situations involving the commission of mass atrocities. We reiterate that the veto is not a privilege, but an international responsibility. In this regard respect, we welcome and support the initiative of France, jointly presented in conjunction with Mexico, to propose a collective and voluntary agreement among the permanent members of the Security Council to the effect that the permanent members of the Security Council would refrain from using their veto powers in cases of mass atrocities", *Political statement on the suspension of the veto in case of mass atrocities Presented by France and Mexico open to signature to the members of the United Nations,* 70th General Assembly of the United Nations, (Aug. 1, 2015), *supra* note 144.

[146] *List of Supporters of the Political Declaration on Suspension of Veto*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, (July 13, 2022), https://www.globalr2p.org/resources/list-of-supporters-of-the-political-declaration-on-suspension-of-veto/.

[147] Austria, Chile, Costa Rica, Denmark, Estonia, Finland, Gabon, Ghana, Hungary, Ireland, Jordan, Liechtenstein, Luxembourg, Maldives, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Slovenia, Sweden, Switzerland, Tanzania, and Uruguay. Switzerland is the coordinator of ACT.

[148] Code of Conduct regarding Security Council action against Genocide, Crimes against Humanity or War-crimes, Annex I to the letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General, A/70/621 S/2015/978. U.N. Accountability, Coherence and Transparency Group, *infra* note 144.

[149] *Id.* at 2.

[150] *U.N. Accountability, Coherence and Transparency Group, Explanatory Note on a Code of Conduct Regarding Security Council action against genocide, crimes against*

majority of UN members, including two permanent members: France and the U.K.

However, none of the proposals forces the P-5 to intervene. Also, all initiatives seem hard to realize, as they only amount to nonbinding commitments. The French-Mexican proposal does build on an agreement signed by the P-5 and makes an exception for when a P-5 has vital interests, which makes it similar to a situation without an RN2V. The ACT's proposal, on the other hand, is not made binding. Thus, it does not commit any UNSC member legally to vote against an R2P intervention, as the document is drafted in nonbinding terms. Also, the ACT code and the French-Mexican voluntary agreement would cover a situation when another state is committing these crimes but not stop another actor from committing them.[151] Another flaw so far is that only the two minor members of the P-5, France, and the U.K. have supported the RN2V. Concerning the recent U.S. statement, it is a temporary unilateral political statement, made in a specific context: the Ukraine war.

I. THE UNSC AS A GUARDIAN OF PEACE IN CHAPTER VII

Key Articles in Chapter VII are Articles 39, 40, 41, and 42. Also, in Chapter VIII, Article 53, regional organizations can be empowered by the UNSC to carry out the actions contained in Chapter VII. Article 39 constitutes the portal paragraph and the key to Chapter VII giving the UNSC broad powers:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken by Articles 41 and 42, to maintain or restore international peace and security."

It is apparent from the preamble to the UN Charter that the UNSC has the discretionary power to assess what poses a threat to the peace, a breach of the peace, or an act of aggression. All three terms are intentionally left open. The broadest term of them, "any threats to the peace," provides the widest latitude and scope for political judgment. It is also the phrase that is most frequently, and almost solely, relied on by the UNSC because it is

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humanity or war-crimes, (Sept. 1, 2015), https://uploads-ssl.webflow.com/5eefcd5d2a1f37244289ffb6/62bb27fc4236d95aa526e367_2015%20ACT%20Group%20Explanatory%20Note_Code%20Conduct%20SC%20genocide_CAH_warcrimes.pdf.

[151] *Id.*

inclusive, as it covers both breaches of the peace and acts of aggression. The ICJ has emphasized that it is more of a political assessment.[152]

The wide margin of apprehension given to the UNSC can be seen in its practice, in which its determinations that a situation falls under Article 39 have been used broadly. Already early on in its existence, the UNSC moved from treating solely international conflicts under Chapter VII to intervening in civil wars, like the Palestine question in 1948 and the Congo in the 1960s.[153] In the 1960s, it did not shun away from adopting sanctions in domestic situations even without the existence of any armed conflict, acting against the gross human rights violation of apartheid practices in South Africa and South Rhodesia.[154]

After the end of the Cold War, Chapter VII of the Charter has been much more frequently applied. The defrosting of international relations made the UNSC able to respond to gross violations of human rights, implement self-determination, act for the right to democracy, act against international terrorism, prevent the development of weapons of mass destruction, and intervene against maritime piracy and other organized crimes, such as drug trafficking, human trafficking, poaching and illegal overfishing, illegal diamond trade, and crimes against the common world heritage, which have all been situations classified as a threat to peace. [155] Moreover, threats to

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[152] Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v. U.S.) & (Libya v. U.K.) States, Provisional Measures, Order, 1992 I.C.J. 3 (Apr. 14); *see also* 1992 I.C.J. 26, ¶ 3. E.

[153] Question of Palestine, S.C. Res. 50 (May 29, 1948); Question of the Congo, S.C. Res. 143 (July 14, 1960), S.C. Res. 161 (Feb. 21, 1961). On the Congo conflict, *see Hammarskjöld,* a movie by Per Fly, (2023).

[154] Bring & Svanberg, *supra,* note 62, at 488–90.

[155] Bring & Svanberg, *supra* note 62, at 573. Int. terrorism after 9/11, *see e.g.,* S.C. Res. 1368 (Sept. 12, 2001) (condemning terrorist attacks on 9/11); 1373 (Sept. 28, 2001),_1397 (Mar. 12, 2002) (explaining the threat posed by ISIL in Iraq); 1989 (June 17, 2011) (reaffirming sanctions toward Al-Qaida); ISIL (Da'esh) in S.C. Res. 2253 (Dec. 17, 2015). On self-determination, S.C. Res. 621 (Sept. 20, 1975) (Western Sahara); S.C. Res. 632 (Feb. 16, 1989) (Namibia independence); S.C. Res. 787 (Nov. 16, 1992) on Bosnia. On the right to democracy, *see e.g.,* Haiti, S.C. Res. 2700 (Oct. 19, 2021) (Haiti's democratic processes). Natural resources, *see, e.g.,* S.C. Res. 2134 (Jan. 28, 2014). On poaching *see* S.C. Res. 2136 (Jan. 30, 2014) (authorizing targeted sanctions against poachers, and wildlife product traffickers in the DRC); S.C. Res. 2608 (Dec. 3, 2021). Maritime Piracy, *see e.g.* S.C. Res. 2246 (Nov. 10, 2015), piracy efforts in Somalia and Nigeria S.C. Res. 2608 (Dec. 3, 2021), on organized crimes, *see e.g.*, S.C. Res. 2405 (Mar. 8, 2018). Regarding organized crime in Afghanistan; S.C. Res. 2347 (Mar. 24, 2017) (protection of cultural heritage); *see also* S.C. Res. 2347 (Mar. 24, 2017), which is also an example of a generic UNSC resolution aimed

world health in the form of outbreaks of diseases, such as Ebola and COVID, have been labeled "a threat to . . . peace."[156] Neither does the threat to peace have to be acute. It may be latent, as the risk of a state developing nuclear weapons. The threat does not have to be situational but includes threats of abstract and general nature, such as international terrorism or possession of weapons of mass destruction *per se.*[157]

The UNSC has used its enforcement powers to serve international law. International criminal law has been strengthened by the UNSC when it uses its Chapter VII powers to refer prosecutions to the ICC.[158] The UNSC has also imposed international criminal liability by creating the *ad hoc* international criminal courts.[159] Furthermore, the UNSC has used its mandatory powers to require individual states to fulfill their international treaty obligations. For decades, the UNSC has invoked states' liability to adhere to the law of war and the Geneva Conventions and it has called on states to stop human rights violations.[160] Over the last decade, the UNSC has advanced into the field of treaty law. Thus, in 2010 the UNSC attached its sanctions to states' non-compliance with various named treaties, whose application could affect international peace and security.[161] Areas of interest from the point of R2P have been the recognition of treaties in international

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against all trade in cultural property, on weapons of mass-destruction *see* S.C. Res. 1441 (Nov. 8, 2002) (Iraq), S.C. Res. 1540 (Apr. 28, 2004) (all state prohibition on proliferation of weapons of mass-destruction).

[156] Ebola, *see e.g.* S.C. Res. 2177 (Sept. 18, 2014); COVID-19, *see, e.g.*, S.C. Res. 2532 (July 1, 2020).

[157] On state's obligations to impose measures against international terrorism, *see e.g,* S.C. Res. 1373 (Sept. 28, 2001), 2178 (Sept. 24, 2014), 2253 (Dec. 17, 2015). On the prohibition against weapons of mass-destruction, *see e.g.*, S.C. Res. 1441 (Nov. 8, 2002), 1540 (Apr. 28, 2004), 2325 (Dec. 15, 2016).

[158] *See infra* in Part I: J, *Criminal Accountability as an Outgrowth of R2P.*

[159] *See e.g.*, S.C. Res. 827 (May 25, 1993), and S.C. Res. 855 (Aug. 9, 1994), the two resolutions which established the ICTY and ICTR; S.C. Res. 827 (1993) and 955 (1994). *See also* S.C. Res. 1315 (Aug. 14, 2000) (calling on the UN Secretary-General to draft a Special Court for Sierra Leone.).

[160] Bring & Svanberg, *supra* note 62, at 564. *See e.g.*, S.C. Res. 1929 (June 9, 2010), which demands that Iran complies with IAEA Safe Guard Agreement; S.C. Res. 2246 (Nov. 10, 2015), on maritime piracy in the Gulf of Aden enforcing the Convention on the Law of the Sea; S.C. Res. 2316 (Nov. 9, 2016), the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and S.C. Res. 2347 (Mar. 24, 2017), recalling the obligation to adhere to the various Conventions for the Protection of Cultural Property.

[161] *See* S.C. Res. 2371 (Aug. 5, 2017), on North- Korea and S.C. Res. 1929 (June 9, 2010), on Iran.

criminal law, humanitarian law, and human rights.[162]

The protection of civilians is an area where the UNSC has acted under Chapter VII. A problem is the view, that the responsibility of the UNSC to protect civilians against mass atrocities is something new and alien to the framework of collective security. This is not true! Already the framers of the UN Charter emphasized that the Holocaust had shown that gross violations against human rights in themselves are a threat to the peace and demand UNSC action, even if the crimes do not transcend a state's borders.[163] An important step in the protection of human rights outside of conflict was made in UNSC practice in the 1960s with resolutions with sanctions made against apartheid in South Africa and the racist regime in Southern Rhodesia.[164]

Since the end of the Cold War, UNSC directives to protect human rights and the protection of civilians in armed conflict have become increasingly frequent. This fits well with the UN's purpose in Art.1(3) of the UN Charter: "in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." From the 2000s when R2P was launched the UNSC frequently cited bodies of law on human rights, such as resolutions 1325 (2000), on the role of women in peacekeeping. In resolution 2686 (2023), the UNSC reaffirmed

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[162] Sir Michael Wood, *The UN Security Council and International Law: The Legal Framework of the Security Council,* Hersch Lauterpacht Memorial Lectures, First Lecture, (Nov. 7, 2006), http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_ lecture_1.pdf.

[163] This was highlighted in connection with the discussion of paragraph 1(3) in the UN Charter, on the protection of human rights as one of the UN's purposes, the possibility that the UNSC could intervene *ex officio* in case of violation of human rights under what would be Chapter VII in the UN Charter: "The subcommittee held that assuring or protecting such fundamental rights is primarily the concern of each state. If however, such rights and freedoms were grievously outraged so as to create conditions which threaten peace or to obstruct the application of provisions of the Charter, then they cease to be the sole concern of each state" and could demand intervention, *UNCIO doc.*, Part 6. (1945) U.N. Conference On International Organization, at p. 705. Regarding the principle of the right to self-determination as a basis for friendly relations between nations, in Art. 1(2) in the UN Charter, Belgium's representative expressed concerns: "This would open the door to inadmissible interventions if, as seems probable, one wishes to take inspiration from the peoples' right of self-determination in the action of the Organization..." *ibid.*, at p. 300.

[164] South Africa, *see* S.C. Res. 418 (Nov. 4, 1977); S.C. Res. 421 (Dec. 9, 1977); S.C. Res. 558 (Dec. 13, 1984); S.C. Res. 569 (July 26, 1985); South Rhodesia, *see e.g.* S.C. Res. 216 (Nov. 12, 1965); S.C. Res. 217 (Nov. 20, 1965); S.C. Res. 232 (Dec. 16, 1966); S.C. Res. 253 (May 29, 1968); S.C. Res. 277 (Mar. 18, 1970), "Condemns the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity" and declared the South Rhodesia racist regime "null and void."

"states' obligation to respect, promote, and protect the human rights and fundamental freedoms of all individuals and encouraged all relevant stakeholders consistent with international law."[165]

The first resolution that expressed a responsibility to protect civilians in armed conflict in a thematic way was Resolution 1296 (2000) and 1379 (2001). The year after the World Summit Outcome Document framed R2P as an obligation to intervene against mass atrocity crimes, Resolution 1674 (2006), for the first time, in a thematic resolution on the protection of civilians in armed conflict, emphasized the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Resolution 2150 (2014) on the prevention of genocide, calls upon states that have not yet ratified or acceded to the Genocide Convention to consider doing so. Importantly, this resolution directly "*Calls upon* states to reaffirm paragraphs 138 and 139 of the *World Summit Outcome Document* on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

From 2009–2022 the protection of civilians has been a theme in nearly yearly UNSC thematic resolutions, reiterating R2P as "the primary responsibility of states to protect the population throughout their territories."[166] The UNSC has adopted resolutions protecting journalists in armed conflict, *see* S/RES/1738 (2006). It has condemned the use of child soldiers in S/RES/1612 (2005) and several other resolutions. Resolution 2225 (2015) prohibits the kidnapping of children in armed conflict. Resolution 1894 (2009) reinforces the protection of civilians in armed conflict and condemns the use of sexual violence as a tactic of war. The UNSC in Resolutions 2462 (2019) and 2482 (2019) spelled out the need for counterterrorism measures to comply with IHL. Resolution 2286 (2016) condemns attacks on medical facilities and personnel in conflict. The issue of conflict-induced hunger and the protection of civilians from the use of starvation as a method of warfare is condemned in S/RES/2417 (2018). In 2019 the UNSC adopted resolutions on missing persons in armed conflict and on the situation of persons with disabilities in armed conflict and human

[165] S.C. Res. 2686 (June 14, 2023).

[166] S.C. Res. 2573 (Apr. 27, 2021) On the Protection of Civilians, S.C. Res. 2417 (May 24, 2018) calls upon all states to uphold international humanitarian law in conflict and ensure accountability for mass atrocity crimes, S.C. Res. 2286 (May 3, 2016), on "healthcare in armed conflict." It reaffirms that states bear the primary responsibility to protect their populations and also stresses the importance of ensuring accountability for violations of international humanitarian law. This is the first resolution on healthcare in armed conflict.

emergencies in S/RES/2474 and 2475 (2019).

The UNSC has also moved towards the concept of human security when it classified the outbreak of diseases, Ebola and COVID-19, as "threats to the peace."[167] Epidemics and famine are situations that usually fall under the concept of human security. "Human security" was coined in 1994 in the UN's Human Development Report (HDR) from the United Nations Development Programme (UNDP).[168] According to the HDR Report, human security rests on two pillars "'freedom from fear' and 'freedom from want,'" which have been borrowed from the Universal Declaration of Human Rights preamble, which in turn builds on a famous speech at the UN by U.S. President Franklin D. Roosevelt during WW2.[169]

In summary, the UNSC's resolutions show that the references to states' obligation to protect their population increased from 2014. It is from the mid-2010s that resolutions with a thematic focus on the protection of civilians in armed conflicts and R2P emerged and became adopted on an almost yearly basis. In so doing, Chapter VII of the Charter has been applied to civil wars and other crises to protect populations from mass atrocities and large-scale human suffering and to promote human rights or the right to self-determination, to enforce the right to democracy, as well as enforce the prohibition on international terrorism and work against the development of weapons of mass destruction, even moving into the area of human security labeling deceases such as Ebola in S/RES/2177 and Covid-19 in S/RES/2532 (2020), as threats to the peace.

All is possible because the principle of nonintervention in Art.2(7) in the UN Charter loses its applicability according to its second sentence, which overrides national sovereignty as a legal obstacle to Chapter VII intervention. Thus, powerful states such as China, India, and Brazil, have unsuccessfully tried to raise Art.2(7) as a shield against Chapter VII interventions.

The importance of human rights and the corresponding outlaw of the most horrendous international crimes against individuals is shown by the discussion of *jus cogens* and *erga omnes* norms as the ultimate limit to UNSC

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[167] Bring & Svanberg, *supra* note 62, at 273.

[168] HUMAN DEVELOPMENT REPORT, PUBLISHED FOR THE UNDP 22–23 (Oxford University Press 1994).

[169] Franklin Delano Roosevelt's address, *Roosevelt, President of the United States, Address to the United States Congress,* (Jan. 6, 1941), http://www.wwnorton.com/college/history/ralph/workbook/ralprs36b.html.

powers. They appear as the sole limitation to the UNSC's enforcement powers under Chapter VII because a special feature of the UN Charter is that it is *superior to states' international obligations under international law* according to Art. 103.[170] Art. 103 applies in analogy, to customary international law as well.[171] The ICJ ruled in the *Lockerbie case* that UNSC resolutions under Chapter VII take precedence over a state's other international agreements according to Arts. 103 and 25 in the UN Charter.[172] In his separate opinion, on the Bosnia Genocide Case, Judge Lauterpacht found that norms of *jus cogens,* [that is peremptory norms of international law] limit the authority of the UNSC and must prevail over inconsistent UNSC resolutions.[173] This was affirmed by the EU court in the *Kadi* case, the principle that fundamental human rights trump even UNSC sanctions if in a collision.[174] This gives emphasizes to the thesis that the UNSC should be

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[170] Art. 103 reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[171] *See, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law,* Adopted by the International Law Commission at its Fifty-eighth Session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, (A/61/10, ¶ 251), Yearbook of the International Law Commission, 2006 Y.B. Int'l L. Comm'n vol. II, Part two (2006), *The status of the United Nations Charter.2* (Part 2). *See also* Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency,* J. INT'L HUM. RTS. 24, 61, (2007) (Who argues: "Under Article 103 of the Charter, the obligations of Member States prevail over those provided for by treaty. In light of their relative hierarchical positions as sources of international law, customary international law short of jus cogens is subject to pre-emption by Chapter VII action as well."); B. Bardo Fassbender, *The United Nations Charter as Constitution of the International Community,* 36 COLUM J. TRANSNAT'L L. 529–619, 594 (1997) ("Art. 103 of the Charter [...] can only be read to give the Charter priority over all conflicting obligations of states regardless of their formal source.").

[172] Questions of Interpretation and Application of 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) & (Libya v. U.K.), Provisional Measures, Order, 1992 I.C.J. 3, ¶ 26 (Apr. 14).

[173] Application of Convention on Prevention and Punishments of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Provisional Measures, Order, 1993 I.C.J. 325, 440, ¶ 100 (Sept. 13) (separate opinion by Lauterpacht, J.).

[174] Case T-315/01 Yassin Abdullah, Kadi v. Council of the Eur. Union and Commission of the European. Communities, (Sep. 4, 2008). E.C.R. II-3659. The Kadi Case is a landmark case. It was about EU member-states obligations to freeze citizens assets in conformity with UNSC mandatory resolution 1373 (2001), when a person is added to its list of suspected terrorists after 9/11 and if such a decision could be judicially reviewed. The appellate EU-court, the European Court of Justice (ECJ), found that according to Chapter VII in the UN-Charter, the UNSC ought to comply not only with *jus cogens* but also with *fundamental non-*

bound to respect core human rights and act against international crimes that are norms of *jus cogens.*

The broad interpretation of the concept of "international peace and security" in Art. 39, read together with the wide margin of appreciation the UNSC has in its determination of what constitutes a threat to the peace, shows that it is inherent in its mandate to authorize humanitarian interventions. It is completely free to take on a R2P-responsibility. Already the UN framers intended it to do so by the UN Charter purpose to safeguard human rights in Art.1(3).

J. CRIMINAL ACCOUNTABILITY AS AN OUTGROWTH OF R2P

International criminal accountability serves as an outgrowth of the R2P principle. As the Global Centre for the Responsibility to Protect notes: "At the heart of R2P is the principle that states must act to prevent mass atrocity crimes and protect all populations from risks related to their occurrence. When states lack the capacity to take such measures, the international community has a responsibility to help in doing so."[175] The threat of criminal punishment acts as an additional deterrent.

The UNSC's earliest examples came through the creation of ad hoc international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, to create accountability for such international crimes as genocide, crimes against humanity, and war crimes.[176] Additional accountability methods have included hybrid international courts, national courts with international

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derogatory human rights, such as the right to fair trial. The ECJ held that EU measures must respect fundamental rights as enshrined in the EU legal order, even when implementing UN Security Council resolutions. The court annulled the EU regulations to the extent that they applied to Kadi, emphasizing that the protection of fundamental rights is paramount.

[175] Global Centre for the Responsibility to Protect, *The Responsibility to Protect- a background briefing,* (Jan. 14, 2021), https://www.globalr2p.org/publications/the-responsibility-to-protect-a-background-briefing/#:~:text=At%20the%20heart%20of%20R2P,provide%20assistance%20in%20doing%20so.

[176] Two *ad hoc* tribunals were created by the UNSC, for the conflicts in the territory of former Yugoslavia (ICTY) in S.C. Res. 827 (May 25, 1993) and for Rwanda (ICTR), in S.C. Res. 955 (Nov. 8, 1994). They were created under the mandatory Chapter VII of the UN Charter with reference to the existence of a threat to the peace.

elements, and investigative and evidence-collection bodies.[177]

These crimes are similarly subjected to the jurisdiction of the International Criminal Court (ICC), a court created through an international treaty in 2002.[178] The link between the international criminal code in the Rome statute and the UNSC's responsibility to protect from those crimes is apparent from Article 13(b) in the Rome Statute. This sets out the standard for a possible referral by the UNSC to the ICC: "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."[179]

The ICC operates under the principle of complementarity, where the responsibility of investigating and prosecuting perpetrators of international crimes first resides within domestic legal systems.[180] The avenues for ICC jurisdiction include (1) referral by a state party, (2) an investigation initiated by the prosecutor, or (3) a UNSC referral.[181] Jurisdiction is the most expansive with UNSC referral, covering the territory of every state in the world, regardless of whether the state in question is a party to the Rome Statute.[182] The UNSC has used its possibility to refer to a situation and seek prosecution for international crimes at the ICC, although only twice and only in connection with R2P.

Only twice has a UNSC referral to the ICC occurred, and *only* in connection with the first R2P cases ever handled by the UNSC. The UNSC exercised its right of referral under Chapter VII for the first time in the case of Sudan, which was also the first time it used R2P as a basis for UNSC

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[177] *See e.g.*, Bring & Svanberg, *supra* note 62 at 561; Cody Corliss, *Digital Terror Crimes*, 62 COLUM. J. TRANSNAT'L L. 58, 112 (2023) (noting the creation of such international criminal justice mechanisms as investigative bodies, hybrid courts, and internationalized domestic chambers).

[178] Rome Statute of the International Criminal Court, Arts. 6 –8 (July 17, 1998), 2187 U.N.T.S. 90 [hereinafter Rome Statute] (The crime of aggression went into effect in June 2018)

[179] Bring & Svanberg, *supra* note 62 at 561.

[180] Cody Corliss, *Human Trafficking as "Modern Slavery": The Trouble with Trafficking as Enslavement in International Law*, 71 S.C. L. REV. 603, 629 (2020).

[181] Rome Statute, Art. 13.

[182] Cody Corliss, *Prosecuting Members of ISIS for the Destruction of Cultural Property*, 45 FLA. ST. U. L. REV. 183, 216 (2017). If the matter is referred by a state party or initiated by the prosecutor, the ICC's jurisdiction is more restricted. Under those methods, jurisdiction is generally restricted to the territory or nationals of state parties to the ICC, unless a nonparty state consents to jurisdiction of the court.

resolutions. Through the resolution 1593 (2005), the UNSC referred Sudan's President Al Bashir for indictment. The UNSC's second referral in 2011 was against the then-ruling dictator of Libya Colonel Muammar Gaddafi, and four members of his government and military, in resolution 1970 (2011). In Libya, the referral was in connection with another first, the first UNSC resolution to cite R2P as a basis for an international military intervention.[183] Both referrals were on the territory of a non-state party to the Rome Statute. However, both in the cases of Libya and Sudan, these indictments so far, have failed.

In Darfur, a region in Sudan, between 2003 and 2005, an estimated 200,000 civilians died from brutal attacks and starvation. This was the result of a campaign of terror against the black population in the Dar, Zaghawa, and Masalit communities, launched by the Arabic Janjaweed militia and supported by the Sudanese government in a struggle for resources.[184] In May 2004, the U.S. State Department's investigation concluded that the atrocities in Darfur qualified as genocide.[185] The UN set up the International Commission of Inquiry to examine the question, and in its report in 2005 found genocide had taken place. In 2005, the UNSC referred the case to the ICC through UNSC Resolution 1593 (2005). Al Bashir's arrest warrant was for the ICC charges of five counts of crimes against humanity: two counts of war crimes; and three counts of genocide.[186] The ICC referral was the only mandatory Chapter VII decision taken in this conflict. However, Darfur was the first situation ever in which the UNSC invoked R2P in Resolution 1564 (2004), stating that "the Sudanese government bears the primary responsibility to protect its population," under Resolution 1706 (2006). [187] President Omar Al Bashir clung to power until 2019 when his thirty-year dictatorship came to an end through a military coup. After the coup, neither he nor other governmental officials have been transferred for arrest to the ICC, despite the UNSC referral.

In Libya, the UNSC unanimously referred to the situation of "alleged

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[183] Bring & Svanberg, *supra* note 62.

[184] United States Holocaust Memorial Museum, *Darfur,* HOLOCAUST Encyclopedia, [https://encyclopedia.ushmm.org/content/en/article/Darfur, (accessed Jan. 3, 2024)].

[185] UBALDO & RAFIKI, GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN (Samuel Totten, Eric Markusen *eds.* London: Routledge, 2006); 1:2 J. OF AFR. CONFLICTS AND PEACE STUD. 97–103, 97 (2009) (book review).

[186] Al Bashir Case, *The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09, Case Information Sheet (July 2021), https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf.

[187] Libya, *Situation referred to the ICC by the United Nations Security Council*, ICC-01/11, Investigation (Feb. 2011), [https://www.icc-cpi.int/situations/libya].

crimes against humanity and war crimes committed in the context of the situation in Libya since February 15, 2011." The alleged crimes were the brutal crash down on popular demonstrations during the Arab Spring quest for democracy against the dictatorial Gaddafi government. The referral was made because Libya is not a state party to the Rome Statute, and because the UNSC in S/RES/1970 (2011) was:

> *condemning* the violence and use of force against civilians, *deploring* the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.

This is why the UNSC called for an R2P intervention. The resistance movement in 2011 executed President Muammar Gaddafi, and the Pre-Trial Chamber I, formally withdrew the case due to his death.[188] Against his son, Saif Al-Islam Gaddafi, the Appeals Chamber of the ICC confirmed the admissibility of the case. It thus, rejected the challenges of double jeopardy, that the case is inadmissible before the ICC as it was subject to domestic proceedings in Libyan domestic courts, and that an amnesty law was passed in Libya in 2015.[189] The indictment did not stop Saif Gaddafi from registering as a presidential candidate in the 2022 Libyan elections.[190]

The possibility for individual state parties to the Rome Statute to refer a case to the ICC can be used to invoke an R2P responsibility. [191] The case of Ukraine is a vivid example, where forty-three states referred the situation to the ICC in March 2022 after the Russian invasion.[192] On November 17, the Prosecutor's Office of the ICC received a referral from several countries,

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[188] *Id.*

[189] *Id.* In 2015, a Libyan Court in Tripoli sentenced Saif Gadaffi, and fellow ICC suspect Abdullah al-Senussi and seven other former government officials to death, of whom several were executed. The trial and verdicts generated an international outcry over allegations of serious due process violations, Saif al-Islam Gaddafi, Coalition for the International Criminal Court, [https://www.coalitionfortheicc.org/cases/saif-alislam-gaddafi].

[190] *Libyan Court Reinstates Saif Gaddafi as presidential candidate,* ALJAZEERA (Dec. 2, 2021), https://www.aljazeera.com/news/2021/12/2/libya-court-reinstates-gaddafis-son-as-presidential-candidate.

[191] Rome Statute, Art. 14.

[192] *Situation referred to the* ICC *by 43 States Parties: March - April 2022, Situation in Ukraine, ICC-01/22. Investigation* (March 2022), https://www.icc-cpi.int/situations/ukraine

including South Africa, Bangladesh, Bolivia, Comoros and Djibouti to investigate the "situation in the State of Palestine."[193] Also, an ICC prosecutor can use their power to *proprio motu* open an investigation into a situation where R2P is at stake.[194] It is apparent from the following case study in Part II, that the ICC has been used as a mechanism to invoke responsibility in situations ripe for R2P intervention. However, as will be discussed after the case study in Part II, the use of the ICC instead of more forceful R2P action, aimed to immediately stop and alleviate human suffering, might make such ICC referrals a scapegoat for more robust R2P intervention from the international community. On the other hand, it could have worked as a bolster for more robust action paving the way for later intervention.

PART II. BYPASSING THE UNSC IN THE NEW MILLENNIUM - WHAT ABOUT R2P?

A. *FROM KOSOVO, AFGHANISTAN, SYRIA, AND YEMEN, TOWARDS UKRAINE, NAGORNO-KARABAKH, GAZA*

Starting in 1999, the UNSC has been bypassed on most occasions when it comes to major collective international armed interventions. There is one exception: the UNSC-mandated NATO intervention in Libya in 2011, which was adopted as an R2P-intervention. To demonstrate the operationality of R2P, I have included the major military interventions undertaken from 1999 until May 1, 2024—conflicts in which the international community was involved. Several of those conflicts qualify as examples of dire humanitarian conditions with atrocity crimes present. Most of the conflicts are mixed, civil wars with international elements present, others qualify as civil wars, while yet few can be seen as regular international armed conflicts. All the situations in the case study could *per se* qualify as ripe for R2P interventions. The case study will establish the cause for intervention in each case. Second, it describes the conditions that could have triggered R2P intervention if they were present. The main thesis is that only in a few of the conflicts did R2P affect the policy to intervene. Most instances examined in the case study also encompass the sphere of international criminal responsibility for atrocity crimes.

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[193] *Situation referred to the* ICC *by 7 States Parties: 17 November 2023, Situation in Gaza* [https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf].

[194] Rome Statute, Art. 15.

2.2.1 KOSOVO

Kosovo was a province in Serbia, inhabited by 90% ethnic Albanians, who had been oppressed since 1989 by Serbia's Milosevic government. Serbian military attacked the Kosovo Albanian minority because of their fight for independence in 1998. This abuse led to about 400,000 Kosovo Albanian civilians becoming refugees when hostilities intensified in 1998. The UNSC adopted Resolution 1199 (1998), which explicitly declared that the worsened situation in Kosovo posed a threat to international peace and security. It also demanded that Serbia (FRY) and the Kosovo Liberation Army (UCK) establish a ceasefire to reduce the risk of "a serious humanitarian disaster."[195] The massacre of civilian Albanians in Račak, and the large refugee flows, made the North Atlantic Treaty Organization (NATO) openly threaten to use force for a humanitarian intervention. Attempts were made to persuade the parties to sign the peace agreement of the Rambouillet Accord. The agreement provided full autonomy and self-government for Kosovo, a referendum on the territory's future status with full FRY military withdrawal, and replacement by a NATO presence.[196] When the FRY refused to sign the agreement, China and Russia firmly indicated their intention to veto any use of armed force authorized by the UNSC.

In March 1999, 19 NATO states began air strikes against Serbia, citing humanitarian intervention to legitimize the intervention. Later scholars view Kosovo as the primary example of the right of a severely oppressed minority to remedial secession.[197] The NATO intervention resulted in the complete withdrawal of Serbia from its province Kosovo in June of 1999. In 2001 Serbia delivered FRY's President Milosevic to the International Criminal Tribunal for the Territory of Former Yugoslavia (ICTY) after his forced removal from office. The UNSC created the ICTY in 1993 by S/RES/827 under Chapter VII of the UN Charter, as the first International Tribunal created during a conflict since the International Military Tribunal (Nüremberg Tribunal), established after World War II to prosecute the Nazi leaders in 1945–1946. Milosevic was the first head of state ever to be indicted while in office, while the conflict in Kosovo was still raging in 1999, which made it *stare decisis* that no immunity existed for the Crimes in the Rome Statute.

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[195] S.C. Res. 1199 (Sept. 23, 1998).

[196] *The Rambouillet Accords*, Interim Agreement for Peace and Self-Government in Kosovo, U.N. Doc. S/1999/648 (Jun. 7, 1999).

[197] *See infra* in Part III:B, on Remedial self-determination.

The UNSC Resolution 1244 (1999) under Chapter VII of the UN Charter put Kosovo under UN Territorial Administration. However, when negotiations broke down on the territory's future status, Kosovo unilaterally declared its independence in 2008.[198] The international community is divided on Kosovo's right to independence. In total, Kosovo has received 114 diplomatic recognitions by UN member states.[199] The Independent Commission of Inquiry on Kosovo declared the intervention "illegal but legitimate."[200] This prompted Serbia to request an advisory opinion from the ICJ regarding the Declaration of Independence. Although the ICJ chose to avoid addressing the question of whether minorities have a right to self-determination, it concluded that unilateral declarations of independence are not inherently illegal under international law unless they violate *jus cogens.* The opinion suggests the possibility that a seriously oppressed minority against which severe criminal acts, genocide, crimes against humanity, ethnic cleansing, and war crimes are carried out, may be entitled to secession as a last resort, referred to as "remedial secession."[201]

2.2.2 AFGHANISTAN

The large-scale terrorist attacks against the U.S. on 9/11/2001 made the U.S. invoke a right to collective self-defense against international terrorism. The U.S. Government intervened in Afghanistan with a coalition of states to conquer al-Qaida, the terrorist network, that the U.S. Government blamed for the 9/11 attacks. The U.S. also intervened against the Afghan Taliban regime, which had refused to extradite the al-Qaida leader, Osama Bin Laden, and was perceived as "hosting" the international terrorists. The UNSC had in resolution 1268 (2001) unanimously confirmed that a right to individual and collective self-defense for the U.S. existed after 9/11 based on Art. 51 in the UN Charter. The use of self-defense against international terrorist attacks is an extensive interpretation of the right to self-defense in Art. 51. This interpretation was immediately accepted as an act of instant customary

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[198] Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 25 (July 22).

[199] Katharina Buchholz, *Kosovo & Beyond: Where the UN Disagrees on Recognition*, STATISTA, (Feb. 23, 2023), https://www.statista.com/chart/29371/un-partial-recognitions/#:~:text=Kosovo%20declared%20its%20independence%20in,as%20a%20fully%20independent%20nation.

[200] INDEPENDENT. INT'L COMMISSION ON KOSOVO, The Kosovo Report, CONFLICT v. INTERNATIONAL RESPONSE v., LESSONS LEARNED 2–4 (Oxford University Press 2000), [https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/The%20Kosovo%20Report%20and%20Update.pdf].

[201] Independence of Kosovo Case, Advisory Opinion, 2010 I.C.J. 25 at 5.

international law (CIL).[202] Since then it has frequently been used by military-potent states to intervene against perceived terrorists.[203]

On the other hand, the Taliban's severe repression of women and girls, as well as other extensive human rights violations, had not resulted in any call for humanitarian intervention or use of R2P, neither by the UNSC nor by other states prior. In the 1990´s, girls and women were denied education, the right to work, and Jews had to wear a David's star symbol. Tough Sharia laws were applied with capital punishments such as public stoning and whipping. Moreover, the Taliban violated cultural heritage through the destruction of the huge Buddha statues in Bamyan.[204]

The U.S.-led international military intervention lasted until December 2001, and led to the Taliban regime collapse and the destruction of al-Qaeda's network in Afghanistan. Then, a nation-building project aimed at democracy and stability—as endorsed by the UNSC through S/RES/1286 (2001)—was commenced with support for the new democratically elected government by NATO. In February 2020, the United States and the Taliban signed an agreement on the withdrawal of international forces from Afghanistan by May 2021. In April 2021, NATO Foreign and Defense ministers decided to withdraw all Allied troops from Afghanistan within a few months, *see infra* on Afghanistan in the 2020's at B.3.2.1.

2.2.3 IRAQ

In 2003, the U.S. and the U.K. led an allied force in the invasion and occupation of Iraq without securing a UNSC mandate for the intervention.[205] The intervening states motivated the war by Iraq's non-compliance with the ban on the possession and development of weapons of mass destruction, including mandatory weapons inspections, imposed on it by UNSC Resolution 687 (1991), as a condition after the Gulf War.[206] Failing to gain support from the UNSC on weapons of mass destruction, as a resolution in the UNSC would have been met with vetoes by Russia, China, and possibly France, neither would have been able to secure nine concurring votes by the

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[202] Carsten Stahn, *Between Law-Breaking and Law-Making*: *Syria, Humanitarian Intervention and" 'What the Law Ought to Be", Journal,'* 19:1 J. OF CONFLICT AND SECURITY L. 25, 46 (2014).

[203] *Id. See also* Svanberg, & Bring, *supra* note 62, at 318.

[204] Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law,* 14 E.J.I.L. 619–51 (2003).

[205] Svanberg, & Bring, *supra* note 62, at 161.

[206] S.C. Res. 687 (Apr. 8, 1991).

non-permanent members. The U.S. and the U.K. framed the invasion of Iraq moreover, as an application of R2P. They alleged that ending Saddam Hussein's tyranny justified a humanitarian intervention. [207] The war was met with massive criticism—the claim that it lacked legal basis.[208] The UN Secretary-General Kofi Annan emphasized the war was illegal: "I have indicated it was not in conformity with the UN Charter. From our point of view, from the Charter point of view, it was illegal."[209]

The humanitarian rationale offered, was subsidiary to other reasons, as Saddam Hussein's regime did not meet the standards for a humanitarian intervention. His regime was not engaged in immediate, gross, and large-scale human rights violations at the time. Thus, it appears to have been merely a pretext for the war.[210] But there was a connection to the international crimes that triggered an R2P intervention, as the Iraqi leadership was subsequently tried by the Iraqi High Tribunal, a special criminal court, which was an internal judicial institution with international elements created by the occupying powers the U.S. and U.K., to try Iraqi nationals or residents accused of genocide, crimes against humanity, war crimes, or other serious crimes with universal jurisdiction. It used a mix of Iraqi and international criminal law and had retroactive jurisdiction, reaching as far back as 1988 and the Iraq-Iran war.[211] The Iraqi leader was subsequently convicted of the death penalty and was hanged. The court was met with heavy criticism because it was established by the occupying power; was not providing adequate legal safeguards, such as due process; was accused of violating the principle of non-retroactivity of criminal law; and was violating the procedures for capital punishment.[212] It would have been preferable for the Iraqi leadership to have been tried by the ICC. The reasons for not using the

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[207] Andrew M. Bell, *Using Force Against the "Weapons of the Weak": Examining a Chemical-Biological Weapons Usage Criterion for Unilateral Humanitarian Intervention Under the Responsibility to Protect*, 22 CARDOZO J. OF INT'L. AND COMPAR. L. 261, 276 (2014).

[208] Richard Falk, *What Future for the UN Charter System of War Prevention?*, 97 AJIL 590 (2003); Frederic Kirgis, *The Security Council Resolution 1483 on the Rebuilding of Iraq, ASIL Insights*, AMERICAN SOC'Y. INT'L. L. 13 (2003); David Wippman, *The Nine Lives of Article 2(4)*, 15 MINN. J. INT'L. L. 387, 391 (2007).

[209] Interview with UN Secretary-General Kofi Annan, BCC NEWS, (Sep. 16, 2004).

[210] *War In Iraq – Not Ana Humanitarian Intervention*, HUM. RTS. WATCH (Jan. 25, 2004), https://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention.

[211] Bantekas, & Ilias. *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 THE *International and Comparative Law Quarterly*, 54(1) INT'L. & COMPAR. L. Q. 237–53, 239 (2005).

[212] *Unjust and unfair: The death penalty in Iraq*, AMNESTY INT'L., AI Index MDE 14/014/2007 (2007), https://www.amnesty.org/en/wp-content/uploads/2021/08/mde140142007en.pdf.

ICC were that neither the U.S. nor Iraq were parties to the ICC and that the Hussein regime's crimes extended further back than its jurisdiction.[213]

2.2.4 OPERATION INHERENT RESOLVE (IRAQ AND SYRIA)

A civil war broke out in Iraq in 2014 when the international terrorist organization ISIS captured several Iraqi cities as the movement spread across Iraq and Syria in an attempt to establish a Caliphate based on Sharia law. ISIS emerged as a direct threat to the state of Iraq's existence and the entire Middle East, and ISIS carried out extensive terrorist deeds around the world. Its extremely brutal methods used against religious and ethnic groups, such as beheading and burning alive, were branded by the UN as acts of genocide. [214]A U.S.-led coalition, "Operation Inherent Resolve" was invited by the legitimately elected government of Iraq to intervene in collective self-defense against ISIS.[215] Following the *stare decisis* from the 2003 Iraqi war, the UNSC was not engaged in the issue of military intervention but was again bypassed by a U.S.-led coalition. No reference was made to R2P although large-scale atrocities carried out by ISIS were documented and classified as acts of genocide against ethnic groups, such as the Yazidis.[216] The ICC has not been involved, but a UN Investigative Team (UNITAD) to Promote Accountability for Crimes committed by Da'esh/ISIL cooperates with the Iraqi judiciary for domestic prosecution.[217]

2.2.5 SYRIA AND R2P AGAINST USE OF CHEMICAL WEAPONS

The Iraqi government asked the U.S. to extend "Operation Inherent Resolve" to attack ISIS in Syria, as an act of collective self-defense, because ISIS raids were made from Syria into Iraq. The assumption was that the

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[213] Bring & Svanberg, *supra* note 62, at 238.

[214] ICC Prosecutor Karim A.A.Kahn, *Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL,* UNITAD (May 10, 2021) https://news.un.org/en/story/2021/05/1091662.

[215] "The mission of the Department of Defense is to provide a lethal Joint Force to defend the security of our country and sustain American influence abroad". Mission, Operation Inherent Resolve, US DEPARTMENT OF DEFENSE, [https://dod.defense.gov/OIR/Speeches-and-Transcripts/].

[216] The first criminal trial addressing genocide against the Yazidis, was the Higher Regional Court in Frankfurt, Germany, which convicted Taha Al J. for genocide and crimes against humanity, AMNESTY WORLD NEWS (Nov. 30, 2021), https://www.amnesty.org/en/latest/news/2021/11/germany-iraq-worlds-first-judgment-on-crime-of-genocide-against-the-yazidis/.

[217] UNITAD hands over a landmark case assessment report to the Iraqi Judiciary: Unveiling the structure of ISIL's Bayt Al Mal [EN/AR], UNITAD Report, Feb. 12, 2024.

Syrian government was *unable* and *unwilling* to control its territory due to the Syrian civil war.[218] Russia, as an ally of the Syrian Assad regime, has intervened militarily in Syria since 2014, following an official request from the Assad Government. Several double vetoes from Russia and China blocked the UNSC from intervening in the Syrian civil war, from 2011-2022. [219] The R2P argument for the U.S.-led intervention was that the Assad government had forfeited its legitimacy through crimes against humanity against its population: by denying its people democracy; by using chemical weapons against them.[220] The Assad government was indeed unwilling and unable to protect its population and was itself a perpetrator, a condition for an R2P intervention.[221]

Since the start of uprisings during the Arabic Spring 2011, Syrian Arab Armed Forces and pro-Assad paramilitary forces have been implicated in more than 300 chemical attacks in Syria.[222] The use of chemical weapons constitutes a serious violation of the prohibition of chemical weapons, which is considered customary international law and perceived as a *jus cogens* norm, and the use of chemical weapons is classified as a crime against humanity and war crimes.[223] The U.S., U.K., and France found their intervention to be a lawful retaliation against the international crime of using poison gas.[224] The use of poison gas has been banned for 100 years by the

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[218] Ryan Goodman, *International Law on Airstrikes against ISIS in Syria,* JUST SECURITY FORUM (Aug. 28, 2014), https://www.justsecurity.org/14414/international-law-airstrikes-isis-syria/, (accessed Jan. 8, .2024).

[219] Three Draft resolutions that threatened sanctions could not be adopted due to Russian and Chinese vetoes, Siniša Vuković & Diane Bernabeia, *Refining Intractability: A Case Study of Entrapment in the Syrian Civil War*, 24 INTERNATIONAL NEGOTIATION, 407–36 (2019); A. Ycoubian, *Syria's Stalemate Has Only Benefitted Assad and His Backers*, UNITED STATES INSTITUTE OF PEACE, (Mar. 14, 2023), https://www.usip.org/publications/2023/03/syrias-stalemate-has-only-benefitted-assad-and-his-backers (accessed Jan. 12, 2024).

[220] Marc Weller, *Striking ISIL: Aspects of the Law on the Use of Force*, 19(5) ASIL Insights, (2015), [https://www.asil.org].

[221] Evans & Sahnoun, *supra* note 31, at para. 2.14.

[222] Loveluck Lovisa, *Syrian army responsible for Douma chemical weapons attack, watchdog confirms*, WASH. POST (Jan. 27, 2023), https://www.washingtonpost.com/world/2023/01/27/syria-chemical-weapons-douma-opcw/.

[223] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction [CWC], 1992, effective in 1997. Today it has 192 parties, why its core provisions are *jus cogens*, that is peremptory norms from which no derogation is possible, why Syria is bound even though it is not a party to the CWC.

[224] Matthew Lee & Josh Lederman, *US pulled multiple ways in Syria as Islamic State*

Geneva Protocol of 1925, which is established customary law and is cited as an example of a *jus cogens* norm.[225] Importantly, the U.K. *relied explicitly on R2P* against the use of chemical weapons in a legal opinion made by its Attorney General, which set up three conditions for a valid *humanitarian intervention* in the case of inaction by the UNSC:

"If action in the UNSC is blocked, the UK would still be permitted under international law to take exceptional measures to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

(i) There is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief.

(ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

(iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)."[226]

The Danish government made similar arguments, also providing three conditions that would justify an R2P intervention in Syria.[227] It established the link identified in the World Summit Outcome Document, that war crimes, crimes against humanity, and genocide, trigger R2P interventions. However, the British Parliament voted against the Legal Opinion's reliance on a right

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recedes, Allied Press, FOX NEWS (Jan. 23, 2018), http://www.foxnews.com/us/2018/01/23/us-pulled-multiple-ways-in-syria-as-islamic-state-recedes.html.

[225] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva 1925.

[226] Chemical Weapon Use by Syrian Regime: UK Government Legal Position, at 1 (Aug. 29, 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf., accessed Dec. 7, 2023].

[227] Danish Ministry of Foreign Affairs, *'General principled considerations on the legal basis for a possible military operation in Syria'* UPN, (Aug. 30, 2013), [http://www.ft.dk/samling/201212012 1/almdellurulbilag/225/1276239/index.html;] The Memorandum was followed by a policy research paper commissioned by the Danish Ministry of Foreign Affairs from Kendal · Human Rights Consulting, David Michael Kendal, *Denmark and the Responsibility to Protect (R2P) — How Denmark can further contribute to the prevention of mass atrocities*, (Sep. .2013), [file:///C:/Users/ls00094/Downloads/Denmark-and-the-Responsibility-to-Protect2013.pdf].

to humanitarian intervention in Syria. Instead, the U.K., France, and the U.S. coalition relied on a right to collective self-defense against international terrorism, based on ISIS's presence in Syria through Operation Inherent Resolve, *see supra.*

Russia's President Putin, on the other hand, wrote an op. ed. in the *New York Times*, where he denied that international law confers any right to humanitarian intervention nor indeed any R2P responsibility, without a prior UNSC mandate: "Under current international law, force is permitted only in self-defense or by the decision of the Security Council. Anything else is unacceptable under the United Nations Charter and would constitute an act of aggression."[228] This sentiment was shared by several other states, such as China, Brazil, India, Indonesia, and South Africa.[229]

An analysis of the Syrian war tends to show that in current international law, no explicit responsibility to protect by military means exists without UNSC approval. This is because customary international law has not developed to allow states' R2P interventions without a UNSC mandate. States have shown neither *opinion juris* nor state practice to support such a development.[230] However, the legal briefs from the U.K. and Denmark do underscore that humanitarian intervention as an R2P responsibility done outside of the UN is advancing as a powerful *lege ferenda* norm in the mid-2010s. In 2023 the Netherlands and Canada filed a case in the ICJ, alleging that Syria is violating the International Convention Against Torture.[231] The ICJ Order in November 2023, directed Syria to take all measures within its power to prevent acts of torture and other abuses.[232] The ICC has not yet been seized of the matter of Syria.

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[228] Vladimir Putin, '*A Plea for Caution from Russia*', Op-ed in NEW YORK TIMES, (Sep. 11, 2013), cited in Christian Henderson, *The UK Government's legal opinion on forcible measures in response to the use of chemical weapons by the Syrian government*, 64:1 INT'L AND COMPAR. L. Q. 179–96, 193 (Jan. 2015).

[229] Henderson, *supra* note 228.

[230] Anne Orford, *International Authority and the Responsibility to Protect,* CAMBRIDGE UNIV. PRESS (2011), p. 22–27, considers that R2P, despite being a political concept, nevertheless lays the foundation for jurisdiction as well as the responsibility of the decision-makers to comply with R2P.

[231] G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

[232] Application of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Can. & Neth. v. Syria), Order No. 2023/67 (Nov. 16).

2.2.6 YEMEN

The Arabic Spring led to demonstrations against Yemen President Ali Abdallah Saleh in early 2011. He stepped down, through a Gulf Cooperation Council (GCC)-brokered initiative. In 2012, Mansour Hadi was elected president of Yemen for a two-year transition period. This peaceful political transition was interrupted in 2014 when the Houthi rebels, allied with forces loyal to ex-President Saleh, entered the capital, Sana'a, and overthrew Hadi. In 2015 a coalition made up of 15 states led by Saudi Arabia with strong support of the Emirates (UAE), intervened in Yemen "to protect its people from the aggression." The Houthis are a religious minority, from North Yemen, that receives military backing from Iran, making it a proxy war.

The coalition based its intervention on consent from the exiled president Mansur Hadi, who had fled to Saudi Arabia since he had lost control and was thus not in a position to invite according to international law. By framing the military intervention in terms that invoke widely accepted norms relating to human rights protection and R2P, Saudi Arabia provided scope for the international community to endorse the legitimacy of the intervention despite its probable illegality.[233] The Saudi-led intervention was subsequently welcomed by the UNSC *ex post facto* in Resolution 2216 (Apr. 14, 2015), as an "[R2P] intervention" by invitation from the "legitimate" democratically elected Government. It noted in its preamble: "The President of Yemen . . . has requested from the Cooperation Council for the Arab States of the Gulf and the League of Arab States to immediately provide support, by, *including military intervention* all necessary means and measures, *to protect Yemen and its people from the continuing aggression by the Houthis.*" [234]

It can be contested that the Yemen intervention has improved the humanitarian situation. The conflict has exacerbated already high levels of need in Yemen, creating one of the largest humanitarian crises in the world. The UN estimates that more than 18 million people, or nearly 70 percent of the entire population, need humanitarian assistance and protection in 2024, The main drivers of need remain Yemen's deteriorated economy, lack of public

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[233] Elinor Buys &, Andrew Garwood-Gowers, *The (Ir)Relevance of Human Suffering: Humanitarian Intervention and Saudi Arabia's Operation Decisive Storm in Yemen,* 24:1 JOURNAL OF CONFLICT AND SECURITY LAW 1–33, 33 (2019).

[234] S.C. Res. 2216 (Apr. 14, 2016); *see also* Mulford, F., *Circumventing the Responsibility to Protect in Yemen: Rhetorical Adaptation and the United Nations Security Council*, 14(1) GLOBAL RESPONSIBILITY TO PROTECT 75 (2022), https://doi.org/10.1163/1875-984X-14010009.

services, and protracted conflict-induced displacement.[235] President Biden announced in 2022 that the U.S. would no longer provide "offensive" support for Saudi military operations in Yemen, (as an anti-terrorist mission) because the Saudis and UAE have been accused of war crimes during the brutal war.

Since the Israel-Gaza conflict broke out, the Houthis have moved to attack international shipping, targeting all vessels directed at Israeli ports. This made the U.S. and the U.K. launch an international task force to counter these attacks.[236] In 2024 the U.S. and U.K. conducted airstrikes against Houthi military strongholds in Yemen, as an act of self-defense against the rebel's attacks against international shipping.[237] Also, a naval presence from the U.S. and U.K. is used. In 2025 "the current high maritime risks could either increase or gradually decrease. This will largely depend on how the incoming U.S. administration addresses the Gaza war, which the Houthis have been using to justify their attacks, and on Iran," to quote The Washington Institute for Near East Policy.[238] The response to the Houthi attacks and the Gaza war stalled the Omani-facilitated talks between the Houthis and Saudi Arabia to reach a peace agreement and efforts to develop a road map for an inter-Yemeni political process.[239] Thus, it is most likely that the Trump administration's backing of a cease-fire in Gaza in January is tied to the insight that the Israeli war is also economically a disaster for international shipping. The economic benefit of an R2P intervention is outside the scope of my article, but its advantages appear evident, as destructive wars and dictatorships usually do not benefit the economy.[240]

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[235] *US Relations with Yemen, Bilateral Relations Fact Sheet*, Bureau of Near Eastern Affairs, (June 8, 2022); Security Council Report Staff, *Monthly forecast,* SECURITY COUNCIL REPORT 16-17 (May 2024), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2024_05_forecast.pdf.

[236] *See infra* in 2.3.3. on Gaza.

[237] Oren Liebermann et al, *US and UK carry out strikes against Iran-backed Houthis in Yemen*, CNN (Jan. 12, 2024).

[238] Noam Raydan & Farzin Nadimi, *Houthi Shipping Attacks: Patterns and Expectations for 2025,* WASHINGTON INSTITUTE FOR NEAR EAST POLICY (Dec. 16, 2024), https://www.washingtoninstitute.org/policy-analysis/houthi-shipping-attacks-patterns-and-expectations-2025.

[239] Security Council Report Staff, *supra* note 235.

[240] John Forrer & Conor Seyle, *The Role of Business In The Responsibility To Protect,* ONE EARTH FUTURE (Apr. 16, 2021), https://oneearthfuture.org/en/one-earth-future/publication/role-business-responsibility-protect.

2.2.7 BURMA (MYANMAR)[241]

About 700,000 Rohingya fled and were expelled to neighboring Bangladesh in 2017. Burma's military government has denied responsibility for the persecution and claimed that it was a question of righteous military operations against a militia group in an internal conflict, so the ICC lacked jurisdiction because Burma is not a party to the ICC. An independent fact-finding mission from the UN visited in 2018. They found that alleged crimes against humanity through mass murders and the forced displacement of the population, as well as gang rapes, had occurred. Also, allegedly genocidal acts were committed by military forces against the Muslim Rohingya people, and the commander-in-chief and five generals should be prosecuted for genocide and crimes against humanity.[242]

Burma is not a member of the ICC. Due to Chinese and Russian, resistance, no UNSC resolution was forthcoming, which could have made the UNSC refer the situation to the ICC under Art.15 in the Rome statute. Neither was the UNSC able to adopt any resolution that would authorize any sanctions. In a high-profile pre-trial decision on jurisdiction in 2018, the ICC panel of judges decided it had jurisdiction. Its decision was based on "effects-based jurisdiction." The idea was that the military persecution of the Rohingya ethnic minority on suspicion of mass deportation and displacement was completed on Bangladesh territory, as a large number of Rohingya had crossed the border, and Bangladesh is a state party to the ICC and had referred the case.[243] Hence, ICC has jurisdiction over crimes against humanity (in the form of deportation, ICC Statute Art.7d).[244] The Panel also ruled that the prosecutor can investigate other crimes, including future crimes, linked to the situation described in the prosecutor's request—which focused on crimes

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[241] Changed by the military government in 1989 from Burma to Myanmar, much of the international community agreed to recognize the name change. Yet, the United States and the United Kingdom, among a group of nations, continue to use the name Burma, based on the fact that the name Myanmar is not representative of all the peoples living in Burma. I will use the name Burma, as this is the name used by the U.S. government as the name preferred by most of the local population, not being highjacked by the ruling elite, *see* Aung Htoo, *Armed Conflicts in Burma: Winning the Peace Through Human Rights and the Rule of Law,* Dissertation, forthcoming, Stockholm University, 2024.

[242] Report of the Independent International Fact-Finding Mission on Myanmar (A/HRC/39/64) (Advance Unedited Version) [EN/MY], (Aug. 27, 2018).

[243] Request Under Regulation 46(3) of the Regulations of the Court, nr. ICCRoC46(3)-01/18, (Sep. 6, 2018)

[244] *Id.*

committed during two waves of violence, in 2016 and 2017 in Rakhine State —since Bangladesh joined the ICC in 2010.[245]

In November 2019, Gambia—with the backing of the Organization of Islamic Cooperation (OIC)—filed a case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, before the ICJ.[246] It alleged that the Burmese military forces' atrocities against the ethnic Rohingya in Rakhine State violated various provisions of the Genocide Convention.[247] Gambia filed under Art. 9 of the Genocide Convention, which allows for disputes between parties "relating to the responsibility of a state for genocide" to be submitted to the ICJ.[248]

In 2021, after a subsequent military coup against the democratically elected Burmese government, the UNSC adopted its first resolution in decades on Burma, S/RES/2669.[249] The resolution did not use Chapter VII and was non-binding. It addressed the crisis and called for an end to the Burmese military regime's escalating repression and violence against civilians, citing that "the regime must end its violence across the country, release arbitrarily detained prisoners, allow unhindered humanitarian access, protect members of minority groups, and respect the democratic aspirations of the people of Burma."[250]

2.2.8 LORD RESISTANCE ARMY

The sect is infamous for its human rights violations of mass kidnappings of children and girls with forced sex enslavement and child soldiers. The LRA started in Uganda, in the 1980s. However, the war in Uganda has been called one of the world's most forgotten conflicts. Despite reports of extensive abuses by the LRA, just only a condemnation from the President of the UNSC came forward in 2004, after the Ugandan Government had brought a case against the LRA to the ICC, which led the ICC to open a preliminary

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[245] Developments in Gambia's Case Against Myanmar at the International Court of Justice, HUMAN RIGHTS WATCH (Feb. 14, 2022), https://www.hrw.org/news/2022/02/14/developments-gambias-case-against-myanmar-international-court-justice#_Are_there_efforts.

[246] *The Gambia v. Myanmar, Application Instituting Proceedings* (Nov. 11, 2019), [https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf, accessed Jan. 19, 2024.]

[247] Application of Convention on Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), 2022 I.C.J. 477 (July 22).

[248] *Id.*

[249] S.C. Res. 2669 (Dec. 21, 2021).

[250] *Id.*

investigation against the LRA.[251] Kony and several other leaders were indicted for war crimes and crimes against humanity and arrest warrants were issued in 2005 but Kony has never been arrested. In 2016 the ICC commenced the trial of Ongwen, a former child soldier who became a commander in the LRA.[252]

The LRA moved to neighboring countries after U.S. and internationally-backed Ugandan forces intervened against the LRA in 2008 in Uganda. Since then, the movement has been present in South Sudan, DRC, and the CAR. The UNSC has adopted resolutions citing R2P to authorize its peace-keeping forces to act against LRA in the civil wars in South Sudan, DRC, and CAR to protect civilians.[253] The AU has formed a regional task force, RCI-LRA, operating with consent from the concerned governments whose forces contributed, together with U.S. special forces, to eliminate LRA through Operation "Moonsoon" in 2013.[254] In 2017, the U.S. and several of the participating states withdrew, citing that LRA was not a threat anymore.[255]

2.2.9 THE DISMEMBERMENT OF UKRAINE IN 2014

2.2.9.1 CRIMEA

Crimea is a Republic in Ukraine. Historically, it had belonged to Russia but was transmitted in the Soviet Union to Ukrainian jurisdiction in 1954. The Russian Navy had the right by agreement to keep its naval fleet base in the city of Sevastopol. The majority in Crimea is made up of ethnic Russians. Crimea's autonomous status within Ukraine was limited by the Ukrainian authorities in 1995, some years after Ukraine's independence from the Soviet Union in 1991. A government crisis in Ukraine in February 2014 led to the deposal of Ukraine's then pro-Russian President Yanukovych. The crisis quickly escalated due to Russia's open support for the separatists, and a political uprising was a fact. The rebels received assistance from the Russian Federation which intervened militarily—more or less openly, as they were already in place through its naval base in Sevastopol. Ukraine asked for help

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[251] Situation in Uganda, ICC-02/04 (2005).

[252] Prosecutor v. Dominic Ongwen, ICC-02/04-01/15 (Dec. 6, 2016).

[253] The UN Force, UNMIS in South Sudan, *see* S.C. Res. 1663 (Mar. 24, 2006), S.C. Res. 2277 (Mar. 30, 2016) (authorizing the UN force MONUC in DRC to use force to protect civilians against LRA.).

[254] AU AFR. UNION PEACE AND SECURITY COUNCIL, (Nov. 22, 2013).

[255] Secretary-General's Special Representative in the subregion, SC, U.N. SCOR., 71 Sess. 7967 meeting, at 5, U.N. Doc. SC/12867 (2017).

from NATO, which sent reconnaissance planes to the eastern border areas to monitor the situation. Soon, however, Ukraine's military forces evacuated the Crimea peninsula while Russia officially took control.[256]

The new parliament of Crimea declared the Autonomous Republic of Crimea's independence on March 11, 2014. A referendum on the independence of the Crimean Peninsula was held, where an overwhelming majority, 96%, voted in favor of secession from Ukraine and joining Russia. The referendum was condemned by many states, i.e. Ukraine, the EU, Canada, and the U.S.. The Republic of Crimea and the city of Sevastopol were annexed by Russia and became official parts of the Russian Federation on 18 March 2014. International reactions were a strong condemnation of the secession and integration of Crimea with Russia. The UNGA declared the Russian annexation illegal.[257] The UNSC voted in March 2014 on a resolution that would have declared the referendum in Crimea void and called for non-recognition, but it was defeated by Russian veto.[258] The EU and the U.S. imposed sanctions on Russia.[259] In 2017, the UN's High Commissioner for Human Rights strongly criticized Russia's violation of human rights in the "occupied territories."[260] Resolutions from the UNGA condemning the Human rights situation in Crimea, as well as the occupation and annexation, have been adopted yearly since 2016, but with considerably less support.[261]

2.2.9.2 DONETSK AND LUHANSK

The struggle of the separatists with the support of Russia, spread to Eastern Ukraine, to the Luhansk and Donetsk regions where there are large Russian minorities. About 17% of people living in Ukraine are ethnic Russians, and even more have Russian as their mother tongue. Despite denial, Moscow left military economic, and political support to the separatists that

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[256] Bring & Svanberg, *supra* note 62, at 411–14.

[257] G.A. Res. 68/262 (Mar. 27, 2014), adopted with 100 votes in favor.

[258] UNSC Draft Resolution, S/2014/189, (2014) which declared that the referendum in Crimea "have no validity" and called on states not to recognize its results.

[259] Jess McHugh, *Putin Eliminates Ministry of Crimea, Region Fully Integrated into Russia, Russian Leaders Say*, INTERNATIONAL BUSINESS TIMES, (Jan. 10, 2016).

[260] Office of the United Nations High Commissioner for Human Rights, *Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, (2017).

[261] G.A. Res. A/C.3.7/l/L.26 (Oct. 31, 2016), Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), 70 States voted for while 77 states abstained and 26 voted against. The same number of votes applied in, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, A/C.3/72/L.42, (2017).

took control of parts of Luhansk and Donetsk regions and proclaimed the independent "People's Republics," in April 2014, based on contested referendums. Two Minsk Agreements have been negotiated to regulate the conflict in Eastern Ukraine, between a contact group that includes representatives for Ukraine, Russia, the Organization for Security and Cooperation in Europe (OSCE), and the separatists.[262] The Minsk II Agreement in 2015, is a peace agreement that will give peace by ending Russia's support to the separatists in exchange for Donetsk and Luhansk Republics obtaining internal self-determination within Ukraine. The Minsk II Agreement failed. In 2016 Ukraine lodged a declaration under Art.12(3) in the Rome Statute, accepting the jurisdiction of the ICC. The ICC pronounced the conflict "an international armed conflict between Ukraine and the Russian Federation."[263] In 2020 the ICC announced that the preliminary examination gave that there was a reasonable basis to believe that a broad range of conduct constituting war crimes and crimes against humanity have been committed.[264] The secessionist conflict led to the Russian invasion of Ukraine in 2022, *see infra* in B.2.3.2.

B. 2020'S CONFLICTS

2.3.1 AFGHANISTAN

NATO and U.S. forces' hasty withdrawal let the Taliban regain power in 2020, after U.S. President Trump signed a peace deal with the Taliban in February 2020, which was followed by President Biden in 2021.[265] Since the Taliban takeover of Afghanistan, in Fall 2021, the Taliban Government's policy of "gender persecution and apartheid" has returned, despite promises in the peace agreement.[266] There is growing evidence that the Taliban are

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[262] Minsk I and Minsk II Agreements.

[263] On September 8, 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction of the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, ICC, Information for Victims, Ukraine [https://www.icc-cpi.int/victims/ukraine#:~:text=On%208%20September%202015%2C%20the,onwards%2C%20with%20no%20end%20date].

[264] *Id.*

[265] *U.S. Withdrawal from Afghanistan This document outlines the key decisions and challenges surrounding the U.S. withdrawal from Afghanistan*, WHITEHOUSE.GOV, [https://www.whitehouse.gov/wp-content/uploads/2023/04/US-Withdrawal-from-Afghanistan.pdf].

[266] Belquis Ahmadi & Scott Worden, *Two Years of the Taliban's 'Gender Apartheid' in Afghanistan*, Analysis, U.S. INST. FOR PEACE (Sep. 14, 2023),

committing the crime against humanity of gender persecution of women and girls, assertions made by the UN Special Rapporteur on the situation of human rights in Afghanistan, and by several NGOs, such as Amnesty International and Human Rights Watch.[267] "Gender Apartheid" is seen in a series of policies and daily abuses that bar women and girls from engaging in public life and having hopes of any financial autonomy. It is designed and enacted as a system of governance that aims to compress and relegate women and girls into narrow roles: as child-bearers, child-rearers, and sources of unremunerated domestic labor. In Afghanistan, gender apartheid is seen in the Taliban banning women and girls from several societal functions.[268] Women are restricted from work, they are not allowed to leave home without a male guardian, they are denied education as girls above sixth grade are not able to attend school and universities have stopped accepting female students. Women in Afghanistan are banned from almost all public spaces, decrees restrict women from entering public parks and participating in sports, gyms, and beauty salons and women need to adhere to a strict dress code, and wear a hijab (favorably in the form of Burka). For enforcement, the Taliban established the Female Moral Police Department in 2022.[269]

In 2020, the Appeals Chamber of the ICC authorized the ICC Prosecutor to commence an investigation into alleged crimes under the jurisdiction of the Court (Afghanistan Appeals Judgment), ". . . about alleged crimes committed on the territory of Afghanistan in the period since May 1, 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation committed on the

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[https://www.usip.org/publications/2023/09/two-years-talibans-gender-apartheid-Afghanistan#:~:text=These%20restrictions%20and%20rules%20continue,NGOs%20or%20the%20United%20Nations].

[267] *Situation of women and girls in Afghanistan*, Report of the Special Rapporteur on the situation of human rights in Afghanistan and the Working Group on discrimination against women and girls, Human Rights Council, Fifty-third session, (June 19–July 14, 2023), 16–20; *Alliance for Human Rights in Afghanistan -– Joint Statement – Afghanistan: Call for justice accountability and effective response to ongoing violations and gender persecution*, HUM. RTS. WATCH (August 15, 2023), https://www.hrw.org/sites/default/files/media_2023/08/Alliance%20-%20Joint%20statement%20marking%20two%20years%20since%20Taliban%20takeover%20-%2015%20August-%20Final%202_0.pdf.

[268] Nia Gissou, *Gender Apartheid is a Horror. Now the UN Can Make It a Crime Against Humanity,* NEW ATLANTICIST, ATLANTIC COUNCIL, (Oct. 5, 2023), https://www.atlanticcouncil.org/blogs/new-atlanticist/gender-apartheid-is-a-horror-now-the-united-nations-can-make-it-a-crime-against-humanity/.

[269] *See* Bell, *supra* note 207, at 185.

territory of other States Parties in the period since July 1, 2002."[270] The investigation will cover crimes committed by all the main parties to the Afghanistan conflict, that is, crimes against humanity and war crimes by the Taliban and affiliated forces and Afghan National Security Forces. as well as alleged crimes by the U.S. armed forces and the Central Intelligence Agency (CIA).[271] The Rome Statute includes as a crime against humanity the persecution of any identifiable group, including based on gender, in Art 7(1)(h). Since the last U.S. troops left Afghanistan in August 2021, no international intervention has taken place. Instead, the ongoing investigation against Taliban crimes is hoped to be updated to include the current return of its policies of gender persecution.[272] "The ICC's work in Afghanistan remains vital for justice to the victims of terrible crimes, including women and girls, ethnic minorities, and LGBT people," the UN Special Rapporteur on Afghanistan, Mr. Gossman, emphasized.[273] The Rome Statute of the International Criminal Court (ICC) and the Ljubljana Convention on the investigation and prosecution of international crimes both include gender-based offenses, particularly within the definition of crimes against humanity, where "the severe deprivation of women's fundamental rights based on their gender" is included. Thus, it is possible to use the current Rome Statute against gender persecution by the Taliban, as indicated by the Hassan case from Mali, now on trial in the ICC.[274] However, the more recent definition of "gender apartheid" might be broader than the current ICC definition of crimes against humanity. Thus, several actors are lobbying for the inclusion of gender apartheid into the Rome Statute.[275] The benefit would be that it would criminalize *per se* gender apartheid as an oppressive system, drawing on the

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[270] Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, Judgment, I.C.C. 02/17-138, (Appeals Chamber Mar. 5, 2020).

[271] Situation in Afghanistan, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to Article 18(2) of the Statute authorizing the Prosecution to resume investigation", ICC-Resume Investigation", Decision, I.C.C. 02/17-218, (Apr. 4, 2023).

[272] Richard Bennett (Special Rapporteur on the Situation of Human Rights in Afghanistan), *Second Rep. on the Situation of Human Rights in Afghanistan*, U.N. Doc A/HRC/52/84.

[273] *ICC: Afghanistan. Inquiry Can Resume,* HUM. RTS. WATCH (Oct. 31, 2022), https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume.

[274] Al Hassan Case, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,* Mali, ICC-01/12-01/18, (2018), Judgement to be delivered on June 24, 2024.

[275] Ahmad Ali Shariati, *Gender Persecution and Gender Apartheid in Afghanistan: Seeking the Appropriate Legal Basis for International Accountability*, EJIL TALK! (Apr. 10, 2024), https://www.ejiltalk.org/gender-persecution-and-gender-apartheid-in-afghanistan-seeking-the-appropriate-legal-basis-for-international-accountability/.

implications of the term "apartheid" which is an established crime. In the context of the ICC investigation in Afghanistan, however, the ICC has already an inroad through the current case in ICC "crimes that have a nexus to the armed conflict in Afghanistan."[276]

The ICC investigation of the many and persistent (20+ years), grave crimes, made against women, men, and children, highlights that the situation in Afghanistan could qualify as an R2P intervention. This is also true for the policy of gender apartheid. It will not go away through the narrow window of the ongoing ICC investigation, where the Taliban gender apartheid falls outside the scope of the investigation's nexus to an armed conflict.

2.3.2 THE RUSSIAN INVASION OF UKRAINE

In November 2021, Russia did a buildup of over 100,000 military forces along Ukraine's borders. Russia argued that the Russian minority in Donetsk and Luhansk were severely oppressed and that Ukraine tried to carry out genocide against them.[277] Russia also demanded promises that Ukraine would never be allowed to join NATO. NATO's response was a maintained position that it is up to Ukraine to decide on NATO membership. [278] Russia launched a full-scale invasion of its neighbor on February 24, 2022, with a march on Kyiv in an attempt at regime change.[279]

The invasion is a clear violation of international law, Art. 2(4) in the UN Charter, and state sovereignty.[280] The invasion gave Ukraine a right to individual and collective self-defense by Art.51 in the UN Charter. Ukraine received military supplies, training, equipment, and economic support from

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[276] Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II, "Decision pursuant to article 18(2) of the Statute authorizing the Prosecution to resume investigation", ICC-02/17-218, (Appeals Chamber Apr. 4, 2023).

[277] *Full Text: Putin's declaration of war on Ukraine of war on Ukraine*, THE SPECTATOR, (Feb. 24, 2022, 10 AM).

[278] Jim Garamone, *Leaders Agree to Expedite Ukraine's NATO Membership,* US Department of Defense, DOD News (July 11, 2023)

[279] Gabriella Blum & Naz Modirzadeh, *The Ukraine conflict and international law*, Harvard Law School Faculty Scholarship, (Mar. 9, 2022), [https://hls.harvard.edu/today/the-ukraine-conflict-and-international-law].

[280] Marko Milanovic, *What is Russia's Legal Justification for Using Force against Ukraine?*, EJIL TALK! (Feb. 24, 2022), https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/ (accessed Jan. 9, 2024); Anthony Dworkin, *Russia Attacks Ukraine,* Commentary, THE EUROPEAN COUNCIL ON FOREIGN RELATIONS (Feb. 25, 2022).

the EU, other European States, The U.S., and Canada but NATO did not do any direct military intervention because Ukraine is not a NATO member.

The ICC has received 43 state referrals, and the Prosecutor announced the opening of an investigation in March 2022. The scope of the situation encompasses any past and present allegations of war crimes, crimes against humanity, or genocide committed on any part of the territory of Ukraine by any person from November 21, 2013, onwards.[281]

The war has been strongly condemned by the UN, NATO, and other actors. The UNSC failed to adopt a draft resolution that garnered eleven votes, due to Russian veto. Its text demanding the Russian Federation should immediately cease its use of force against Ukraine, and withdraw all its military forces unconditionally from that country's territory, and called upon all parties to allow and "facilitate the rapid, safe and unhindered access of humanitarian assistance to those in need, to protect civilians, including humanitarian personnel, and children."[282] Instead, the UNSC adopted a procedural S/RES/2623 (Feb. 27, 2022), calling for an *Emergency Special Session of the General Assembly* to be able to respond to the Russian invasion of Ukraine.[283] It emphasized "taking into account that the lack of unanimity of its permanent members at its meeting on February 25 has prevented the UNSC from exercising its primary responsibility for the maintenance of international peace and security." The Emergency Special Session was immediately followed up by UNGA Resolution ES-11/1 "Aggression against Ukraine," (Mar. 2, 2022), adopted with an overwhelming majority of the UN members, with 141 affirmative votes.[284] It deplored Russia's invasion of Ukraine and demanded a full withdrawal of Russian forces and a reversal of its decision to recognize the self-declared People's Republics of Donetsk and Luhansk.

Interestingly, R2P was invoked by the Authorities in Russia, as one prominent reason for the invasion. In Putin's Declaration of War, he emphasized:

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[281] *Ukraine, Information for Victims*, ICC Homepage, [https://www.icc-cpi.int/victims/Ukraine] and *Situation in Ukraine,* ICC-01/22 (Mar. 2, 2022).

[282] SC/14808, (Feb. 25, 2022). The draft, submitted by Albania and the United States, garnered support from 11 members but was vetoed by the Russian Federation. China, India and the United Arab Emirates abstained.

[283] S.C. Res. 2623 (Feb. 27, 2022). It recorded votes of 11 in favor to 1 against (Russian Federation), with 3 abstentions (China, India, and United Arab Emirates).

[284] G.A. Res. ES-11/1, Aggression against Ukraine (Mar. 2, 2022), with 141–5–35 (for–against–abstained).

> [t]o *protect people* who have been subjected to bullying and genocide by the Kyiv regime for eight years. And for this, we will strive for the demilitarization and denazification of Ukraine, as well as bringing to justice those who committed numerous, bloody crimes against civilians, including citizens of the Russian Federation.[285]

Putin also referred to the right to self-determination, enshrined in Art.1(3) of the UN Charter, because the Donetsk and Luhansk breakaway republics were officially recognized by the Russian leader the days before the invasion of Ukraine.[286] The secession was used as an 'invitation" to participate in collective self-defense, but also to launch an R2P intervention, citing remedial secession.[287] Even if greatly exaggerated by Putin, the U.S. Department of State, Amnesty International, and the UN had in previous Reports confirmed Ukrainian forces' human rights abuses and the government's inaction to prosecute abuses in the Donbas region resulting in impunity in the separatist war.[288]

In the 21st century, Putin's Government has used R2P as a justification, time and again, for armed intervention aimed at seceding the Russian minorities in South Ossetia, Abkhazia, Crimea, and Sevastopol, from Georgia respectively Ukraine, so that they could integrate or associate with Russia.[289] Russian rhetoric has invoked Kosovo as a precedent and argued that Russian minorities have suffered severely from pressure and endured attacks from the Mother state and that referendums have been carried out with overwhelming

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[285] *Full Text: Putin's declaration of war on Ukraine of war on Ukraine*, THE SPECTATOR (Feb. 24, 2022).

[286] Russia had signed a decree recognizing the self-proclaimed "Donetsk People's Republic" (DPR) and the "Luhansk People's Republic" (LPR) as independent.

[287] *Id.*

[288] "The government generally failed to take adequate steps to prosecute or punish most officials who committed abuses, resulting in a climate of impunity. Human rights groups and the United Nations noted significant deficiencies in investigations into human rights abuses committed by government security forces, in particular into allegations of torture, enforced disappearances, arbitrary detention, and other abuses reportedly perpetrated by the security service of Ukraine (SBU)". Ukraine 2017 Human Rights Report, US DEPARTMENT OF STATE, (2017), https://www.state.gov/wp-content/uploads/2019/01/ukraine.pdf.

[289] Bring & Svanberg, *supra* note 62, at 414, Heather Ashby, *How The Kremlin Distorts the 'Responsibility to Protect' Principle,* Analysis, UNITED STATES INSTITUTE OF PEACE, (Apr. 7, 2022), https://www.usip.org/publications/2022/04/how-kremlin-distorts-responsibility-protect-principle.

support for independence.[290] Russia's claim that their military "special operation" is a legitimate R2P operation has been repudiated, as "a misappropriating and abusing R2P language to justify intervention."[291] Professor Hipphold remarks that Putin uses "Orwellian 'Newspeak' on the international scene, in an attempt to justify an intervention," that has no roots in large-scale human rights abuses and international crimes.[292] The inherent problem with Putin's rhetoric is how he highlights the negative consequences and pasted bias through previous R2P interventions in Kosovo, Libya, and Syria from the West, and uses the same reasoning to invade Ukraine, attempt regime change.

Ukraine's president Volodymyr Zelensky, desperate for help, asked for an R2P intervention in the form of no-fly zones patrolled by NATO to protect civilians in Ukraine, but NATO declined citing the risk of escalation.[293] Some scholars are proponents of an R2P intervention to protect the people of Ukraine, as evidence of international crimes committed by Russians grow.[294] Others find the Ukraine war show how deficient R2P is, failing to protect civilians and pointing to that "R2P was set up to fail," due to the veto and unresolvable geopolitical tension.[295] However, others notice that Russia's atrocities did not escape R2P liability, as harsh, unparalleled, draconian, non-military sanctions against Russia were adopted by the EU, the U.S., and many other countries, although they stopped short of a blockade, (that is

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[290] Bring & Svanberg, *supra* note 62, at 411.

[291] Mark Kersten, *Does Russia Have a "Responsibility to Protect" Ukraine? Don't Buy It!,* THE GLOBE AND MAIL (2014), https://www.theglobeandmail.com/opinion/does-russia-have-a-responsibility-to-protect-ukraine-dont-buy-it/article17271450/./.

[292] Peter Hilpold, *Justifying the Unjustifiable: Russia's Aggression against Ukraine, International Law, and Carl Schmitt's "Theory of the Greater Space* ("*Großraumtheorie*"), 22.3 CHINESE J. OF INT. L. 409–33, at 27 (Sep. 2023).

[293] Catie Edmonson, *Annotated Transcript: Zelensky's Speech to Congress,* N.Y. TIMES (Mar. 16, 2022), https://www.nytimes.com/2022/03/16/us/politics/transcript-zelensky-speech.html.

[294] Charles H. Camp, Kiran Nasir Gore, & Lilia Chu, *Nation States Must Comply with Their Responsibility to Protect Ukraine Against the Russian Federation's Ongoing War-crimes*, THE WORLD FIN. REV. (Aug. 25, 2023); Christopher Skaluba, *The US and allies should be weighing their military options,* ATLANTIC COUNCIL, [https://www.atlanticcouncil.org/blogs/new-atlanticist/experts-react-russia-has-launched-a-war-against-ukraine-how-can-the-west-fight-back/ (visited Jan. 9, 2024)].

[295] Peter Lee, *Ukraine: the UN's 'responsibility to protect' doctrine is a hollow promise for civilians under fire,* THE CONVERSATION (Mar. 7, 2022), https://theconversation.com/ukraine-the-uns-responsibility-to-protect-doctrine-is-a-hollow-promise-for-civilians-under-fire-178661.

implementation by the use of force).[296] The UN Secretary-General suggested such non-military sanctions as a non-forceful "pillar II" concept of the R2P doctrine.[297] The crisis in Ukraine has prompted renewed calls for UNSC reform, specific in relation to the veto.[298] It has led to calls for unilateral military R2P intervention, to prevent genocide, crimes against humanity and war crimes being perpetrated, "not by a State against its own population but by an aggressor State," to cite Rebecca Barber .[299] The ironic twist being that Putin used R2P as a just cause for the intervention.

The Russian invasion of Ukraine has caused large-scale suffering and death, both among civilians and combatants with a death toll topping 500 000 people on both sides. About 130,000 Ukrainian and about 230,000 Russian soldiers have been killed, as of winter 2024 but at the end of 2024 some sources point to that as much as 600,000 Russians and 400,000 Ukrainians have been killed.[300] Fighting and air strikes have inflicted nearly 22,000 civilian casualties, leaving 10,000+ dead, while 5.1 million people are internally displaced, and more than 6.2 million have fled Ukraine, 17.6 million people need humanitarian assistance, according to the UN Human Rights Monitoring Mission in Ukraine.[301]

The ICC is investigating war crimes, crimes against humanity, and genocide.[302] In March 2023, ICC Pre-Trial Chamber II issued arrest warrants:

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[296] The sanctions include targeted restrictive measures (individual sanctions), applied against 2000+ individuals and entities. They comprise of economic sanctions and visa measures, freezing of assets controlled by Russia and Russia's central bank, ban on oil- and gas imports from Russia, export bans, etc. The sanctions also encompass Belarus in response to its involvement in the invasion of Ukraine, Also, Iran, in relation to the manufacture and supply of drones, has been sanctioned.

[297] Responsibility to Protect: timely and decisive response Report of the Secretary-General, Follow-up to the outcome of the Millennium Summit, Special report by the UN Secretary General, U.N. Doc. A/66/874–S/2012/578 (July 25, 2012); Rebecca Barber, *Does the Responsibility To Protect Require of States in Ukraine?,* 25 J. INT. PEACEKEEPING 155–77 (2022), https://www.justsecurity.org/80833/does-the-responsibility-to-protect-require-states-to-go-to-war-with-russia/.

[298] Barber, *supra* note 298, at 172.

[299] *Id.* at 155.

[300] James Kilmer, *Zelensky says 400,000 Ukrainian troops killed or injured in war*, THE TELEGRAPH (Dec. 9, 2024), https://www.yahoo.com/news/zelensky-says-400-000-ukrainian-063000750.html?guccounter=1.

[301] Press Release, *Civilian Deaths in Ukraine War Top 10,000, UN Says*, U.N. Press Release (Nov. 21, 2023), https://ukraine.un.org/en/253322-civilian-deaths-ukraine-war-top-10000-un-says.

[302] Ukraine. Information for Victims, ICC Homepage, [https://www.icc-cpi.int/victims/Ukraine, visited Jan. 23, 2025].

for Vladimir Putin, President of the Russian Federation, and Maria Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation.[303] This is for the suspect of responsibility for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation, as it is suspected between 5000–10,000 children have been abducted.[304] The prosecutor used war crimes in the Arts. 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute, however, not yet using genocide.[305] On March 5, 2024, the ICC issued arrest warrants for senior military officials Viktor Sokolov and Sergey Kobylash, on reasonable grounds suspecting them of war crimes of directing attacks at civilian objects and of causing excessive incidental harm to civilians or damage to civilian objects, based on Arts. 8(2)(b)(ii) and 8(2)(b)(iv) of the Rome Statute, and the crime against humanity of inhumane acts under Art. 7(1)(k).[306] This is aimed at the terror bombings of civilian housing, apartment buildings, shelters, infrastructure, and power plants.

To the day of writing in Spring 2024, no R2P-motivated military intervention by NATO has been considered, and neither has any other direct military confrontation. The closest has been French Prime Minister Emmanuel Macron in a statement made in March 2024, cited "not ruling out sending Western troops." [307] The statement caused a pushback from other European leaders, denying such a proposition. President Donald Trump has emphasized that the vast human toll and destruction in the Ukraine war warrants peace negotiations between Russia and Ukraine to end the war. Trump expressed his wish to stop the Ukraine war at the World Economic Forum in Davos: "The war has to end . . . that's not from the standpoint of the economy but the standpoint of millions of lives are being wasted, Ukrainian and Russian lives. It's a carnage."[308] Trump has not mentioned

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[303] *Situation in Ukraine, Investigation,* ICC-01/22.

[304] *Id.*

[305] *Id.*

[306] ICC news, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov*, [https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and.].

[307] *Interview with Emmanuel Macron*, French national television TF1 and France 2, (Feb. 27, 2024), [https://apnews.com/article/paris-conference-support-ukraine-zelenskyy-c458a1df3f9a7626128cdeb84050d469.].

[308] *'Time to end it': Trump says Ukraine peace efforts 'under way'*, TRT WORLD (Jan. 23, 2025), https://www.trtworld.com/us-and-canada/time-to-end-it-trump-says-ukraine-peace-efforts-under-way-18257268.

R2P in this context, (not sending U.S. or NATO troops). but framing the reason to stop the war about loss of human lives and ending the suffering, does echo a humanitarian goal resounding with many of his supporters. However, critics from European NATO partners and Ukraine President Zelensky believe that a peace negotiation might help Russia win the war and result in an unfair peace deal, giving in to a war of aggression and the dismemberment of Ukraine. But as long as no states are willing to intervene directly to protect Ukraine, indefinite conflict does not safeguard the Ukrainian population. A well-defined peace process can reconcile perspectives from both sides, as one has to remember that it started as an ethnic conflict where a minority tried to separate against the *uti possidetes* of international law, but that the Russian minority in Donetsk and Luhansk already in the Minsk II peace-accord were offered self-government and had de facto separated since 2014.

2.3.3 NAGORNO-KARABAKH

Nagorno-Karabakh was a self-proclaimed Armenian republic in Azerbaijan that ceased to exist as of January 1, 2024, and is now fully under Azerbaijani governance.[309] There has been a long Nagorno-Karabakh ethnic and territorial conflict between Armenia and Azerbaijan over the region. The Nagorno-Karabakh region has been a break-away republic named the Republic of Artsakh, since 1990 but is formally recognized as part of Azerbaijan. Both Armenia and Azerbaijan belonged to the Soviet Union, while Armenians in Nagorno-Karabakh were heavily discriminated against. At the time Armenians were pressured to leave the region and Azerbaijanis were encouraged to settle within it.[310]

After the dissolution of the Soviet Union, a war was fought in the early 1990s and won by the Artsakh Republic and Armenia, which led to their occupation of the region.[311] In 1993 the UNSC adopted resolutions that supported the territorial integrity of Azerbaijan and demanded immediate withdrawal of Armenian forces and a ceasefire was established in 1994.[312]

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[309] Wendell Stevenson, *Nagorno-Karabakh, The Republic that Disappeared Overnight*, THE ECONOMIST (Jan. 1, 2024), https://www.economist.com/1843/2024/01/01/nagorno-karabakh-the-republic-that-disappeared-overnight.

[310] *Nagorno-Karabakh*, BRITANNICA, [https://www.britannica.com/place/nagorno-karabakh].

[311] *Id.*

[312] S.C. Res. 822 (Apr. 30, 1993); S.C. Res. 853 (July 29, 1993); S.C. Res. 874 (Oct. 14, 1993); S.C. Res. 884 (Nov. 12, 1993).

The Armenians were in full control of most of the enclave and held approximately 9% of Azerbaijan's territory outside the enclave.

Since 2008 violence escalated again with several clashes. In 2020 a second full-scale war broke out in Nagorno-Karabakh with an Azerbaijani offensive made with Turkey military support. This was modern warfare deployed with drones and long-range missiles and thousands of casualties, leading to an Azerbaijani victory. An armistice was established by a tripartite ceasefire agreement in which Russia had a major hand, that gave Azerbaijan regained control over the occupied territories surrounding Nagorno-Karabakh plus a third of Nagorno-Karabakh territory. Russian peacekeepers were deployed. Azerbaijan began a blockade against Nagorno-Karabakh in December 2022 effectively blocking transports between Armenia and Nagorno-Karabakh leading to humanitarian concerns. Azerbaijan ignored calls from the Russian peacekeepers to observe the 2020 ceasefire conditions and return to their initial territorial positions. France tried to get the UNSC to issue a joint statement condemning the blockade, but the action failed after what is believed to be Albanian, Russian, UAE, and U.K. supposedly sank the initiative.[313] The ICJ has decided on Provisional Measures to stop the blockade after Armenia referred the situation to the Court.[314] The European Court of Human Rights is also seized of the situation under the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[315]

On September 19, 2023, Azerbaijan troops launched a large-scale military offensive that overran the Republic of Artsakh in one day and led to its surrender. Azerbaijan called the offensive a "local counter-terrorism measure in its sovereign territory."[316] The Republic was officially declared dissolved on January 1, 2024. The attack resulted in a flight of 100,000 Nagorno-Karabakh Armenians to neighboring countries, primarily Armenia, which was nearly the entire population of 120,000 Armenians in Nagorno-Karabakh.[317]

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[313] Joshua Kucera , *UN Security Council opts not to issue statement on Karabakh blockade,* EURASIANET (Jan. 4, 2023), https://eurasianet.org/un-security-council-opts-not-to-issue-statement-on-karabakh-blockade.

[314] Application of International Convention on Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, 2023 I.C.J. 14 (Feb. 22).

[315] *See infra.*

[316] Application of International Convention on Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Order, ¶ 26 (Nov. 17, 2023).

[317] *Id.*

The UNSC discussed the issue in a meeting but did not adopt any resolution condemning the war, most likely because of Russia's opposition, but also because EU's dependence on Azerbaijan oil since the Ukraine war was involved.[318] Multiple alerts were made by various actors such as the European Parliament and NGOs that the region's Armenian population was at risk of being subjected to genocide and ethnic cleansing through the forced transfer of a population,[319] war crimes, and crimes against humanity.[320] The ICC's inaugural prosecutor, Luis Moreno Ocampo, has classified the ethnic cleansing of Nagorno-Karabakh Armenians as a second Armenian genocide and opined that the inaction of the international community encouraged Azerbaijan to act with impunity.[321] The ICJ, in its pending case, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), adopted provisional measures to the end that Azerbaijan had to let Armenians return to Nagorno-Karabakh and ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 or returned to Nagorno-Karabakh, are free from the use of force or intimidation that may cause them to flee.[322]

The forced expulsion of almost the entire Armenian population in the enclave of Nagorno-Karabakh has not met with any R2P language from the international community nor suggestions for any intervention. Despite that, states such as Germany's and the U.S. representatives in the UNSC,[323] and

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[318] Press Release, *Security Council, Latest Clash between Armenia, Azerbaijan Undermines Prospects of Peace, Speakers Warn Security Council, Calling for Genuine Dialogue to Settle Outstanding Issues*, U.N. Press Release SC/15418 (Sep. 21, 2021). A guess is that Russia might have vetoed a resolution, writes Wouter Jan de Graaf, *Russian Cynicism Perpetuates the Armenia-Azerbaijan Conflict*, PROVIDENCE MAGAZINE (Aug. 11, 2020), https://providencemag.com/2020/08/russian-cynicism-perpetuates-armenia-azerbaijan-conflict/.

[319] *Guarantee Right to Return to Nagorno Karabakh After Traumatic Massive Exodus,* HUMAN RIGHTS WATCH (Oct. 5, 2023), https://www.hrw.org/news/2023/10/05/guarantee-right-return-nagorno-karabakh.

[320] Anthony Deutsch & Stephanie van den Berg, *Nagorno-Karabakh Exodus Amounts to a War Crime, Legal Experts Say*, REUTERS (Sep. 29, 2023), https://www.reuters.com/world/asia-pacific/nagorno-karabakh-exodus-amounts-war-crime-legal-experts-say-2023-09-29/.

[321] Luis Moreno Ocampo, Erney Plessman de Camargo, *Current genocides and the consistent international practice to deny them*; Summary of the case of Nagorno-Karabakh, University of Sao Paulo Innovation on global order project (Dec. 20, 2023); HUMAN RIGHTS WATCH, *supra* note 319.

[322] Arm. v. Azer., Provisional Measures, Order of 17 November 2023; Arm. v. Azer., Request for the Indication of Provisional Measures (Feb. 22, 2023).

[323] Annalena Baerbock, Federal Minister for Foreign Affairs of Germany, S/PV.9422

many scholars, stress the responsibility to protect the Armenian minority in Nagorno-Karabakh, comparing it to FRY attacks against Kosovo in 1998–99.[324] The ICJ, in its Provisional Measures, emphasized that the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) demands that the forced expulsion of most Armenians to leave Azerbaijan should be reversed, but without calling it outright an "ethnic cleansing" or genocide.[325]

The EU has not adopted any sanctions, but its organs have condemned Azerbaijan's actions; the European Parliament adopted a resolution that emphasized that ethnic cleansing took place:

> whereas ethnic cleansing is described by the UN Security Council as rendering an area ethnically homogeneous by using force or intimidation to remove from a given area persons of another ethnic or religious group and is contrary to international law; whereas there is a pressing need to stop and reverse the ongoing forced exodus of the local Armenian population, which amounts to ethnic cleansing . . . . [326]

It urged the EU's members to "adopt targeted sanctions against individuals in the Azerbaijani government over the assault and alleged human rights breaches in Nagorno-Karabakh, which blatantly violates international law and international commitments[;]" that the EU suspend any negotiations on a renewed partnership with Baku and consider suspending the application of the EU visa facilitation agreement with Azerbaijan.[327] They also called "to

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(Sep. 21, 2021), said: "Azerbaijan carries *the responsibility to protect* the civilian population living reliably and fully in Nagorno-Karabakh. A displacement and forced exodus of ethnic Armenians from Karabakh is not acceptable."; *see also* Linda Thomas-Greenfield (United States) , *Id.:* " ...its obligation to protect the human rights of those people in its territory."

[324] Sossi Tatikyan, *International Community Must Prevent Azerbaijan's Creeping Ethnic Cleansing in Nagorno-Karabakh*, EVN Report, (Mar. 28, 2022); Sossi Tatikyan, *Can the International Community Reverse the Ethnic Cleansing of Armenians of Nagorno-Karabakh? Part 2*, EVN Report, (Oct. 17, 2023); Avedissian, Karena, *The Failure of the European Union to Address the Threat of Ethnic Cleansing of Armenians in Nagorno-Karabakh*, 15(1) GENOCIDE STUDIES INTERNATIONAL 34–44, 34 (2021); *Project MUSE*, [muse.jhu.edu/article/905258. [muse.jhu.edu/article/905258].

[325] *Id.* at 63.

[326] European Parliament Resolution of October 5, 2023 on the situation in Nagorno-Karabakh after Azerbaijan's attack and the continuing threats against Armenia; EUR. PARL. DOC. (RSP 2879) (2023), The resolution was adopted by 491 votes in favor, 9 against with 36 abstentions.

[327] *Id.*

reduce the EU dependency towards gas exports from Azerbaijan."[328] The European Commission did not follow up on the EU Parliaments demands. It adopted a Statement that only "*called on*" Azerbaijan to:

> . . . ensure the human rights, fundamental freedoms, and security of the Karabakh Armenians, including their right to live in their homes in dignity, without intimidation or discrimination, as well as to create the conditions for the voluntary, safe, dignified and sustainable return of refugees and displaced persons to Nagorno-Karabakh with due respect for their history, culture, and human rights. the cultural heritage and property rights of the local population need to be effectively protected and guaranteed.[329]

The Statement also emphasized that Azerbaijan must comply with the interim measures indicated by the European Court of Human Rights on Sep. 22, 2024, to refrain from taking any measures that might entail breaches of their obligations under the European Convention on Human Rights, notably Art. 2 (right to life) and Art. 3 (prohibition of torture and inhuman or degrading treatment or punishment), by Rule 39 § 2 of the Court.[330]

But no forceful action to protect the Armenian minority in Nagorno-Karabakh was forthcoming from the UNSC, nor any other parts of the international community. This, although the Armenians, is acknowledged to already once have been the victims of the second largest genocide in the 20th century, in the year 1915–16 when 1.2 to 1.5 million Armenians were killed.[331]

2.3.4 GAZA

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[328] *Id.*

[329] 1478th meeting of the Committee of Ministers on October 18, 2023, EU statement on Armenia/Azerbaijan, (Oct. 18, 2023), https://www.eeas.europa.eu/delegations/council-europe/1478th-meeting-committee-ministers-18-october-2023-eu-statement-armeniaazerbaijan_en?s=51.

[330] Interim measures issued by the European Court of Human Rights on Sept. 22 and Provisional measures of the ICJ adopted on Dec. 7, 2021, Feb. 22, 2023, and July 6, 2023.

[331] United States Holocaust Memorial Museum, *The Armenian Genocide (1915–16): Overview*, Holocaust Encyclopedia, https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust; *See more infra* at note 381.

Hamas militants attacked Israel on October 7, 2023, taking over 200 hostages and killing about 1400 persons. Israel declared war against Hamas and their government in Gaza and threatened severe punishment for the terrorist deeds.[332]

On October 9, Israel imposed a complete siege of Gaza, resulting in acute shortages of water, food, and medicines that threatened the survival of 2.3 million Palestinians and created a dire humanitarian crisis.[333] On October 13, 2023, the Israeli Defense Forces (IDF) sent infantry into the Gaza Strip, stating that their goals were to attack Hamas militants and to rescue hostages that had been abducted to Gaza by Hamas. On the 27th of October, the IDF launched a large-scale ground assault that started its official military intervention into Gaza (which is still ongoing, as of January 2025). The assault came amid a series of large-scale Israeli airstrikes that cut off mobile communications and internet access in Gaza. Before the raids, The IDF had urged around 1.1 million civilians, to leave North Gaza so they would not be hurt or caught in cross-fire, to evacuate during a 24-hour window, while Hamas instructed those residents to stay put.

The invasion saw an unfolding humanitarian tragedy, when the Palestinians in Gaza were cut off without humanitarian supplies, food, clean water, and electricity, resulting in an ongoing blackout contributing to the collapse of hospitals and water and sanitation services in Gaza. Later the IDF made similar operations in Rafah in the South Gaza strip. Most civilians were not able to evacuate and were not allowed to leave Gaza, which the UN defines as occupied Palestinian territory, thus under the control of Israel, and the border crossings were closed.[334] Israel had issued multiple evacuation orders for Northern Gaza, over 2 million people lived in Gaza before the start of hostilities, and at least 1.8 million are currently internally displaced. The death toll in December 2024 was estimated at 45,000 Palestinians by UN estimates, and at least 100,100 have been injured.[335] South Africa has brought

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[332] Tolstaff, *Promising Merciless War on Hamas, Netanyahu says Israel will 'avenge this black day'*, THE TIMES OF ISRAEL (Oct. 8, 2023).

[333] *Gaza Background*, GLOBAL CENTER FOR THE RESPONSIBILITY TO PROTECT, [https://www.globalr2p.org/countries/israel-and-the-occupied-palestinian-territory/./]

[334] Samson, Elizabeth. *Is Gaza Occupied? Redefining the Legal Status of Gaza*. Begin-Sadat Center for Strategic Studies, 2010. *JSTOR*, (2010) [http://www.jstor.org/stable/resrep04760, (. Accessed Jan. 11, 2024).].

[335] *Gaza death toll passes 45,000 as UN school suffers new deadly strike,* UN News, Perspective Stories, (Dec. 16, 2024) [https://news.un.org/en/story/2024/12/1158206].

a case against Israel in the ICJ under the Genocide Convention.[336] In May 2024 the Israeli Government pressed ahead with an invasion of the city of Rafah on the southern border of the Gaza Strip in defiance of then U.S. President Joe Biden, who warned such an offensive would be a "red line" Biden said he could not tolerate another 30,000+ dead Palestinians. Germany's Foreign Minister Annalena Baerbock said such an offensive would be "a humanitarian catastrophe."[337] In the U.S. protests among the public against the Israeli war in Gaza, have increased and the focus has also been on the Israeli government's duty to bring the hostages home alive through negotiations.[338] International pressure was mounting on Israel to agree to a cease-fire, but it took until 2025 to manage a cease-fire after pressure from joint efforts by U.S. President Joe Biden and incoming President Donald Trump. The UN Secretary-General finds that the world is witnessing an "unparalleled and unprecedented" level of civilian death in Gaza.[339]

Numerous crimes have allegedly occurred, besides the massive terrorist attack and hostage-taking by Hamas. The IDF launched attacks against civilian installations, and airstrikes targeted hospitals and UN-run schools, with the rationale that they are considered hiding places for the Hamas terrorists, thus being perceived as legitimate military targets under IHL, and civilian casualties are regarded as collateral damages. Also, two-thirds of all homes have been destroyed. Almost 200 relief workers have been killed so far (April 2024), as condemned by UN Secretary-General Antonio Guterres, who called for an independent investigation after Israeli airstrikes killed seven people working for a U.S.-based food charity.[340] Human Rights Watch claims that Israel's war on Gaza has included "acts of collective punishment that amount to war crimes and include the use of starvation as a method of warfare," the cutting off of essential services such as water and electricity,

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[336] Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Oral Hearing, Verbatim record 2024/1, (Jan. 11, 2024).

[337] Ronzheimer & Martuscell, *Netanyahu vows to defy Biden's 'red line' on Rafah*, POLITICO, (Mar. 10, 2024), [https://www.politico.eu/article/israels-netanyahu-says-he-will-defy-bidens-red-line-and-invade-rafah/. /].

[338] *Id.*

[339] OCHA, *Hostilities in the Gaza Strip and Israel, Flash Update #88,* OCHA (Mar. 21, 2024), [https://www.ochaopt.org/ content/hostilities-gaza-strip-and-israel-flash-update-88. The statistics are up to date to Mar. 21, 2024].

[340] Michelle Nichols, *UN Chief to Israel; Israel: 196 aid workers have been killed, why?*, REUTERS, (Apr. 5, 2024), [https://www.reuters.com/world/middle-east/un-chief-hopes-israel-quickly-effectively-boost-gaza-aid-access-2024-04-05/].

and blocking the entry of most critical humanitarian aid.[341] In the UNSC debate of Gaza on 27th February 2024, UN organizations warned again of an imminent famine, with the first deaths from starvation already recorded, prompting the European Union and the U.S. to open a sea corridor to deliver aid from Cyprus as Israeli authorities have been criticized for blocking the delivery of humanitarian assistance by land.[342]

Many state representatives in the UNSC debates also emphasized that Israel was using starvation as a method of warfare.[343] Starvation of civilians as a method of warfare is prohibited under Art. 54(1) of the First Additional Protocol to the Geneva Conventions (Protocol I) and Art. 14 of the Second Additional Protocol (Protocol II). Under the Rome Statute, "intentionally using starvation of civilians as a method of warfare" is a war crime. However, there have been successive cycles of deadly hostilities between Israel and Hamas and other Palestinian armed groups over the past two decades, during which both Israeli forces and Palestinian armed groups have perpetrated serious violations and abuses of international law that likely amount to war crimes. However, the 2023 Hamas terrorist attack and the ensuing Gaza war stands out for its brutality against civilians and the enormous death toll and injured among Palestinians.[344]

There are the two most well-known international tribunals, the ICC and the ICJ, seized the Israel-Gaza conflict, with charges of crimes against humanity, war crimes, and genocide. South Africa, with four other ICC-member states, has also referred the situation in Gaza to the ICC for

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[341] Human Rights Watch, *Israel: Starvation Used as Weapon of War in Gaza Evidence Indicates Civilians Deliberately Denied Access to Food, Water,* HUMAN RIGHTS WATCH (Dec. 18, 2023), https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza#:~:text=Human%20Rights%20Watch%20interviewed%2011,t%20know%20how%20we%20survived.%E2%80%9D.

[342] Press Release, *Security Council, Famine Imminent in Gaza, Humanitarian Officials Tell Security Council, Calling for Immediate Ceasefire*, U.N. Press Release SC/15604 (Feb. 27, 2024), where Ramesh Rajasingham, Director of Coordination at the Office for the Coordination of Humanitarian Affairs, reporting on the grave situation in Gaza, currently at least 576,000 people there — one quarter of the population is one step from famine. Maurizio Martina, Deputy Director-General of the Food and Agriculture Organization (FAO), said that the risk of famine increases daily. In the ensuing discussion, UNSC members expressed concern over worsening food insecurity in the Gaza Strip.

[343] *Id.*

[344] State of Palestine, Situation in the State of Palestine, Investigation, ICC-01/18 (Mar. 3, 2021), with focus on crimes that are alleged to have been committed in the Situation since June 13, 2014.

investigation on allegations of genocide.[345] The ICC's Chief Prosecutor, Karim Kahn, made clear that the ICC will investigate war crimes, crimes against humanity, and genocide, both about the Hamas terrorist attack and hostages taken on the 7th of October, and about Israeli Defense Forces (IDF) actions.[346] In May 2024 the ICC Chief Prosecutor, Karim Khan, made an unprecedented move when he requested arrest warrants for Israeli Prime Minister Benjamin Netanyahu, Israeli Defense Minister Yoav Gallant, and three senior Hamas leaders over alleged war crimes and crimes against humanity.[347] This was after a Panel of Experts in International Law convened by the ICC Prosecutor announced its conclusions. The Panel was established at the Prosecutor's request in support of his investigation into the 'Situation in the State of Palestine', which covers international crimes committed either on the territory of Palestine or by a Palestinian national. The Panel's mandate was to advise the Prosecutor on whether his applications for arrest warrants met the standard provided in Article 58 of the Rome Statute of the ICC and the Panel unanimously endorsed the Prosecutor's assessment that the Court had jurisdiction and that there were 'reasonable grounds to believe' that individuals named in the arrest warrants— including senior leaders of Hamas and Israeli Prime Minister Benjamin Netanyahu—have committed war crimes, or crimes against humanity within the jurisdiction of the Court.[348] Khan said both Netanyahu and Gallant bear criminal responsibility for a list of "war crimes," including starving civilians, willfully "causing great suffering, or serious injury," willful killing and, intentionally directing attacks against a civilian population. "We submit that the crimes against humanity charged were committed as part of a widespread and systematic attack against the Palestinian civilian population under State policy," Khan

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[345] Mogomotsi Magome, *South Africa refers Israel over Gaza attacks to the ICC as pressure mounts to Cut diplomatic ties,* AP NEWS (Nov. 16, 2023).

[346] "I have to say that Israel has clear obligations about its war with Hamas: not just moral obligations, but legal obligations that it has to comply with the laws of armed conflict. It's there in the Rome Statute. It's there in the Geneva Conventions." *Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the situation in the State of Palestine and Israel,* Office of the Prosecutor, ICC Homepage, (Oct. 30, 2023), [https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-cairo-situation-state-palestine-and-israel#:~:text=I%20want%20to%20underline%20clearly,re%20in%20the%20Middle%20Ages.]

[347] *South Africa welcomes ICC arrest warrant request for Netanyahu and Hamas leaders*, AFRICA NEWS (May 20, 2024).

[348] *Amal Clooney and Marko Milanovic, Panel of Experts Publishes Report Supporting ICC Arrest Warrant Applications for Crimes in Israel and Palestine*, EJIL TALK! (May 20, 2024), https://www.ejiltalk.org/panel-of-experts-publishes-report-supporting-icc-arrest-warrant-applications-for-crimes-in-israel-and-palestine/.

wrote in the ICC statement.[349] Also, Hamas leaders were charged with crimes against humanity as part of a widespread and systematic attack against the civilian population of Israel by Hamas and other armed groups under organizational policies.[350] On Nov. 21, 2024, the arrest warrants were issued for Prime Minister Netanyahu and former Defense Minister Gallant, by the ICC and took effect—and all 124 state parties to the ICC are now legally obliged to arrest Netanyahu and Gallant if they set foot on their territory.[351]

The arrest warrants met with criticism from several Western states. U.S. President Biden and the U.S. State Department asserted that the ICC lacks jurisdiction in this case since Israel is not a signatory to the Rome Statute, as did Emanuel Macron, the French prime minister, who also referred to Netanyahu's immunity as Prime Minister.[352] It met with outrage from Israel Prime Minister Netanyahu, who said they would appeal the decision and said the ICC's decision was a "dark day in the history of humanity" and "an antisemitic step that has one goal - to deter me, to deter us from having our natural right to defend ourselves against enemies who try to destroy us." [353] South Africa

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[349] Khan's charges read: "On the basis of evidence collected and examined by my Office, I have reasonable grounds to believe that Benjamin NETANYAHU, the Prime Minister of Israel, and Yoav GALLANT, the Minister of Defense of Israel, bear criminal responsibility for the following war-crimes and crimes against humanity committed on the territory of the State of Palestine (in the Gaza strip) from at least 8 October 2023: 'Starvation of civilians as a method of warfare as a war crime contrary to article 8(2)(b)(xxv) of the Statute; Wilfully causing great suffering, or serious injury to body or health contrary to article 8(2)(a)(iii), or cruel treatment as a war crime contrary to article 8(2)(c)(i); Wilful killing contrary to article 8(2)(a)(i), or Murder as a war crime contrary to article 8(2)(c)(i); Intentionally directing attacks against a civilian population as a war crime contrary to articles 8(2)(b)(i), or 8(2)(e)(i); Extermination and/or murder contrary to articles 7(1)(b) and 7(1)(a), including in the context of deaths caused by starvation, as a crime against humanity; Persecution as a crime against humanity contrary to article 7(1)(h);Other inhumane acts as crimes against humanity contrary to article 7(1)(k)', *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, (20 May 2024),* [https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state].

[350] *Biden says it's 'outrageous' ICC is seeking arrest warrants for Netanyahu and Israeli leaders*, NBC NEWS (May 20, 2024), https://www.nbcnews.com/news/world/netanyahu-arrest- warrant-israel-hamas-war-icc-rcna149743.

[351] *Statement of ICC Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants in the Situation in the State of Palestine*, ICC (Nov. 21, 2024), [https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-state-palestine].

[352]Frances Mao, *Israel to appeal against ICC warrants for Netanyahu and Gallant,* BBC NEWS (Nov. 27, 2024), https://www.bbc.com/news/articles/cm273g1jm51o.

[353] *Id.*

and several other states welcomed the prosecutor's decision.[354] From the point of international law, Israel is not a party to the ICC, so it is unlikely the targeted Israeli leaders will face prosecution. This is because non-state party sitting officials have immunity under Art. 98(1) of the Rome Statute, to cite Olivia Flash, who comments on the opposite effects of Art 27(2) and Art 98(1) in the Rome Statute:

Article 27(2) of the Rome Statute provides that international immunities, such as those enjoyed by sitting senior officials of a State, cannot shield such officials from prosecution by the ICC. This provision addresses the position of state officials vis-à-vis the ICC. Article 98(1), conversely, provides that the ICC is prevented from requesting States Parties to arrest and/or surrender foreign state officials who enjoy immunity in their territory unless the state in question has waived that immunity. This provision addresses the position of state officials vis-à-vis other States.[355]

However, there has been confusion on the interpretation of Art.98 (1), both from the ICC and several Western States, who have declared the need to arrest Russian President Putin if he sets foot on their territory.[356] The Palestine administration, on the other hand, is a party to the ICC, which is why Art 27 applies to them, but is not likely to extradite the Hamas leaders, since they appear to have been killed by IDF.[357] However, the decision would have made it difficult for them to travel abroad, as 124 states are parties to the ICC, and must arrest an indicted person. But since former Defense Minister Gallant is out of office, a case might be made that he no longer has immunity. The arrest warrants are the first time where Western leaders have been indicted since the establishment of the ICC, experts noted.[358]

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[354] "As Prime Minister of Israel, I reject with disgust the Hague prosecutor's comparison between democratic Israel and the mass murderers of Hamas," said Netanyahu, *South Africa welcomes ICC arrest warrant request for Netanyahu and Hamas leaders*, AFRICA NEWS (May 20, 2024), https://www.africanews.com/2024/05/21/south-africa-welcomes-icc-arrest-warrant-request-for-netanyahu-and-hamas-leaders//.

[355] Olivia Flasch, *The interplay between Articles 27 and 98 of the Rome Statute: A familiar friend makes a new appearance in the arrest warrants against Netanyahu and Gallant*, EJIL TALK! (Dec. 10, 2024), [https://www.ejiltalk.org/the-interplay-between-articles-27-and-98-of-the-rome-statute-a-familiar-friend-makes-a-new-appearance-in-the-arrest-warrants-against-netanyahu-and-gallant/].

[356] *Id.*

[357] *Id.*

[358] Rashmin Sagoo & Talita Dias, *The ICC Prosecutor's Applications for Arrest*

While the ICC did not issue arrest warrants for the crime of genocide, South Africa has instituted proceedings against the state of Israel at the ICJ, accusing the country of committing "genocide" against Palestinians in Gaza, under the Genocide Convention.[359] South Africa's ruling African National Congress has long shown its support for Palestinians and backed their right to self-determination, considering them to be subject to a long-standing regime of apartheid-like South Africa once was. No other states have, so far, intervened in the ICJ case, but several experts[360] and states are supportive.[361] In the first part of 2024, the ICJ adopted provisional measures in two Court orders. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* Order of 26 January 2024 and Order of 28 March 2024. [362] In its Application, South Africa also requested the Court to indicate provisional measures to "protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention" and "to ensure Israel's compliance with its obligations under the Genocide Convention not to engage in genocide, and to prevent and to punish genocide."[363] In its order of January 26, the ICJ adopted Provisional Measures with an overwhelming majority, "that the State of Israel shall not commit any genocidal acts" and "shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by

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Warrants Explained, CHATHAM HOUSE (May 20, 2024), https://www.chathamhouse.org/2024/05/icc-prosecutors-applications-arrest-warrants-explained; Craig Mokhiber, former United Nations human rights official, post on X, (May 20, 2024).

[359] *Convention on the Prevention and Punishment of the Crime of Genocide*, Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of December 9, 1948.

[360] Experts - part of Human Rights Council Special Procedures, support the proceedings and call for a cease-fire, The Organization of Islamic Cooperation was supportive, calling on the ICJ to "take urgent measures to stop this mass genocide, OIC Welcomes South Africa's International Court of Justice Suit against Israel Over Genocide, OIC Homepage, (Dec. 30, 2023), [https://www.oic-oci.org/topic/?t_id=40161&t_ref=26840&lan=en].

[361] Lisandra Novo, *Five questions and answers about South Africa's genocide case against Israel*, NEW ATLANTICIST (Jan. 12, 2024), https://www.atlanticcouncil.org/blogs/new-atlanticist/five-questions-and-answers-about-south-africas-genocide-case-against-israel/.

[362] Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Verbatim Record 2024/1 (Jan. 11, 2024).

[363] S. Afr. v. Isr., Order, ¶ 4 (Jan. 26, 2024). The Court indicates provisional measures, Order of 26 January 2024, ¶ 4, ICJ Press Release, No. 2024/6 (Jan. 26, 2024), [https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-pre-01-00-en.pdf].

Palestinians in the Gaza Strip" and "The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in Gaza;"[364] The Order also affirmed that the Hamas had to return the hostages unharmed.[365] Because Israel continued its war in Gaza with the attack on the city of Rafah, South Africa asked for additional provisional measures and the ICJ delivered a new Order of March 28, 2024.[366] In it, the ICJ decided to emphasize its provisional measures of January 26 and the South African requested the Court "to indicate further provisional measures," concerning Articles 41, 75, and 76 of the Statute of the Court. The ICJ decided on provisional measures, now especially targeted at the famine and starvation in Gaza and the safe and unhindered delivery of humanitarian assistance. Thus, the ICJ unanimously adopted in 2 (a):

> The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and given the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation. Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary;

The Provisional Measures para. 2(b) were adopted with a vote 15 to 1 to:

> Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action,

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[364] *Id.*, Order in ¶. 5.
[365] *Id.*, Order in ¶¶ 1 and 2.
[366] S. Afr. v. Isr., Order (Mar. 28, 2024).

the delivery of urgently needed humanitarian assistance;[367]

ICC's Chief Prosecutor was correct when he emphasized that both the Palestinian Hamas Government and individual terrorists, as well as the Israeli government and IDF, have a responsibility under international law not to commit atrocity crimes as laid down in the Rome Statute. What's important is that those are also the crimes—war crimes, crimes against humanity, and genocide—that trigger R2P. This responsibility applies to three categories of people in the conflict: the Palestinian civilians, the hostages, and the Israeli civilians. It applies to both the Israeli government and the Palestinian Authorities.

To start with the hostages, it is well known in Public International Law (PIL) that humanitarian intervention also applies to a state's nationals abroad when in need of rescue operations. This is the *Protection of Nationals Abroad Doctrine*.[368] This right is limited to the use of force to rescue the citizens of the intervening state in compliance with the props of necessity and proportionality and is limited to the objective of protecting citizens from harm.[369] Thus, it is usually done by a commando raid, conducted by the state's forces, with the help of contributing forces. The connection to R2P is the criteria that there is a *failure or inability to protect* a state's own nationals. Hostage-taking is a grave violation under Common Art. 3 of the *Geneva Conventions* which prohibits the "taking of hostages" and it is also a grave breach of the *Fourth Geneva Convention* Art. 96, and is a norm of customary international law.[370] Moreover, the ICC issued an arrest warrant, on November 21, 2024, in the *Situation in the State of Palestine*, for Mohammed Diab Ibrahim Al-Masri, 'Deif', for alleged crimes against humanity and war crimes committed on the territory of the State of Israel and the State of Palestine from at least October 7, 2023.

The Israeli Government has an R2P responsibility to protect its citizens and thus the Israeli hostages and, to that end, has the right to use force. The doctrine suggests that should negotiations fail, because Israel does have a

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[367] *Id.*, 36 (a) and (b).

[368] Sir Gerald Fitzmaurice, *The General Principles of International Law*, 81, RECUEIL DES COURS 172–74. (1957).

[369] Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 496 (1952); Andrew W. R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 WASH. U. GLOBAL STUD. L. REV. 627, 629 (2012).

[370] *The IV Geneva Conventions of August 12, 1949*, The International Red Cross, (1949).

policy of non-negotiation with terrorists, a military rescue mission is legal. Not least Israeli forces have made successful rescue missions abroad to free hostages, such as the Entebbe raid in 1976, when Israeli commandos freed the hostages from a hijacked plane at Entebbe Airport in Uganda, with justified minimum casualties.[371] This option has to be carried out in such a way that the hostages' lives are least put in danger, by the principles of IHL of necessity and proportionality. The IDF's extensive bombing of civilian sites and the excessive and unnecessary use of force killing three of the hostages waving a white flag, have exceeded the criteria for a proportionate R2P rescue mission. Arguably, it could be that the Israeli Government needs to free the hostages under an R2P responsibility. The Government has different options; but when choosing a military alternative, it should be done with precaution, fulfilling the principles of military necessity and proportionality in IHL, and with the narrowly defined aim to save the hostages' lives. When the Israeli military, the IDF, does not prioritize the freeing of the hostages, but instead unnecessarily endangers them through starvation and indiscriminate attacks on Gaza, the strict criteria for saving nationals abroad in a humanitarian intervention are not met. However, even if the use of force exceeded proportionality and the hostages were put at severe risk, the Israeli government still had a responsibility to free the hostages under the R2P doctrine. This responsibility was set aside when putting revenge and retaliation before Israeli civilians' lives. Still, 470 days after the 7th of October attack, IDF forces have only managed to free a very limited number of hostages by force, while more than 90 hostages remain in the Gaza Strip at the end of January 2025, as freeing the hostages was not made a priority.[372] Three Israeli scholars emphasized that states have responsibilities towards their nationals and the problem is when the Israeli government is unable and unwilling to protect its citizens, they argue that the international community ought to help bring the hostages home alive.[373] On the 18th of January, finally, after pressure from the U.S. Government, a

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[371] Leslie Green, *Rescue at Entebbe – Legal Aspects*, 6 ISRAEL YEARBOOK ON HUMAN RIGHTS, 1976, s. 312. Actually, Israel Prime Minister Netanyahu's brother was in command of the Entebbe mission, but was killed in the raid. In 1980 the United States landed commandos in Tabas, Iran, overnight, in order to free the hostages in the American Embassy, Text of Kenneth Dam's Speech on Legal Bases for US Action, Nov. 4, 1983.

[372] Relatives of hostages still being held by militants in Gaza have called on Israeli Prime Minister Benjamin Netanyahu to ensure all remaining captives are freed, and they also beg U.S. President to excert more pressure on the parties.

[373] Shelly Aviv Yeini, Amichai Cohen, & Hostovsky Brandes, *Hostage Situation in Gaza and the Responsibilities of the International Community,* OPINIO JURIS (Dec. 7, 2023), https://opiniojuris.org/2023/12/07/the-hostage-situation-in-gaza-and-the-responsibilities-of-the-international-community/.

cease-fire was managed that paved the way for the release of three of the hostages in exchange for Palestinian female prisoners, and there is hope that these peaceful negotiations will result in more hostages soon being released.

The Israeli government has justified the Gaza intervention with the right to self-defense against an armed attack and international terrorism. That is a separate legal basis, outside the scope of R2P. However, such an operation has to follow IHL principles of distinction, precaution, and proportionality in IHL. "About every dwelling house, about any school, any hospital, any church, any mosque – those places are protected, unless the protective status has been lost," to cite ICC Chief Prosecutor Karim Kahn, under Art. 52 and 53 of Protocol 1, in addition to the Geneva Convention (Protocol 1) that embodies principles of customary international law.[374] The dire humanitarian situation in Gaza, with the purposeful cut off of medicine, food, and water to the inhabitants in Gaza are grave breaches of Protocol 1 Art. 54, the impeding of relief supplies.

The Netanyahu government has referred to its responsibility to keep Israelis safe from Hamas attacks as a primary justification for the military operation in self-defense, however, self-defense is separate from R2P. With threats of renewed terrorist attacks and ensuing crimes of humanity and war crimes, Israel can claim an R2P responsibility to protect its population, as the Government under R2P has a primary responsibility for their safety. However, in contrast to self-defense, any R2P military response has to be short and targeted to its aim, that is saving lives. R2P applies to the whole civilian population in Israel, as well as Palestinians. Gaza can be considered an occupied territory under the definition in Art. 42 of the *Hague Regulations*, which explains why the laws of occupation are applicable.[375] They are found in the Hague Regulations of 1907, the Fourth Geneva Convention of 1949, and its Additional Protocol I, and in customary international law. Israel is required, as the occupying power, to make sure that the basic needs of the population of Gaza, such as food and water, are met and that the people in Gaza get their human rights. The same is true for the *de facto* authorities in Gaza, Hamas, they need to abide by IHL and human rights in the Gaza territory. Thus, both the Israeli government as an occupying power and the *de facto* Palestinian authorities must not intentionally target civilians and use the population as human shields. This is part of the R2P doctrine, a state's

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[374] *Protocol Additional to the Geneva Conventions of 12 August 1949*, and relating to the Protection of Victims of International Armed Conflicts, (June 8, 1977).

[375] ICRC's legal team, *Occupation and International Humanitarian: Answers to Your Questions, Geneva, Switzerland,* (Dec. 14, 2014), https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm.

responsibility to protect all of its population.

There is a good case that R2P intervention would be legal and justified in the case of the situation in Gaza, but none of the parties nor the international actors have managed to raise the issue, which has made snide comments in the press and the international debate.[376] "Where is the Responsibility to Protect Gaza?" is a rhetorical question asked by Professor Abdelwahab El-Affendi.[377] Also, Israeli researchers asked early on for an R2P intervention from the international community, to help recover the hostages:

> A fair assessment would be that Hamas is unwilling and the Israeli Government unable to do what it takes to free the hostages and abide by PIL. [ ] If one considers R2P a legitimate doctrine in international law, then the offenses committed by Hamas should be sufficient to trigger its applicability.[378]

Due to the U.S. use of its veto four times, the UNSC has not managed any binding Chapter VII resolution but has adopted non-binding resolutions 2712 and 2720 (2023).[379] These resolutions do not cite binding Chapter VII, nor do they call for any ceasefire or UN peacekeepers. Resolution 2720 does demand respect for International Law (PIL), unhindered delivery of humanitarian assistance,[380] and ". . . for the immediate and unconditional release of all hostages";[381] "reaffirm [] that civilian objects [and] places of refuge . . . are protected under [IHL]"; "reject[] forced displacement of the civilian population . . . in violation of [IHL] and . . . human rights law";[382] and

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[376] Abdelwahab El-Affendi, *Where is the 'responsibility to protect' in Gaza?,* Opinion, ALJAZEERA (Oct. 31, 2023), https://www.aljazeera.com/opinions/2023/10/31/where-is-the-responsibility-to-protect-in-gaza, who continues: ". . . y*esterday's proponents of the 'responsibility to protect' doctrine are today's biggest supporters of Israel's genocidal assault on Gaza*."

[377] *Open Call by for an Immediate Ceasefire in the Gaza Strip and Israel to Prevent a Humanitarian Catastrophe and Further Loss of Innocent Lives*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, Open Letter, (Oct 18, 2023), [https://www.globalr2p.org/publications/crasefirenow-in-gaza-strip-and-isreal-290-orgs/./]

[378] Yeini, Cohen, and Brandes, *supra* note 373.

[379] S.C. Res. 2720 (2023).

[380] *Id.*, op. ¶ 3."*Demands* the unhindered delivery of humanitarian assistance to the Gaza strip,"

[381] *Id.*, op. ¶ 7: "*Demands* the immediate and unconditional release of all hostages,"

[382] *Id.*, op. ¶ 10: "*Reaffirms* that civilian objects, including places of refuge, including within United Nations facilities and their surroundings, are protected under international

"reiterate[] *its unwavering commitment to the vision of the two-State solution, of two democratic states . . .* "[383]

After a U.S.-sponsored draft resolution was defeated by Russian and Chinese vetoes, who found the resolution too weak, the UNSC adopted Resolution 2728 on March 25, 2024. It demands an "immediate cease-fire" in Gaza for the month of Ramadan, and demands for the lifting of all barriers to the provision of humanitarian assistance at scale, in line with international humanitarian law. It was adopted with 14 members voting in favor and the U.S. abstaining but it is not a binding resolution and neither does it demand *a permanent* cease-fire.[384] The U.S. blocked Palestine's bid to become a full member of the UN due to a veto on a draft resolution in April 2024, that would have recommended the granting of such status.[385] The U.S. representative did express support for Palestinian Statehood within a comprehensive peace agreement.[386]

The ICJ made its judgment of provisional measures twice in 2024. They came short of demanding a ceasefire but did order Israel to "take all measures" to prevent genocide and demanded that Israel let in unhindered humanitarian access to conquer the spread of famine and starvation.[387] This could be seen as a victory for R2P, as the first legal inroad towards a return to R2P, to quote Kristian Alexander at Real Instituto Elcano: "By charging Israel with genocide in the International Court of Justice, South Africa has invoked the underlying principles and objectives of the Responsibility to Protect doctrine, even if it does not formally reference it."[388] The arrest warrants in the ICC for crimes against humanity and war crimes together with

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humanitarian law, and *rejects* forced displacement of the civilian population, including children, in violation of international law, including international humanitarian law and international human rights law;"

[383] *Id.,* op. ¶ 12: *Reiterates* its unwavering commitment to the vision of the two-state solution where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders,"

[384] S/PV. 9586 (Mar. 25, 2024).

[385] SC/15670 (Apr. 18, 2024).

[386] *Id.*

[387] Application of Convention on Prevention and Punishment of Crime of Genocide in Gaza Strip (S. Afr. v. Isr.), Order, (Jan. 26, 2024).

[388] Kristian Alexander, *The limits of international law: the Responsibility to Protect (R2P),* ISRAEL AND THE INTERNATIONAL COURT OF JUSTICE, Commentaries, Real Instituto Elcano, Royal Institute, [https://www.realinstitutoelcano.org/en/commentaries/the-limits-of-international-law-the-responsibility-to-protect-r2p-israel-and-the-international-court-of-justice/].

the Provisional Measures adopted by the ICJ against Genocide are weighty arguments for an R2P intervention with a limited Chapter VII mandate to protect the delivery of humanitarian assistance combined with the mandate to create safe havens for civilians in Gaza. The idea of deploying neutral forces and observers could have saved many civilians' lives. The international community's help in releasing or freeing the hostages would have alleviated suffering and 1000's of civilian deaths and injured, many of the children and eliminated the destruction of about 60% of Gaza's buildings.[389]

2.3.5 SUDAN 2020-2023

The history of civilians being subjected to serious human rights abuses in Darfur extends at least as far as 2003. After the UNSC's first R2P resolutions ever,[390] the joint AU/UN mission deployed against genocidal actions perpetrated in West Sudan in the Darfur region, a new need for action came in demand in 2015. Again, violence and impunity with acts of genocide took place in Sudan. The UNSC adopted two resolutions citing R2P in 2015-16: "*Determining* that the situation in Sudan constitutes a threat to international peace and security." They made for the continued deployment since 2007 of a UN—AU Hybrid Operation in Darfur, that completed its mandate late 2020, (UNMISAB) under a Chapter VII mandate to protect civilians, deliver humanitarian assistance, and protect UN personnel.[391] In December 2023, with S/RES/2715 (2023) the UNSC withdrew the remaining UN Integrated Transitional Assistance Mission in Sudan (UMITAMS), at the request of the Government. The end of the mission comes against the backdrop of the continuing war raging between rival militaries that has claimed over 6,000 lives, driven millions from their homes, led to abhorrent sexual and gender-based violence, and precipitated a severe humanitarian crisis.[392] This is not unlike Rwanda and the heavily criticized decision in 1994 to withdraw the UN peacekeeping force when the genocide broke out.[393] A culture of impunity has emboldened perpetrators of extreme violence to

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[389] *Gaza Strip in maps: How 15 months of war have drastically changed life in the territory,* BBC NEWS (Jan. 16, 2025).

[390] S.C. Res. 1591 (Mar. 29, 2005).

[391] S.C. Res. 2296 (June 29, 2016).

[392] *Security Council agrees to terminate UN mission in Sudan*, UN NEWS (Dec. 1, 2023), https://news.un.org/en/story/2023/12/1144257.

[393] Rep. of the Independent Commission of Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, transmitted by Letter dated December 15, 1999 to the Secretary-General of the U.N. Addressed to the President of the Security Council, U.N. Doc. S/1999/1257 (Dec. 15, 1999).

commit a campaign of atrocities in Darfur. Instead of facing accountability for their role in perpetrating the genocide in Darfur, Generals Abdel Fattah al-Burhan and Mohamed Hamdan Dagalo "Hemedti" have accrued further power and legitimacy culminating in their roles as Head of State and Deputy Head of State following the October 2021 coup in Sudan. There is evidence of crimes such as genocide, crimes against humanity, war-crimes, ethnic cleansing, and conflict-related sexual violence (CRSV) being perpetrated against civilians.[394] In 2023, Sudanese and international civil society groups have come together to call on the international community to take decisive preventative action in the form of international intervention from an AU force, and make an international arms embargo on Sudan, the establishment of humanitarian corridors, and end to impunity for international crimes.[395] Joyce Msuya, Assistant Secretary-General for Humanitarian Affairs and Deputy Emergency Relief Coordinator, when in the UNSC warned that intervention is needed: " The situation today bears all the marks of risk of genocide, with strong allegations that this crime has already been committed."[396] Instead, the UN missions were terminated, like in the Rwanda genocide in 1994 and no R2P intervention made, and no non-military sanctions adopted. A draft resolution on the protection of civilians was defeated, with the following reasoning:

> It appears that members also diverged on whether to include language from the Secretary-General's 21 October report, which presented recommendations for the protection of civilians in Sudan, pursuant to resolution 2736 of 13 June. The report acknowledged that "at present, the conditions do not exist for the successful deployment of a UN force to protect civilians" in Sudan. Some members—including Algeria, China, Mozambique, and Russia—apparently advocated for including this language verbatim in the preambular paragraphs. Other members—including the U.S.—rejected this proposal. The U.S. apparently argued that the text should send a strong message to the parties

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[394] Press Release, Security Council, We Must Go Above, Beyond Compliance, Fully Protect Civilians against 'Harms They Are Suffering on Our Watch', Senior Humanitarian Official Tells Security Council, U.N. Press Release SC/15702 (May 21, 2024).

[395] *Civil Society Sounds Alarm: Take Immediate Action on Sudan or Be Complicit in Future Atrocities*, GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (Nov. 15, 2023), https://www.globalr2p.org/publications/civil-society-sounds-alarm-take-immediate-action-on-sudan-or-be-complicit-in-future-atrocities/.

[396] Press Release, *supra* note 394.

> about fulfilling their commitments, rather than reflecting on the conditions for a force, particularly when the resolution does not address the deployment of such a force.[397]

C. BYPASSING R2P: CONCLUSIONS DRAWN FROM THE CASE STUDY

The bypassing of the UNSC in most of the cases in the case study was due to vetoes. It can be argued that most, if not all, of the cases could have been justified as R2P interventions. To start with the period 1999–2016, there was a more interventionist approach, although the idea of R2P was trumped by the fight post 9/11 against international terrorism.

In the case of Kosovo, the NATO intervention was launched as a humanitarian intervention (R2P was not invented yet), which paved the way for the R2P doctrine. In Yemen, the UNSC gave its *ex post facto* authorization "to *protect Yemen and its people* from the continuing aggression by the Houthis" (emp. added). Also, the 2003 Iraqi war was, at least partly, justified by the intervening states as a "humanitarian intervention" to bring about regime change from a repressive dictatorship. However, the interventions in Afghanistan in 2001-2020 and Iraq in 2014 were motivated by claims to collective self-defense, rather than the gross violations of human rights and IHL that took place. This although, ISIL as well as the al-Qaida warfare, through extensive as well as extraterritorial terrorism with large-scale attacks committed abroad, could have triggered an R2P intervention.

In Syria, the Arabic Spring with the right to democracy and then the use of chemical weapons, led to calls for an R2P intervention, by Western intervening states, as the UNSC was deadlocked by Russian and Chinese vetoes. However, the U.S.-led coalition airstrikes in Syria chose anyway to base its actions on collective self-defense against international terrorism instead of R2P. In Iraq and Syria, ISIL's reign of terror in captured territories gives substantial evidence of large-scale loss of life, torture, and ethnic cleansing.[398]

In the 2020s, R2P interventions are definitely out of fashion, in an unstable world similar to Cold War II, which even comes close to the interwar

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[397] Sudan Vote on Draft, UNSC Reports (Nov. 17, 2024), https://www.securitycouncilreport.org/whatsinblue/2024/11/103323.php.

[398] Christine Longo, *R2P: An efficient means for intervention in humanitarian crises—a case study of ISIL in Iraq and Syria*, 48 GEO. WASH. INT'L L. REV. 893, 908 (2016).

period 1920–1938, with aggressive war policies in fashion. The large-scale human suffering in recent conflicts gives a picture that R2P would be a suitable response in Ukraine, Nagorno-Karabakh, Gaza, Afghanistan, and Sudan, to save civilians from large-scale atrocities amounting to international crimes.

In Ukraine, R2P was called for by President Zelensky's wish for no-fly zones to protect civilians. French President Macron has for now ruled out the possibility of international forces on the ground in Ukraine—the idea to help with humanitarian assistance; and protection of civilians, thus alleviating the Ukrainian army. However, if President Trump's idea of peace negotiations works out, suggestions have been made for a neutral observer force or a NATO peace-keeping operation. Such a force could include a protective R2P mandate.

In Nagorno-Karabakh, an intervening peace-keeping force could have stopped the mass exodus of Armenians and created a buffer zone around the enclave while negotiations on the future status of the region could be held. In Gaza, negotiations backed by an international force could have helped the IDF forces rescue the hostages. A joint commando raid, with a robust R2P mandate, had put pressure on Hamas to return the hostages unharmed. Then, with the hostages freed, an international R2P-mandated force could help deliver and protect the delivery of humanitarian assistance and enforce the responsibility of the Israeli Government to protect the Palestinian people under occupation and oversee a cease-fire agreement. Palestinian civilian lives could have been saved by robust R2P language from the UNSC, with demands for a targeted proportional response by the Israeli Government to the large-scale international terrorist attacks on the 7th of October, a response that needs to be directed towards the culprits, Hamas, in Gaza.

In Afghanistan, women and girls have suffered in what has been labeled "gender apartheid" under the Taliban government, since the international forces pulled out in 2021. The NATO failure to protect civilians, women, and girls against Taliban human rights violations should be reversed through the pressure of the threat of renewed sanctions against the Taliban regime aimed at forcing it to fulfill its obligations in the peace agreement from 2020. In retrospect, it is clear that leniency towards the Taliban in their repression confirms their extremism and scars women for life.

In Sudan, human rights organizations ask for a regional AU-led R2P intervention. Another possibility could be a renewed mandate to a hybrid

force, and to extend the UNSC referral to the ICC regarding the situation in Sudan from 2005 up to today's situation.

Taken together the picture is dark in the 2020s. The strong launching of R2P in 2001 made a promising start with UNSC resolutions on Sudan in 2005, an R2P intervention authorized by the UNSC in Libya in 2011 and in the CAR. R2P was discussed as a tool against Syrian gas attacks against its population in the Syrian war. But already from the beginning of the 2000s both the UNSC and the R2P doctrine were bypassed in most military interventions. With the return to a Cold War climate in the 2020s, a disarmed and impotent West made for the grim reality where the responsibility to protect civilians became not only out of fashion but much harder to realize in a world where just war theories reigned.

D. THE JUST WAR THEORY

Just War Theory deals with the justification of how and why wars are fought.[399] The justification can be either theoretical or historical. The theoretical aspect is concerned with ethically justifying war and the forms that warfare may or may not take. Michael Walzer's famous *Just and Unjust Wars* (1977) restarted the focus on Just War Theory in public international law and international relations.[400] Just War Theory deals with the justification for overriding the strong presumption of the prohibition on the use of force in the UN Charter and waging war.[401] The Just War Theory rests on two separate pillars: *Jus ad bellum* refers to the conditions under which states may resort to war or the use of armed force in general. The prohibition against the use of force amongst states and the exceptions to it – self-defense and UN authorization for the use of force – set out in the UN Charter of 1945 are the core ingredients of *jus ad bellum*. *Jus in bello* regulates the conduct of parties engaged in an armed conflict. International Humanitarian Law (IHL) is synonymous with *jus in bello*. *Jus in bello* considers methods of warfare and weapons based on current treaties and customary international legal rules regulating warfare, that is avoidance and accountability for atrocities in warfare.[402]

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[399] Alexander Moseley, *Just War Theory*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, (2023), https://iep.utm.edu/justwar/#H1.

[400] MICHAEL WALZER, JUST AND UNJUST WARS (Basic Books, 4th ed. 1977).

[401] Moseley, *supra* note 399.

[402] International Committee of the Red Cross, *What are jus ad bellum and jus in bello?,* INT'L COMM. OF THE RED CROSS (Jan. 22, 2015), [https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0%EF%BB%BF].

Since the terrorist attacks on the United States on 9/11 in 2001, academics have returned their attention to Just War Theory. In focus has been the political justification of war, what is called "righteousness of the cause" of the war. [403] Just War Theory is back as an explanation as to why the use of force is necessary, even if not by a strict interpretation of the UN Charter. Just cause has traditionally meant that saving human life from mass atrocities is a just cause. "Just War Ethic in debates about issues that are partly moral and partly political, such as, humanitarian intervention to save lives and the human environment," to quote Joseph C. Sweeney.[404] The importance of such an unselfish goal to alleviate suffering would override the gray zone in which a humanitarian intervention or an R2P intervention exists in relation to the prohibition of the use of force in Art. 2(4). However, any humanitarian intervention must be weighed against the question of whether it perhaps increases the suffering and worsens the situation, as the French philosopher Paul Ricoeur puts it: "The question of preparedness for how many people may be killed or die before the humanitarian goals are achieved."[405]

Today though, the just cause is no longer framed in humanitarian goals, but the focus is on a return to the Westphalian order of nation-states that builds on territorial integrity and political independence.[406] In the 2020s, a return to consequentialists' and act utilitarians' views on just war legitimation, *jus in bello* has returned. The idea is that if military victory is sought then *all methods* should be employed to ensure it is gained at a minimum of expense and time. Arguments from "military necessity" are of this type; for example, to defeat Germany in World War II, it was deemed necessary to bomb civilian cities, ending WWII by inventing and dropping two atomic bombs, regardless of the civilian casualties that would count in the 100,000s.[407] In philosophy, Intrinsicists' claim that certain acts are good or bad in themselves. They may decree that no morality can exist in the state of war. They may claim that possessing a just cause (the argument from righteousness) is a sufficient condition for pursuing whatever means are necessary to gain a victory, or to punish an enemy. Peaceful resolution of

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[403] *Id.*

[404] Joseph C. Sweeney, *The Just War Ethic in International Law*, 27 FORDHAM INT'L L.J. 1865 (2003), [https://ir.lawnet.fordham.edu/ilj/vol27/iss6/2].

[405] Paul Ricoeur, Paul, *Le pardon peut-il guérir?* ESPRIT, (Mar. 1995), https://esprit.presse.fr/article/paul-ricoeur/le-pardon-peut-il-guerir-10768.p. 78

[406] IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 275, 287 (Oxford University Press 2003).

[407] Christopher Nolan, *Oppenheimer* (Movie, Warner Bros. July 21, 2023).

conflicts set aside when peace has returned. This perspective is shown today by Hans Gulbrodt who embraces this idea: "The consideration of *reasonable chances of success at appropriate proportionality* is a core component of the just war tradition, Often prerequisites for just cause are described as being necessary, a *proportional* use of force and used as a *last resort.*"[408]

Those are all arguments we recognize from the Russian invasion of Ukraine. The position maintained by Ukraine and its allies is that its right to self-defense gives it the right to wage war until the war is won and to use even illegitimate means of warfare, such as dirty bombs, and cluster munition.[409] The same is said for Russia; it has threatened the use of nuclear weapons, in a first strike, if NATO would intervene militarily in the conflict. The ICC has also found numerous instances of war crimes, crimes against humanity, and the proposition that genocide is carried out by Russia in Ukraine. Both parties to the conflict have the perspective that overriding just causes trumps international legal norms on warfare. It is somewhat surprising that the media, also in the West, appears to have embraced such a view that the war in Ukraine should be fought until there is a winner, no matter how many lives are spilled or atrocities committed. The instrumentalists' view of peace negotiations is that they are a non-concern during a war. However, President Trump won the presidential elections with the thesis that Ukraine needs peace negotiations to not only spare both Ukrainian but also Russian lives: "US President Donald Trump equally blamed his Ukrainian and Russian counterparts Thursday for the nearly three-year war in Ukraine, which he said has claimed the lives of far too many 'young, beautiful people.'"[410] It could be the insight that Ukraine could not have won the war if not for the contributions of Western States' armed forces, but his message was also that the war was unnecessary for both parties and that the loss of lives was not worth it.

In Azerbaijan, it is also the perspective that the winner takes it all. Even in Western liberal states, there are no headlines about the fact that Armenians were the victims of a major genocide in 1915–1916 in the Ottoman Empire, from which the origin of the term *genocide* and its codification in

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[408] *Id.*

[409] *The Convention on Cluster Munitions* (CCM), (2008), is an international treaty that prohibits all use, transfer, production, and stockpiling of cluster munitions. In 2023, it had 124 signatories. *See* Convention on Cluster Munitions, (2008), 2688 U.N.T.S. 39.

[410] Michael Hernandez, *Trump Blames Putin and Zelensky*, AA AMERICAS (Jan. 24, 2024), [https://www.aa.com.tr/en/americas/trump-blames-zelenskyy-putin-for-ukraine-war-says-it-should-end-immediately/3460929].

international law have their roots. Then possibly as many as 1.2–1.5 million died during the genocide, either in massacres and individual killings, or from systematic ill-treatment, exposure, and starvation.[411] Today, the disregard for the sufferings of the Armenian people is frightening! After all, it was Hitler who asked:"Wer redet heute noch von der Vernichtung der Armenier?" ["Who today remembers the Armenians"], about the prior Armenian genocide in a speech in 1935, to justify the Nazi's Holocaust.[412] It is quite clear that the lack of consequences contributes to more perpetrators taking inspiration from previous atrocities. Hitler's argument appears scarily up-to-date, when again genocidal actions, such as the forced displacement of the Nagorno-Karabakh's Armenian population, take place without much attention and the same can be said for the 700,000+ Rohingya that allegedly are victims of Burmese genocide, or the inaction towards genocidal actions Darfur in Sudan.

In Gaza, Israel wages war with impunity without consideration of civilian Palestinian casualties, and neither with much concern for saving the Israeli hostages out of harm's way. The disproportionate attacks on civilians, and the disregard for their sufferings, with arguments about retaliation, retribution, and vengeance from the Israeli Government. This is even more true for Hamas, which has an indiscriminate policy of terrorism, making it a rogue government that uses its population, as well as hostages, as policy and human shields, indifferent to suffering. However, media, on both sides, mostly describe the conflict as only loop-sided, without any mercy for civilian casualties and international law.

This is a return to the Dark Ages where the doctrine of R2P has little relevance. Where the Westphalian notion of state sovereignty cannot be challenged by human rights or democracy. Where the government has unlimited power to declare and wage war in a perceived state interest. A war where the ends justify the means. But it is in such dark ages that R2P is needed more than ever to save those who suffer caught up in endless war and destruction. Because the normative framework of IHL and human rights and

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[411] United States Holocaust Memorial Museum, *The Armenian Genocide (1915–16): Overview*, HOLOCAUST ENCYCLOPEDIA,. https://encyclopedia.ushmm.org/content/en/article/the-armenian-genocide-1915-16-overview (introduction-to-the-holocaust).

[412] *Akten zur Deutschen Auswartigen Politik*, 1918–1945 [Files on German Foreign Policy, 1918–1945], Baden-Baden: Impr. Nationale, at 171–77, Serie D, Band VII, (Baden-Baden, 1956) 171–72. in Dadrian, V. N. (2003); VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS 403, 407 (Berghahn Books 2003).

international criminal law, does not erode easily, neither does the principles of humanity and equality.

PART III. REMEDIES

INTRODUCTION

Here I introduce some ideas about how to refresh R2P responsibility to heighten the likelihood of R2P action. Below are six options presented that could revitalize and enforce the use of forceful R2P intervention.

A. REMEDIAL SELF-DETERMINATION AND SECESSION AS A LAST RESORT

Several of the recent cases concern the rights of a minority under severe persecution and denial of government access. The case of Afghanistan is about the oppression by a larger segment of the population, women and girls in gender apartheid. Do minorities, like the Armenians in Nagorno-Karabakh, have a right to self-determination at all, or should they only rely on their minority rights in Art.27 of ICCPR? Can gender apartheid qualify as a basis for a right to internal self-determination, in analogy with the right for a severely oppressed racial majority to participate in government and society in equal rights, based on the right to internal self-determination?[413]

Since Kosovo, there has been a debate in international law that focuses on the right of minorities to "remedial self-determination." This is a right to secession as a last resort given to severely oppressed minorities.[414] The problem is that minorities are not regarded as "peoples" in the meaning of Art.1(3) in the UN Charter, why they, in the normal case, do not have *any* right to self-determination.[415] This is because self-determination claims from minorities threaten to destabilize and fragmentize the Westphalian order of nation-states. Instead, minorities are to direct their claims to minority rights

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[413] KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (Cambridge University Press 2004).

[414] CHRISTIAN WALTER et. al., SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW (Oxford University Press 2014).

[415] *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion Upon the Legal Aspects of the Aaland Island Question*, League of Nations O. J., Spec. Supp. 3 Official Journal, Special Suppl. No. 3, (1920). The Aaland Island opinion, is still cited as support for that minorities do not have a right to self-determination, *see* the more recent *Reference re. Secession of Quebec*, [1998] Collection: Supreme Court of Canada Judgments, (199808-20), 2 S.C.R. 217 (Can.), no. 25506, Question 2, ¶ 109.

in Art. 27 of the ICCPR.[416] The thesis in "remedial self-determination" is that only if they are severely oppressed a gradual shift be tipped over toward different means of self-governing models, and at the end of the spectrum, secession.[417]

A limited right for minorities to remedial self-determination would facilitate ways to resolve ethnic conflicts through manifest legal rules. Several scholars have engaged in proposing a right to remedial self-determination and secession, after Kosovo and the Quebec case, where the French minority sought independence from Canada.[418] This proposition merges two important normative developments to support a right to remedial self-determination for ethnic minorities: (1) The *Responsibility to Protect* (R2P). (2) *The Friendly Relations Declaration* (FRD), para. 7, that spells out that a state's territorial integrity is conditioned on: "[c]ompliance with the principle of self-determination of peoples, and...*thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.*" Together, they open for secession as a last resort for severely oppressed peoples and minorities inside a state that are denied government access and denied basic human rights as a group, such as minority rights in Art. 27 ICCPR. Remedial secession also necessitates that the oppression takes the form of grave offenses, crimes against humanity, genocide, and war crimes. Thus, the denial is based on "race, creed or color."[419]

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[416] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

[417] *Reference re. Secession of Quebec, supra* note 415.

[418] *Id.*

[419] *See, e .g.* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: – A LEGAL REAPPRAISAL (Cambridge University Press 1995); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (Univ. of Pa. Press 2d Rev. Ed. 2011); KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (Cambridge University Press 2004); FRENCH, DUNCAN, STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW (Duncan French ed., Cambridge University Press (2013); Yuval Shany & Brown J., *Does International Law Grant the People of Crimea and Donetsk a Right to Secede?: Revisiting Self-Determination in Light of the 2014 Events in Ukraine*, 21 J. OF WORLD AFF. 233 (2014), MILENA, STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: "SELFISTANS," SECESSION AND THE RULE OF THE GREAT POWERS (Routledge 2013); JUAN FRANCISCO ESCUDERO ESPINOSA, SELF-DETERMINATION AND THE EMERGENCE OF HUMANITARIAN SECESSION AS AN INTERNATIONAL LAW RESPONSE TO SERIOUS VIOLATIONS OF A GLOBALIZED WORLD HUMAN RIGHTS 157–77 (Springer 2017).

The right to remedial secession can be a relevant measure in several of the recent international conflicts, as a supplement to R2P. The cases of the ethnic Russians in the secessionist Republics Crimea, Donetsk, and Lugansk show that early respect for the ethnic minorities in Ukraine could have mitigated their sudden violent aspirations for secession. The Minsk II Agreement which was never signed, provides for self-government for Donetsk and Lugansk.[420] Peace negotiations redirecting the parties to the conflict towards self-government and minority rights for the Russian minorities would be a relevant roadmap toward peace. The Russian minority was never oppressed to such an extent that large-scale atrocity crimes inherent in the R2P doctrine were committed against them, so they lacked a right to remedial secession but were rightly redirected to internal self-determination in the Minsk II.

In Nagorno-Karabakh, forced displacement of the Armenian population living in the enclave was a mass-atrocity crime that could pave the way to remedial secession, when less-than-sovereign rights, in the form of meaningful representation in the state, cannot be guaranteed. The starving and forced displacement of the Armenians, if amounting to acts of genocide, would emphasize their right as a "people" towards self-government and remedial secession. The proposition is that they cannot be safe inside the mother state of Azerbaijan.

In the case of Gaza, an *occupied people* already have a right to external self-determination, firmly based on the UN partition plan from 1948 that has wide recognition today of the two-state solution.[421] Occupied peoples qualify as bearers of a right to self-determination *per se,* through the Hague Regulations and the 1949 Geneva Convention IV, Art. 47 which state an occupation should be temporary and guide the territory back to independence. When the Israeli government wants to deny Palestinians self-government and external self-determination, then remedial secession could be an option through R2P.

In Afghanistan, South Africa referred the situation to ICJ, on account of gender apartheid. This can pave the way for Afghanistan's women's right to access to government and the right not to be excluded from society through

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[420] *See supra* at note 277.

[421] The UN General Assembly adopted the two-state-solution through its partition Plan for Palestine as Resolution 181 (Nov. 29, 1947). The two-state solution has been accepted since the 1990 Oslo Accords, and S.C. Res. 2720 (Dec. 22, 2023) on the Gaza war supports it, *see supra* note 379.

gender oppression, opening for a people under apartheid's right to internal self-determination through representation in Government. In the 2010s, post-colonial self-determination could also emerge when a large segment of the population is denied government access, such as apartheid policies, based on the same merge of R2P with FRD, as highlighted, *supra*.[422] In the case of women and girls in Afghanistan, there is a good case made for existing "gender apartheid." Professor Antonio Cassese, in his famous work *Self-Determination of Peoples – A Legal Reappraisal*, finds that the right to self-determination afforded to racial majorities denied access to government (apartheid) paves the way for internal-self-determination: "Internal self-determination means a right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime [. . .] [i]t is an ongoing right."[423] Thus, an analogy should be made from the right of an oppressed racial majority to internal self-determination that would give women government access, and other institutions on equal terms with men, in Afghanistan. The right to remedial self-determination gives rise to a base for international sanctions against the Taliban government, similar to what was done against the racist regimes in South Rhodesia and South Africa. Then, prolonged non-military sanctions were applied by the UNSC. The crime of apartheid is considered *jus cogens*. There is a clear link to atrocity crimes in cases of gender apartheid, as the Rome Statute includes as a crime against humanity the persecution of any identifiable group, including based on gender, in Art 7(1)(h), which makes the connection between R2P and a right to remedial internal self-determination.

Today a negative attitude towards post-colonial self-determination is a trend.[424] Many scholars examine recent cases of remedial secession and answer this possibility in the negative, against the background of Kosovo.[425] Milena Sterio makes the pessimistic argument that "great-power rule dictates" which self-determination claim will get support – hence a "regrettable quasi-legal doctrine."[426] This goes hand in hand with the pessimism about the R2P doctrine in the 2020s. Current conflicts show in large a denial of FRD, para. 7, the disregard of conduct in: "[c]ompliance

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[422] MILENA, STERIO, SECESSION IN INTERNATIONAL LAW: A – A NEW FRAMEWORK, (Routledge 2018).

[423] Antonio Cassese, *supra* note 419, at 101.

[424] ADAM GETACHEW, WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION, Princeton University Press (2019).

[425] JAMES CRAWFOORD, THE CREATION OF STATES IN INTERNATIONAL LAW, (Oxford University Press 2nd ed. 2007); JING LU, ON STATE SECESSION FROM INTERNATIONAL LAW PERSPECTIVES, (Springer 2018).

[426] Sterio, *supra* note 422, at 170. Sterio, Milena, (2013) *supra* note 419, at 175.

with the principle of self-determination of peoples, and...*thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color*," or its territorial integrity might be forfeited.[427]

B. THE UNITING FOR PEACE RESOLUTION

The Uniting for Peace Resolution was a UN General Assembly resolution adopted in 1950 during the Korean War as a response to a situation when the UNSC was deadlocked by one veto from a P-5. The Soviet Union (USSR) soon corrected its mistake of a boycott of the UNSC, which had made possible UNSC recommended intervention to help South Korea against North Korean aggression, the USSR returned to the UNSC in August 1950.[428] Thereafter, no new initiatives could be taken by the UNSC concerning the ongoing operations done under the UN flag that assisted the South Korean government against the North Korean attack, operations made possible by S/RES.82-84 (1950). In that situation, U.S. Secretary of State Dean Acheson presented a plan (the Acheson Plan) to bypass the UNSC when deadlocked by veto. In such situations, Acheson said, the UNGA must be able to step in and take over the UNSC's primary responsibility for "the maintenance of international peace and security" in Art.24 of the UN Charter. Thus, the UNGA uses its subsidiary responsibility for international peace in Art.11 of the UN Charter. However, the UNGA, as outlined in Art. 11, only has an advisory role related to international peace and security but is not equipped with enforcement powers. The Acheson Plan is designated as the "Uniting for Peace," and under it, the UNGA can *recommend enforcement action*. This is similar to today's practice with UNSC authorizations to use force, which makes it voluntary to participate in UNSC-mandated Chapter VII enforcement operations.[429] On November 3, 1950, the General Assembly adopted the "Uniting for Peace Resolution."[430] The most famous part of the Uniting for Peace resolution is its mandate to recommend the use of force on behalf of the UN when the UNSC is deadlocked:

> *If the Security Council,* because of lack of unanimity of the permanent members, *fails to exercise* its primary responsibility for the maintenance of international peace and

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[427] Bring & Svanberg, *supra* note 62, at 496–501.
[428] S.C. Res. 83, (June 27, 1950).
[429] Bring & Svanberg, *supra* note 62, at 305.
[430] G.A. Res. 377, *infra* note 468.

> security in any case where there appears to be a threat to peace, breach of the peace, or act of aggression, *the General Assembly shall* consider the matter immediately with a view to making appropriate *recommendations to Members for collective measures, including* in the case of a breach of the peace or acts of aggression *the use of armed force* when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in an emergency special session within twenty-four hours of the request therefor. Such emergency special session may be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.[431]

The Uniting for Peace resolution is adopted by a qualified majority, two-thirds of the members of the UNGA. However, Acheson knew at that time that he could count on support from the then-smaller Western-dominated UNSC.[432] It contains a two-step approach. First, to facilitate prompt action by the UNGA in the case of a dead-locked UNSC, the resolution created the mechanism of an "Emergency Special Session," which can be called either based on a procedural vote in the UNSC, where the P-5 has no right to veto, or within twenty-four hours of a request by a majority of UN members.

After being used in the Korean War, the *Uniting for Peace,* as an alternative to UNSC enforcement action, has never been repeated. Maybe because U.S. General MacArthur, the Commander in Chief of the UN Forces in Korea, decided to use nuclear weapons against intervening communist Chinese forces, which put the world on the brink of WWIII. This was luckily stopped by U.S. President Truman, relieving MacArthur of his duties.[433] But it shows how the bypassing of a veto can have disastrous effects.

However, the Emergency Special Sessions have been repeated in urgent matters. Such an Emergency Special Session of the UNGA was called at the beginning of the Ukraine war, with the intent to condemn the Russian intervention, and maybe with the intent to threaten with the implied possibility of military intervention by the Acheson Plan. The S/RES/2623

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[431] G.A. Res. 377(V), Uniting for Peace (Nov. 3, 1950).

[432] It was adopted by a vote of 52 to 5.

[433] History.com Editors, *Truman relieves MacArthur of duties in Korea*, HISTORY.COM (Nov. 13, 2009), [https://www.history.com/this-day-in-history/truman-relieves-macarthur-of-duties-in-korea].

(Feb. 27, 2022) emphasized "taking into account that the lack of unanimity of its permanent members at its meeting on 25 February has prevented it from exercising its primary responsibility for maintenance of international peace and security."[434] It was immediately followed up by UNGA Resolution ES-11/1 "Aggression against Ukraine", (Mar. 2, 2022), adopted with an overwhelming majority of 141 UN members.[435] The UNGA resolution deplored Russia's invasion of Ukraine and demanded a full withdrawal of Russian forces and a reversal of its decision to recognize the self-declared People's Republics of Donetsk and Luhansk, but stopped short of recommendation of any military measures against Russia.

Importantly, this revival of the Uniting for Peace procedural part resulted in the UNGA deciding by consensus that it would meet whenever a veto is cast in the UNSC.[436] Since then, it has convened twice in 2022, by this new procedure: following vetoes by China and Russia on the Democratic People's Republic of Korea, and after a Russian veto on Syria. Also, U.S. vetoes over UNSC Gaza resolutions did result in emergency special sessions of the UNGA.[437]

The Acheson Plan expanded the mandate of the UNGA under the UN Charter. There is a question of whether this is legal. The resolution's mandate for UNGA to recommend collective measures, including the use of armed force, seems contrary to the wording of Articles 11 and 12 of the Charter. While the first part of this Article sets out that the UNGA may issue recommendations concerning the maintenance of international peace and security, the second paragraph of Art. 11 is restrictive:

"Any action which is required by the General Assembly shall be referred to the Security Council before or after the matter."

It seems that the UNGA cannot recommend members a certain action over the head of the UNSC. Art. 12(1) confirms the correctness of this interpretation when it states that the UNGA shall not issue recommendations about a dispute or matter that the UNSC handles by its primary

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[434] S.C. Res. 2623, *supra* note 283. *See also supra* Part I: H. *The Responsibility Not To Veto*; Part II, 2.3.2 *The Invasion of Ukraine.*

[435] G.A. Res. ES-11/1, Aggression against Ukraine (Mar. 2, 2022).

[436] G.A. Res. 76/262 (Apr. 26, 2022).

[437] *See supra* at 2.3.3.

responsibility.[438] A UNSC's paralysis by veto is deliberately incorporated as a way to avoid a threat to peace and security, that would be the result of P-5 on a collision course.

Thus, there are problems with reviving the Uniting for Peace Resolution in its enforcement part. One is that even if the UNGA is a democratic assembly, where each state has one vote and its membership more or less represents the whole world, the question is still about dangers and democracy. If several votes from small countries with a population much less than 1 million, should outweigh the P-5 and other Great powers? Worse, if the UNGA would recommend action against one of the P-5, it might have dangerous implications. Back in 1950, the Acheson Plan almost led the world to the brink of WWIII, when the UN forces came in opposition to the Russian and Chinese military in the Korean War, ending with an armistice still in force.[439]

The fact that Uniting for Peace was contrary to the wording of the Charter made it criticized for violating international law. This was the position immediately taken by the Soviet Union and maintained today by Russia and China. However, the Western powers, which in 1950 could count on a qualified majority in the UNGA, claimed that it was a legal further development of the principles of the Charter to safeguard the UN's ability to maintain international peace and security. When Dag Hammarskjöld became UN Secretary-General a few years later, he accepted Uniting for Peace as a natural development of the Charter's application by its basic purposes. The UN secretariat appears to have shared the common perception that the Acheson Plan may not be compatible with the wording of the Charter but with its spirit.[440]

To date, the interventionist part of the Acheson Plan has not been revived despite situations like Kosovo, Syria, Ukraine, Nagorno-Karabakh, and Gaza.

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[438] *See* Art. 12 in the U.N. Charter: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

[439] On July 27, 1953, military commanders from the United States (representing the United Nations Command), the Korean People's Army, and Chinese People's Volunteer Army signed the Korean Armistice Agreement, ending roughly three years of fighting between 1950–1953.

[440] *See* DAG HAMMARSKJÖLD, STOCKHOLM, *reprinted in* SERVANT OF PEACE: A SELECTION OF SPEECHES AND STATEMENTS OF DAG HAMMARSKJÖLD, SECRETARY-GENERAL OF THE UNITED NATIONS, 1953–1961, 230 (Wilder Foote ed., 61, Stockholm (1962).

In the 2000s, various official and semiofficial UN reports made explicit reference to the Uniting for Peace Resolution as providing a mechanism for the UNGA to overrule any UNSC vetoes, but only in theory.[441] To link the Uniting for Peace to an R2P liability could revive it. It could give the UNGA the democratic influence that is lacking in the UNSC and would be beneficial to the organization's credibility: "[L]least the prospect that a humanitarian intervention authorized by the U.N.'s general membership in a consensual process would confer legality and legitimacy on the operation," to cite Michael Ramsden.[442] It would save lives, even if it could not supplant a UNSC referral to the ICC, which according to the Rome Statute, is done under Chapter VII in the UN Charter. It is important to highlight R2P as the sole ambition of any new forceful Uniting for Peace Resolution that recommends the use of armed force. A return to the Uniting for Peace Resolution in 2022, after the Russian invasion of Ukraine, was the UNSC's "first use of a 'Uniting for Peace' resolution in 40 years."[443] However, no recommendation for military intervention has resulted; with the Gaza war, the UNSC has been more deadlocked than ever. This indicates that Uniting for Peace still suffers from being perceived as a Western, U.S.-led initiative. Thus, even though a UNGA resolution that demands a ceasefire and forceful delivery of humanitarian assistance could receive a large number of votes, no such initiative has been launched, albeit the new Uniting for Peace initiative, that the General Assembly decided by consensus that it would meet whenever a veto is cast in the UNSC is in place.[444] This is the problem of antagonizing a great-power.

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[441] *See* Evans & Sahnoun, *supra* note 1. *See also* Rep. of the Open-ended Working Grp. on the Question of Representation on and Increase in the Membership of the Security Council, U.N. Doc. A/58/47 (2004); Final Document of the Ministerial Meeting of the Coordinating Bureau of the Non-Aligned Movement (2006), transmitted by Letter dated 28 June 2006 from the Permanent Representative of Malaysia Concerning Disarmament and International Security Addressed to the Secretary-General of the Conference on Disarmament, U.N. Doc. CD/1788 (June 30, 2006).

[442] Michael Ramsden, *"Uniting for Peace" and Humanitarian Intervention: The Authorizing Function of the U.N. General Assembly,* 25 WASH. INT'L L. J. 267, 277 (2016): "The character of the Assembly as a multilateral forum could assuage concerns that humanitarian intervention is premised on the unilateral assessment of self-interested states."

[443] Security Council, *In Hindsight: The Long and Winding Road to Security Council Reform,* Security Council Report, MONTHLY FORECAST, (Oct. 2022), at 2. [https://www.securitycouncilreport.org/monthly-forecast/2022-10/in-hindsight-the-long-and-winding-road-to-security-council-reform.php.].

[444] G.A. Res. 76/262, *supra* note 436.

C. BY-PASSING A SOLE VETO

One way forward, when it comes to proposals for a modification of the veto in R2P situations, would be to generate a subsequent practice by the UNSC proven to have been generally accepted by its members. The advantage of such an evolutionary approach would be that there is no need for a formal agreement between the parties, such as in the RNTV proposals. Subsequent practice can also open the door for possibilities other than a voluntary abstention from the veto. Hence, the possibility of eliminating a sole veto that prevents an otherwise widely supported UNSC resolution authorizing an R2P intervention from being adopted.

This idea was brought forward at the time of the Kosovo intervention, where a resolution legalizing the NATO intervention was supported by twelve UNSC members but was defeated by a Russian veto. The wide support for the resolution was acknowledged as an underpinning to making the intervention legitimate. An analogy would be the Soviet boycott of the UNSC in 1950. Thus, when North Korea invaded South Korea in June 1950, the UNSC could respond as forcefully as supposed against an aggressor. The explanation for the boycott was that the Soviet Union protested that China was represented by the Chiang Kaishek exile regime in Taiwan in the UNSC instead of its communist regime led by Mao-Tse-tung.[445] However, hardly any commentator has subsequently disputed the legality of the UNSC resolutions on Korea.[446]

In the 2020s, one veto has obstructed UNSC action, mostly in situations in the Middle East and next in the case of Ukraine. Moscow has used its veto 11 times over the period until May 2024. The U.S. has used its veto to shield Israel from rebuke for its actions in Gaza. China has used five vetoes, each time in tandem with Russia, and mostly in the situation in the Middle East, but also concerning North Korea.[447]

The idea to bypass a sole veto has recently surfaced again after Russian vetoes hindered R2P intervention in Syria and Ukraine and the U.S. in the

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[445] The operations were primarily conducted by the United States under the United Nations flag.

[446] Bring & Svanberg, *supra* note 62, at 555.

[447] *United Nations Security Council Data - Vetoes Since 1946, U.N. PEACE,* Voting System and Sec. Data Hub (last modified Mar. 28, 2024), Records, [https://psdatawww.un.org/dataset/DPPA-SCVETOES.en/sc/meetings/voting.shtml. (follow hyperlink; then select the "visualize" tab and enter "2020" to "2024" date range in appropriate fields)].

case of Gaza. On April 26, 2023, the UNGA adopted Resolution 76/262, holding a UNSC permanent member somewhat accountable for the use of the veto. This was provoked by Russia's veto against UNSC resolutions condemning its invasion of Ukraine.[448] UNGA Resolution 76/262 stipulates that the 193-nation organ will convene for a meeting within ten days whenever a veto is cast by a permanent member.[449] This could be a lightweight alternative from RNVT, as a "mechanism to hold permanent Council members who used [a veto] accountable" and was welcomed by many speakers in the UNSC debate.[450] It appears to be a follow-up to the Procedural Resolution 2623, "call[ing] for an emergency special session of the General Assembly" to be able to respond to the Russian invasion of Ukraine, which was adopted after the vetoed UNSC draft resolution condemning the Russian invasion of Ukraine.[451] The Resolution highlighted that the lack of unanimity among the permanent members had prevented it from exercising its "primary responsibility for the maintenance of international peace and security."[452]

A related procedural response to the Russian invasion was the United States' self-commitment to "refrain from the use of the veto except in rare, extraordinary situations," which is highly unclear what it means, except that it is not immediately related to R2P or mass atrocities.[453] On the other hand, the director of the Max Planck Institute, Professor Anne Peters, is convinced that U.S. self-commitment implies a reference to mass atrocities, including the crime of aggression.[454] However, this seems somewhat ironic because the

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[448] Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022); S.C. Res. 2623, *supra* note 283, it recorded vote of 11 in favor to 1 against (Russian Federation), with 3 abstentions (China, India, United Arab Emirates)

[449] G.A. Res. 76/262, *supra* note 436.

[450] Press Release, Security Council, Security Council Must Be More Transparent, Inclusive to Address Conflicts, Crises, Speakers Stress in Open Debate on 15-Nation Organ's Working Methods, U.N. Press Release SC/15401 (Sep. 5, 2023).

[451] S.C. Res. 2623, *supra* note 283. This was followed by a vote on a procedural resolution that precludes the use of a veto. *See also supra* Part II: B. 2.3.1, *The Invasion of Ukraine* and Part III. C. *The Uniting for Peace Resolution.*

[452] G. A. Res. 76/262 (April 28, 2022). *See supra* in Part II. B. 2.3.1 Invasion of Ukraine.

[453] Ambassador Linda Thomas-Greenfield (n 2); comment by Raphael Schafer, Schäfer, '*The Echo of Quiet Voices. Liechtenstein's Veto Initiative and the American Six Principles,* EUR. J. INT'L L.: Principles', EJIL: TALK! BLOG (Oct. 10, 2022) https://www.ejiltalk.org/the-echo-of-quiet-voices-liechtensteins-veto-initiative-and-the-american-six-principles/.

[454] Anne Peters, *La guerre en Ukraine et la limitation du droit de veto au Conseil de*

U.S., after the Gaza war, has cast five vetoes.[455]

The advantage of an informal amendment of the veto powers, not counting a sole veto, is that such a process is informal. Such a practice can develop *ad hoc*, without the need for an agreement among all the P-5. But it might hinge on the acceptance of a qualified majority. However, what majority is uncertain. The merit of disregarding a sole veto in a strictly defined R2P situation is that an R2P responsibility can be shouldered by the UNSC even in the face of a veto. The disadvantage is that it might destabilize the international community, especially if intervention is taken against a permanent member or its national sphere of interest, such as if UNSC-authorized military intervention is carried out in Ukraine or taken against Israel in the Gaza conflict.

However, safeguards can apply. That could be because an R2P intervention is to be taken directly against a P-5's territory. Another safeguard could be that an R2P intervention against the will of one P-5 needs to secure the concurring vote of the other P-5, plus at least seven other states. This would be a dynamic, evolutionary interpretation of the UN Charter *contra legem*. It would fit with earlier evolutionary interpretations on abstentions to UNSC resolutions and the invention of peacekeepers under imaginary Chapter VI 1/2. This is indeed an alternative to the RNVT.

D. REGIONAL ORGANIZATIONS HUMANITARIAN INTERVENTIONS UNDER ARTICLE 53 IN THE UN CHARTER WITHOUT UNSC PRIOR CONSENT

Since the end of the Cold War, the UNSC has increasingly utilized regional organizations in its enforcement actions.[456] This practice has been especially significant in the case of humanitarian interventions. Sometimes the regional organization has acted independently, before UNSC authorization. This was most notably the case in Kosovo where NATO intervened despite a deadlocked UNSC. Other instances where a regional

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*sécurité [*Anne Peters, *The War in Ukraine and the Curtailment of the Veto in the Security Cou*ncil*]*,, Issue 5 REVUE EUROPEENNE DU DROIT: GROUPE D'ETUDES GEOPOLITIQUE [EUR. L. R.: GEOPOLITICAL GRP. STUD.],(2022) (Fr.), [https://geopolitique.eu/en/articles/the-war-in-ukraine-and-the-curtailment-of-the-veto-in-the-security-council/#. /].

[455] *See* Security Council Data, *supra* note 447.

[456] MALCOLM N. SHAW, INTERNATIONAL LAW 921 (Cambridge University Press, 7 ed. 2014).

organization claimed to "alleviate suffering" were the ECOWAS interventions in Liberia and Sierra Leone in the 1990s, the NATO intervention in Northern Iraq in 1991, MISAB's in CAR in 1997, French interventions in Ivory Coast and Mali in 2012, in CAR 2014, and the Saudi-led coalition in Yemen in 2015.[457] Those interventions were subsequently "welcomed" by the UNSC in resolutions adopted under Chapter VII.

Article 53(1) authorizes the UNSC to use regional organizations for the execution of coercive measures when appropriate:

"The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." [458]

Article 53(1) presupposes that the UNSC has made a finding by Art. 39 that there exists a threat to peace, breach of the peace, or an act of aggression. Thus, a regional organization may engage in enforcement action only after obtaining a fiat from the UNSC.[459] The wording of Article 39 that the UNSC "shall determine the existence of a threat to peace . . . and decide what measures shall be taken," leaves no doubt that an *ex-post facto* authorization or a tacit or implied authorization is not intended.[460]

A highly debated question is whether Article 53 could be interpreted to open for implied authorizations or *ex-post facto* authorizations to use force in the case of R2P interventions.[461] An argument for such a development would be that swift action is needed in the case of large-scale mass atrocities when

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[457] *See* S.C. Res. 688 (Apr. 5, 1991) (enforcing a NATO enforced no-fly-zone and humanitarian aid in Iraq), S.C. Res. 688 (April 5, 1991); Liberia, S.C. Res. 788 (Nov. 19, 1992); Sierra Leone, S.C. Res. 1132 (Oct. 8, 1997) and S.C. Res. 1156 (Mar. 16, 1998); CAR, S.C. Res. 2181 (Oct. 21, 2014), welcomed the French military force deployment *ex post facto*; in Mali S.C. Res. 2100 (April 25, 2013), authorizing an R2P intervention when France launched operation "Serval" with airstrikes against the advance of Islamic extremists, welcoming the French military force deployment *ex post facto*; for the Saudi-led intervention in Yemen, welcomed *ex- post facto* by S.C. Res. 2216 (April 14, 2015).

[458] U.N. Charter art. 53:1.

[459] Shaw, *supra* note 456, at 926.

[460] U.N. Charter art. 39. *See* Michael Wood, *Third Lecture: The Security Council and the Use of Force* (2006), *in*, THE UN SECURITY COUNCIL AND INTERNATIONAL L. 116, 127 (Cambridge University Press 2022), *Third Lecture: The Security Council's Powers and their Limits,* Herst Lauterpacht Memorial Lectures, 30 (2006).

[461] FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW, 270, (Stevens and Sons, London 1964).

there is no time to await a forthcoming UNSC authorization. However, the text of Art. 53 does not allow for *ex post facto, tacit,* or implied authorizations. This is plain from its wording which reads "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." [462]

Opposite views are frequent in the doctrine. Several famous scholars support *ex post facto* and implicit authorizations of the use of force to regional organizations based on UNSC practice. Malcolm Shaw points out: "Practice recently appears to suggest rather controversially that not only is prior approval not required, but that Security Council authorization need not occur until substantially after the action has commenced."[463] He relies on a statement in the Report of the Secretary-General's High-Level Panel on Threats, Challenges, and Change from 2004, which suggests that: "Authorization from the Security Council should in all cases be sought for regional peace operations, recognizing that in some urgent situations that authorization may be sought after such operations have commenced."[464] In their commentary on Art. 53 in *The Charter of the United Nations*, George Ress and Jürgen Bröhmer find that even though a teleological interpretation implies a prior and explicit authorization by the UNSC, exemptions seem possible when considered from a practical point of view. Thus, there is support in the literature and UNSC practice, that supports that under exceptional circumstances, an *ex post facto* authorization can be justified.[465]

So-called "tacit" approval, i.e. acceptance in the absence of condemnation from the UNSC, appears to be illegal because the absence of UNSC condemnation of the intervention may be a natural consequence of the veto. Tacit and implied authorizations seem to be against both the wording and spirit of the UN Charter and its collective security system.[466] On the other hand, they could form a basis for implicit support of an R2P intervention that is blocked by a veto, if the intervention has already begun, and when

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[462] DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS, (Clarendon Press 1999); *see also* Christian WALTER, *Regional Arrangements and the United Nations Charter*, Max Planck Encyc. of Int'l L. (2009), www.mpepil.com/subscriber.

[463] Shaw, *supra* note 456, at 925–66.

[464] *Id.*

[465] Georg Ress & Jürgen Bröhmer, *Commentary of Article 53, in* THE CHARTER OF THE UNITED NATIONS – A COMMENTARY, 854, 866 (Bruno Simma et. al eds., 2012).

[466] Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspections Regime*, 93-4 AM. J. INT'L L. 124, 130 (1999).

operations are in conformation with the RwP doctrine.[467]

It should be emphasized that two regional African organizations, the African Union (AU) and ECOWAS, have in the 2000s introduced in their Statutes provisions that allow for the *right to intervene military for humanitarian purposes* in members without prior UNSC approval. This may also apply to a group of states as a license to take military action against another state, if necessary. Thus, Art. 4(h) of the AU Charter gives the AU the right to make humanitarian interventions in its Member States: "The right of the Union to intervene in a Member State by a decision of the Assembly in respect of serious circumstances, namely war-crimes, genocide and crimes against humanity." Art. 4(h) was extended in 2003 to include also "serious threats to legitimate order." Through Art. 4(j), the right of a state to request intervention in a member state was formalized.

ECOWAS has incorporated the right to humanitarian intervention through Art. 22(c) of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping, and Security, which entitles the organization to conduct "humanitarian intervention in support of humanitarian disaster."[468] ECOWAS has been diligent in conducting regional interventions in West Africa without a prior UNSC mandate—but usually, they have received it afterward. Thus, regional situations, such as Liberia, Sierra Leone, Darfur, and Mali, indicate that both AU and ECOWAS still seek UNSC approval *ex post facto* for their humanitarian interventions in member states.[469]

A different view is that those regional organizations have asserted a right to take humanitarian interventions without a UNSC mandate. In his research on the *Right of Intervention under the African Union's Constitutive Act,* Kioko finds that the AU leaders: "...have shown themselves willing to push the frontiers of collective stability and security to the limit without any regard for legal niceties such as the authorization of the Security Council."[470]

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[467] Kolb, *supra* note 79, at 22.

[468] Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 10, 1999, ECOWAS.

[469] Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit,* 20 WHITE PAPER ON THE RESP. TO PROTECT 162 (2006), http://archives.cerium.ca/IMG/pdf/BELLAMY-_ALEX wither_the_Responsibility_to_Protect-2.pdf.]

[470] Ben Kioko, *The Right of Intervention Under the African Union's Constitutive Act: From Non-Interference to Non-Intervention*, 85 INT'L REV. OF THE RED CROSS 807, 821, (2003).

A benevolent interpretation of the AU and ECOWAS provisions on humanitarian intervention in its member states makes it legal out of the doctrine of consent. States can invite other states to carry out military operations on their territory, why such a right could possibly be laid down in a treaty, not unlike how states have conferred powers to the UNSC in the UN Charter.[471]

With an updated interpretation of the UN Charter in conformity with the R2P principle that emphasizes the organization's obligation to contribute to respect for human rights, in its purposes 1(3) and Arts. 55 and 56, a good case can be made for an interpretation of Art. 53 that allows for regional organizations' right to R2P intervention without prior UNSC mandate. However, strict conditions need to be met for regional organizations' R2P interventions in conformity with the RwP doctrine. Moreover, an *ex post facto* authorization from the UNSC should be sought afterward. If the UNSC is still deadlocked, the UNGA could use the Uniting for Peace resolution, but maybe with a lesser 51-60% majority to evaluate the merits of the claim to ascertain if the intervention could pass as a legitimate R2P intervention.

E. A RIGHT TO COLLECTIVE SELF-DEFENSE AGAINST LARGE-SCALE ATROCITY CRIMES?

The case study clearly shows the trend since the 9/11 terrorist attacks, how the UNSC was bypassed in favor of the unilateral use of force based on an extensive interpretation of the right to self-defense in Art. 51 in the UN Charter. Instantly, this new Art. 51 interpretation was accepted as *customary* international law—stretching Art. 51 to include self-defense against large-scale international terrorist attacks as well as a government that harbors terrorist networks.[472] The subsequent interventions in Syria, Yemen, and Iraq, all cite a right to collective self-defense as a basis for intervention. The new

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[471] David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent,* 7 DUKE J. OF COMPAR. & INT'L L. 209, 209–40 (1996).

[472] The support for the U.S.-led response founded on a right to self-defense was manifest and broad. The day after the attacks came S.C. Res. 1368 (Sep. 12, 2001) which "*Recognizing* the inherent right of individual or collective self-defense in accordance with the Charter". Also, on the September 12, 2001, NATO invoked its musketeer principle in Art. 5 in the Washington Treaty for the first time in its history. This principle says that an attack on one NATO state is an attack on all, *See* also statement by the European Council on the 21st Sep.2001 supporting the right to self-defense after 9/11. Also, 56 Muslim countries supported the right to self-defense through the Qatar declaration in September 2001.

permissive interpretation of self-defense in current international law could serve the R2P doctrine, as it actually could be used to support R2P interventions!

What if to broaden the interpretation of Art? 51 to accommodate a right to collective self-defense in all cases of grave atrocities committed against populations that the state government itself is unable or unwilling to stop? R2P could be based on "piercing the veil of state sovereignty." The phrase suggests a willingness to look beyond the usual protections afforded by state sovereignty to hold governments accountable for specific actions or obligations. This is relevant in the context of R2P, where international crimes have been committed and the government is unable or unwilling to stop violations or is itself the perpetrator.[473] This is the right to bypass the consent of a government that has forfeited its right to represent its people. Then, the population itself, or a severely oppressed part of the population, such as women, a racial majority, or a minority, could be legalized to call for an R2P intervention, invoking the right to self-defense under Art. 51 in the UN Charter. Such an option would up-play the importance of individuals as bearers of human rights and shift the focus from the government to the inhabitants of a state or territory. It would underscore that individuals' human rights should trump state sovereignty when the most severe crimes against individuals occur and the state government is unwilling or unable to stop them.

This would fit with democratic values and consociationalism. Most importantly, it would get rid of the problem that a humanitarian intervention does not fit into the traditional scheme of exceptions to the prohibition on the use of force in Art. 2(4). Suddenly it fits into the order of the UN Charter as one of the exceptions in Article 2(4), as well as suits the R2P doctrine. This is because self-defense is a *legal* exception to the prohibition on the use of force. The text of Art. 51 does not imply that it must be solely a government that disposes of the right to self-defense. The R2P doctrine, itself, is quite clear that the need to be protected belongs to the population, and that it is triggered when a government cannot adequately defend its population.[474] Thus, without sacrificing the wording of Art. 51, a purpose-driven interpretation can update the understanding of who is the agent of the state in R2P situations—giving the right to self-defense to the suffering population,

[473] This is akin to corporate entities where the veil may be lifted to hold individuals accountable for corporate actions.

[474] Evans & Sahnoun, *supra* note 1, at 11.

and thereby do away with the problem of how to fit an R2P mission without UNSC mandate into the UN Charter.

The right to collective self-defense in an R2P situation would follow the same criteria as those already set out in Art. 51, that is, self-defense has to be carried out in accordance with the conditions provided in Art. 51 and the *Caroline* case, which sets the parameters for how the right to self-defense shall be exercised. Thus, the self-defense has to be reported to the UNSC, and it has to be necessary, instant, and proportional. This means the self-defense must be in proportion to the ongoing atrocities. Therefore, the aim should be to halt atrocities in an in-and-out operation and also to bring the perpetrators to justice This preferably through a referral to the ICC, based on the link between the four international crimes that trigger R2P which converge with the crimes inserted in the Rome Statute. Triggering an ICC referral can be done by the states participating in the collective self-defense. One criterion would be that states participating in an R2P intervention using collective self-defense ought to be parties to the ICC, to ensure that intervening states have altruistic motives and support international justice.

F. CRIMINAL RESPONSIBILITY IS THE NEW R2P?

A conclusion that can be drawn from the case study is that almost all of its situations resulted in exacted judicial responsibility for atrocity crimes. Already in Kosovo, in 1999, FRY President Milosevic was indicted to the ICTY on charges of genocide, crimes against humanity, and war crimes. He was subsequently transferred to the tribunal but died before any verdict.[475] After the Iraqi war, the Iraqi High Tribunal was created; it was a domestic special court with jurisdiction over war crimes, crimes against humanity, and genocide. These *ad hoc* tribunal verdicts have been criticized by some as biased and not by due process, but by implementing victory's justice. All the other situations but Yemen, and until recently Syria, were referred to permanent international tribunals for investigations of atrocity crimes, that is, the ICC and the ICJ. It shows tendencies of interest from the perspective of R2P:

A) That the investigation of atrocity crimes by the ICC or ICJ, is proof of, and strengthens, the case for a responsibility to protect. It establishes a link between the four atrocity crimes genocide, crimes

[475] Prosecutor v. Milošević, Case No. IT-02-54, Indictment, (Int'l Crim. Trib. for the former Yugoslavia Oct. 22, 2002).

against humanity, war crimes, and ethnic cleansing that shall trigger an R2P intervention.

B) It can be used as an alternative when forceful intervention is not forthcoming, such as when the UNSC is deadlocked, or collective intervention outside the UNSC is not happening. A problem is when the ICC, and also sometimes the ICJ, routinely, are seized of a situation as a cheaper substitute for R2P intervention. This is the risk that the ICC and ICJ become an escape route to avoid intervention. The provisions in its Statute Art.98(1) also make it complicated to arrest an individual government official that has immunity, such as a Head of State or Minister. This is because Art. 98 (1) makes an exception for those, while several state parties to the Court as well as ICC itself have tried to disregard the provision. This makes ICC toothless in the many instances when suspects are ruling elites from non-state parties.

A problem with solely a referral to the ICC is that criminal responsibility at the ICC takes time and that a judgment usually was made several years after the mass atrocity crimes occurred. None of the situations in the case study resulted in regime change and the immediate stop of mass atrocities because of ICC intervention. Even though the ICC is a criminal court, it builds on voluntary partnerships. Only states parties to its Charter are bound to extradite a suspect, the only exception being a UNSC referral under Chapter VII of the UN Charter, where the UNSC's coercive powers force every state to cooperate with the ICC.[476] However, of the only two referrals made by the UNSC up-to-date (for the President of Sudan, President al-Bashir, and the Libyan Dictator Colonel Muammar Gaddafi and four members of his government and military), none have hitherto been successful. Referrals to the ICJ under the Genocide Convention, the CERD, or the Torture Convention, did result in rather quick orders of provisional measures aimed to hinder the occurrence in real-time of mass atrocities. However, the ICJ is a dispute court without criminal liability or forceful sanction mechanisms. It is aimed at states' voluntary compliance and works with compensation as a penalty—state vis á vi state.

As an alternative to forceful R2P intervention, the substitute of

[476] Rome Statute of the International Criminal Court, art.13, July 17, 1998, 2187 U.N.T.S. 10.

international courts seems non-efficient and delusive in the hindrance of ongoing mass atrocities. Without international policing in the form of intervention, international courts are toothless, when it comes to enforcement. The perpetrators, in most of the situations in the case study are still in government or have not been brought into ICC custody. Worse, is that in none of the situations did the justice process inhibit or stop the atrocity crimes. A vivid example is Burma, where no forceful action or intervention at all was considered. It is an example of how the process at the ICC is very slow as six years have passed since the situation was referred to the ICC and five years since Gambia initiated a case at the ICJ for genocide. A slow justice process makes for criticism of bias, and raises questions about the selectivity of global justice, with comparisons to the quick real-time ICC investigation in Ukraine. It highlights the ongoing debate about the *West v. the Rest* as a problem for the ICC and for R2P.[477] It underscores the problem of lack of enforcement to back up the judicial process. The Burmese military regime feels safe knowing that the ICC and its members do not prioritize them. There is a need for stronger state support and funding for accountability in situations such as Burma and elsewhere.[478] Also, in Afghanistan, the ICC investigation has gotten a bit out of sight, the jurisdiction of the court being established as late as 2020, for atrocities to have been committed since 2002. The situation for women and girls after the Taliban take-over only might be covered. It is also depressing that after a 20-year of NATO and U.S. intervention, the only remedy applied left is the ICC, sort of used as a scapegoat after their withdrawal.

This is in sharp contrast to the situation in Ukraine, where the ICC has large funding and already has indicted several high-profile dignitaries, such as President Vladimir Putin. Lots of media coverage and interest in the West have raised hopes that an ICC trial poses an imminent threat to the Russian leadership and thus works as a deterrent to commit severe atrocity crimes. Indeed, some scholars and many media outlets pitch the idea, that the use of the ICC in Ukraine, is the main tool for demanding R2P and that the ICC is the enforcement of the international community's responsibility to protect.[479]

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[477] Mark Klamberg & Lovisa Bodagard, *The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court*, 48 GEO. J. INT'L L. 639 (2016–2017); Mohammed Nuruzzaman, *"Responsibility to Protect" and the BRICS: A Decade after the Intervention in Libya*, 2 GLOB. STUD. Q. (2022).

[478] *Id.*

[479] Senthan Selvarajah & Lorenzo Fiorito, *Media, Public Opinion, and the ICC in the Russia–Ukraine War,* 4 JOURNALISM AND MEDIA 760, 760–89 (2023).

The ICC and ICJ processes about crimes against humanity, war crimes, and potential genocidal actions in Israel's war in Gaza and the case brought against Azerbaijan in Nagorno-Karabakh like Ukraine, show how real-time legal intervention can be an alternative, although weak, when forceful military intervention is not forthcoming, and/or the UNSC is deadlocked by veto, and real-politics and finance hinder regional organizations or other states from forceful intervention.

The ICJ referrals in the cases of Syria and Burma are examples of how the ICJ is used as the last resort when it is not feasible to invoke criminal responsibility in the ICC because the states are not parties to the Rome Statute, and the UNSC has not referred the situation.

One benefit of the use of ICC and ICJ lies in the attention. The Ukraine indictments and investigation at the ICC of genocide; war crimes and crimes against humanity; and the ICC Chief Prosecutor's file for arrest warrants for crimes against humanity and war crimes against Israeli prime-minster Netanyahu and his defense minister Yoav Gallant and three Hamas leaders, and the ICJ Provisional Measures Against Gaza under the Genocide Convention have received great international attention and brought to light the likelihood of that severe international crimes are committed in those situations. This increases the possibility of R2P intervention. The link between those international crimes should trigger R2P. It is hard to argue that perpetrators of such crimes should be able to carry on committing them! The justice process brings the possibility of a judicial sanction. For a suspect, in a best-case scenario, it brings only bad publicity and the dangers of traveling abroad. However, an indictment might result in a possible transfer and verdict at the ICC and a lifetime sentence. The ICC member states must arrest a suspect. The process is supposed to work as individual prevention of future crimes in the actual situation – the view that prosecutions, arrest warrants, and statements from the ICC Prosecutor could have a deterring and preventive impact during an active conflict.[480] Also, at play is the idea of general prevention, sending a message to future possible culprits. However, sometimes charges at the ICC can work against peace efforts, as the indicted try to cling to power to ensure they are not transferred. It can also enrage part of the population and give more support to raging the conflict.

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[480] Aakash Chandran, Jennifer Keene-McCann, Emma Palmer, *What of the Rohingya? The ICC, Ukraine, and limits of "international" justice*, THE INTERPRETER, LOWY INST. (Apr. 5, 2023), https://www.lowyinstitute.org/the-interpreter/what-rohingya-icc-ukraine-limits-international-justice.

No matter any bias or shortage of funding, justice is always slower than policing. While international courts are not, and should not be, the alternative to immediate R2P action – it shall not become a substitute. However, the ICC and the ICJ can work as proof of the necessity of activating R2P's military potential.

CONCLUSION

How can R2P be operationalized when the Dark Age of super-power rivalry again entered the stage in the 2020s and returned the World to a Cold War II and scare of a WWIII? I have tried to offer some solutions.

An option is to focus on the procedures and purpose of the collective security system. To use the innovative "Uniting for Peace" procedure to recommend action through the UNGA, based on its subsidiary responsibility for international peace and security in Article 11 in the UN Charter.

Another powerful and innovative suggestion made here is the re-interpretation of Article 51 in the UN Charter, "piercing the veil of sovereignty", to give the Right to Self-Defense to a suffering population (or part of a population) against whom crimes of genocide, crimes against humanity, war crimes, or ethnic cleansing take place, and where the government itself is the perpetrator, or cannot stop the violence. This is the need to upgrade individual's importance to become primary subjects of international law.

Article 53 in the UN Charter is possible to use when a regional organization is prepared to enforce R2P. This is building on a modern praxis with an extensive interpretation of the possibility of using force by regional organizations in cases of conflicts where large-scale mass atrocities occur. They would only need approval by the UNSC *ex post facto,* or even tacit, for a purely R2P motivated intervention, that fulfills the criteria in RwP with sunset clauses, no alternate political goals, and sole focus on alleviating human suffering, but not aimed at regime change if not necessary.

Another possibility is to bypass a sole veto made by a P-5 under Chapter VII when possible. That would be a dynamic, evolutionary interpretation of the UN Charter *contra legem.* It would fit with earlier evolutionary interpretations on abstentions to UNSC resolutions and the invention of peacekeepers under imaginary Chapter VI ½. A step in this direction was

taken in 2022 when the UNGA decided to meet whenever a veto paralyzes the UNSC. This is an alternative to the RNVT.

The idea is to use a right to remedial secession, marrying the concept of R2P with self-determination. The possibility of upgrading a severely oppressed minority, to external self-determination, to reclassify them as a people in Article 1(2) in the UN Charter. Alternatively, the right to self-determination can be used as remedial *internal* self-determination for a severely oppressed majority in a state against which apartheid-like measures are systematically imposed, using the FRD savings-clause, paragraph 7. This would then open for their right to take part in government on equal footing.

The use of the ICC, when alleged atrocity crimes have occurred, is important to make for accountability and preventiveness. However, an ICC referral should not be in lieu of R2P, which the case study does show an inclination of. It is important not to shuffle away the responsibility to protect solely to international tribunals' slower work. A judge is no police who can step out and stop atrocities in real-time.

The current return to old-fashioned Just War Theories collides with the right of civilians to be free from oppression and mass atrocity crimes in the Dark Ages of 2020s. No *jus ad bellum* cause can override the purpose of saving human life and alleviating human suffering. This is even more true since the R2P doctrine was invented! The destructiveness of war as a policy of the nation-state is usually a cause for large-scale human suffering and a breeding ground for atrocity crimes.

Maybe, we must accept that there is no magic formula that can change that the UNSC is never more than the political will and economic powers of its members. The time is ripe for other actors in the international community to step forward. A state is not operating in a legal vacuum but is influenced by societal norms and values existing today. Even if it appears that the Westphalian state-centric concept rules in the 2020s, many in civil society and among the public, protest against this backlash because they know that international law has upgraded individuals' rights at the expense of traditional state sovereignty. This has made the building blocks for a responsibility to protect in the 2000s. It was invented by states from within, from their citizens' need for respect for human rights and IHL. This is also the shift in international law from a state-centric subjectivity to new subjects in international law, such as people and individuals. The R2P doctrine can be viewed as shifting the focus from governments as agents of the state towards

the individuals making up the state's population. This is the idea of helping suffering populations, in the true spirit of the UN Charter's preamble:

> "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED, to save succeeding generations from the scourge of war . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person."[481]

The postulate that political will is the driving force that is needed to make the normative pull to reinterpret the existing UN Charter to be able to respond to violations of international atrocity crimes. R2P is a powerful tool with a normative pull that will overcome the wall of non-intervention. Thus, the way forward is to work through practice and reinterpretation of the UN Charter. The UN Charter has been informally reformed and developed throughout the UN's existence as was the intent of the UN framers. To quote Lord Halifax in the preparatory works to the UN Charter:

> We all want our Organization to have life. We want it to develop its own codes of procedure. We want it to be free to deal with all the situations that may arise in international relations. We do not want to lay down rules which may, in the future [,] be the signpost for the guilty and a trap for the innocent. [] I, for one, hope that we may succeed in creating an organic body which will have within itself the seeds of a vigorous life . . . [482]

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[481] U.N. Charter Preamble.

[482] Lord Halifax, Delegate of the United Kingdom, *United Nations Conference on International Organization*, UNCIO Doc. Part VI, San Francisco (1945).

A DIMINISHED FIRST AMENDMENT IN CYBERSPACE: THE BRUSSELS EFFECT ON FREEDOM OF EXPRESSION

By Kurt A. Webber[*]

ABSTRACT

This article introduces the reader to the European Union's attempts at moderating the internet through its Digital Security Act (DSA) and the primary voices heard in that effort, including the trusted flaggers, the member states' digital services coordinator, and the platforms themselves.

The article explores the EU's high hopes for the DSA to eliminate harmful and illegal content and ensure transparency through its collective database of moderation actions.

The article describes the transparency database and details its principal inadequacies.

Finally, the article highlights the conflict between the U.S. and EU's views on moderation.

[*] Visiting Professor of Law, Simmons Law School, Southern Illinois University; University of Illinois College of Law, J.D., *cum laude*; Indiana University Kelley School of Business-Bloomington, B.S.

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I. INTRODUCTION TO EU INTERMEDIARY MODERATION

The European Union's (EU) adoption of the Digital Services Act (DSA) was a watershed event. The European Parliament and the Council of the EU (collectively the EU) adopted Regulation (EU) 2022/2065 (DSA).[1] In the EU's public square of cyberspace, the DSA was designed to benefit society by articulating some standards of behavior, creating greater transparency, facilitating takedown resolutions and appeals, and helping curtail illicit activities. In short, the DSA planned to moderate the internet by using private companies like "Alibaba, Amazon, Apple, Booking.com, Facebook, Google, Microsoft, Pinterest, Snapchat, TikTok, Twitter [now X], Wikipedia, and Zalando."[2] The EU is trying "to bring private power under democratic control."[3] It is "the privatization and automation of online speech control."[4]

The DSA attempted to create harmonized rules regarding different types of intermediary services.[5] Broadly speaking, those services encompass being a mere conduit, caching, or hosting.[6] Depending upon the level of involvement and knowledge, the intermediary could be insulated from liability for illegal content on its network.[7] The DSA defined illegal content as "any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with [EU] law or the law of any Member State. . . ."[8] When an intermediary acts on content that is illegal or incompatible with its terms of service, the intermediary must "provide a clear and specific statement of reasons to any affected recipients of the service"[9] and it becomes a part of the mandated online DSA Transparency Database.[10]

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[1] Commission Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L277) 1. [hereinafter DSA].

[2] Anupam Chander, *When the Digital Services Act Goes Global*, 38(3) BERKELEY TECH. L. REV. 1067, 1068 (2023).

[3] *Id.*

[4] *Id.* at 1068-69 (*citing* Florence G'sell, The Digital Services Act: A General Assessment, 1 CONTENT REGUL. IN THE EUR. UNION: The Digital Services Act, 85–86 (Antje von Ungern-Sternberg ed. 2023)).

[5] DSA, *supra* note 1, at art. 1.

[6] *Id.* at art. 3 (g)(i—iii).

[7] *Id.* at arts. 4—6.

[8] *Id.* at art. 3(h).

[9] *Id.* at art. 17.

[10] *See id.* at art. 24, ¶ 5; EUR. COMM'N: *DSA Transparency Database*, https://transparency.dsa.ec.europa.eu/ (last visited June 25, 2024).

In addition to the DSA, the EU also adopted Regulation (EU) 2022/1925 of the European Parliament and the Council of the EU of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and 2020/1828 (Digital Markets Act) (DMA).[11] According to the preamble, the DMA was designed to combat the prevalent:

> online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communications services, cloud computing services, virtual assistants, web browsers and online advertising services, including advertising intermediation services, [that] . . . have the capacity to affect a large number of end users and businesses, which entails a risk of unfair business practices.[12]

In the EU's view, these gatekeepers "have gained the ability to easily set commercial conditions and terms in a unilateral and detrimental manner for their business users and end users."[13] The EU is particularly interested in those operating "in at least three Member States" who have a "strong ability to monetize . . . users."[14] In short, the DMA attempted to level the playing field for businesses similar to how the DSA tried to moderate speech.

Within the DSA's framework, one of the newest moderating voices is the trusted flagger. A would-be-flagger must apply to a member state's digital services coordinator (DSC) to serve.[15] DSCs "are responsible for supervising, enforcing and monitoring the DSA" within their own states.[16] Going up the DSA hierarchy, the European Commission (EC) "enjoys exclusive competence to supervise, enforce and monitor compliance" of platforms but shares competence with DSCs.[17]

In the end, the DSA is a multilayered system with formal players, specifically the trusted flaggers, DSCs, and the EC. The platforms and engines are

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[11] Commission Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L265), 1 [hereinafter DMA].
[12] *Id.* at 14.
[13] *Id.* at 13.
[14] *Id.* at 17.
[15] *See id.* at art. 22, ¶ 2.
[16] *Digital Services Coordinators*, EUR. COMM'N, SHAPING EUR.'S DIGITAL FUTURE, https://digital-strategy.ec.europa.eu/en/policies/dsa-dscs (last updated July 31, 2024).
[17] *Id.*

also self-policed under the DSA's requirements. Finally, the complaining public plays a role as well.

In terms of the formal players, the process is off to a slow start. Some member states of the EU have not yet appointed a DSC, including Belgium and Poland,[18] leaving prospective flaggers with no place to apply. Only two trusted flaggers, The Copyright Information and Anti-Piracy Centre and Der Schutzverband gegen unlauteren Wettbewerb (Google® translated to Protection Association Against Unfair Competition), have been appointed by Finland and Austria, respectively.[19] No other member state has appointed a trusted flagger. This is particularly perplexing in the case of Germany. Germany previously appointed Freiwillige Selbstkontrolle Multimedia-Diensteanbieter e.V. (FSM) and Jugendschutz.net as flaggers[20] under its own Network Enforcement Act or NetzDG.[21]

Whereas the DSA seems focused largely on communication, the DMA is focused mainly on anticompetitive measures in commerce — but overlap is inevitable. A very large online platform under the DSA is likely a gatekeeper under the DMA.[22] These gatekeepers have arduous obligations.[23] Under the DMA, gatekeepers have mandatory reporting expectations,[24] and the EC can investigate them[25] along with the national authorities of member states.[26] Those national authorities, including national courts, are supposed to harmonize their respective decisions,[27] but time will tell whether conflicts will ensue when national authorities become actively involved.[28] The DMA text is supposed to take precedence,[29] and national courts should not make a decision running counter to any EC decision.[30]

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[18] *Id.*

[19] *See Trusted flaggers under the Digital Services Act (DSA)*, EUR. COMM'N: SHAPING EUR.'S DIGIT. FUTURE, https://digital-strategy.ec.europa.eu/en/policies/trusted-flaggers-under-dsa#:~:text=Trusted%20flaggers%20are%20special%20entities,it%20to%20the%20online%20platforms (last updated Sept. 26, 2024).

[20] *See* William Echikson & Olivia Knodt, *Germany's NetzDG: A Key Test for Combatting Online Hate*, at 2, n.4, CENTR. FOR EUR. POL'Y STUD. [CEPS] RSCH. REP. NO. 2018/09 (2018), https://ssrn.com/abstaract=3300636.

[21] *See id.* at i.

[22] DMA, *supra* note 11, art. 3, ¶ 1.

[23] *See id.* at arts. 5–8.

[24] *See id.* at art. 11.

[25] *See id.* at 74.

[26] *Id.* at 91.

[27] *Id.* at 92.

[28] *Id.* at art. 23, ¶¶ 3–10.

[29] *Id.* at art. 1, ¶ 7.

[30] *Id.* at art. 39, ¶ 5.

Nevertheless, conflict is coming because internet traffic freely crosses borders without conscious action and any nonuniform approach to moderation will be perplexing, leading to diametrically opposed administrative, legislative, and judicial decisions among countless jurisdictions, including among the EU member states. Who is really doing the moderating in the EU is important.

II. THE EUROPEAN MODERATING VOICES

Moderation is a daunting, impossible task, illustrated by a simple search of the DSA Transparency Database, which yielded 66,064,026 results on a single day, i.e., June 24, 2024.[31] Yes, 66 million moderating actions were created in the database on June 24th. When extracting a sample from any search, the DSA Transparency Database defaults to return only the last 1000 entries regardless of the total number of entries, which may not be representative of that search's overall results. On this occasion, the sampled results for June 24th involved incompatible content, with 83.6% of the results being disabled, 7.5% of the results being removed, and 8.9% of the results being resolved in other ways.[32] The incompatible content most often concerned a generic image (32.3%), trailed by a promotional overlay on an image (20.2%), restricted adult content (8.6%), personalized advertising of sexual interest (7.9%), medical misinformation (6.3%), personalized advertising of personal hardships (6.2%), and harassment and bullying (4.8%).[33] The database most commonly categorized these instances as conflicting with the scope of the platform's service (86.2%), trailed by negative effects on civic discourse or elections (7.0%) and illegal or harmful speech (5.7%).[34]

Looking again on June 24th, the platforms[35] voluntarily initiated 66,011,535 actions.[36] The sample of all statements of reason for June 24th were the same statements of reason for voluntary initiated actions, meaning the last 1000 entries on that day were all platform initiated.[37]

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[31] *Search "Statements of reasons,"* EUR. COMM'N: DSA TRANSPARENCY DATABASE, https://transparency.dsa.ec.europa.eu/statement?s=&created_at_start=24-06-2024&created_at_end=24-06-2024 (last visited June 25, 2024).

[32] *Id.*

[33] *Id.*

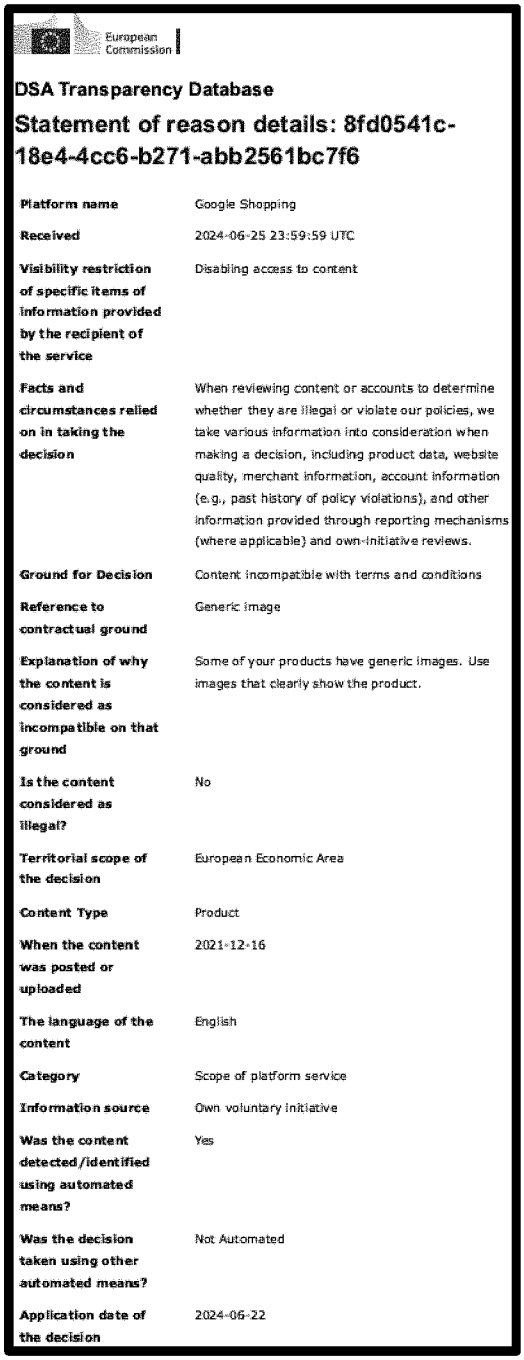
[34] *Id.*

[35] "Platform(s)" is used generically to encompass an entity subject to the DSA.

[36] *Search "Statements of reasons,"* EUR. COMM'N: DSA TRANSPARENCY DATABASE, https://transparency.dsa.ec.europa.eu/statement?s=&source_type%5B%5D=SOURCE_VOLUNTARY&source_type-SOURCE_VOLUNTARY=on&created_at_start=24-06-2024&created_at_end=24-06-2024 (last visited June 25, 2024).

[37] *Id.*

The following figure illustrates a typical statement of reason initiated by a platform, including the platform name; time received; visibility restrictions; justification; legality; territorial scope; date posted; language; category; source; detection method; level of automated decision making; and date decided:



European Commission

DSA Transparency Database

Statement of reason details: 8fd0541c-18e4-4cc6-b271-abb2561bc7f6

Platform name	Google Shopping
Received	2024-06-25 23:59:59 UTC
Visibility restriction of specific items of information provided by the recipient of the service	Disabling access to content
Facts and circumstances relied on in taking the decision	When reviewing content or accounts to determine whether they are illegal or violate our policies, we take various information into consideration when making a decision, including product data, website quality, merchant information, account information (e.g., past history of policy violations), and other information provided through reporting mechanisms (where applicable) and own-initiative reviews.
Ground for Decision	Content incompatible with terms and conditions
Reference to contractual ground	Generic image
Explanation of why the content is considered as incompatible on that ground	Some of your products have generic images. Use images that clearly show the product.
Is the content considered as illegal?	No
Territorial scope of the decision	European Economic Area
Content Type	Product
When the content was posted or uploaded	2021-12-16
The language of the content	English
Category	Scope of platform service
Information source	Own voluntary initiative
Was the content detected/identified using automated means?	Yes
Was the decision taken using other automated means?	Not Automated
Application date of the decision	2024-06-22

(Figure 1)

From this information, one can quickly surmise that the driving force behind compliance with the DSA is the platforms themselves. Of the statements of reason for June 24th, only 52,491,[38] or roughly 0.0795%, were initiated by someone other than a platform.

Continuing the analysis of June 24th, notices under Article 16 of the DSA encompass moderation initiated by someone other than the platforms and flaggers. On that day, 22,258 Article 16 notices were created.[39] The sampled results involved incompatible content 60.9% of the time and illegal content 39.1% of the time,[40] suggesting the public is less interested in legality than incompatible content. Prompted by the public's actions, 26.4% of the results were disabled and 66% of the results were removed.[41] More significantly, 7.6% of the accounts were suspended.[42] In terms of incompatibility, sexual content topped the list 19.4% of the time, trailed by Digital Millennium Copyright Act content (11.2%) and harassment and bullying (9.6%).[43] The database categorized these instances as most often involving illegal or harmful speech (41.7%), trailed by the scope of the platform's service (17.7%), and pornography or sexualized content (17.2%).[44]

Probably because only two trusted flaggers have been named thus far, flaggers have had limited effect. A search conducted of flagger activity yielded 556 statements of reason from February 17, 2024,[45] through June 24, 2024, with 99.1% of those statements involving Snapchat®.[46] Content was removed 30.6% of the time and disabled another 0.9%.[47] Accounts were suspended 57.4% of the time and terminated 11.2%.[48] Top complaints related to sexual content (44.6%), harassment

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[38] 52,491 = 66,064,026 - 66,011,535.

[39] *Search "Statements of reasons,"* EUR. COMM'N: DSA TRANSPARENCY DATABASE, https://transparency.dsa.ec.europa.eu/statement?s=&source_type%5B%5D=SOURCE_ARTICLE_16&source_type-SOURCE_ARTICLE_16=on&created_at_start=24-06-2024&created_at_end=24-06-2024 (last visited June 25, 2024).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] The DSA took effect on February 17. DSA, *supra* note 1, art. 93, ¶ 2.

[46] *Search "Statements of reasons,"* EUR. COMM'N: DSA TRANSPARENCY DATABASE, https://transparency.dsa.ec.europa.eu/statement?s=&source_type%5B%5D=SOURCE_TRUSTED_FLAGGER&source_type-SOURCE_TRUSTED_FLAGGER=on&created_at_start=17-02-2024&created_at_end=24-06-2024 (last visited June 25, 2024).

[47] *Id.*

[48] *Id.*

and bullying (24.6%), and illegal or regulated activities (15.1%).[49] The category most identified as justifying action was the protection of minors (26.6%).[50]

To give one an overall idea of the magnitude involved in moderation, over 12 billion (i.e., 12,335,733,737) statements of reason were in the DSA Transparency Database as of June 26, 2024, 10:40 EST,[51] and over 8 billion (i.e., 8,481,369,713) of these were fully automated decisions.[52] This equates to roughly 66,407 moderation decisions being made in one second.[53]

III. DSA TRANSPARENCY DATABASE

The DSA Transparency Database is a product of Article 24 of the DSA, a mandated "machine-readable database managed by the [EC]."[54] Online platforms must ensure that information submitted to this database does not contain personal data,[55] thereby making analysis of decisions impossible. Platforms must submit, and appear to be submitting, statements of reason as required by Article 17.[56] In particular, Article 17(3) requires the statement of reason to contain at least the following information:

> (a) information on whether the decision entails either the removal of, the disabling of access to, the demotion of or the restriction of the visibility of the information, or the suspension or termination of monetary payments related to that information, or imposes other measures . . . with regard to the information, and, where relevant, the territorial scope of the decision and its duration;
>
> (b) the facts and circumstances relied on in taking the decision, including, where relevant, information on whether the decision was taken pursuant to a notice submitted in accordance with Article 16

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Search "Statements of reasons,"* EUR. COMM'N: DSA TRANSPARENCY DATABASE, https://transparency.dsa.ec.europa.eu/statement?s=&automated_decision%5B%5D=AUTOMATED_DECISION_FULLY&created_at_start=&created_at_end= (last visited June 26, 2024).
[53] 66,407 {decisions per second} = 12,335,733,737 {statements of reason} / 129 (days) * 24 {hours} * 60 {seconds}
[54] DSA, *supra* note 1, art. 24, ¶ 5.
[55] *Id.*
[56] DSA, *supra* note 1, art. 17; art. 24, ¶ 5.

> or based on voluntary own-initiative investigations and, where strictly necessary, the identity of the notifier;
>
> (c) where applicable, information on the use made of automated means in taking the decision, including information on whether the decision was taken in respect of content detected or identified using automated means;
>
> (d) where the decision concerns allegedly illegal content, a reference to the legal ground relied on and explanations as to why the information is considered to be illegal content on that ground;
>
> (e) where the decision is based on the alleged incompatibility of the information with the terms and conditions of the provider of hosting services, a reference to the contractual ground relied on and explanations as to why the information is considered to be incompatible with that ground;
>
> (f) clear and user-friendly information on the possibilities for redress available to the recipient of the service in respect of the decision, in particular, where applicable through internal complaint-handling mechanisms, out-of-court dispute
> settlement and judicial redress.[57]

Unfortunately, not all required information is accessible in the DSA Transparency Database without downloading pertinent files (e.g., *.csv) and accounting for redactions.

One commentator correctly predicted the limited utility to researchers of the database contemplated by Article 24.[58] She cautioned the EC would host "billions of notices about platforms' content moderation decisions, only to discover both high costs and important limitations."[59] Researchers cannot determine which users' content was removed because all personally identifiable information is eliminated.[60] In light of how the database currently works, "always" should now be substituted for "often" in the commentator's prediction.

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[57] DSA, *supra* note 1, art. 17, ¶ 3.
[58] Daphne Keller, *The EU's new Digital Services Act and the Rest of the World*, VERFBLOG (Nov. 7, 2022), https://verfassungslog.de/dsa-rest-of-world/.
[59] *Id.*
[60] *Id.*

Drawing upon the file entitled sor-global-2024-06-25-full-00000-00000.csv available from the DSA Transparency Database,[61] some generalities can be gleaned from a broader sample. This file contained 100,001 statements for a single day, 96.39% concerning Google Shopping and 99.96% of which were voluntarily initiated by the platforms.[62] Not surprisingly, 47.10% of the reported statements concerned content in the English language, and 100% of the statements concerned incompatible content.[63] Of the actions taken to address visibility, 96.45% entries were disabled and 2.08% were removed.[64] Although a plethora of categories were mentioned, including some concerning ones (e.g., 30 instances of child sexual abuse imagery), nothing capable of being independently analyzed could be found.

IV. THE HIGH HOPES OF DSA

The EU formulated new rules through the DSA to "'put an end to the digital Wild West where the big platforms set the rules themselves and criminal content [went] viral.'"[65] The EU naively imagined a more democratic online without harmful or illegal content, all while poking U.S.-based companies in the eye.[66] The EU also aspired to create a gold standard beyond its geographical borders.[67] It wanted to indirectly set "the frames for the sayable and seeable."[68] And that was a recipe for conflict and censorship.

The concept of illegality "varies between [member] states due to national laws and jurisdiction . . . ."[69] The conundrum is evident when a Twitter comment could be criminally prosecuted in Germany but not in France or Portugal.[70] Charging decisions depend largely on context and vary according to the facts presented.[71] The issue in the EU is quite nuanced. "For example, Germany, France,

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[61] *Data Download*, EUR. COMM'N, https://transparency.dsa.ec.europa.eu/data-download (last visited June 28, 2024).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Gabi Schlag, *European Union's Regulating of Social Media: A Discourse Analysis of the Digital Securities Act*, 11 POL. & GOVERNANCE 168, 168 (2023) (citation omitted), https://www.cogitatiopress.com/politicsandgovernance/article/view/6735.
[66] *Id.* at 169.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 170.
[70] *Id.*
[71] *Id.*

Austria, Belgium, the Czech Republic, Romania, Lithuania, and Slovakia have laws against Holocaust denial,"[72] meaning a denier's speech is limited there. Elsewhere in the EU denialism is more tolerated, and less offensive actions are common in other parts of the world. This type of conflict falls squarely within the purview of the DSA without a definitive resolution. Germany provides an excellent illustration of the coming conflict and the absence of true uniformity in the EU.

The challenge is to "determine the legality of content that falls under hate speech – or 'incitement to hatred' as referred to in Germany's criminal code."[73] The genesis of the NetzDG came from a rise in hate speech perpetrated when refugees emigrated from the Middle East around 2015.[74] Germany's parliament passed the law in 2017 "to combat hate speech, radicalization, and fake news online."[75]

The regulatory scheme applied to all "for-profit social media platforms with at least two million registered users in Germany."[76] It required platforms to "delete or block obviously illegal content within twenty-four hours."[77] Critics opposed the law because "it would set a precedent for governments around the world to restrict online speech."[78] Many believe "the law . . . violates freedom of expression under not only the German constitution but a host of international treaties."[79] Others believe Germany "should have sought a European-wide law, rather than pursuing its own single-country approach."[80]

The reaction was immediate:

> Against this backdrop, NetzDG went into effect on January 1, 2018. That same day, Twitter and Facebook took down a post from German far-right AfD politician Beatrix von Storch, accusing the Cologne police of appeasing 'barbaric, gang-raping Muslim hordes of men'. [sic] Twitter first blocked the post based on German law and later, based on its own community standards, suspended the account of Titanic, a German satirical magazine, for mocking von Storch's tweet. These incidents reinforced the concern of NetzDG

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[72] *Id.* at 172.
[73] Echikson & Knodt, *supra* note 20, at 3.
[74] *Id.* at 4.
[75] Imara McMillan, *Enforcement Through the Network: The Network Enforcement Act and Article 10 of the European Convention of Human Rights*, 20(1) CHI. J. OF INT'L L. 252, 254 (2019) (footnote omitted), https://chicagounbound.uchicago.edu/cjil/vol20/iss1/7.
[76] Echikson & Knodt, *supra* note 20, at 5.
[77] *Id.* at 6.
[78] *Id.* at 8 (footnote omitted).
[79] McMillan, *supra* note 75, at 254—55 (footnote omitted).
[80] Echikson & Knodt, *supra* note 20, at 8.

> critics that the law, even in its diluted final form, would end up as a censorship tool.[81]

The conflict NetzDG critics predicted is here. NetzDG "shifts the responsibility for tackling illegal content away from public authorities and courts to private companies."[82] NetzDG names twenty-one separate criminal offenses, including defaming religions, defaming religious and ideological associations; insulting; general defaming; and intentionally defaming.[83] Distinguishing between legal and illegal content concerning insults and defamation is difficult enough,[84] even before trying to tackle hatred and fake news.[85]

> Criminal investigations were immediate:
>
> Numerous legal cases [were opened] in Germany against Facebook over content removals. Judges have issued a series of contradictory rulings. In some cases, plaintiffs challenged Facebook for deleting content that is legal under German law. In other cases, plaintiffs challenged Facebook for over-deleting based on its own definitions of hate speech. Some judges have ruled in favour of protecting the freedom of expression enshrined in Article 5 of the German Constitution, while in other cases, judges asserted Facebook's right to enforce its community guidelines.
>
> Contradictory decisions put Facebook in a difficult position. On the one[] hand, it is required to delete information, at the risk of significant fines, while on the other hand it runs a significant risk of being sued for deleting legal content. German court decisions are content and context specific, making it difficult to establish any kind of precedent. The contradictory decisions muddle the picture and underline the complexity of determining and dealing with illegal content.[86]

Now interject the DSA and DMA into the mix, which requires respect for the national laws of Germany, and consider the conundrum presented by Nazi paraphernalia.

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[81] *Id.* (footnote omitted).
[82] *Id.* at 7.
[83] *Id.* at 22, Box A 2.
[84] *Id.* at 12-13.
[85] "France has put forward a law to fight 'fake news.'" *Id.* at 15.
[86] *Id.* at 11 (footnote and table omitted).

Collectors love all things Nazi, creating a thriving market with annual sales approaching "as high as $100 million — and in the United States nothing about it is illegal."[87] Harlan Crow is a friend of Justice Clarence Thomas and an avid collector of Nazi paraphernalia.[88] Crow could sell his Nazi paraphernalia in the U.S. through the internet, but that transaction could become problematic in parts of Europe. The world market is an uncertain free-for-all, "with laws prohibiting it in some European countries and criticism of auction houses that sell the items fierce in places where it is permitted."[89] This type of transaction would certainly fall within the purview of both the DSA and DMA, the latter of which seeks to harmonize legal obligations in the EU for the benefit of the EU's economy and consumers.[90] But no harmony exists among the member states regarding this type of commercial transaction. With most NetzDG complaints relating "to hate speech and political extremism,"[91] does German law become the least tolerant, common denominator by which the EU must operate? Who are the final arbiters in this circumstance? Are they the same western gatekeepers the EU considers unfair?[92]

In the eyes of the EU, the gatekeeping platforms originally "tend[ed] to adopt global or at least pan-European business models and algorithmic structures . . . and in some cases . . . adopted different business conditions and practices in different Member States, which [was] liable to create disparities . . . to the detriment of integration of the internal market [of the EU]."[93] A good example is the approach adopted in Germany by Facebook® (now Meta®) concerning its internal criminal laws.

> All reported content is first reviewed under Facebook's community standards. If these are violated, then the piece of content is removed globally and is not included in the specific NetzDG transparency report. If content only violates German law but not Facebook's terms of service, then the content is blocked only in Germany. This two-step approach has allowed Facebook to avoid having its broader content review process subject to NetzDG fines.

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[87] Menachem Kaiser, *Opinion Guest Essay: What Kind of Person Has a Closet Full of Nazi Memorabilia?* N.Y. TIMES (Sept. 29, 2023), https://www.nytimes.com/2023/09/29/opinion/nazi-memorabilia-market-liveauctioneers.html.

[88] Andrew Lapin, *GOP Donor's Nazi collection raises questions about Clarence Thomas ties*, THE JERUSALEM POST (Apr. 11, 2023), https://www.jpost.com/american-politics/article-738917.

[89] *Id.*

[90] DMA, *supra* note 11, ¶ 8.

[91] Echikson & Knodt, *supra* note 20, at 12.

[92] *See* DMA, *supra* note 11, at ¶ 14.

[93] *Id.* at ¶ 7.

> In some respects, Facebook's community guidelines are stricter than those under NetzDG. German law lists 21 different types of illegal content. Facebook bans many more categories including nudity. German law allows nudity.[94]

The way Facebook complied with German law necessarily ensured nonuniformity across the EU.

What happens when an authoritarian political party takes over a member state of the EU? "[A] worldwide trend to restrict freedoms for the sake of national security" has already taken hold.[95] In authoritarian regimes, restrictions come in the form of "control and command mechanisms with a centralized agency to regulate internet access and available content."[96] Meanwhile, most democracies, including the U.S., "have advocated a free, less monitored internet."[97] The crisis intervention aspects of the DSA seem to mimic an authoritarian regime instead of a democracy. Whether that regime takes hold is dependent upon a first (and maybe last) election. We learned "[a] key historical lesson of the Holocaust is that the people, through their representatives, can destroy democracy and human rights."[98]

After authoritarian figures are democratically elected in a member state, they could appoint a complicit DSC and then complain about "what they believe to be . . . disinformation about their own activities."[99] "This makes the various mechanisms that the DSA offers to achieve its goals attractive for governments with authoritarian tendencies."[100] The complicit DSC could:

> exercise those powers not on behalf of all of the people of a country, but rather a particular interest. Political or personal preferences might favor flaggers aligned with those preferences. Accredited dispute settlement bodies might favor a particular viewpoint. Researchers who may have better relations with the [DSC] may be likely to be approved, which may help produce studies that favor the government's viewpoint. Indeed, a provision designed to allow the

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[94] Echikson & Knodt, *supra* note 20, at 10.
[95] Schlag, *supra* note 65, at 170.
[96] *Id.* at 170—71 (citations omitted).
[97] *Id.* at 171 (citation omitted).
[98] Aharon Barak, *Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 20 (2002).
[99] Chander, *supra* note 2, at 1077.
[100] *Id.*

> public to scrutinize platform actions through outside research could be weaponized to strengthen government control.[101]

With twenty-seven recently elected authoritarian leaders in the EU, each has "an incentive to control information flow — to designate the opposition's critique as defamation and lies."[102] Their thoughts are logical:

> It makes sense to prepare for inevitable crises with protocols in place to respond. And certain crises will demand immediate response. But emergency powers raise risks of abuse. Governments could use them to target what the [incumbent] governments believe to be election disinformation produced by opposition, or communal discontent that might undermine those in power.[103]

The use of the DSA in this fashion is not farfetched. The Czech Republic is a member state of the EU[104] but was previously within a socialist system encompassing Russia.[105] Before "elections in 2021, Russian authorities ordered Apple and Google to remove an app created by supporters of opposition leader Alexei Navalny."[106] Russia also "banned Facebook in the wake of the Ukraine invasion . . . ."[107] Brazil imposed "fake news" protocols that are draconian and subject to abuse.[108] The Indian government has ordered Twitter® (now X) to take down unfavorable tweets.[109] Nigeria banned Twitter for a time.[110] Even the French Prime Minister is not above the fray, floating "the possibility of a shutdown of TikTok, Snapchat, and Telegram after accusing them of contributing to . . . riots."[111]

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[101] *Id.* at 1080 (footnote omitted).
[102] *Id.* at 1086.
[103] *Id.* at 1080—81.
[104] *Czechia*, EU, https://european-union.europa.eu/principles-countries-history/eu-countries/czechia_en#:~:text=Make%20a%20complaint,is%20the%20head%20of%20state (last visited Dec. 31, 2024).
[105] Barak, *supra* note 98, at 25.
[106] Chander, *supra* note 2, at 1081 (footnote omitted).
[107] *Id.* (footnote omitted).
[108] *Id.* at 1083.
[109] *Id.* at 1084.
[110] *Id.*
[111] *Id.* at 1084—85.

V. POTENTIAL IMPACT ON ELECTIONS

The EU is attempting "to strengthen authentic and trustworthy communication by demanding platforms take down harmful and illegal content."[112] It is trying to demand "more transparency from platforms on how they actually apply algorithms, delete content, or process complaints."[113] Unfortunately, the aspiration is not a reality when it comes to elections.

The EU's parliamentary elections, which take place every five years, occurred last year from June 6th to June 9th.[114] Upon searching those dates in the DSA Transparency Database for negative effects on civil discourse or elections, one finds 28,850 statements of reason.[115] From the sample, one finds visibility was affected in 75.5% of the cases, content removed in 22.4% of the cases, and content disabled in 2.1% of the cases.[116] The sample cited medical misinformation (94.3%) and misinformation (2.6%) as reasons for taking action.[117] In each instance, the action was automated at least partially 97% of the time.[118] The effect these attempts at moderation had on the EU's parliamentary elections is unknown based on the limited information contained in the DSA Transparency Database, a troubling set of circumstances.

France's President recently conducted a snap election "after the Euroskeptic far right walloped his pro-European party in the elections for the European Parliament."[119] The day after that snap election, "France awoke to final results that none of the polls had predicted."[120] The National Assembly was split among the "left-wing coalition's New Popular Front," the president's "centrist coalition," and

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[112] Schlag, *supra* note 65, at 174.
[113] *Id.*
[114] Press Release, Council of the Eur. Union, Council confirms 6 to 9 June 2024 as dates for next European Parliament elections (May 22, 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/05/22/council-confirms-6-to-9-june-2024-as-dates-for-next-european-parliament-elections/.
[115] *Search "Statement of reasons," DSA Transparency Database*, EUR. COMM'N, https://transparency.dsa.ec.europa.eu/statement?s=&category%5B%5D=STATEMENT_CATEGORY_NEGATIVE_EFFECTS_ON_CIVIC_DISCOURSE_OR_ELECTIONS&category-STATEMENT_CATEGORY_NEGATIVE_EFFECTS_ON_CIVIC_DISCOURSE_OR_ELECTIONS=on&created_at_start=06-06-2024&created_at_end=09-06-2024 (last visited June 25, 2024).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] Catherine Porter, *What the Mood Is Like in France After Surprise Election Results*, N.Y. TIMES (July 8, 2024), https://www.nytimes.com/2024/07/08/world/europe/france-election-reaction.html?smid=nytcore-android-share.
[120] *Id.*

the "far-right National Rally."[121] As one editorial put it, "'the National Assembly of tomorrow will be more ungovernable than yesterday's.'"[122] Just like with the EU's parliamentary elections, the DSA Transparency Database would provide no indication of what impact moderation efforts had in creating these election results.

VI. THE UNCERTAIN STATUS OF U.S. MODERATION

Historically, the U.S. has been at the forefront of free speech on the internet, legislatively creating intermediary immunity in cyberspace. The origin story starts in the Telecommunications Act of 1996, Pub. L. 104—104, 110 Stat. 56, wherein the Communications Decency Act (CDA) gave birth to intermediary immunity.

> Section 230, as it is now colloquially known, 'represents the approach of Congress to a problem of national and international dimension.' Section 230 consists of two prongs: The shield and the sword. The shield provides: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.' This prong insulates the intermediary from publication errors. The sword provides: 'No provider or user of an interactive computer service shall be held liable on account of —any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . .' This prong insulates the intermediary from moderation errors.[123]

When provided with an imperfect opportunity to weigh in on the scope of the immunity a term ago in *Twitter, Inc. v. Taamneh*[124] and *Gonzalez v. Google, LLC,*[125] the U.S. Supreme Court did not resolve the legal issue,[126] but the Court got another two chances this term.

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[121] *Id.*

[122] *Id.* (quoting Alexis Brézet, Editorial, *France de droite, cap à gauche*, LE FIGARO, July 8, 2024, at 1 (Fr.)).

[123] Kurt A. Webber, *Colonizing the Internet: America's Public Square Reaches the World Through Trade Treaties*, 50 RUTGERS COMPUTER & TECH. L.J. 1, 3—4 (2023) (footnotes omitted).

[124] Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023).

[125] Gonzalez v. Google, LLC, 143 S. Ct. 1191 (2023).

[126] *Id.* at 1192.

In *Moody v. NetChoice, LLC*,[127] Florida and Texas had attempted some degree of internet moderation through state-level legislation. Through Florida Senate Bill 7072 and Texas House Bill 20, the states "tried to experiment with some of the same regulatory measures as seen in the EU's DSA."[128] The U.S. Supreme Court did not seem particularly receptive to the state's justifications for moderation, remanding the cases to the district courts for further fact-finding.[129]

In *Murthy v. Missouri*,[130] the U.S. Supreme Court confronted executive branch bullying of platforms to mitigate perceived misinformation:

> During the 2020 election season and the COVID-19 pandemic, social-media platforms frequently removed, demoted, or fact checked posts containing allegedly false or misleading information. At the same time, federal officials, concerned about the spread of 'misinformation' on social media, communicated extensively with the platforms about their content-moderation efforts.[131]

Although ultimately concluding the plaintiffs lacked standing to complain,[132] the U.S. Supreme Court elaborated on the First Amendment implications of the states' bills:

> With their billions of active users, the world's major social-media companies host a 'staggering' amount of content on their platforms.
>
> * * *
>
> Under their longstanding content-moderation policies, the platforms have taken a range of actions to suppress certain categories of speech. They place warning labels on some posts, while deleting others. They also 'demote' content so that it is less visible to other users. And they may suspend or ban users who frequently post content that violates platform policies. For years, the platforms have targeted speech they judge to be false or misleading.[133]

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[127] Moody v. NetChoice, LLC, Nos. 22-777 and 22-555, U.S. LEXIS 2884 (2024).
[128] Webber, *supra* note 123, at 20 (footnote omitted). *See* S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021) and H.B. 20, 87th Leg., 2nd Spec. Sess. (Tex. 2021).
[129] *Moody*, *supra* note 127, at *53.
[130] Murthy v. Missouri, No. 23-144, 2024 U.S. LEXIS 2842 (2024).
[131] *Id.* at *10.
[132] *Id.* at *11.
[133] *Id.*

The social media companies "applied their misinformation policies during the 2020 Presidential election season"[134] and thereafter to those questioning "the integrity of the election results."[135] During the pandemic, the platforms suppressed calls for an end to COVID-19 lockdowns.[136]

"The questions of whether, when, and how to regulate online entities, and in particular the social-media giants, are understandably on the front-burner of many legislatures" in the U.S.,[137] as well as the EU. However, those state legislatures must remain mindful "[t]o the extent that social-media platforms create expressive products, they receive the First Amendment's protection."[138] When they make millions of decisions daily about what to include, exclude, organize, and prioritize, they produce "their own distinctive compilations of expression."[139]

Social media is just a newer version of older, traditional media the U.S. Supreme Court has seen before.[140] When confronted with laws curtailing editorial choices like that, the Court looks with a jaundiced eye to ensure those laws pass First Amendment muster.

> The laws, from Florida and Texas, restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users. Or otherwise put, the laws limit the platforms' capacity to engage in content moderation – to filter, prioritize, and label the varied messages, videos, and other content their users wish to post.
>
> [T]he laws [also] require a platform to provide an individualized explanation to a user if it removes or alters her posts.[141]

These moderation efforts are strikingly similar to those found in the DSA.

Texas officials passed its law because they thought the social media news feeds "skewed against politically conservative voices."[142] Put differently, Texas officials thought conservative voices were being censored or stifled. Their

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[134] *Id.* at *12.
[135] *Id.* at *12—13.
[136] *Id.* at *30.
[137] *Moody*, *supra* note 127, 2024 U.S. LEXIS 2884, at *11—12.
[138] *Id.* at *12.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at *16.

"objective [was] to correct the mix of speech that the major social-media platforms present."[143] However, "[o]n the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana."[144]

Unlike the legislative approach of Texas and Florida, the executive branch of the federal government took a different tact described by the majority in *Murthy*. "Over the past few years, federal officials regularly spoke with the platforms about COVID-19 and election-related misinformation."[145] When a post was not removed, the White House Director of Digital Strategy complained: "'Last time we did this dance, it ended in an insurrection.'"[146] The White House also pushed "to remove accounts [for] the 'disinformation dozen,' 12 people (including [Robert F. Kennedy, Jr.]) supposedly responsible for a majority of COVID-19-related misinformation."[147] The dissent in *Murthy* — Justices Alito, Thomas, and Gorsuch — was even less forgiving of the federal government's tactics.

The dissent believed the plaintiff victims were justified in wanting the government to stop "coerc[ing] social media platforms to suppress speech."[148] They "simply wanted to speak out on a question of the utmost public importance."[149] The dissent opined:

> Freedom of speech serves many valuable purposes, but its most important role is protection of speech that is essential to democratic self-government . . . and speech that advances humanity's store of knowledge, thought, and expression in fields such as science, medicine, history, the social sciences, philosophy, and the arts . . . . The speech at issue falls squarely into those categories. It concerns the COVID-19 virus, which has killed more than a million Americans.
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> * * *
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> Some was undoubtedly untrue or misleading, and some may have been downright dangerous. But we now know that valuable speech

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[143] *Id.* at *47.
[144] *Id.* at *49.
[145] *Murthy*, *supra* note 130, at *13.
[146] *Id.* at *14 (internal brackets and citation omitted).
[147] *Id.* at *34.
[148] *Id.* at *47 (Alito, J., dissenting).
[149] *Id.* at *48.

> was also suppressed. That is what inevitably happens when entry to the marketplace of ideas is restricted.[150]

Valuable speech about the origin of the virus was regrettably suppressed by the coercive pressure of the federal government. Facebook's Mark Zuckerberg lamented, "'[t]his seems like a good reminder that when we compromise our standards due to pressure from an administration in either direction, we'll often regret it later.'"[151] The dissent also opined:

> [I]nternet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources. If a President dislikes a particular newspaper, he (fortunately) lacks the ability to put the paper out of business. But for Facebook and many other social media platforms, the situation is fundamentally different. They are critically dependent on the protection provided by § 230 of the Communications Decency Act of 1996, 47 U. S. C. § 230, which shields them from civil liability for content they spread. They are vulnerable to antitrust actions; indeed, Facebook CEO Mark Zuckerberg has described a potential antitrust lawsuit as an 'existential' threat to his company. And because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government's diplomatic efforts to protect their interests.
>
> For these and other reasons, internet platforms have a powerful incentive to please important federal officials, and the record in [*Murthy*] shows that high-ranking officials skillfully exploited Facebook's vulnerability. When Facebook did not heed their requests as quickly or as fully as the officials wanted, the platform was publicly accused of 'killing people' and subtly threatened with retaliation.
>
> Not surprisingly these efforts bore fruit. Facebook adopted new rules that better conformed to the officials' wishes, and many users

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[150] *Id.* at *48-49 (citations and footnotes omitted).
[151] *Id.* at *49 n. 2 (Alito, J., dissenting).

> who expressed disapproved views about the pandemic or COVID19 vaccines were 'deplatformed' or otherwise injured.[152]

The White House specifically blamed Facebook for not only COVID-19 misinformation but also claimed the "'insurrection . . . was plotted, in large part, on [the] platform."[153] The issue reached the President, and his press secretary threatened antitrust sanctions.[154] The President told reporters the platforms were "'killing people,'"[155] and he was "'reviewing' whether § 230 should be amended to open the platforms to suit."[156] Not surprisingly, the platform's response "resembled that of a subservient entity determined to stay in the good graces of a powerful taskmaster."[157]

Social media platforms are not public fora akin to open venues controlled by state actors. They are "typically . . . websites and mobile apps that allow users to upload content — messages, pictures, videos, and so on — to share with others. Those viewing the content can then react to it, comment on it, or share it themselves."[158] The biggest social media companies, like Facebook and YouTube, make some editorial decisions in "conformity with content-moderation policies they call Community Standards and Community Guidelines. Those rules list the subjects or messages the platform prohibits or discourages — say, pornography, hate speech, or misinformation on select topics."[159] Both Florida and Texas attempted to supplant the platform policies with legislative "content-moderation provisions, restricting covered platforms' choices about whether and how to display user generated [sic] content to the public. And both include[d] individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices."[160]

Time will tell whether individual states or the federal government will persist in their attempts to moderate content but one thing remains certain: The EU is bringing the battle to the U.S. shores and enlisting the cooperation of the U.S. government. In late 2022, "the EU opened a San Francisco office — the only secondary office the EU has ever opened in the country where it already had a

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[152] *Id.* at *52—53 (Alito, J., dissenting) (footnotes omitted).
[153] *Id.* at *55—56 (Alito, J., dissenting).
[154] *Id.* at *80, 84 (Alito, J., dissenting).
[155] *Id.* at *52, 62—63, 91 (Alito, J., dissenting).
[156] *Id.* at *62—63, 80 (Alito, J., dissenting).
[157] *Id.* at *66. (Alito, J., dissenting).
[158] *Moody*, *supra* note 127, at *16.
[159] *Id.* at *17.
[160] *Id.* at *18.

delegation — stating that it was necessary 'to strengthen transatlantic technological cooperation and to drive the global digital information based on democratic values and standards.'"[161] In 2023, the Antitrust Division of the Department of Justice and the Federal Trade Commission sent liaisons to Brussels to assist with implementing the DMA.[162] Meanwhile, the potential list of want-to-be regulators of U.S.-based platforms continues to grow.[163]

VII. THE BRUSSELS EFFECT ON U.S. MODERATION

The EU is at the vanguard of this global movement. It is operating "as the subtle giant lurking beneath the steely surface of the international system, exercising a novel form of international power. The Brussels Effect, named after the EU's capital, is as indirect as it is powerful."[164] Anu Bradford, a professor at Columbia University, coined the term "describ[ing] the EU's growing ability to control and affect international regulations without entering into international agreements."[165] The phenomenon is an unwritten aspect of European power.[166] Although underestimated,

> [t]he European Union sets the global rules across a range of areas, such as food, chemicals, competition, and the protection of privacy. EU regulations have a tangible impact on the everyday lives of citizens around the world. Few Americans are aware that EU regulations determine the makeup they apply in the morning, the cereal they eat for breakfast, the software they use on their computer,

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[161] Letter from Sen. Ted Cruz, Ranking Member, U.S., S., Comm. on Com., Sci. & Transp., to Gerard de Graaf, Senior Envoy for Digit. to the U.S. (Aug. 22, 2023) (footnotes omitted), https://www.commerce.senate.gov/services/files/618A0044-D963-4528-AF34-8F66656027DB.

[162] Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Justice Department, Federal Trade Commission and European Commission Hold Third U.S.-EU Joint Technology Competition Policy Dialogue (Mar. 30, 2023), https://www.justice.gov/opa/pr/justice-department-federal-trade-commission-and-european-commission-hold-third-us-eu-joint-0.

[163] *The Global Online Safety Regulators Network*, ESAFETY COMMISSIONER, https://www.esafety.gov.au/about-us/who-we-are/international-engagement/the-global-online-safety-regulators-network (last visited July 16, 2024).

[164] Quentin Levin, *A Review of* THE BRUSSELS EFFECT *by Anu Bradford*, 22(2) GEO. J. OF INT'L AFFAIRS 307, 307 (2021), https://muse.jhu.edu/article/805860.

[165] McMillan, *supra* note 75, at 256, n. 19; *see also* Anu Bradford, *The Brussels Effect*, 107 NW. U.L. REV. 1 (2012), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1275&context=faculty_scholarship.

[166] McMillan, *supra* note 75, at 267.

> and the privacy settings they adjust on their Facebook page. And that's just before 8:30 AM. The EU also sets the rules governing the interoffice phone directory they use to call a coworker. EU regulations dictate what kind of air conditioners Americans use to cool their homes and why their children no longer find soft plastic toys in their McDonald's Happy Meals.[167]

This Brussels Effect could soon have a profound effect on the First Amendment as well.

As often occurs in "most post-war international human rights treaties, the [European Convention on Human Rights (ECHR)] establishes a set of enumerated rights."[168] Article 10 of the ECHR[169] ensures everyone has the right to freedom of expression, an essential foundation for a democratic society.[170] Although relatively brief, containing "only two paragraphs, Article 10 is complicated. It articulates multiple freedoms of expression, including the freedom to express one's opinion, receive information, and communicate information."[171] It protects the offensive, shocking, and disturbing.[172] On the other hand, this expressive right is limited by the necessity of a democratic society's need to preserve national security and the collective health of the population.[173] Article 17 constrains abuse of the expressive right found in Article 10.[174] Although Article 10 is a close cousin to the First Amendment, Article 17 is not even a distant relative to anything in the U.S. Constitution.

The nearly impossible task of reconciling the reach of the DSA and DMA with Articles 10 and 17 of the ECHR will fall to the European Court of Human Rights, whereas determining the First Amendment limitations on government moderation will fall to the U.S. Supreme Court. One must wonder whether the Brussels Effect may have any impact on the U.S. Supreme Court.

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[167] Bradford, *supra* note 165, at 2 (footnotes omitted).
[168] McMillan, *supra* note 75, at 269.
[169] Eur. Conv. for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, C.E.T.S. No. 5, 213 U.N.T.S. 221, at art. 10.
[170] McMillan, *supra* note 75, at 269.
[171] *Id.* (footnote omitted).
[172] *Id.* (discussing the prohibition on Holocaust denial and other odious speech).
[173] Delfi AS v. Estonia, App. No. 645691/09, ¶ 46 (June 16, 2015), https://hudoc.echr.coe.int/eng#{%22appno%22:[%2264569/09%22],%22itemid%22:[%22001-155105%22]}.
[174] McMillan, *supra* note 75, at 272.

An extraterritorial regulatory effect is difficult to achieve. "Unilateral regulatory globalization occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms, resulting in globalization of standards."[175] The "law of one jurisdiction migrates into another in the absence of the former actively imposing it or the latter willingly adopting it."[176] At one time, the U.S. was a regulatory influencer. U.S. states even had a "Delaware Effect" for organizational matters and a "California Effect" for environmental matters.[177] Whereas the U.S.'s extraterritorial legislation formerly provoked the wrath of the EU, today the EU both tolerates the phenomenon and increasingly practices it for its own benefit.[178]

The EU's regulatory reach can now shape the focus and content of international and third countries' laws.[179] To give one example, the EU's Directive on electronic waste influenced the "Basel Convention, leading to the adoption of draft technical guidance on transboundary movements of e-waste and used electrical and electronic equipment."[180]

> Simultaneously,
> there are many EU measures that may be considered unilateral in the sense that they create autonomous EU obligations in the absence of international standards, because they create EU obligations that are considerably more detailed and/or stricter than the corresponding international measures, or because they carve out a role for the EU in enforcing international standards in circumstances in which that role is not recognized by the international standards themselves.[181]

The EU previously criticized the U.S. for adopting measures not predicated upon an "internationally recognized jurisdictional base."[182] Now, however, the EU shapes the organization, operation, and governance of every foreign firm wanting to provide goods or services within the EU.[183]

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[175] Bradford, *supra* note 165, at 3.
[176] *Id.* at 4.
[177] *See id.* at 7.
[178] Joanne Scott, *Extraterritoriality and Territorial Extension in the EU Law*, 62 AM. J. COMP. L. 87, 88 (2014), http://doi.org/10.5131/AJCL.2013.0009.
[179] *Id.* at 88-89.
[180] *Id.* at 108, n. 84.
[181] *Id.* at 112—13 (footnote omitted).
[182] *Id.* at 118.
[183] *Id.* at 107.

In practice, corporations like to comply "with just one regulatory standard . . . , which is less costly than tailoring its production to meet divergent regulatory standards. A single standard also facilitates the preservation of a uniform global brand."[184] Wherever applicable,

> the [foreign firm], after having converted its products or business practices to comply with the strict standards [of the EU], decides to apply this new standard to its products or conduct worldwide. In other words, global standards emerge only when corporations voluntarily opt to comply with a single standard determined by the most stringent regulator, making other regulators obsolete in the process.[185]

An excellent example of this phenomenon is privacy regulation differences between the EU and U.S.

The EU views privacy as a fundamental right and regulates it accordingly.[186] Meanwhile, U.S. consumer privacy laws are largely restricted to sensitive sectors like healthcare and banking.[187] Since "the EU's Data Protection Directive was passed, over thirty countries have adopted EU-type privacy laws . . . [and those] privacy standards already affect the business practices of many U.S. companies."[188] The EU's "planned expansion of privacy rights is expected to severely curtail the business practices of foreign companies" and, according to critics, "'represents the biggest threat to free speech on the internet . . . .'"[189]

> The amorphous nature of
> data has further facilitated the globalization of the EU's privacy policy. While national regulations may differ from country to country, 'data flows lightly and instantly across borders.' Multinational corporations have adjusted their global data management systems to reduce their compliance costs with multiple regulatory regimes. Internet companies find it difficult to create different programs for different markets and therefore tend to apply the strictest international standards across the board. At times, it is technologically difficult or impossible to separate data involving European and non-European citizens. Other times it may be feasible

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[184] Bradford, *supra* note 165, at 17—18 (footnotes omitted).
[185] *Id.* at 17 (alteration in original).
[186] *Id.* at 22—23.
[187] *Id.*
[188] *Id.* at 23 (footnotes omitted).
[189] Bradford, *supra* note 165, at 24 (footnotes omitted).

> but too costly to create special websites or data-processing practices just for the EU. As a result, the technical or the economic non-divisibility of the EU rules has prompted several U.S. companies ranging from Google to General Motors to amend their global privacy practices. Indeed, today many multinational companies have only one company-wide privacy protection policy - and it is Europe's.[190]

The DSA "will likely carry a Brussels Effect."[191] However, the Brussels Effect is not limitless because "external and internal constraints impose boundaries on the EU's ability to leverage its market size and foist its regulatory preferences on other states and market participants."[192] Ultimately, "insufficient market power [may] set[] boundaries on the EU's global regulatory clout."[193] The U.S. has particular reason to push back and

> constrain the EU. EU policies impose adjustment costs on U.S. corporations. U.S. consumers also end up paying more for goods when producers are forced to accommodate concerns that U.S. consumers do not necessarily share. The United States frequently views the EU's regulatory policies as inefficient and detrimental to its welfare — in addition to being counter-majoritarian and thus undemocratic.[194]

Meanwhile, emerging technology is displacing market power disparities as a determining factor, thereby enabling China to increasingly set global standards.[195] "China's growing economic clout will [also] . . . challenge . . . world powers on both sides of the Atlantic," including the U.S. and EU.[196]

> [U.S. corporations will] 'voluntarily opt to extend the regulatory requirements of the most stringent regulator to their global operations' . . . only in a specific circumstance: when the benefits of standardizing their operations around a single regulatory standard,

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[190] *Id.* at 25—26 (footnotes omitted).
[191] Chander, *supra* note 2, at 1071.
[192] Bradford, *supra* note 165, at 48.
[193] *Id.* at 57.
[194] *Id.* at 49—50 (footnotes omitted).
[195] Levin, *supra* note 164164, at 307.
[196] *Id.* at 308.

> rather than dividing their operations between Europe and the rest of the world, outweigh the costs.[197]

If the EU makes compliance too costly for the return involved, the China Effect could supplant the Brussels Effect[198] until democratic nations begin to understand the threat these effects have on sovereignty.[199]

Social media regulation "is a proxy war in the ultimate battle over how to tame the internet."[200] In this arena, at the present time,

> [t]he acknowledgement of the existence and influence of the Brussels Effect has implications for how we think about power and the question of who is powerful and why. If you were to ask national security experts whether the EU is powerful, they would probably say no. If you were to ask economists whether the EU is powerful, they would probably discuss how the relative power of the EU is diminishing with the rise of China. But if you were to ask GE, Microsoft, Google, Monsanto, Dow Chemical, or Revlon whether the EU is powerful, the answer would be a resounding (and likely bitter) yes.[201]

The EU is proof it "can be a superpower without [being] a super state."[202]

VIII. THE BRUSSELS EFFECT ON THE U.S. SUPREME COURT

The issue of internet moderation will return to the U.S. Supreme Court as states react to *Moody* but not until the EU has started creating a body of common law interpreting the DSA and DMA. The question will become what version of freedom of expression is adopted across the Atlantic and, perhaps, worldwide.

U.S. legislative and judicial pronouncements "have always been . . . shining examples of constitutional thought and constitutional action."[203] Foreign jurists should "look to developments in the United States as a source of inspiration,"[204] as

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[197] *Id.*
[198] *Id.*
[199] *Id.* at 309.
[200] McMillan, *supra* note 75, at 289.
[201] Bradford, *supra* note 165, at 64—65.
[202] *Id.* at 66.
[203] Barak, *supra* note 98, at 27.
[204] *Id.*

preserving democracy has grown in importance in every judicial system.[205] Democracies, particularly new ones, are fragile things and "cannot exist without the protection of individual human rights — rights so essential that they must be insulated from the power of the majority."[206] Any democracy can be "perverted and destroyed [as happened] in the Germany of Kant, Beethoven, and Goethe."[207] Therefore, the main job of any jurist, foreign or domestic, "is to maintain and protect the constitution and democracy."[208]

In modern democracies, the judges are at the forefront "protecting democracy both from terrorism and from the means the state wants to use to fight terrorism."[209] They realize "[t]he protection of every individual's human rights is a much more formidable duty in times of war and terrorism than in times of peace and security. If [they] fail in [their] role in times of war and terrorism, [they] will be unable to fulfill [their] role in times of peace and security."[210] Rationalizing an action during times of urgency will create a principle that lies around like a loaded weapon to be used again out of convenience, eroding rights until we consider them merely privileges. The question necessarily becomes: Will the U.S. Supreme Court interpret the First Amendment in cyberspace in a manner consistent with its history and purpose, or will it succumb to the Brussels Effect and increased moderation?

In the U.S., most judges and justices "'do not cite foreign case law in their judgments[.]'"[211] They "say that consideration of foreign legal precedents in American judicial decisions is illegitimate, and that there can be no transnational dialogue about the meaning of the United States Constitution."[212] Generally speaking, the receptiveness of justices to the influences of foreign jurists when interpreting domestic laws breaks along ideological lines. The late Justice Ginsburg might find "tremendous persuasive value" in the opinion of an Israeli jurist on terrorism.[213] In comparison, Chief Justice Roberts might reject that jurist's view because "no president accountable to the people appointed that judge and no Senate

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[205] *Id.* at 28.
[206] *Id.* at 39 (footnote omitted).
[207] *Id.* at 37.
[208] *Id.*
[209] *Id.* at 149.
[210] *Id.*
[211] Adam Liptak, *American Exception: U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17, 2008) (quoting Barak, 16 HARV. L. REV. 19, 114 (2002), https://www.nytimes.com/2008/09/18/us/18legal.html.
[212] *Id.*
[213] Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 59 (2009) (footnote omitted), https://scholarship.law.umn.edu/concomm/1028.

accountable to the people confirmed that judge."[214] The late Justice Scalia had an even more strident view: "[T]he basic premise . . . that American *law* should conform to the *laws* of the rest of the world [] ought to be rejected out of hand."[215] Nevertheless, "U.S. law is simply chock full of reference and allusions to foreign law, some of it very old, some of it quite recent."[216]

Judges often do interpret foreign law under choice of law provisions, conflicts of law disputes, and the law of nations.[217] More to the point, U.S. common law began with foreign laws the U.S. initially adopted.

> As even the deepest skeptics about citation of foreign law recognize, the U.S. Constitution is *full* of references to foreign law, so full that one cannot make sense out of many of its provisions without foreign law. As Justice Scalia has pithily acknowledged, '[T]he reality is that I use foreign law more than anyone on the Court. But it's all old English law.' Though no one debates this proposition, we've become so used to one brand of 'foreign' law that we think it's domestic; it's so common that we call it 'common law.' Consider just Article I, section 9, which in the course of a few sentences defines Congressional power over 'habeas corpus,' 'bill[s] of attainder,' and 'letters of marque and reprisal.' These references, all of which would have been well understood at the time of ratification and which would continue to be so understood today, all refer to *foreign* law. Not only these but many of the provisions of the Bill of Rights, with its references to unreasonable searches, the right to jury trial at common law, and more — all assume a deep background in foreign law. The law in question, of course, is that of Great Britain, with which the United States had fought a long war to gain their independence. But when the new nation wanted to establish its government, it often did so by describing familiar laws and practices that the Founders wished either to preserve (like right of trial by jury) or to reject (like bills of attainder).[218]

In *Roper v. Simmons*, the U.S. Supreme Court declared executing those under eighteen years of age violated the Eighth Amendment, finding that "the

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[214] *Id.* at 60 (footnote omitted).
[215] *Id.* at 66 (footnote omitted).
[216] *Id.* at 67.
[217] *Id.* at 61—63.
[218] *Id.* at 64 (alteration in original) (footnotes omitted).

United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[219] Though not controlling, the Court noted it had previously "referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eight Amendment's prohibition of 'cruel and unusual punishments.'"[220] In particular, the Court noted: "[t]he United Kingdom's experience bears particular relevance . . . in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."[221] However, Justice Scalia dissented, believing the meaning of the Eighth Amendment should not "be determined by the subjective views of five Members of [the] Court and like-minded foreigners."[222] While doing so, Justice Scalia highlighted the difference between the Court's holdings excluding illegally obtained evidence and the European Court of Human Rights' holdings that using such evidence does not prevent a fair trial under the European Convention on Human Rights.[223] Justice Scalia did not want to submit to "the jurisprudence of European courts dominated by continental jurists — a legal, political, and social culture quite different from [the U.S.]."[224]

Justice Scalia may be gone from the Court but Justice Alito, his kindred spirit, remains.[225] In *Dobbs v. Jackson Women's Health Organization*,[226] Justice Alito cited English common law as far back as the thirteenth century[227] and relied upon abortion cases from the colonial period.[228] Nevertheless, Justice Alito's opinion on today's European Courts would likely share similarities with Justice Scalia's view of yesteryear.

IX. WHAT WILL BECOME OF THE PUBLIC SQUARE IN CYBERSPACE

Certain things are well-known regarding discourse in cyberspace.

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[219] Roper v. Simmons, 543 U.S. 551, 575 (2005).
[220] *Id.* (citation omitted).
[221] *Id.* at 577.
[222] *Id.* at 608 (Scalia, J., dissenting).
[223] *Id.* at 626 (Scalia, J., dissenting).
[224] *Id.* at 626—27 (Scalia, J., dissenting).
[225] Neil A. Lewis, *Expecting a Vacancy, Bush Aides Weigh Supreme Court Contenders*, N.Y. TIMES (Dec. 27, 2002), at A1 (referring to Alito as Scalito), https://www.nytimes.com/2002/12/27/us/expecting-a-vacancy-bush-aides-weigh-supreme-court-contenders.html.
[226] Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
[227] *Id.* at 371.
[228] *Id.* at 246.

> [S]ocial-media platforms have become the 'modern public square.' In just a few years, they have transformed the way in which millions of Americans communicate with family and friends, perform daily chores, conduct business, and learn about and comment on current events. The vast majority of Americans use social media, and the average person spends more than two hours a day on various platforms. Young people now turn primarily to social media to get the news, and for many of them, life without social media is unimaginable. Social media may provide many benefits — but not without drawbacks. For example, some research suggests that social media are having a devastating effect on many young people, leading to depression, isolation, bullying, and intense pressure to endorse the trend or cause of the day.[229]

Regarding this issue, the EU, nations, states, and other governments will attempt to regulate speech, technology will resist those limitations, and the First Amendment will continue to play a role in the delicate balancing act between the two.

Everyone can recognize that social media companies have gained the capacity to "'shape' and even 'manipulate popular opinion.'"[230] Under U.S. law, social media's "collection of third-party content into a single speech product (the operators' 'repertoire' of programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment."[231] In analyzing social media and its ilk under the First Amendment, three points are pertinent:

> First, the First Amendment offers protection when an entity engaged in compiling and curating others' speech into an expressive product of its own is directed to accommodate messages it would prefer to exclude. Second, none of that changes just because a compiler includes most items and excludes just a few.
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> Third, the government cannot get its way just by asserting an interest in better balancing the marketplace of ideas. In case after case, the Court has barred the government from forcing a private speaker to

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[229] *Moody*, *supra* note 127, at *83 (Alito, J., concurring) (footnotes and citations omitted).
[230] *Id.* at *30.
[231] *Id.* at *32.

> present views it wished to spurn in order to rejigger the expressive realm.[232]

Applying constitutional principles is not straightforward within the social-media universe.[233]

Four Justices — Thomas, Alito, Kagan, and Gorsuch — are potentially inclined to reevaluate various aspects of First Amendment jurisprudence. With respect to social media specifically, Justice Kagan did not dismiss out of hand all restrictions in *Moody*, sympathizing with the diagnosis that "'modern media empires' had gained ever greater capacity to 'shape' and even 'manipulate popular opinion.'"[234] Years earlier, then Professor Kagan, writing about *New York Times v. Sullivan*,[235] suggested the "adoption of the actual malice rule . . . may . . . have *resulted from* the extraordinary circumstances of the case."[236] At the time, "[p]ublic official libel suits were . . . attempts by government to shut down criticism of official policy."[237] According to Professor Kagan, "if the dominant concern of the Court was to prevent recovery not only by Sullivan but by the host of other southern officials who had filed libel suits on the basis of articles about the civil rights movement, the actual malice standard may have appeared by far the best approach."[238] *Sullivan* was believed to have removed this threat.[239] Perhaps Justice Kagan will see extraordinary circumstances in the age of social media when the issue returns to the Court.

Justice Thomas seems equally concerned, believing "the common-carrier doctrine" might dictate the applicable analysis for social media regulation.[240] He sees a "clear historical precedent" for regulating communications networks in a manner similar to traditional common carriers.[241] In particular, Justice Thomas sees

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[232] *Id.* at *34-36.
[233] *Id.* at *57 (Barrett, J., concurring).
[234] *Id.* at *30.
[235] New York Times v. Sullivan, 376 U.S. 254 (1964).
[236] Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 198, 202-03 (1993), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11530&context=journal_articles
[237] *Id.* at 204.
[238] *Id.* at 203.
[239] *Id.*
[240] *Moody*, *supra* note 127, at *62 (Thomas, J., concurring).
[241] *Id.* at *63 (Thomas, J., concurring) (citation omitted).

the harm posed by false accusations made in cyberspace and wants to revisit the actual malice jurisprudence of *Sullivan*.[242] Justice Gorsuch feels similarly.[243]

Drawing a clear distinction between "how newspapers and social media platforms edit content" in *Moody*,[244] Justice Alito appreciates the gravity of any decision after *Moody*:

> Newspaper editors are real human beings, and . . . editors assign[] articles to particular reporters, and copyeditors [go] over typescript with a blue pencil. The platforms, by contrast, play no role in selecting the billions of texts and videos that users try to convey to each other. And the vast bulk of the 'curation' and 'content moderation' carried out by platforms is not done by human beings. Instead, algorithms remove a small fraction of nonconforming posts *post hoc* and prioritize content based on factors that the platforms have not revealed and may not even know. After all, many of the biggest platforms are beginning to use AI algorithms to help them moderate content. And when AI algorithms make a decision, 'even the researchers and programmers creating them don't really understand why the models they have built make the decisions they make.' Are such decisions equally expressive as the decisions made by humans? Should we at least think about this?[245]

Justice Alito recognized the platforms already divulge "'proprietary and closely held' information" to comply with the EU's DSA.[246] According to him, "[i]f, on remand, [Florida and Texas] show that the platforms have been able to comply with [DSA] in Europe without having to forgo 'exercising editorial discretion at all,' then that might help them prove that their disclosure laws are not 'unduly burdensome.'"[247] Justice Alito believed "complying with [the DSA] does not appear to have unduly burdened each platform's speech in those countries. On remand, the courts might consider whether compliance with EU law chilled the platform's speech."[248]

Regardless of what foreign courts may say about the EU's moderation limits, the U.S. Supreme Court will be left to interpret our First Amendment: "[N]o

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[242] Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting on denial of *cert.*).
[243] *Id.* at 2429—30 (Gorsuch, J., dissenting on denial of *cert.*).
[244] *Moody*, 2024 U.S. LEXIS 2884, at *115 (Alito, J., concurring).
[245] *Id.* at *115—16 (Alito, J., concurring) (footnote omitted).
[246] *Id.* at *111 (Alito, J., concurring).
[247] *Id.* at *111 n. 46 (Alito, J., concurring) (citations omitted).
[248] *Id.* at *119—20 (Alito, J., concurring).

common law system is the same today as it was fifty years ago."[249] "The meaning of the law before and after a judicial decision is not the same."[250] That will be particularly true when the U.S. Supreme Court speaks again regarding social media and moderation in cyberspace.

[249] Barak, *supra* note 98, at 23.
[250] *Id.*

GOOD FAITH AS MECHANISM FOR AN EFFICIENT MARKET

Victor Caminha Cavalcante[1]

ABSTRACT

This article explores the role of the principle of good faith in enhancing commercial efficiency within Brazilian, Italian and U.S. legal systems. The principle, recognized under Brazilian Civil Law since the enactment of the 2002 Civil Code, is compared with its application under U.S. law, particularly through the Uniform Commercial Code (UCC) and Restatement (Second) of Contracts, and under Italian Civil Code. The study analyzes how good faith, as an objective legal standard, fosters contractual fairness, transparency, and predictability, thereby contributing to a more structured and efficient market. By examining case law, scholarly perspectives, and the interaction between traditional and modern contractual principles, the article argues for the integration of good faith as a tool to balance party autonomy with legal interventions aimed at promoting equitable contractual relationships. Ultimately, the article advocates for the simultaneous application of classical and contemporary contractual principles to achieve both individual freedom and collective market growth.

[1] A lawyer (ICEV), with a specialization in Judicial Recovery and Bankruptcy (PUC-PR).

1. INTRODUCTION

In Brazilian law, more specifically after the Civil Code was approved by the National Congress, a new institute was introduced—the principle of good faith.[2] The principle of good faith sparked some debate and gave scholars the task to understand its nuances. This new principle is one of the contractual principles that shape contractual relationships and is of great importance for Brazilian civil and commercial law.

At first, the principles that were in the 1916 Civil Code (the previous code) and were kept after the birth of the Civil Code of 2002 would be considered antagonistic to those new principles (that arise with the Brazilian Civil Code of 2002).[3] However, the best interpretation of this relation between "old" and "new" principles depends on their interrelationship.[4]

The debate was not new in 2002. Some scholars, like Clovis do Couto e Silva, had already written about obligation as a process.[5] Judith Martins-Costa wrote a book about good faith, [6] and until now, is one of the best ones to study the institute.

It is not only Brazilian law that upholds the principle of good faith. In Germany (§ 242 of BGB),[7] it is found in this institute and in the Italian Civil Code (art. 1.337[8]—in pre-contractual liability, art. 1.366[9]—interpretation based in good faith, and art. 1.375[10]—execution of contracts) as well.

However, some legal systems do not promote this institute in contractual law. It is the case with English contractual law, which does not provide a general model to deal with injustice,[11] but prefers the use of fragmented solutions to deal with it instead.[12]

In United States (U.S.) contractual law, some cases bring an interesting debate that could provide us with good parameters to understand its importance. Despite that, the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts show concepts that keep an important source to understand how good faith could foster commercial relations.[13]

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[2] CÓDIGO CIVIL [C.C.] art. 422 (Braz.).
[3] CÓDIGO COMERCIAL [C.COM.] [COMMERCIAL CODE] (Braz.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] (Braz.).
[4] Antônio Junqueira De Azevedo, *Princípios do Novo Direito Contratual e Desregulamentação do Mercado - Direito de Exclusividade nas Relações Contratuais de Fornecimento - Função Social do Contrato e Responsabilidade Aquiliana do Terceiro que Contribui para Inadimplemento Contratual* [*Principles of the New Contract Law and Market Deregulation - Right to Exclusivity in Contractual Supply Relationships - Social Function of the Contract and Aquilian Responsibility of the Third Party that Contributes to Contractual Default*], 87 RT/Fasc. Civ. 113, 115–16 (1998) (Braz.).
[5] CLÓVIS DO COUTO E SILVA, A OBRIGAÇÃO COMO PROCESSO [OBLIGATION AS A PROCESS] (FGV Law 2020) (Braz.).
[6] *Cf.* JUDITH MARTINS-COSTA, A BOA-FÉ OBJETIVA NO DIREITO PRIVADO: CRITÉRIOS PARA A SUA APLICAÇÃO [OBJECTIVE GOOD FAITH IN PRIVATE LAW: CRITERIA FOR ITS APPLICATION] (Saraiva 2019) (Braz.).
[7] Performance in good faith: An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.
[8] CODICE CIVILE [C.C.] [CIVIL CODE] art. 1337 (It.).
[9] *Id.* at art. 1366.
[10] *Id.* at art. 1375.
[11] The "general model" that we refer to is the institute of good faith.
[12] NEIL ANDREWS, DIREITO CONTRATUAL NA INGLATERRA [CONTRACT LAW IN ENGLAND] 38 (Revista dos Tribunais 2012) (Braz.).
[13] *See* Tommaso Febbrajo, *Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Iterpretation of Article 1337 of the Italian Civil Code*, 02 IT. L. J. 291 (2016).

In this article, we are defending how the principle of good faith could contribute to commercial efficiency. To achieve this, we will show how it has been developing under the Brazilian law and U.S. law. To do this, a review of legislation, case law, and academic articles are needed.

So, we need to score some introduction to a market rationality. The markets need to be structured, and the law serves to do so.[14] These principles simultaneously create a foundation and a pathway for players to construct their contractual relationships. So, this is the importance of good faith and other principles, structured contractual law, and, in a macro scenario, the economy.

In this article, we are not defending an extremely liberal market. Instead, we need markets that are free, but have restrictions which serve to limit harmful actions of the parties and, therefore, create a structure to organize these actions and reprove illegal movements, thus creating more liberty.

This logic could improve the markets because certain behaviors should be regulated by the legal system to promote liberty, and at the same time, the foundational rule of the contractual legal system must remain the liberty of the parties.

At this point, we may consider that the old principles of Brazilian contractual law represent liberty, and the new ones represent the interventions in this liberty to ensure its protection.[15] This paradoxical logic is important to avoid actions that may intervene in parties' liberties. Essentially, a degree of intervention is necessary to gain greater liberty on a large scale.

This is what Antônio Junqueira de Azevedo said about the old and the new principles.[16] The new ones did not invalidate the old ones, and for this reason, we argue that both groups of principles should be applied simultaneously, following the logic we have discussed.

This is the reflex of thinking after the French Revolution. Initially, a negative liberty, the freedom from interference, was needed, but subsequently, a positive liberty, the freedom to intervene and create capacity, became necessary.[17]

For the improvement of the economy, a nation must have these two kinds of liberty. The first is to empower those who already have the capacity to exercise their liberty, and the second one is to create a capacity for those do not yet have the capacity to exercise their liberty by themselves.[18]

Moreover, markets are composed of broad chain of contracts. Thus, if the objective is to create a structure that guides the economic players (parties to a contract), a precise analysis is needed first.

Contracts, as an instrument used in the majority of economic relations, play a key role. For this reason, it is necessary to structure contract rules in order to organize the

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[14] *See* MARTINS-COSTA, *supra* note 6, at 302–03.
[15] *See* João Hora Neto, *O Princípio Da Boa-Fé Objectiva No Código Civil De 2002* [*The Principle of Objective Good Faith in the Civil Code of 2002*], 02 REVISTA DA ESMESE 229 (2002) (Braz.).
[16] Junqueira de Azevedo, *supra* note 4.
[17] *See* JOSÉ GUILHERME MERQUIOR, LIBERALISMO ANTIGO E MODERNO [ANCIENT & MODERN LIBERALISM] (Edson Manoel de Oliveira Filho ed., 3rd ed. 2014) (Braz.).
[18] *Id.*

economy. If this can be achieved, it would create structures that boost the economy by applying this concept to contracts and, consequently, to the broader economy.

Therefore, good faith needs to be understood as an objective model—a structure used by markets to regulate parties' behavior. Consequently, understanding the difference between subjective and objective good faith is the first step to grasping what good faith as a principle means.[19]

Then, the discussion about functions of good faith in contracts is extremely necessary because it will enforce the real objective of good faith and show how this principle could help the contractual law to enhance the contractual relationships.[20]

Although good faith creates attached duties that go beyond the principal obligation, the parties need to fulfill these duties in order to satisfy all contractual obligations:

> The process began with the acknowledgement of the fact that the normative value underlying the duty of good faith is an objective standard. In this respect, it was stated that the principle of good faith is "one of the hinges and overriding principles of the legal discipline of obligations and establishes a proper legal duty," which is violated not only if one of the parties has acted maliciously, to the other party's detriment, but also when the conduct of said party has not been guided by openness, diligent fairness, and a sense of social solidarity, which are an integral part of good faith.[21]

Another necessary topic is the discussion about negative and positive interests. While some scholars advocate using one over the other, others argue for the use of both.[22]

The next point of the discussion is the discussion of good faith in the United States legal system, which can be identified in the UCC, the Restatement, and jurisprudence.[23]

Basically, we shall discuss how good faith, as a general solution, can enhance security and ensure justice in contractual relationships. The quick answer is that good faith is broad enough to address most situations.

In this article, we should not compare good faith and the remedies of British law. We shall focus on proving how good faith can help the market build a more secure legal system, implying more objective interpretations and guaranteeing more information.

2. GOOD FAITH IN BRAZILIAN CIVIL AND COMMERCIAL LAW

2.1. OBJECTIVE GOOD FAITH AND SUBJECTIVE GOOD FAITH

To deal with good faith, it is necessary to understand that the concept is not singular. Legal doctrine divides good faith into two concepts: subjective good faith and

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[19] *See* Febbrajo, *supra* note 13, at 297.
[20] *Id.*
[21] Febbrajo, *supra* note 13.
[22] *Id.*
[23] *Id.*

objective good faith.[24] In a contractual relationship, only objective good faith should be important.

Thus, it is necessary to clarify the debate surrounding these two concepts in order to demonstrate why only the objective good faith is relevant in contractual relationship and how this concept could broadly improve the market.

To begin the discussion about the difference between these concepts, we may say that subjective good faith refers to the parties' state of mind. his state may or may not appear to the public.

Similarly, Paulo Lobo understands that subjective good faith is "*a psychological state opposed to bad faith.*"[25] So, the counterpart of subjective good faith is bad faith.[26] However, we cannot say the same for objective good faith, because the opposite is the absence of good faith.[27]

On the other hand, we have objective good faith that is a standard of behavior (loyalty and trustworthiness)[28] that guide the parties to a favorable scenario for a development of the contract. This concept is the one which is relevant for the analysis of the parties' relationship. By understanding this concept, we can introduce the concept of ancillary duties.[29]

Ancillary duties deriving from objective good faith are inherent in all contracts. It is a non-exhaustive list, which may vary depending on the contractual relationship, imposing on the parties' obligations beyond those expressly stated in the contract. Examples include duties of information, safety, confidentiality, and cooperation to ensure the full achievement of the contractual objectives.[30] Violation of these duties can lead to the voiding of the contract.[31] The violation of the ancillary duties is the behavior that is understood as those that violate objective good faith.[32]

Moreover, Paul Lobo defines objective good faith as "*the duty to act in accordance with certain socially recommended standards of correctness, integrity and honesty. It is a rule of conduct, to be followed by the contracting party based on honesty, rectitude, loyalty and, above all, consideration for the legitimate interests and reasonable expectations of the other contracting party, seen as a member of the social group.*"[33]

This is the concept and mindset behind the idea of good faith.

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[24] *Id.*
[25] Paulo Lobo, *O Princípio da Boa-Fé Objetiva no Código Civil de 2002* [*The Principle of Objective Good Faith in the Civil Code of 2002*], 2 Rev. ESMESE 12, 229–42 (2002) (Braz.).
[26] PAULA FORGIONI, CONTRATOS EMPRESARIAIS: TEORIA GERAL E APLICAÇÃO [BUSINESS CONTRACTS: GENERAL THEORY & APPLICATION] 265 (6th ed. Thomson Reuters Brasil 2021).
[27] Cristiano Chaves de Farias & Nelson Rosenvald, CURSO DE DIREITO CIVIL: CONTRATOS: TEORIA GERAL E CONTRATOS EM ESPÉCIE 203 (11th ed. 2021).
[28] FORGIONI, *supra* note 26; ANDERSON SCHREIBER, COMENTÁRIO AO CÓDIGO CIVIL [COMMENTARY ON THE CIVIL CODE] 305 (5th ed. Forense 2023) (Braz.).
[29] "*Deveres anexos*" in the Brazilian law.
[30] SCHREIBER, *supra* note 28, at 306.
[31] Lobo, *supra* note 25, at 232–33.
[32] *Id.*
[33] *Id.*

2.2. FUNCTIONS – TO INTERPRETATE

Good faith has at least three functions: a) to interpret; b) to protect against rights infringing on loyal and trustworthy conduct; and c) to create collateral obligations.[34] We will focus on the first and the third one, because they may express the real impact of the principle in economic relationships. In this section, we will focus on the first function, and in the next section, on collateral obligations.

The necessity to use good faith and behavioral parameters to interpret the contracts is established by *I Jornada de Direito Civil – Enunciado nº 26*.[35] It is important to establish the purpose of the principle. The principle may not have an impact if it cannot impose behaviors, but it will impose them through interpretative function.

In sum, good faith must be a parameter of behavior, and it can only be applied when the interpretative function is applied as a general rule. However, this function cannot override the importance of the liberty of the parties. It means that if the parties want to agree on a specific rule of interpretation, they may do it.[36]

Although the interpretative function of good faith cannot be applied if the parties specify the methods of interpretation, these methods cannot be used to violate the collateral obligations of good faith.[37]

Thus, what is the importance of interpreting a contract according to objective good faith? Paula Forgioni answers this:

> *When the law mandates the interpretation of agreements in accordance with good faith, it is not only providing support to a monastic rule, but reviving a traditional norm of mercantile law, useful to companies and the market. From this perspective, good faith is stripped of so many moral aspects that, to cover in other contexts and to appear in an objective manner, must be in accordance with the standards of behavior accepted in a given market [or in a certain market].*[38]

Thus, legal security is given by standard behaviors that are reaffirmed by objective good faith. The legal security can affect the risks of contracts as it contributes to a more predictable and foreseeable scenario.[39] This is why this institute is so relevant to economic relationships (in a micro scenario) and to the economy of a region (in a macro scenario).

2.3. COLLATERAL OBLIGATION AND THE IMPORTANCE OF GOOD DEVELOPMENT OF THE CONTRACTS.

Ancillary duties could improve the contractual relationship and, furthermore, in a macro scenario, could stimulate economic growth. In this topic, we will show that this possibility can become a reality and how it can affect and impact society broadly.

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[34] SCHREIBER, *supra* note 30, at 306.
[35] Nelson Eizirik, *M&A Regime Societário e Contratual,* EDITORA QUARTIER LATIN DO BRASIL (2024).
[36] *Id.*
[37] MERQUIOR, *supra* note 17.
[38] FORGIONI, *supra* notes 28, at 264.
[39] Rodrigo Dufloth, *Brasil, custos de transação e insegurança jurídica (causas e consequências)*, MIGALHAS (July 21, 2017), https://www.migalhas.com.br/depeso/262312/brasil–custos-de-transacao-e-inseguranca-juridica–causas-e-consequencias.

To begin the discussion, we must ask how the duties of information, cooperation and care can improve the economy. For this, it is necessary to analyze from the micro to a macro level.

George Akerlof proved that information could influence prices.[40] Moreover, information could also improve the parties' decisions, as it allows them to understand all the risks of the contract and make their decisions based on comprehensive information.

Accurate information promotes fairness in contracts providing equal advantages for all parties and avoids contractual vices or, at least, reduces their occurrence.

Contractual vices could be reduced for two reasons. First, with more accurate information, the parties would only sign contracts when it is mutually beneficial. Second, because the parties have the most accurate and necessary information, it would be more difficult for a breach of contract to occur.[41] Hence, clear information could help people think more clearly and sign better contracts, benefiting all parties involved.

The duties of cooperation and care interact with the duty of information, creating a new mindset about the relationship between the parties. Instead of seeing other party as a rival, this contractual mindset forces them to view the other party as a partner, working together to benefit from the contract during its performance.[42]

This cooperative approach to dealing with contracts was adopted in Brazil in the 2002 Civil Code. This Code is different from its predecessor, as it lacks the voluntary nature that existed in the 1916 Brazilian Civil Code. Good faith appeared in this new Code as a principle that did not exist in the previous Civil Code.[43]

To conclude, the evolution brought by good faith is significant, and this is how contracts must work. However, we cannot forget that the parties have their own interests, and these interests must be respected and considered—unless they violate the legal system, which includes good faith as a contractual principle.

3. REMEDIES: NEGATIVE INTEREST VERSUS POSITIVE INTEREST. THE BRAZILIAN AND ITALIAN CASE

Negative and positive interest refer to how the breaching party can compensate the injured party for the breach of contract. Negative interest means placing the party in the position they should have been in before signing the contract. Conversely, positive interest means placing the party in the position they would have been in if the contract had been performed correctly.[44]

Some scholars in Brazil talk about these remedies and defend negative interest as the only remedy for contract breach, arguing that applying positive interest means taking

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[40] George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488–500 (1970).

[41] Mainly in commercial law, if the parties have the information, one can decide for themselves and have assumed the risks of the contract. Hence, the parties that have assumed the risk could not use lack of information as fundament to breach the contract.

[42] MARTINS-COSTA, *supra* note 6, at 234.

[43] C.C. (1916).

[44] Alexandre Guerra, *Responsabilidade Civil Contratual: Um Brevíssimo Ensaio à Busca de um Modelo*, MIGALHAS (Oct. 20, 2022), https://www.migalhas.com.br/coluna/migalhas-de-responsabilidade-civil/375609/responsabilidade-civil-contratual-um-ensaio-a-busca-de-um-modelo.

away the liberty to contract, as the legal system would not force one party to contract with another.[45] However, others, like Ruy Rosado de Aguiar Junior and Carlyle Popp, hold the opposite view and argue for the use of positive interest to address these breaches.[46]

Previously, following the arguments of Cristiano Chaves de Farias and Nelson Rosenvald, we defended the exclusive application of negative interest.[47] However, we now understand that this position was incorrect because, in some cases, the application of positive interest is necessary to avoid harm and unjust enrichment.[48]

In Italy, case law has evolved from the application of negative interest in precontractual liability to also applying positive interest because:

> in cases of pre-contractual liability, not all damage can be compensated; only negative interests, i.e. the cost and earnings lost during negotiations, may be. Positive interests, the gains that would have been obtained with the conclusion and performance of the contract, cannot be compensated . . . .
>
> . . . [I]t must be stressed in the light of the current boundaries of pre-contractual liability. [I]t no longer appears possible to uphold the traditional view where, in cases of the breach of good faith during negotiations, compensable damages is limited to compensating the negative interest.[49]

Thus, the evolution in Italian Civil Law came about due to the necessity of improving the liability doctrine.[50] Unlike Italy's case, it is possible to track the path that Brazilian doctrine should follow. What is necessary in Brazil is to broaden liability law to encompass as many cases as possible.

In American Common Law, as outlined in the Restatement (Second) of Contracts § 344, three remedies are recognized.[51] Two of these remedies are the same as positive interest (expectation damages) and negative interest (reliance damages).[52]

The other remedy is to restore profits gained by the party before it breached the contract with restitution damages.[53] This is the best way for legal systems to defend the interests of the parties, even better than either the Brazilian or Italian solution.

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[45] Judith Martins-Costa, *Responsabilidade civil contratual. Lucros cessantes. Resolução. Interesse positivo e interesse negativo. Distinção entre lucros cessantes e lucros hipotéticos. Dever de mitigar o próprio dano. Dano moral e pessoa jurídica, in* TEMAS RELEVANTES DO DIREITO CIVIL CONTEMPORÂNEO - REFLEXÕES SOBRE OS 10 ANOS DO CÓDIGO CIVIL (Renan Lotufo at al. eds., Atlas 2012); Gustavo Tepedino et al., *Fundamentos do Direito Privado: Responsabilidade Civil* (2d ed. Forense 2021).

[46] *See* RUY ROSADO DE AGUIAR JÚNIOR, EXTINÇÃO DOS CONTRATOS POR INCUMPRIMENTO DO DEVEDOR [TERMINATION OF CONTRACT FOR DEBTOR'S BREACH] (1st ed. 1991) (Braz.); CARLYLE POPP, RESPONSABILIDADE CIVIL PRE´-NEGOCIAL: O ROMPIMENTO DAS TRATATIVAS [PRE-NEGOTIATION LIABILITY: TERMINATION OF NEGOTIATIONS] (2001) (Braz.).

[47] *See* Victor Caminha Cavalcante, *Fluxo de Riqueza nos Contratos Privados: Uma Análise dos Princípios Contratuais e da Interpretação dos Contratos* (2021).

[48] *See* CRISTIANO CHAVES DE FARIAS & NELSON ROSENVALD, CURSO DE DIREITO CIVIL [CIVIL LAW COURSE] (16th ed. 2018) (Braz.).

[49] Febbrajo, *supra* note 13 at 305–06.

[50] *See id.*

[51] RESTATEMENT (SECOND) OF CONTS. § 344 (AM. L. INST. 1981).

[52] *See* Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 687 (2007) (discussing a new perspective to reliance damages).

[53] RESTATEMENT (SECOND) OF CONTS. § 344 (AM. L. INST. 1981).

4. GOOD FAITH IN U.S. LAW.

To analyze how the U.S. deals with good faith, we may use sources such as the UCC and the Restatement, as well as relevant cases.

Starting with the Restatement, information is critical for determining prices and drafting clauses that parties need to consider when they contract, as mentioned above. American law imposes a duty of disclosure under § 161 of the Restatement (Second) of Contracts.[54]

Under § 161, a party has a duty to disclose certain facts that they know, and if the party fails to disclose, it is equivalent to asserting that the fact does not exist.[55]

We can also see in § 205 of the Restatement (Second) of Contracts[56] and in Uniform Commercial Code § 1-304[57] a general clause of the duty of good faith and fair dealing. However, like Article 422 of the Brazilian Civil Code,[58] § 205 is too general and abstract. It would be much better if in the same section included provisions of pre-contractual and post-contractual liability, as Nelson Eizik said when he discussed Article 422 of the Brazilian Civil Code.[59]

The same scholar discusses the necessity of including pre-contractual and post-contractual liability in Article 422, and this view is reaffirmed by Hamid Charaf Bdine Junior, who says that Article 422 of the Brazilian Civil Code applies to both pre-contractual and post-contractual liability.[60] However, the *I Jornada de Direito Civil—Enunciado nº 25* and the *III Jornada de Direito Civil—Enunciado nº 170* address this issue, supporting the scholars' arguments.[61]

Another scholar, Haroldo Malheiros Duclerc Verçosa, talks about the narrow scope of Article 422 of the Brazilian Civil Code which does not address pre-contractual liability, unlike Article 1.337 of the Italian Civil Code.[62] He also emphasizes the possibility of defending the existence of pre-contractual liability through the articles addressing torts, specifically Articles 186 and 187 of the Brazilian Civil Code. Malheiros states:

> It is also possible to resolve the issue of non-existence of good faith in the pre-contractual phase by applying the concept of tortious act, as established in articles 186 and 187 of the NCC. . . .
>
> In the first case, the failure to exercise proper conduct (by action or omission) regarding the pre-contractual right of the counterparty is

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[54] RESTATEMENT (SECOND) OF CONTS. § 166 (AM. L. INST. 1981).
[55] *Id.*
[56] RESTATEMENT (SECOND) OF CONTS. § 205 (AM. L. INST. 1981).
[57] U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM'N 1977)
[58] C. C. art. 422.
[59] NELSON EIZIRIK, M&A: REGIME SOCIETÁRIO E CONTRATUAL [M&A CORPORATE AND CONTRACTUAL REGULATION] 186 (2023) (Braz.).
[60] Hamid Charaf Bdine Junior, *Resilição Contratual e o Art. 473 do C.C.*, [*Contractual Termination and Article 473 of the Brazilian Civil Code*] 116 REV. ADV. 98 (2012) (Braz.).
[61] SCHREIBER, *supra* note 30, at 306.
[62] HAROLDO MALHEIROS DUCLERC VERÇOSA, CONTRATOS MERCANTIS E A TEORIA GERAL DOS CONTRATOS: O CÓDIGO CIVIL DE 2002 E A CRISE DO CONTRATO [MERCANTIAL CONTRACTS AND THE GENERAL THEORY OF CONTRACTS: THE 2002 CIVIL CODE AND THE CONTRACT CRISIS] 241 (2010) (Braz.).

> considered a violation of rights by the agent, resulting in harm to the counterparty, even if exclusively moral. It should also be borne in mind that the pre-contractual right in question is protected by article 421 of the NCC, referring to the freedom to contract, considered here as one of the foundations of the contract, as an exercise of the expression of private autonomy within the limits established by the legislator.
>
> With regard to the second case, it should also be noted that the abusive conduct of the counterparty during the negotiation phase may characterize a breach of the economic or social purpose of the contract or, in addition to the breach of good faith, consist of infringement of uses or customs related to the conclusion of certain types of contracts.[63]

Haroldo Malheiros also argues that good faith at the moment the contract is signed is the culmination of the prior negotiation process.[64] Consequently, we cannot say that good faith can exist at the moment the contract is signed if it did not exist during the preceding negotiations.

It makes sense because if the parties did not act in good faith during the pre-contractual process, we cannot argue that they acted in good faith at the moment the contract was signed. For this reason, we agree with the idea that good faith must be present throughout all stages of the contract.

Therefore, in American contract law, reliance interests need to be secured, but under what circumstances? Alan Schwartz and Robert Scott, after studying thirty cases of pre-contractual liability, find that:

> the courts did not find liability, whether based on promissory estoppel or quantum meruit, in twenty-six, or approximately 87%, of the thirty preliminary negotiation cases. The case data thus show that, absent misrepresentation or deceit, there generally is no liability for inducing reliance investments during the negotiation process.[65]

It is evident that, for reliance damages to apply, the parties must be bound by a legal obligation.[66] Another question arises: must the parties be bound by consideration (a bargain for exchange), or can promissory estoppel also be used?

In *Hoffman v. Red Owl Stores, Inc.*, one can see that promissory estoppel is relevant when considering reliance damages:

> An action based on promissory estoppel is different from a breach of contract action, and promissory estoppel does not require the establishment of a promise supported by consideration. It may serve to protect parties that are exposed to losses during complicated negotiations because of their detrimental reliance on a promise. Damages were appropriate for all of these items, although damages for the sale of the grocery store should be reduced to the difference between the price for which it was sold and its fair market value, while accounting for any goodwill.[67]

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[63] *Id.*
[64] *Id.*
[65] Schwartz & Scott, *supra* note 52, at 671.
[66] *See id.* at 702.
[67] *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 701 (1965).

To enforce preliminary agreements, Schwartz and Scott state that the parties must "have manifested assent to an exchange."[68] However, to maintain legal certainty, the best interpretation is that only contracts binding due to consideration can be affected by reliance damages if we are considering commercial contracts.[69] The scholars also introduce an important innovation in their article that could be used in cases of reliance damages in pre-contractual liability:

> Recently, in a major shift in doctrine, courts have relaxed the knife-edge character of the common law by which parties are either fully bound or not bound at all. Instead, a new default rule is emerging to govern cases in which the parties contemplate further negotiations. The default rule starts with the presumption that preliminary agreements typically do not create binding contracts. This presumption follows the common law approach and rests on the view that courts should not hold parties to contracts unless the parties intended to make them. The new default rule requires parties to such a preliminary agreement to "accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement." Neither party, however, has a right to demand performance of the transaction. If the parties cannot ultimately agree on a final contract, they may abandon the deal.
>
> The doctrinal key to the enforcement of these agreements is the parties' intent. Courts honor express reservations of intention as well as statements of intention to be fully bound. The major doctrinal development is that modern courts recognize a further obligation to implement parties' expressed intent to bind themselves in preliminary agreements by creating a duty to bargain in good faith even when one of them prefers not to deal.[70]

Let us analyze what *Market Street Associates Limited Partnership v. Frey*, a case from the Seventh Circuit Court of Appeals, may teach us.[71] These are the facts of the case:

> In a sale-leaseback agreement between J.C. Penney and General Electric Pension Trust, Paragraph 34 allowed J.C. Penney to purchase the property at less than its market value if General Electric did not negotiate with it over future financing. J.C. Penney later assigned its interest in the property to Market Street Associates Limited Partnership. General Electric refused to negotiate with Market Street over future financing, since it was no longer aware of the clause. Market Street, which was aware of it, sued for specific performance as it sought to acquire the property through the option in Paragraph 34.
>
> The manager at Market Street who was responsible for the property admitted that the General Electric representative with whom he interacted might not have been aware of the clause and that he had known during negotiations that he might not have been aware of it. Therefore, the trial court ruled that Market Street had acted in bad faith by attempting to exercise the option and dismissed the case.[72]

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[68] Schwartz & Scott, *supra* note 52, at 674.
[69] *Id.* at 672.
[70] *Id.* at 675.
[71] Market Street Assoc. Limited Partnership v. Frey, 941 F.2d 588 (7th Cir. 1991).
[72] JUSTIA U.S. LAW, Annotation, *Market Street Assoc. Limited Partnership v. Frey*, 941 F.2d 588 (7th Cir. 1991), https://law.justia.com/cases/federal/appellate-courts/F2/941/588/403036/ (last visited Dec. 1, 2024).

Therefore, Judge Richard Allen Posner decided that:

> There is a difference between acting in an altruistic manner, which is not required of parties to a contract, and acting in good faith, which is required. Knowingly exploiting another party's ignorance of a pivotal matter is not the same as using superior knowledge in negotiations. However, the lower court judge erred in making a finding of bad faith as a matter of law. This is a factual issue that should be resolved by a jury.[73]

Judge Posner's opinion reinforces what we wrote earlier about good faith and the parties' interests (item 2.3).[74] Altruism is not required. As Judge Posner said, good faith is a standard of behavior that guides parties toward a fair agreement.[75]

5. CONCLUSION - GOOD FAITH AS A MARKET ALLY

We have demonstrated that good faith may improve market relationships by imposing behavioral standards that induce parties to act in accordance with a specific method which, if followed, may allow them to establish a fair contractual relationship.

The principle also has functions that form its foundation and includes ancillary duties that assist the principal obligation. It is important to understand that commercial relationships must have legal certainty, including in the pricing system, as it may impact the decisions of the parties.[76] With the standards of behavior that objective good faith imputes to the parties, they may allocate their risks based on a structure that also could give the security of a fair negotiation.

Moreover, a system that gives incentives for sharing broad information allows the parties to negotiate with more confidence in the other party; not because of subjective good faith of the parties, but mainly because of the standards of behavior given by objective good faith. This structure directs the parties to a process in which their objective is the fulfillment of the contract, and the parties should be allied to complete this objective.

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[73] *Id.*
[74] Cavalcante, *supra* § 2.3.
[75] *See Market Street Assoc. Limited Partnership,* 941 F.2d at 595.
[76] Schwartz & Scott, *supra* note 52, at 673.

AMERICAN INTERESTS AND RUSSIAN ARBITRATION: *OVERCOMING CONFUSION AND CONCERN*

By Blake Alderson

ABSTRACT

This article seeks to circumvent potential pitfalls for American investors by highlighting the key governing principles in Russian arbitration and the enforcement of associated awards, both foreign and domestic. To this end, the article will briefly orient the reader with the applicable commercial law and authorities behind the arbitral structure before engaging with the governing authorities of the Law on International Commercial Arbitration (ICA) and the New York Arbitration Convention (NY Convention) on recognizing foreign arbitral awards, with the end goal of establishing a cohesive path for prospective American businesses to pursue necessary arbitration actions on Russian soil. To aid the American reader, the doctrinal focus will be largely limited to the legislative treatment of foreign persons and the path they follow in enforcing agreements.

I. INTRODUCTION

The stereotypical response to conversations about the Russian legal system will often involve a quick dismissal of the notion that Russia is governed by more than the whims of politicians and judges.[1] Despite these assumptions, American legal and corporate interests would do well to acknowledge the inevitability of interactions with the Russian legal system. Russia operates under a statute-intensive civil law system with a highly specialized judiciary that separates matters by subject matter under a single Russian Supreme Court. The commercial or *arbitrazh* courts of the Russian Federation operated under an independent Higher Arbitrazh Court until 2014 when it was joined with the Russian Supreme Court.[2] While Western companies operating in Russia will often "'do everything possible' to avoid the Russian courts,"[3] Russia's reliance on foreign capital and abundant natural resources creates an all too attractive opportunity for some investors to resist. The arbitral traditions of Russian governments existed long before foreign investors were permitted to return after the enactment of *perestroika*. The Soviet Union, and later the Russian Federation, adapted and reformed the institutions of each prior regime to create an arbitral identity that is uniquely Russian, an influential outlier on the international stage.

The first legislation on Russian arbitration can be found in the code of Czar Alexis in the late seventeenth century, and while the first regulation on general arbitration would not follow until 1857, Russia would become the site for an international dispute between the United Kingdom and the United States in 1822.[4] At the request of American President James Monroe, Czar Alexander of Russia heard one of the first international arbitration disputes in American history. The issue at hand concerned some five thousand escaped slaves, then conceived of as private property, that fled to British lines and were carried away during the War of 1812.[5] Having heard the American case from Henry Middleton, the Czar decided the dispute and claims for restitution "according to the literal and grammatical sense . . . of the treaty of Ghent."[6] Though the Czar's siding with America is still scrutinized, the decision was on the cutting edge of "a new-age of inter-state arbitration" and reflected an acknowledgement of Russia's political importance by the English speaking parties that continues to overshadow arbitration in the country today.[7]

Czarist Russia was particularly favorable to arbitration and mediation, with a surprising inclination to limit the interference of the government. The Civil Procedure Code of 1864 introduced a codification of the arbitration institution that did not require the application of Russian law and instead focused on the wisdom of "higher justice and life truths rather than on the basis of codified law."[8] Under circumstances in which neither party claimed express wrongdoing, the oldest Russian approach "is not inconsistent with United States and international commercial practice, according to which arbitrators may decide a case . . . as amiable."[9]

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[1] Glenn P. Hendrix, *Business Litigation and Arbitration in Russia*, 31 INT'L L. 1075, 1075 (1997).
[2] Kathryn Hendley, *Judges as Gatekeepers to Mediation: The Russian Case*, 16 CARDOZO J. CONFLICT RESOL. 423, 429 (2015).
[3] Hendrix, *supra* note 1, at 1076.
[4] Bennett Ostdiek & John Fabian Witt, *The Czar and the Slaves: Two Puzzles in the History of International Arbitration*, 113 AM. J. INT'L L. 535, 551–52 (2019).
[5] *Id.* at 536.
[6] *Id.* at 552.
[7] *Id.* at 551.
[8] Karen Halverson, *Resolving Economic Disputes in Russia's Market Economy*, 18 MICH. J. INT'L L. 59, 78 (1996).
[9] *Id.* at 96.

The arrival of the Soviets in 1917 saw arbitration abolished for seven years before its reintroduction under Lenin's New Economic Policy, only for arbitration to be rendered moot by the implementation of total central planning by the 1930s. Though domestic arbitration was no more, Soviet foreign trade and their inherent distrust of foreign nations demanded some ability for pursuing recourse on the front of international arbitration. After a decade with no forum of its own, 1932 saw the formation of an enduring power in Russian arbitration disputes with the Foreign Trade Arbitration Commission (FTAC), now called the International Commercial Arbitration Court (ICAC). The ICAC and the accompanying Maritime Arbitration Commission (MAC) would function serviceably for the Soviet Union's remaining existence, often serving as a shield for Soviet interests in an era of institutionalized arbitration. With the disasters of *glasnost* and *perestroika*, new political and economic forces were unleashed on state institutions that were grossly unprepared, or abandoned, after sixty years of state control. With the reemergence of an independent market, Russian State *arbitrazh* courts would require a total overhaul, a task that would take the next twenty-five years.

The political and economic upheaval stemming from the fall of the Soviet Union continues to have an impact on both the Russian perception of dispute resolution in arbitration and the wider reputation on the expected fate of American ventures in Russia. While some writers believed the collapse of the Soviet Union to be an unparalleled opportunity to experiment with true freedom of contracts, a lack of consideration of the effects of the Russian civil law system and the turmoil of the moment would see their hopes go unfulfilled.[10] In a series of 1993 interviews, Russian and foreign businessmen critiqued a wide berth of issues for the new government to address, ranging from vague and inconsistent legal formulations to an excess of federalized rules creating widespread insecurity.[11] Epitomizing the haphazard development of post-Soviet arbitration, the USSR Union of Jurists established an arbitration tribunal in 1990 with direct authorization from the Soviet government.[12] This arbitration tribunal would survive the Soviet government and operate for nearly two years without any corresponding regulation.[13] The explosion of the arbitration tribunal in the late 1990s, while lauded by jurists for the increased accessibility of the system for the Russian market, would expose a lasting issue in Russian arbitration with their difficulty to enforce.[14] While international arbitration was first regulated by the 1993 Law of the Russian Federation on International Commercial Arbitration,[15] regulation remained largely incomplete until the Arbitration Procedure Code was reformed in 2002 to broaden the scope of rules and regulations on foreign persons.[16] Despite its drawbacks, the post-Soviet era would firmly establish by regulation and custom that the arbitration tribunals would intersect the larger scope of the *arbitrazh* and state court system, stabilizing the place of arbitration under the supervision of the new civil and arbitration codes of the Russian Federation. For the concerned foreign investor seeking to have an arbitrated agreement enforced, they will most likely be served by Russia's two permanent arbitration tribunals, the International Commercial Arbitration Commission (ICAC) or Maritime Arbitration Commission (MAC). As foreign awards are enforced only two-thirds of the

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[10] Paul H. Rubin, *Growing A Legal System in the Post-Communist Economies*, 27 CORNELL INT'L L.J. 1, 3 (1994).
[11] MARK TOUREVSKI & EILEEN MORGAN, CUTTING THE RED TAPE: HOW WESTERN COMPANIES CAN PROFIT IN THE NEW RUSSIA, 166–92 (1993).
[12] Halverson, *supra* note 8, at 84.
[13] *Id.*
[14] *Id.*
[15] William E. Butler, *State Interests and Arbitration: The Russian Model*, 113 PENN ST. L. REV. 1189, 1194 (2009).
[16] Sergey Budylin, *Judging the Arbiters: The Enforcement of International Arbitration Awards in Russia*. REV. OF CENT. & E. EUR. L. 34, no. 2 (2009).

time in Russia—far removed from the international average of 90%—a thorough understanding of the procedure and the tribunal mechanisms are essential for any foreign party.[17]

II. CIVIL PROCEDURE

A. FOREIGN PERSONS

The basic principles for the governing of foreign persons engaged in the arbitration process in Russia fall under Section 5, Chapter 43 of the Civil Procedure Code, known as Grazhdanskiĭ Protsessual'nyĭ Kodeks Rossiĭskoĭ Federatsii (GPK). Foreign citizens are entitled to the same procedural rights and duties as a Russian citizen, subject to reciprocal restrictions suffered by Russian citizens in the foreigner's country.[18] Foreign organizations also receive the olive branch of personal and procedural rights and duties that a Russian organization would receive.[19] In addition, the Russian courts may elect an organization as present independent of official organization in the foreigner's country.[20] For foreign interests concerned about being roped into litigation in the Russian Federation, the Russian Federation holds the right to consider any dispute concerning foreign persons if the defendant, or any managerial or affiliate body of the person or organization, is located within the territorial boundaries of the Russian Federation.[21] Additionally, should any agreement concern the full or partial fulfilment of a duty, the Russian Federation has the right to bring the foreigner to court.[22] If a foreigner wishes to interact with Russia or with Russian citizens in pursuit of a business venture, independently or through an intermediary, they should be aware that, from the perspective of the Russian Federation, they have availed themselves.

In comparing the Russian Code to its American counterpart, the Russian propensity to firmly guide international affairs is on full display in Article 403 of the Civil Procedure Code, (GPK).[23] The Russian Federation claims exclusive recognition in cases concerning any immovable property and shipping contracts in which the shipper is within the territory of the Russian Federation.[24] For the benefit of foreign parties looking to arbitrate elsewhere, the Russian Federation does acquiesce that foreign persons may independently agree to another venue.[25] However, once the legal process with a foreign citizen begins in the Russian Federation, it may not be removed and it will not stop until completion.[26] Unsurprisingly, a natural response toward interested parties is to recommend prospective arbitration be contracted to occur outside of Russia or under foreign law, an understood preemption to most foreign investments in Russia.[27]

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[17] Elliot Glusker, *Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications,* 10 PEPP. DISP. RESOL. L.J. 595, 606 (2010); William R. Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, and Cases*, 16 AM. REV. INT'L ARB. 261, 262 (2005).

[18] GRAZHDANSKIĬ PROTSESSUAL'NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [hereinafter GPK RF] [Civil Procedure Code], art. 398 (Russ.).

[19] *Id.*at art. 400.

[20] *Id.* at art. 400(2).

[21] *Id.* at art. 402.

[22] *Id.*

[23] *Id.* at art. 403(1).

[24] *Id.*

[25] *Id.* at art. 404.

[26] *See id.* at art. 405.

[27] *See* Glusker, *supra* note 17, at 595.

B. FOREIGN COURTS AND DECISIONS

The immediate acknowledgement of foreign courts by the Russian Federation of foreign courts is found in Article 407 of the GPK with a claim to "execute the orders of foreign courts, subject to international treaty."[28] While this is by no means foolproof, as Americans should observe in the NY Convention and Russia's treatment of foreign arbitration awards, it does provide the basis of procedural assurance. Additionally, foreign orders will be enforced subject to the degree to which they can be deemed to impinge on the sovereignty of the Russian Federation or its laws.[29] Furthermore, foreign orders will not be accepted if the request goes beyond the authority of the court to which the order is delivered.[30] Just like in America, the litigant must ensure that they are filing with the correct body. Accepted orders from foreign courts will be executed in accordance with local Russian law unless otherwise agreed upon by international treaty.[31] Concerns over the Russian government rejecting official documents presented as evidence from foreign courts are eliminated by Article 408, which states that all documents "issued, compiled, or certified in conformity with the foreign law . . . shall be accepted by the courts of the Russian Federation."[32]

The procedure enforcing a foreign arbitration award, though largely governed by different legislation, is first beholden to the civil procedure of Russia. Decisions of courts, including settlements reached "amicabl[y]," are to be acknowledged and enforced.[33] Courts seeking forcible execution within Russia, may present their case to the corresponding Russian authority within three years of the original court's decision.[34] The petition for forcible execution of a foreign court decision may be delivered for consideration to the Supreme Court of the Republic, the territorial or regional court, the court of a federally significant city, or the court of an autonomous region dependent on the identity and location of the indebted party.[35]

The identifying content of the petition is to include the name and residence of the exactor and their representative; the name and residence of the debtor or indebted organization; and the exactor's specific request for forcible execution, specifying from what moment the execution is demanded.[36] In the absence of any international agreement, Russian procedure demands the petitioner include a copy of the certified decision of the foreign court, an official certification of the effectiveness of the decision, any former executing document of the decision, a record of notice of the opposing party, and a certified translation into Russian of each above documents.[37]

The petition for forcible execution will be considered, post-notice, in an open court session during which the debtor shall have the opportunity to present proof and explanations.[38] The court will then issue a ruling on the matter of forcible execution, dependent upon the tenants of the arbitration code and regulations of the Russian Federation.[39] Should the court agree with the

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[28] GPK RF, *supra* note 18, at art. 407.
[29] *See Id.* at art. 407(2).
[30] *Id.*
[31] *Id.* at art. 407(4).
[32] *See id.* at art. 408.
[33] *Id.* at art. 409(1).
[34] *Id.* at art. 409(3).
[35] *Id.* at art. 410.
[36] *Id.* at art. 411(1)(1-3).
[37] *Id.* at art. 411(2)(1-5).
[38] *Id.* at art. 411(3).
[39] *Id.* at art. 411(4).

determination of the foreign court, a writ of execution shall be issued with a copy returned to the court of origin.[40] If doubt arises during the court session as to the issue at hand, the petitioner may be subject to questioning, or the Russian court may "request an explanation from the foreign court."[41] As demonstrated below, Russian courts are generally more inclined to defend local interests than their international counterparts by either delaying or outright refusing enforcement.

III. ARBITRATION PROCEDURE

A. EXPANDED RULES OF ARBITRATION

When comparing Chapter 31 of the Arbitration Procedure Code (APK) with Chapter 45 of the GPK, Yarkov recognized that the APK significantly expanded upon the notion of recognition beyond the considerations of international treaties.[42] Chapter 31 of the APK concerns the recognition proceedings related to the enforcement of foreign court decisions. The decisions of the courts of foreign states centers around disputes of business and other economic matters, including decisions regarding awards of "*ad hoc* arbitration tribunals."[43] The inclusion of the unifying article to concisely indicate that the authority of recognition and enforcement extended to all applicable foreign and domestic courts once the issue was submitted to Russian law was a relatively recent development, only coming about in 2002.[44] Issues of recognition and enforcement are to be determined by the *Arbitrazh* Court following petition from a case already considered by a foreign court or arbitrating party.[45] Functionally, the petitioner, having received a favorable judgement in their home venue, faces a two-part struggle: to attain recognition of the validity of the foreign decision to award in their favor, and then to attain domestic (Russian) enforcement of the award as originally decided.[46]

The application for an award recognition made to the commercial court of the Russian Federation, as submitted by the claimant, corresponds with the residence of the debtor. The application for recognition must specify the commercial court, claimant, debtor, and award decided by the foreign court for which recognition is requested, and include accompanying documents.[47] Certified copies of foreign court decisions recognizing the award decision, certifying appropriate notice, confirming timely notice of the debtor to the award, and movement to enforce in domestic (Russian) court are just the beginning of the process.[48] The application will be further subject to the requirements of Article 255 of the APK, stating that foreign documents from competent authorities of foreign states are to be treated by the standards of the foreign state and accompanied by the appropriate state fee as established by federal law.[49]

Having received the application for recognition and enforcement, the decision lies with the judge alone to make within the first month from receiving the application.[50] The court shall give

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[40] *Id.* at art. 411(6).
[41] *Id.* at art. 411(5).
[42] V. V. Yarkov, *Access to Justice: Foreign Persons and Russia's New Arbitration Procedure Code (Part I)*, 32 REV. OF CENT. & E. EUR. 121, 125 (2007).
[43] *Id.*
[44] *Id.*
[45] ARBITRAZHNO-PROTSESSUAL'NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII, [hereinafter APK RF] [Arbitration Procedure Code], art. 241 (Russ.).
[46] Yarkov, *supra* note 42, at 126.
[47] APK RF, *supra* note 45, at art. 242(2).
[48] *Id.* at art. 242(3).
[49] *Id.* at art. 242(6), art. 255.
[50] APK RF, *supra* note 45, at art. 243(1).

notice to the persons involved in the affair; however, so long as notice is adequately provided, neither the presence of one nor both parties is necessary for the court to make their decision.[51] In consideration of a case, the commercial court shall determine the validity of the claims on the evidentiary grounds for recognition as were established in the foreign court.[52] The court will have the authority to examine the evidence submitted from the petitioner.[53] Additionally, by international agreement and the procedure of *exequater* (enforcement), the commercial court may not change or correct any of the award once in force.[54] While prohibited from reviewing the merits of a foreign decision, the reality of this code varies dependent on the court and judge participating and their adherence to the APK in practice. Under the circumstances in which proceedings are occurring in a foreign court and a domestic Russian court, the requirement of a month to decide will be superseded by the court's ability to halt the proceeding or agree to a foreign application for an annulment of the agreement.[55]

The court's grounds for refusal, echoed in the NY Convention, may come in whole or in part from a lack of a foreign court entering the award into force; a lack of notice to the debtor or similar inability to submit an explanation to the court; a prior decision from a Russian court of an identical dispute between the same parties; the expiration of the domestic statute of limitations; or a separation between the award and the duty to ensure the public order of the Russian Federation.[56] Within Article 244, the right to refuse may be expanded by the ICA to include the refusal to issue a writ of execution.[57] Yarkov makes an astute observation in his work, noting that "there is no single procedure for recognition and enforcement of foreign court judgements."[58] As a by-product of this lack of official domestic procedure, the effective procedure has often been determined by the level of economic cooperation between Russia and the foreign nation or by the general similarity of legal systems.[59] The number of restrictions in place will be varied by bilateral agreements, such as those retained from the Soviet era between Greece, with four restrictions, and North Korea, with only two restrictions.[60]

The rules on the competence, generally used to mean jurisdiction, of the commercial courts to hear cases involving foreign persons are in Article 247 of the APK, with a few modifications from the GPK. The commercial courts of the Russian Federation consider direct economic disputes and cases concerning general business and investment activities involving foreign persons and organizations, including international organizations and stateless persons falling under the umbrella term of foreign person.[61] Including the involvement of one or more foreign persons in an economic dispute, the competence of a commercial court is established where contractual performance, property damage, or unjust enrichment has occurred within Russian territory.[62] Additionally, commercial courts receive competency over issues involving board ideas of business reputation, facts of legal significance, and disputed territorial relationships with the state.[63] The

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[51] *Id.* at art. 243(2).
[52] *Id.* at art. 243(3).
[53] *Id.*
[54] Yarkov, *supra* note 42, at 143-44.
[55] APK RF, *supra* note 45, at art. 243(7).
[56] *Id.* at art. 244.
[57] *Id.* at art. 244(3).
[58] Yarkov, *supra* note 42, at 144.
[59] *Id.* at 145.
[60] *Id.* at 146.
[61] APK RF, *supra* note 45, art. 247.
[62] *Id.*
[63] *Id.*

ongoing trend in the development of Russian arbitration law has been a steady expansion of the matters and persons bringing concerns to the courts. Under Article 248 of the APK, the commercial courts claim exclusive competency over issues concerning state owned property, immovable property within the Russian Federation, and intellectual property.[64] Identical to the GPK, Article 249 of the APK permits a domestic Russian and a foreign party to conclude a written agreement in which a commercial court within the Russian Federation that normally would have jurisdiction will be granted exclusive competence to consider the dispute.[65] While expansive in scope, the most significant statements of the arbitration code are often in what is excluded rather than included. Relating to Russia's inverse recognition of rights from America and demonstrated in practice by the commercial courts, the rights and powers of the state are open to freely fill legislative gaps.

IV. LAW OF COMMERCIAL ARBITRATION

A. DOMESTIC ARBITRATION OF INTERNATIONAL DISPUTES

Despite the prevalence of international arbitration agreements and bilateral investment treaties in the recognition and enforcement of arbitration involving foreign persons, the private arbitration tribunal still falls under the vast umbrella of state organizational power.[66] State interests established within the legislation of the Russian Federation create a series of "domains" from which power seeps into the private tribunals.[67] Professor Boguslavskii first marked the domains of approximate control over permanent private tribunals by the state in determining the competence or jurisdiction of the court under which the arbitration agreement falls, the validity of the original arbitration clause, the membership of the arbitration tribunal, the security or affairs, and the enforcement of awards in commercial courts.[68] While the notion of control here does not rise to the level of establishing a hierarchal relationship between the bodies, the organization and procedure are ultimately dictated by state courts, or federal legislation in the failure of local agreements.[69]

The domestic framework of international arbitration within the Russian Federation is primarily governed by Law No. 5538-1, ICA. As recognized in the earlier procedure codes, the Russian ICA will be of concern to any foreign investor engaged in the flow of commerce through or within the Russian Federation. The ICA will provide the litigants the rights to determine the authority of a court or tribunal to adequately enforce an arbitration award or agreement.[70] The form of the arbitration agreement, by and large, follows the international standard of a written agreement to submit to arbitration with some additions.[71] The arbitration tribunal has jurisdiction only over the matter to which the arbitration clause applies; however, the involved parties are free to make appropriate challenges to establish, contest, or contract to restrict what is within the jurisdiction of the tribunal.[72] A contractual relationship need not be present; however, contractual disputes open

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[64] *Id.* at art. 248.
[65] *Id.* at art. 249.
[66] Butler, *supra* note 15, at 1196.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 1196–97.
[70] Zakon RF o Mezdunarodnom Kommercheskom Arbitrazhe [Law of the Russian Federation on International Commercial Arbitration], No. 5538-1, signed 7 July 1993, (hereinafter Law on International Commercial Arbitration) (Russ.), https://mkas.tpprf.ru/en/lawstatus/legal_status/law/.
[71] *Id.* at art. 1(3).
[72] *Id.* at art. 16(1).

the dispute to include any and all transactions between the parties regarding performance, amendment, or termination of the contractual relationship.[73] The arbitration agreement in question may further be a clause of a larger agreement or an independent document, under which circumstances the rules of the agreement will be deemed to be inseparable unless otherwise permitted by the ICA.[74] When interpreting the document, the permanent or private arbitration tribunal will interpreted the document in favor of the argument's validity and enforceability.[75]

I. FORMING THE TRIBUNAL

The parties involved have an exceptionally open ability to craft the arbitration tribunal and procedure. So long as the total number of arbitrators is odd, the arbitration tribunal possesses no restrictions on the number of arbitrators upon which may be agreed.[76] Only in the absence of an alternate agreement by the disagreeing parties will the ICA enforce the three-person tribunal structure.[77] The disputing parties may also agree to near-unlimited requirements or restrictions on the arbitrators involved, ranging from qualification to nationality.[78] Further, they may agree to any specific procedure in the selection of the arbitrator, inclusion of a court in the process, or an exclusion of a court from interfering.[79] In the case where negotiations fall apart, the ICA does have a standardized procedure for the process. The ICA will select one arbitrator, subject to any independent restriction agreement, by each participating party.[80] The two nominated arbitrators will then select the third member of the tribunal; however, should the first two arbitrators fail to select a third member within 30 days, a party may request to move the decision to a competent court.[81] The competent court, to which the arbitrating parties have submitted their dispute, will still be bound by the original restrictions on arbitrator selection.[82]

An individual whom either a member of the dispute or a court has approached to be an arbitrator shall disclose in writing any circumstances under which reasonable doubts as to their impartiality or independence may arise.[83] The duty of the arbitrator to be forthcoming with potential conflicts of interest or impartiality will continue until the end of proceeding, and the arbitrator may only be challenged under reasonable doubts as to the circumstances of his impartiality or his failure to meet the requirements of the arbitrating parties.[84] If such circumstances arise, either party may, should an alternative agreement on procedure not exist, raise their objection within fifteen days of becoming aware of the arbitrators joining the tribunal.[85] The objection shall be made in writing and submitted to the other members of the tribunal or a permanent arbitration institution for a resolution.[86] The replacement of the removed arbitrator shall follow the original procedure without alteration. While the original 1993 law mandated that

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[73] *Id.* at art. 7(10).
[74] *Id.* at art. 7(13).
[75] *Id.* at art. 7(9).
[76] *Id.* at art. 10(1).
[77] *Id.* at art. 10(2).
[78] *Id.* at art. 11(1).
[79] *Id.* at art. 11(2).
[80] *Id.* at art. 11(3)(1).
[81] *Id.*
[82] *Id.* at art. 11(6).
[83] *Id.* at art. 12(1).
[84] *Id.*
[85] *Id.* at art. 13(2).
[86] *Id.*

international arbitration disputes were subject to an alternate selection process of the third member of the tribunal, all disputes now function under a unified set of rules as of 2015.[87]

II. ARBITRAL PROCESS AND EVIDENCE

Article 18 of the ICA assures the parties will have their equal treatment and will possess the freedom to agree on alternative rules of procedure, language, and venue.[88] In the absence of an alternative arrangement, the arbitral tribunal shall determine a venue, considering circumstance and convenience.[89] The tribunal may, at a later point, meet at another location for deliberation between arbitrators, hearing witness and expert testimony, or inspecting goods and property.[90] The arbitration is considered to begin at the moment the respondent receives the claim.[91] "The claimant shall" begin by "stat[ing] the facts supporting [their] claim," indicating the particular injury suffered and remedy sought.[92] The respondent shall then mirror this process with their defense on the particular claims raised.[93] At any point prior to a decision by the tribunal either party may amend or supplement claims made during the proceedings; however, the tribunal may block or delay inappropriate or objectionable material.[94] A default will be assessed if one party has failed to show sufficient cause or by the claimant failing to communicate their statement of claim and result in a termination of proceedings.[95] Should the respondent fail to articulate their defense, proceedings shall continue without treating the failure to defend as an admission.[96] If either party fails to appear, the proceedings will continue with the limited or lack of evidence before the tribunal.[97]

The arbitral tribunal may independently appoint one or more experts to provide a report on a specific issue with the final determination provided by the tribunal.[98] Russian experts, however, are not prevented from making claims or assertions about the final issue at hand with most choosing to make a direct declaration on the matter.[99] By request of a party, an expert may present a written or oral report in an open hearing at which the parties will have the opportunity to question the expert and present alternative expert witnesses to provide testimony.[100] If administered by a permanent arbitration institution, a competent court of the Russian Federation may be asked to aid in acquiring evidence.[101] In expanding state involvement on evidentiary discovery to this great extent, Russia far surpasses both international standards and the UN Model law upon which the Russian law was based, in government involvement and permitted evidentiary berth.[102]

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[87] Spiegelberger, *supra* note 17, at 274.
[88] Law on International Commercial Arbitration, *supra* note 70, art. 18–20.
[89] *Id.* at art. 20(1).
[90] *Id.* at art. 20(2).
[91] *Id.* at art. 21.
[92] *Id.* at art. 23(1).
[93] *Id.*
[94] *Id.* at art. 23(2).
[95] *Id.* at art. 25.
[96] *Id.*
[97] *Id.*
[98] *Id.* at art. 26(1).
[99] GPK RF, *supra* note 18, art. 204.
[100] *Id.* at art. 205; Law on International Commercial Arbitration, *supra* note 70, art. 26(2).
[101] Law on International Commercial Arbitration, *supra* note 70, art. 27.
[102] Spiegelberger, *supra* note 17, at 304.

III. ENDING PROCEEDINGS

The tribunal shall make their final determination on the matter according to the rule of law which the tribunal considers applicable and the terms of the contract according to the trade practices or custom from which the dispute arose.[103] The tribunal need only reach a simple majority before determining if an award is to be granted.[104] Should an award be granted, the award is to be made in writing by the affirming arbitrator(s), indicating the reasoning upon which the conclusion, award amount, and fee distribution were determined.[105] The delivery of the award must be made to serve as a form of notice for the decision entered to be later enforced by a commercial court if the dispute continues. Should a foreign party believe that a fee was punitive or otherwise erroneous, the NY Convention may provide relief through the commercial courts. Termination of the arbitration proceeding may be prompted by award, dismissal, settlement, or order of the tribunal.[106] The tribunal may elect to order a termination of proceedings in the event of claimant withdrawal, mutual termination, impossibility of continuation, or redundancy of affairs.[107] The order is held to be without prejudice unless otherwise provided by the ICA.[108] Either party, with notice provided to their opposition, may request a correction of any clerical or interpretive errors within thirty days of the award's first receipt.[109] Within the same thirty-day window, either party, having provided notice to the other party, may move for the tribunal to make an additional award.[110]

IV. RECOURSE AND RECOGNITION

In seeking recourse from an unfavorable award, petitioning parties have a three-month window from the date on which the party receives notice of the first award.[111] If administered before a permanent arbitration institution, the parties may make a direct agreement to hold the tribunals decision as final.[112] Unless a prior agreement stipulates an award from a private tribunal is final, recourse against a tribunal award may be pursued via application to the competent court on the grounds of Article 34 of the ICA.[113] The arbitral award may be set aside by the appropriate commercial court if the moving party demonstrates to the court evidence of incapacity, an invalid arbitration agreement, a violation of domestic law, a lack of notice of arbitrator appointment or proceedings, or an inability to present their case.[114] More substantive to the matter, the moving party may demonstrate that the arbitral award deals with a dispute that was not originally contemplated by the terms of the arbitration agreement.[115] The decision of the tribunal may also be subject to recourse should the tribunal's decision contain a determination on matters beyond the scope of the original arbitration agreement.[116] If the decision may be separated between that

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[103] Law on International Commercial Arbitration, *supra* note 70, art. 29.
[104] *Id.*
[105] *Id.* at art. 31.
[106] *Id.* at art. 32.
[107] *Id.* at art. 32(2).
[108] *Id.* at art. 32(3).
[109] *Id.* at art. 33(1).
[110] *Id.* at art. 33(3).
[111] *Id.* at art. 34(1).
[112] *Id.*
[113] *Id.* at, art. 34(2).
[114] *Id.* at art. 34(2)(1).
[115] *Id.*
[116] *Id.*

which was covered and that which was not, partial recourse may be available.[117] Alternatively, the commercial court may find independent issues of subject matter that are unavailable for arbitration or an award that violates the notion of Russian public order.[118]

For awards established or arbitrated by a foreign tribunal, Article 35 of the ICA assures that the Russian commercial courts will, unless the award is otherwise objectionable, recognize the award as binding and enforce the given award upon appropriate application by the petitioning party.[119] The party awaiting enforcement is responsible for supplying the authenticated copy of the award, in addition to the list documents mentioned in the APK.[120] The ICA dedicates far more time to the grounds for refusing to recognize or enforce awards, though most awards are voluntarily followed.[121] Regardless of the country of origin of the award, the court may elect to refuse enforcement where a party demonstrates to the competent court for reasons near identical to those in Article 34 on setting aside awards.[122] Chief among the reasons and also included within the international NY Convention, matters of public policy or order are consistently the most common reason of Russian courts refusing to enforce a foreign award.[123] In practice, Russian courts may also attempt to address the original facts of the dispute in violation of both the IAC and the NY Convention.[124]

IV. THE NEW YORK CONVENTION

A. BASIC PRINCIPLES

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[125] signed by the Soviet Union and ratified in 1960, still binds the Russian Federation as agreed upon by the Russian Ministry of Foreign Affairs in 1991.[126] Arbitral awards subject to the limitations of the NY Convention include both those made by independent arbitrators and permanent arbitral bodies, such as the ICAC, at any point in the process of seeking enforcement. The NY Convention naturally establishes the standard requirements of a written arbitration agreement[127] and mirrors the required translated documents to be submitted when seeking an award in a foreign court.[128] Article III of the NY Convention establishes the agreement to recognize foreign arbitral awards as binding and to enforce them in accordance with the procedure of the state receiving the order to enforce.[129] Additionally, Article III limits the conditions and fees which may be levied by the recipient court on the petitioning party.[130] As the concern of the foreign

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[117] *Id.* at art. 34(2)(1).
[118] *Id.* at art. 34(2)(2).
[119] *Id.* at art. 35(1).
[120] *Id.* at art. 35(2).
[121] Loukas Mistelis, Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 322 (2008).
[122] Law on International Commercial Arbitration, *supra* note 70, art. 36(1)(1).
[123] Spiegelberger, *supra* note 17, at 296.
[124] *Id.*
[125] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter N.Y.C.], https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.
[126] Spiegelberger, *supra* note 17, 263-64.
[127] N.Y.C, *supra* note 125, at art. II, ¶ 2.
[128] *Id.* at art. IV, ¶1(a).
[129] *Id.* at art. III.
[130] *Id.*

arbitrator in Russia is not an adherence to the NY Convention but a refusal to enforce, Article V of the NY Convention holds the key to understanding refusals of the Russian courts.

B. NON-ENFORCEMENT

Refusals to enforce under the NY Convention are limited to seven restricted categories within Article V. After presenting the required materials to the appropriate court, the party contesting enforcement have the opportunity to prove any of the following: some form of incapacity or other invalidating state during the formation of the arbitration agreement by the laws of the country where the award was made; a lack of notice or ability to adequately present their case; the dispute prompting arbitration was not within the terms of the original arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement; the composition of either the original arbitral authority or procedure was in violation of the original arbitration agreement or local law of the country of formation; or the award for which enforcement is sought has not yet become binding on the parties or has been suspended or halted by the appropriate authority of the country of formation.[131] The court, competency and authority assumed, from which enforcement is requested by the petitioner may also decide to refuse the request if they determine that the subject matter of the dispute is not capable of settlement by the arbitration law of the enforcing country.[132] Finally, the NY Convention leaves a public policy exception,[133] of which Russian courts have no native legal definition, with the closest shared term being to the French "*ordre public.*"[134] As a general rule, the equivalent of public policy clauses within the codes of the Russian Federation typically concern the material sovereignty and security of the nation.[135] The later accounts of Russian cases will further demonstrate the mentality of the Russian courts.

V. THE INTERNATIONAL COMMERCIAL ARBITRATION COURT

After the adoption of the Federal Law No. 382-FZ, "On Arbitration in the Russian Federation", and Law No. 5338-1, the aforementioned ICA, the ICAC began to directly prepare arbitration legislation alongside the Russian Chamber of Commerce and Industry (RF CCI).[136] More importantly for foreign parties and businesses, the ICAC was solidified as a permanent arbitral institution with the right to officiate and administer commercial disputes from international and domestic parties.[137] Within Annex 1 of Law No. 5338-1 (ICA), the ICAC is statutorily enshrined as an independent permanently functioning arbitral institution, acting in conformity with the laws of the Russian Federation. The RF CCI approves the rules of the ICAC, the schedule and rates of arbitration fees, and assists in the discharge of ICAC duties.[138] The ICAC has jurisdiction to administer disputes of contractual and other civil law relationships in the course of foreign trade

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[131] *Id.* at art. V, ¶ 1.
[132] *Id.* at art. V, ¶ 2(a).
[133] *Id.* at art. V, ¶ 2(b).
[134] Spiegelberger, *supra* note 17, at 295.
[135] *Id.* at 296.
[136] ICAC, *History of the ICAC*, Торгово-промышленная палата Российской Федерации (Russ.), https://mkas.tpprf.ru/en/information/about/.
[137] *Id.*
[138] Law on International Commercial Arbitration, *supra* note 70, Annex 1(1).

and international economic relations where there is at least one foreign party.[139] The ICAC lists that the nature of disputes includes

> transactions for the sale/purchase(delivery) of goods, contracts of service and labor, exchange of goods and/or services, carriage of goods or passengers, commercial representation and agency, leasing, scientific-technical exchange, exchange of other results of intellectual activity, construction of industrial and other works, licensing operations, investment, financing, insurance, and joint ventures and other forms of industrial and business cooperation.[140]

Awards granted by the ICAC may only be carried out voluntarily or brought before the commercial court for enforcement within a time limit determined by the Court.[141] Matters subject to the jurisdiction of the ICAC, but not brought to the ICAC directly, may be brought before the Chairman of the Court for aid in determining the amount and security of a claim.[142] Due in large part to the versatility of the ICAC and the open language of its governing rules and regulations, the ICAC continues to be the preeminent permanent arbitration tribunal, hearing over 800 cases in 2021.[143]

A. ORGANIZATION REGULATIONS

The structure of the ICAC consists of the General Meeting of Arbitrators (Lists of Arbitrators), the Presidium, Nomination Committees, the ICAC President, ICAC Vice-Presidents for relevant disputes, and the Secretariat.[144] The ICAC is explicitly authorized to administer international commercial arbitration, internal dispute arbitration, corporate dispute arbitration, sports dispute arbitration, *ad hoc* arbitration, and other disputes, as dictated by international and bilateral treaty agreements.[145] Additionally, arbitration of the formation or operation of legal entities and civil disputes in the field of physical education may be referred to the ICAC by another tribunal or the involved parties.[146] The selection process and requirements for arbitrators remains the same as a regular arbitration tribunal, except for arbitrators being selected by the Nomination Committees from a list of specialized candidates with precise prerequisites.[147] The ICAC contains elements of the state courts and separation from the generalized state of the American legal custom by providing four lists of arbitrators with indications of their specializations.

B. ICAC SPECIFIC RULES

The rules of the ICAC closely resemble those of the average arbitration tribunal. However, the ICAC has received greater attention, detail, and scope in crafting a precise tool of state interests in arbitration. To limit some redundancy, the rules of the ICAC, unless otherwise mentioned, should be assumed to be identical to the ICA in terms of permitting prior agreements to arbitration tribunals, document requirements, and court procedure. However, by the nature of the civil law

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[139] *Id.* at Annex 1(2).
[140] *Id.* at Annex 1(2).
[141] *Id.* at Annex 1(5).
[142] *Id.* at Annex 1(6).
[143] ICAC, *Statistics*, Торгово-промышленная палата Российской Федерации, https://mkas.tpprf.ru/en/statistics.php
[144] RF CCI, Ord. No. 6, Appendix No. 1, § 1(3), 11.01.2017 (Russ.).
[145] *Id.* at § 1(1).
[146] *Id.* at § 2(4).
[147] *Id.* at § 3(1).

system, there may be precise differences and necessary repetition to confirm the authority of the ICAC as pertains to the specific subject matter. The ICAC makes specific restrictions on the amounts of a claim, dependent upon the precise value of that which was damaged or lost.[148] In the absence of a clearly defined claim, the decision will be reserved for the Executive Secretary or members of the ICAC's chosen tribunal.[149] Respondents may, within thirty days from receiving notice of the claim, make a counterclaim via an applicable clause from the principle claim of the original arbitration agreement or an alternate arbitration agreement that has referred the dispute(s) to the ICAC, principle claim still standing.[150]

The ICAC does more than merely tweak the Arbitration Procedure Code. Indeed, tucked at the tail end of the second appendix lie three sections that demonstrate the greatest strength of Russian arbitration in its speed and efficiency in resolving disputes at a low cost. Unique to the operation of the ICAC, §33 of the rules provides guidelines for expedited arbitral proceedings in which claims under $50,000—the most common type of claim brought—are subject to special rules.[151] The expedited process will be overseen by a single appointed arbitrator, and the parties shall be limited to presenting only their base statement of claim and defense respectively.[152] The officials and arbitrator of the ICAC must take all necessary measures to bring the case to completion within 120 days of the initial tribunal's formation.[153] Should the tribunal deem it necessary, ICAC officials may extend the period for an additional sixty days.[154] Any additional extension of the proceedings must be made at the behest of the Presidium.[155] During the interim stage of the proceedings, §34 provides that at the request of either party or tribunal, the arbitral tribunal may order either party to provide security.[156] The authority of the tribunal permits modification, suspension, or cancelation of said interim measures.[157] Where a party has applied to a competent state court regarding measures to be taken to secure a claim to be filed or already filed with the ICAC, the party must simultaneously notify the ICAC Secretariat and tribunal.[158]

The ICAC made two final additions to their operating rules that both secured their independent status from outside businesses and reinforced the reality of their quasi-governmental role. First, arbitrators, reporters, experts, and persons within the managerial bodies of the ICAC and RF CCI are not liable to parties for nonperformance or improper performance relating to the operation of a tribunal's proceedings.[159] Second, the arbitration shall be confidential unless otherwise indicated by the parties involved.[160] Parties and their representatives are obligated not to disclose information regarding disputes settled by the ICAC.[161] Similarly, the arbitrator, reporters, experts, and managerial persons within the ICAC and RF CCI share an obligation of

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[148] RF CCI, Ord. No. 6, Appendix No. 2, § 4(1)(b), 11.01.2017 (Russ.).
[149] *Id.* at § 4(5).
[150] *Id.* at § 7(1-3).
[151] *Id.* at § 33(1); ICAC, *supra* note 143.
[152] RF CCI, *supra* note 148, § 33(3), 11.01.2017 (Russ.).
[153] *Id.* at § 33(5).
[154] *Id.* at § 35.
[155] *Id.*
[156] *Id.* at § 34(1).
[157] *Id.* at § 34(4).
[158] *Id.* at § 34(5).
[159] *Id.* at § 45.
[160] *Id.*
[161] *Id.* at § 42.

nondisclosure over information on settled ICAC disputes and information which may impair the legitimate interests of the parties.[162]

VI. RUSSIAN REALITY, REASONING, AND RESULTS

In taking a passing glance at the reality of the Russian arbitration situation, investors may question if arbitration is truly the best course of action when awards are enforced far below international averages. The nearest supplement for arbitration, mediation, was only authorized in 2011.[163] While the effort was intended to lessen the enormous caseload faced by commercial courts, judges remain generally hesitant to bring laymen into the legal world by advising mediation efforts.[164] Upwards of 60% of judges viewed mediation as a helpful addition; however, a mere 20% believed Russian litigants capable of participating in the resolution of their disputes through mediation.[165] Suggestions have been made to create a hybrid system which utilizes the tribunal judge as an alternative mediator, but there remains little interest within Russia to salvage the institution.[166]

With arbitration still being investors best hope at success, they must next consider the most ephemeral, yet prevalent, obstacles on the path to enforcing an award, matters of public policy and national security. As the notion of public policy has no true equivalent when translated directly to Russian, injection of this idea into the courts have typically revolved around the language used by the Russian Supreme Court in 1998, describing public policy as "denot[ing] the bases of the social order of the Russian State . . . in extraordinary circumstances when the application of foreign law gives rise to a result that is impermissible from the point of view of the Russian legal consciousness."[167] Being a nation with a civil law system, the opinion of the court is not binding; however, commercial courts have demonstrated a fondness for the 1998 definition of public policy.[168] Typical of the Russian courts, conflicting results from the commercial courts have undermined confidence and achieved little else aside from finding differing reasonings within differing courts, all citing and referencing the same language.[169] Unlike English and American courts, which would consider objections upon the basis of public policy only as a last resort, Russian courts have no issue placing, or attempting to place, the burden of their decision immediately upon objections of public policy.[170]

History holds only one case concerning national security through a "Russian entity of strategic importance" where enforcement may result in serious financial hardship or bankruptcy for the entity.[171] In *United World v. Krasyi Yakor*, the court granted the cassation petition over the lower court's decision to enforce before remanding the case.[172] Due to the procedural framing of the case, it was presumed that the challenge was unlikely to succeed.[173] While not a particularly

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[162] *Id.* at § 46.
[163] Hendley, *supra* note 2, at 426.
[164] *See id.* at 437-38.
[165] *Id.* at 452.
[166] Elena Nosyreva, *Alternative Dispute Resolution as a Means of Access to Justice in the Russian Federation*, 12 WASH. INT'L L. J. 709, 718-19 (2003).
[167] Spiegelberger, *supra* note 17, at 296.
[168] *Id.*
[169] *Id.* at 296-97.
[170] *See id.* at 297.
[171] *Id.* at 298.
[172] *Id.*
[173] *See id.*

groundbreaking case, it does demonstrate that even the historically defensive Russia will be unlikely to extrapolate the, perhaps grave, economic concern of one enterprise or city to constitute an matter of public policy or national security. The same, however, should not be assumed for cases of immovable property or territorial dispute. Current affairs aside, the exclusive jurisdiction of Russian courts and the accompanying procedural duty of the Russian Federation to protect the sovereignty of their nation clearly display why no reasonable foreign person has made such a substantial challenge on Russian soil.

If an investor is forced into arbitrating within the Russian Federation, they should almost certainly pursue arbitration under the ICAC, which has been utilized by American companies since the inception of the institution. The ICAC continues to be the most common arbitration location for disputes litigated in Russia that is still generally considered to provide impartial tribunals.[174] Additionally, the ICAC protects the involved investor from the brunt of the commercial court's issues with private tribunals and foreign awards. The flexibility of the ICAC's rules, coupled with their consistent advancement in clarity and consistency, gives the American investor a fighter's chance at attaining a favorable judgement.

VII. CONCLUSION

Over the past quarter-century Russia has made some serious strides in aligning with the world standard of international arbitration, modeling vast portions of their rules and regulations off UN Models. However, the uncertainty surrounding *arbitrazh* courts enforcement of foreign awards and agreements, despite international agreements assuring otherwise, greatly damages the reputation of the Russian investment opportunity. Despite this issue being harped upon from the late-1990s through to the 2010s, the *arbitrazh* courts are still the definitive weak point in the arbitration procedure and the location from which the most refusals to enforce will rear their heads.[175] Due in part to the increased autonomy of the commercial courts and the Russian idea of public policy to be more in line with public order, security, and sovereignty, these courts are unlikely to see any changes to become more lenient to foreign enforcement efforts.

Arbitration is an increasingly expensive affair in America and other western nations. Should Russia manage to come to an agreement with the commercial courts and arbitration tribunals to see a more consistent system emerge, arbitration may once again be considered as the cheap, quick, and effective method of dispute resolution as which it was first heralded. China too once was viewed with similar skepticism; however, Russia lacks the market to make up for its shortcomings in hospitality.[176] While the functional framework of Russian arbitration has become increasingly streamlined and efficient, even for foreign persons, the consistency and reliability of court decisions still injects too much instability for investors to adequately evaluate the cost-benefit analysis of potential endeavors. The clarity of the Russian procedure, should its quality be transplanted to the enforcement decisions of courts, would help to finally bring a legal system without case law into the internationally expected enforcement rates.

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[174] *See* Hendrix, *supra* note 1, 1080-81.

[175] *See* Glusker, *supra* note 17, at 620.

[176] *See* Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMPAR. L. 249, 249 (2001).