

OPINION ARTICLE

RUSSIA AND THE RESPONSIBILITY TO PROTECT: FROM A BIFURCATING UNDERSTANDING TO THE UNLAWFULNESS OF THE ‘SPECIAL MILITARY OPERATION’ AGAINST UKRAINE

Enrico Zannarini*

Abstract

The Responsibility to Protect doctrine has been invoked by the Russian Federation in order to justify its ‘special military operation’ against Ukraine. As a matter of fact, if certain criteria are met, the Responsibility to Protect allows the use of force for humanitarian purposes in a third State in a manner consistent with the international legal framework. This paper aims at analysing Russia’s contradictory approach related to this doctrine as well as the illegality of its forcible intervention under international law, included within the R2P framework.

Keywords: Russian Federation, Responsibility to Protect, sovereignty of States, use of force, aggression.

I. Introduction

In the morning of the 24 February 2022, the president of the Russian Federation, Vladimir Putin, announced the start of a ‘special military operation’ in Ukraine.¹ Among the reasons provided in order to justify forcible intervention in the Ukrainian territory, he stressed that ‘[...] the purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime’.² According to this wording, reference has been made to the notion of the ‘Responsibility to Protect’, a doctrine which in the last two decades has aroused strong interest within the international community.³

* Enrico Zannarini is a PhD student currently enrolled in the PhD course ‘European Union law and national legal systems’ at the University of Ferrara. In 2021, he successfully completed a LL.M in Public International Law at Leiden University. Prior to that, in 2020, he obtained cum laude an international double degree in law studying both at the University of Ferrara and at the University of Granada.

¹ Address by the President of the Russian Federation (24 February 2022), available at <<http://en.kremlin.ru/events/president/news/67843>> accessed on 15 December 2022.

² Ibid.

³ *Inter alia*, see Alicia L. Bannon, Comment, ‘The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism’ (2005) 115 YALE LJ 1157; Rebecca J. Hamilton, ‘The Responsibility to Protect: From Document to Doctrine - But What of Implementation?’ (2006) 19 Harvard Human Rights Journal 289; Carsten Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 AJIL 99; Louise Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (2008) 34 REV. INTL STUD. 445; Carlo Focarelli, ‘The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine’ (2008) 13(2) Journal of Conflict & Security Law 191; Alex J. Bellamy, *Responsibility to Protect: the global effort to end mass atrocities* (Polity Press 2009); Ramesh Thakur and Thomas G. Weiss, ‘R2P: From Idea to Norm—and

International core crimes such as genocide, war crimes, ethnic cleansing and crimes against humanity represent the most serious and heinous forms of violations of human rights. These atrocities affect the international community as whole and,⁴ when States fail in their duty to protect their own citizens, a strong international response is required. At the beginning of the third millennium, a new doctrine, called ‘Responsibility to Protect’ (also known as R2P), was proposed by the Canadian-sponsored but independent International Commission on Intervention and State Sovereignty (ICISS).⁵ In 2005, after being first addressed in two reports of the UN Secretary-General,⁶ on the occasion of the World Summit Outcome, one of the largest meetings in history, attended by more than 170 heads of governments, the Responsibility to Protect was ultimately embraced by the international community.⁷ Paragraphs 138 and 139 are to be deemed as the operative basis of this doctrine.⁸ While in the former the responsibility of each State to protect its population from genocide, war crimes, ethnic cleaning and crimes against humanity is laid out, in the latter, it has been acknowledged that, in exceptional circumstances, and provided that certain criteria are met, forcible intervention for humanitarian purposes could take place. Thus, it has been pointed out that the international community, through the United Nations, is prepared:

Action?’ (2009) 1(1) *Global Responsibility to Protect* 22; Hannah Yiu, ‘Jus Cogens, the Veto and the Responsibility to Protect: A New Perspective’ (2009) 7 *New Zealand Yearbook of International Law* 207; Edward C. Luck, ‘The Responsibility to Protect: Growing Pains or Early Promise?’ (2010) 24(4) *Ethics and International Affairs* 349; James Pattison, *Humanitarian intervention and the responsibility to protect: who should intervene?* (OUP 2010); Jutta Brunnée, Stephen J. Toope ‘The Responsibility to Protect and the Use of Force: Building Legality?’ (2010) 2(3) *Global Responsibility to Protect* 191; Alex J. Bellamy, Sara E. Davies, Luke Glanville (eds), *The responsibility to protect and international law* (Nijhoff 2011); Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011); Jonah Eaton, ‘An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect’ (2011) 32 *MICH. J. INTL L.* 765; Hitoshi Nasu, ‘The UN Security Council’s Responsibility and the “Responsibility to Protect”’ (2011) 15 *Max Planck Yearbook of United Nations Law* 377; Anne Peters, ‘The Security Council’s Responsibility to Protect’ (2011) 8 *International Organizations Law Review* 15; Jared Genser, Irwin Cotler, *The responsibility to protect : the promise of stopping mass atrocities in our time* (OUP 2012); Luke Glanville, ‘The Responsibility to Protect Beyond Borders’ (2012) 12(1) *Human Rights Law Review* 1; Peter Hilpold (ed), *Responsibility to Protect (R2P): A New Paradigm of International Law?* (Nijhoff 2014); Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016); Patrick M. Butchard, *The responsibility to protect and the failures of the United nations Security Council* (Hart 2020).

⁴ See the preamble of the Rome Statute. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

⁵ See ICISS, *The Responsibility to Protect* (14 August 2002) UN Doc A/57/303, Annex.

⁶ UN Secretary-General, *A More Secure World: Our Shared Responsibility* (2 December 2004) UN Doc A/59/565; UN Secretary-General, *In Larger Freedom, Towards Development, Security and Human Rights for All* (21 March 2005) UN Doc A/59/2005. In occasion of the debates which led to the adoption of the *In Larger Freedom* Document, amongst the twenty-eight states that addressed the issue of the responsibility to protect in 2005, almost half were in favour of the R2P doctrine. See UN Docs A/59/PV.86-90.

⁷ UNGA, World Summit Outcome (24 October 2005) UN Doc A/RES/60/1. This document, which reflected the growing interest on the Responsibility to Protect by the international community of States, has to be seen as a significant step forward in relation with the process of the effective implementation of the R2P doctrine since, on that occasion, it was officially recognised as a political imperative by the international community. Cf. Ramesh Thakur and Thomas G. Weiss (n 4) 29. For a further analysis, see also Jutta Brunnée, Stephen J. Toope (n 4). See also Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council (7 December 2007) UN Doc S/2007/721.

⁸ UNGA, World Summit Outcome (n 8) paras. 138-9.

*to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.*⁹

As envisaged in the 2009 UN Secretary-General's Report, *Implementing the responsibility to protect*, this doctrine is based on three pillars of equal length: the responsibility of each State to protect its populations (Pillar I); the responsibility of the international community to assist States in protecting their populations (Pillar II); and the responsibility of the international community to protect when a State is manifestly failing to protect its populations (Pillar III).¹⁰

According to this latter pillar, acknowledged as the most problematic one, when a State fails to protect its own population from genocide, war crimes, ethnic cleansing and crimes against humanity and, when peaceful means turn out to be inadequate, the Security Council is entitled to authorise the use of force for humanitarian reasons.¹¹ The ICISS introduced six conditions which have to be cumulatively fulfilled in order to take collective action through forcible means. These criteria were: just cause, right intention, last resort, proportional means, reasonable prospects and right authority.¹² Nevertheless, in occasion of the 2005 World Summit Outcome, the above-mentioned criteria were omitted.

Since its implementation, the Responsibility to Protect has been invoked in more than 80 resolutions of the UN Security Council,¹³ and, as witnessed by the current situation in Ukraine, it represents a concrete and important topic to deal with.¹⁴

The present paper aims at showing the bifurcating understanding of the Responsibility to Protect by the Russian Federation as well as the illegality of its military aggression against Ukraine under the R2P framework. For this purpose, this contribution will first analyse the compliance of this doctrine within the international legal framework, by focusing in particular on the prohibition of the use of force and on the doctrine of state sovereignty. After that, it will analyse Russia's *opinio iuris* and practice related to the effective implementation of the Responsibility to Protect. Finally, it will provide a focus on the illegality of the Russian 'special military operation' in the Ukrainian territory under the R2P framework.

⁹ Ibid, para 139.

¹⁰ UNGA, 'Implementing the responsibility to protect: report of the Secretary-General' (12 January 2009) UN Doc A/63/677. Concerning the equal length of each pillar, as acknowledged by scholars, the 'Three-Pillar' approach set out in the 2009 UN Secretary-General's report entails the equality of each pillar. As a matter of fact, it has been pointed out that the equal length of each pillar ensures the stability of the whole 'edifice' of the Responsibility to Protect. UN Doc A/63/677, pp. 9-10, para 12.

¹¹ World Summit Outcome (n 8) para 139.

¹² ICISS, *The Responsibility to Protect* (n 6) para 4.16.

¹³ See <<https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/>> accessed on 7 January 2023.

¹⁴ See Global Centre for the Responsibility to Protect, 'Atrocity Alert No. 295: Ukraine, Venezuela and Nigeria' (6 April 2022), at <<https://www.globalr2p.org/publications/atrocity-alert-no-295/>> accessed on 10 December 2022. Moreover, as acknowledged in recent studies, there are several ongoing crises, in particular in Africa and in the middle East where mass atrocity crimes are occurring and in which, as a consequence, urgent action is needed. For instance, in Afghanistan, data available show that, between the 2014 and the 2019, more than 10,000 civilians per year were killed or injured. See Global Centre for the Responsibility to Protect, 'R2P Monitor' issue 57 (1 June 2021), at <<https://www.globalr2p.org/populations-at-risk/>> accessed on 29 November 2022, p. 2.

II. Responsibility to Protect, Use of Force and Sovereignty of States: a Possible Coexistence

Pushed by the need to respond to blatant human rights violations,¹⁵ the R2P doctrine can be seen as a concrete solution in order to reconcile two core elements of the international legal order, namely the inviolability of State sovereignty and the prohibition of the use of force, with the need to respond to gross human rights violations.¹⁶

Regarding the prohibition of the use of force, unlike the rejected doctrine of the humanitarian intervention for which, as happened in 1999 on the occasion of the NATO intervention in Kosovo, it was not possible to find a legal basis in order to justify forcible intervention,¹⁷ within Pillar III of the R2P doctrine, if the conditions required to trigger forcible intervention for humanitarian purposes are met, and after the UN Security Council authorisation, the use of force is to be deemed lawful since exercised in a manner consistent with international law. In other words, forcible intervention under the R2P framework will be therefore exercised in compliance with Article 2(4) of the UN Charter, a cornerstone provision of the international legal order,¹⁸ which is to be deemed not only as a treaty obligation but also as customary international law and even with a *jus cogens* status.¹⁹ As a matter of fact, as pointed out by the former UN Secretary-General Ban Ki-Moon in his 2009 Report, ‘the responsibility to protect does not alter, indeed it reinforces, the legal

¹⁵ Unlike happened, for instance, in Rwanda where, the international community, being aware of the perpetration of the crime of genocide, through a timely and effective response, would have spared the death of around 800.000 human beings. See Nicoleta Mirza, ‘The (II)Legality of Humanitarian Intervention’ (2020) 12 *Amsterdam LF* 1, 5-6. For further details, see also Christine Gray, *International Law and the Use of Force* (OUP 2018) 298-300. See also BBC NEWS, ‘Rwanda genocide: 100 days of slaughter’ (4 April 2019) retrieved from <<https://www.bbc.com/news/world-africa-26875506>> accessed on 17 December 2022.

¹⁶ Providing thus an answer to the interrogative raised by former UN Secretary-General Kofi Annan who asked that ‘[...] if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?’ see UNGA, *Report of the Secretary General, We the Peoples: The Role of the United Nations in the Twenty-First Century* (27 March 2000) UN Doc A/54/2000, para 217.

¹⁷ As a matter of fact, the Independent International Commission on Kosovo stated that the NATO intervention in Kosovo was ‘illegal but legitimate’. Even though in that occasion the use of forcible measures was recognised as legitimate, the NATO military intervention was considered *per se* as illegal since ‘[...] it did not receive prior approval from the United Nations Security Council’. See *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4.

¹⁸ *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda) Judgment, I.C.J. Reports 2005*, p.168, 223, para 148. The ICJ has also recently confirmed the prohibition of use of force as one of ‘the most fundamental principles and rules of international law’. *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda) Judgment*, para 65, issued on 9 February 2022, available at <<https://www.icj-cij.org/en/case/116>> accessed on 12 December 2022.

¹⁹ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, 100-1, para 190. Concerning the *Jus Cogens* status, see Natalino Ronzitti, ‘Use of Force, Jus Cogens and State Consent’, in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Nijhoff 1986), 147; Olivier Dorr and Albrecht Randelzhofer ‘Ch.1: Purposes and Principles, Article 2’ in Bruno Simma et al (ed), *Charter of the United Nations: A Commentary* (OUP 2012) 203; André de Hoogh, ‘Jus cogens and the use of armed force’, in Marc Weller (ed), *Oxford Handbook in the Use of Force in International Law* (OUP 2015) 1173.

obligations of Member States to refrain from the use of force except in conformity with the Charter'.²⁰

With regards to the issue of State sovereignty, despite the fact that there is an evident tension between this principle and Pillar III of R2P, in accordance with a human-rights-based-approach such conflict does not really exist. Sovereignty is not an absolute concept but instead it should be considered as a legal status linked to the duty to protect its population from gross human rights violations.²¹ Within this perspective, the notion of humanity is strictly connected with the notion of sovereignty,²² and, consequently, human rights play a pivotal role in expanding and narrowing the sovereignty principle. Thus, ensuring the respect and promotion of human rights constitutes not only a limit to the notion of State sovereignty but also a qualification of it.²³ Humanity is therefore an intrinsic element of the modern notion of sovereignty whose non-compliance entails the suspension of State sovereignty and the possibility of intervening for the international community.²⁴ If a State is able and willing to protect its population, no external intervention would be allowed.

On the contrary, when it is manifestly failing in its duty to protect, its sovereignty will be suspended and, the international community of States, if the criteria set out under Pillar III are met and, in particular, after the UN Security Council authorisation, would be entitled to take forcible collective action in order to put an end to the commission of international core crimes such as genocide, war crimes, ethnic cleansing and crimes against humanity.²⁵ Therefore, as long as a State complies with its duty to protect its population, its sovereignty should not be questioned. Only when it fails to do so, third States, once the conditions set out in Pillar III are satisfied, would be entitled to a 'residual responsibility' which might allow them to take collective action for humanitarian purposes.²⁶

Accordingly, as enshrined in the 2009 Secretary-General's Report, the Responsibility to Protect should be seen as 'an ally of sovereignty, not an adversary' since it 'seeks to strengthen sovereignty, not weaken it'.²⁷

III. Russia and its Bifurcating Understanding of the Responsibility to Protect

Once the compliance of the R2P doctrine with the international legal framework has been acknowledged, it is worth focusing on its implementation by the Russian Federation, through the analysis of both its *opinio juris* and practice.

²⁰ Implementing the responsibility to protect (n 11) 5, para 3.

²¹ See Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 EJIL 513, 515. Thus, regarding the relationship between sovereignty and R2P some scholars argued that '[...] no longer is it necessary to finesse the tensions between sovereignty and human rights in the Charter; they can now be confronted. Sovereignty no longer implies the license to kill'. See Eaton (n 4) 781.

²² Peters claimed that Humanity is the A and Ω of sovereignty. Peters (n 22) 514.

²³ Going even further, it was claimed that in case of conflict between the sovereignty principle and the human rights principle, not only a balance of interests should be ensured but there should be also a presumption in favour of humanity. Peters (n 22) 514.

²⁴ In order to justify this approach, Bannon stated that '[...] If nations have no sovereign right to commit or passively permit atrocities against their own populations, then they cannot object on sovereignty grounds to coercive actions halting the commission of those atrocities. Sovereignty simply does not extend that far'. Bannon (n 4) 1162.

²⁵ Peters (n 22) 513. On the same path, it was argued that while it is true that the State is considered as the principal guardian of the rights of its people, however, '[...] it loses this status of primacy in cases where it is unable or unwilling to ensure this protection'. See Stahn (n 4) 114.

²⁶ See Gleider Hernández, *International Law* (OUP 2019) 353.

²⁷ Implementing the responsibility to protect (n 11) 7, para 10 (a).

Regarding *opinio juris*, it is safe to state that Russia cannot be deemed as a fervent supporter of the Responsibility to Protect. As a matter of fact, a few months before the *World Summit Outcome*, in occasion of the *In Larger Freedom* debates, while some States pushed for the recognition of the legal character of the Responsibility to Protect,²⁸ a narrower approach had been taken by Russia. Therefore, while formally supporting the Responsibility to Protect, Mr. Denisov, the representative of the Russian Federation, stated that, due to the lack of wide consensus within the international community, it was not possible to consider the Responsibility to Protect as an emerging norm within the international legal framework.²⁹ In the same vein, a few years later, in the occasion of the debates which led to the adoption of the *Implementing the responsibility to protect* Report, while other Security Council permanent members such as the UK, France and the US fully supported the implementation of the Responsibility to Protect,³⁰ Russia, worried about the possibility of a wide arbitrary interpretation of this doctrine against targeted countries, endorsed a conservative position by pointing out that the conditions in order to provide an effective implementation of the Responsibility to Protect were not reached yet.³¹

Russia's conservative approach can be further seen in its use of the veto power, exercise of which had the effect of paralysing the Security Council by preventing it to authorise a forcible intervention within R2P Pillar III. The most striking example is represented by the Syrian case where the Russian Federation vetoed a draft resolution proposed to condemn Syria's crackdown.³² In order to justify the exercise of the veto power it was argued that the situation in Syria could not be considered apart from the Libyan experience in which a shift from a peacekeeping mission to a regime change intervention took place.³³ As a matter of fact, the Russian Federation stated that in the Libyan intervention, the demand for a quick ceasefire had turned into a civil war and the arms embargo had turned into a naval blockade of west Libya. Therefore, it reaffirmed that such models should be excluded from global practices.³⁴

²⁸ The position of the States in favour of the implementation of R2P is well described by the Norwegian statement in which it is stated: 'When a State ignores its responsibilities towards its population, the international community must not remain passive. The international community has a responsibility to use diplomatic, humanitarian and other means to help protect the human rights of civilian populations. When such means are not sufficient, the Security Council has the responsibility to take action under the Charter, with authority, with efficiency and without hesitation in situations of mass atrocity. We endorse the Secretary-General's appeal to embrace the principle of the "responsibility to protect" as a norm for our collective action in cases of genocide, ethnic cleansing and crimes against humanity. We must build greater consensus around the need for collective action and early diplomatic response, which can eliminate the need for military intervention'. See UN Doc A/59/PV.88, p. 13.

²⁹ UN Doc A/59/PV.87, p. 5. Other States such as Algeria, Egypt and Vietnam supported this view. See respectively UN Doc A/59/PV.86, p. 9; UN Doc A/59/PV.86, p. 13; UN Doc A/59/PV.89, p. 22.

³⁰ For the position of France, see UN Doc A/63/PV.97, pp. 9-10; for the position of the United Kingdom, see UN Doc A/63/PV.97, pp. 6-7; for the position of the United States, see UN Doc A/63/PV.97, pp. 17-8.

³¹ UN Doc A/63/PV.100, p. 12. Following this path, the representative of China stated that '[...] the responsibility to protect remains a concept and does not constitute a norm of international law'. UN Doc A/63/PV.98, p. 24.

³² UN Doc S/PV.6627. On that occasion the veto power was also exercised by China which, although it expressed its desire for the Syrian government to adopt a policy aimed at ending the commission of serious human rights violations, it stated that while, on the one hand, the Security Council has the right to encourage such actions, on the other, it has also the duty to respect Syria's sovereignty, independence and territorial integrity. UN Doc S/PV.6627, p. 5.

³³ *Ibid.*, 4.

³⁴ *Ibid.* See also Carsten Stahn, 'Between Law Breaking and Law Making: Syria, Humanitarian Intervention and What Law Ought to Be' (2013) 19 *Journal of Conflict and Security Law* 25.

Russia's mistrust on this doctrine has been reiterated a few years later since it has been argued that practice has shown that R2P, and in particular its third pillar, has been invoked in order to interfere with the international affairs of sovereign States thus going against its initial noble goals.³⁵

Hence, on the one hand, *opinio juris* narrowly circumscribed the Responsibility to Protect. On the other hand, practice has followed a different path, oriented towards a broader interpretation of this doctrine. Since 2008, the Responsibility to Protect has been either offered or assumed in order to justify military actions to protect the Russian population living outside its borders. As a matter of fact, in August 2008, the R2P doctrine was invoked by the Russian government to justify forcible operations carried out in Georgia culminating in an international armed conflict between the two neighbouring countries.³⁶ In those circumstances, Sergey Lavrov, Minister of the Foreign Affairs of the Russian Federation, argued that the Russian Constitution enshrined the duty to protect the life and dignity of Russian citizens.³⁷ He further added that this duty is well known within the international framework as the 'Responsibility to Protect' trying to justify Russian forcible intervention under both domestic and international law.³⁸ Reference on the Responsibility to Protect was also made during the debates which took place within the Security Council dealing with the situation in Georgia.³⁹

The R2P rationale was also used in 2014 as one of the justifications for the military actions in Crimea.⁴⁰ By outlining the reasons for a forcible intervention, Putin argued that there was a national interest in protecting people with whom Russia has close historical, cultural and economic ties.⁴¹ In

³⁵ Permanent Mission of the Russian Federation to the United Nations 'Statement to the General Assembly Informal, Interactive Dialogue on the Responsibility to Protect: Timely and Decisive Response' (5 September 2012) available at <<https://www.globalr2p.org/resources/statement-by-russia-at-the-2012-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed on 26 December 2022.

³⁶ For a further analysis concerning the factual background, see Mindia Vashakmadze, 'Legality of Foreign Military Intervention in International Law: Four Case Studies' (2014) 18(1) Max Planck Yearbook of United Nations Law Online 462, 466-8.

³⁷ '[U]nder the Constitution [the President] is obliged to protect the life and dignity of Russian citizens, especially when they find themselves in the armed conflict. And today he reiterated that the peace enforcement operation enforcing peace on one of the parties which violated its own obligations would continue until we achieve the results. According to our Constitution there is also responsibility to protect - the term which is very widely used in the UN when people see some trouble in Africa or in any remote part of other regions. But this is not Africa to us, this is next door. This is the area, where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect'. Sergey Lavrov, 'Interview to BBC' (9 August 2008) <https://archive.mid.ru/en/web/guest/main_en> accessed on 12 January 2023.

³⁸ Ibid. See also Gareth Evans, 'Russia, Georgia and the Responsibility to Protect' (19 November 2009) 1(2) Amsterdam Law Forum 25.

³⁹ See UN Doc S/PV.5952, p. 5. See also 'Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council' S/2008/545.

⁴⁰ For a detailed analysis, see Vashakmadze (n 37) 490-2.

⁴¹ 'I have personally always been an advocate of acting in compliance with international law. I would like to stress yet again that if we do make the decision, if I do decide to use the Armed Forces, this will be a legitimate decision in full compliance with both general norms of international law, since we have the appeal of the legitimate President, and with our commitments, which in this case coincide with our interests to protect the people with whom we have close historical, cultural and economic ties. Protecting these people is in our national interests. This is a humanitarian mission. We do not intend to subjugate anyone or to dictate to anyone. However, we cannot remain indifferent if we see that they are being persecuted, destroyed and humiliated'. He further argued that '[...] we understand what worries the citizens of Ukraine, both

the same vein, within the Security Council debates, Russia's core argument endorsed to show the lawfulness of the military action in Crimea laid in the necessity to protect Russian nationals living there from threats allegedly emanating from Ukrainian nationalists and the Ukrainian government in Kiev.⁴²

Therefore, practice has shown an instrumental use of the Responsibility to Protect by the Russian Federation oriented towards a self-interest logic aimed at providing legal authority for its military actions in foreign countries.

Accordingly, it is fair to state that, with regards to the R2P doctrine, a contradictory approach has been taken by Russia. As a matter of fact, on the one hand, worried about its manipulation by western great powers and, consequently, the possibility of their unlawful interference in the sovereignty of the weakest States, it has been a fervent opponent of the implementation of this doctrine. However, at the same time, in stark contrast with its formal point of view, practice has shown that the R2P rhetoric has been repeatedly used by Russia in order to justify forcible intervention to supposedly protect its citizens living outside its own borders.

IV. The Unlawfulness of Russian Aggression under the R2P Framework

The Russian 'special military operation' has been firmly condemned by the international community. Therefore, on 1 March 2022, the UN General Assembly, reunited under the 'Uniting for Peace' procedure,⁴³ overwhelmingly adopted a resolution in which it qualified Russian military intervention as an act of aggression thereby demanding the Russian Federation to immediately end its military operations in the Ukrainian territory.⁴⁴ Following the UN General Assembly Resolution, a series of restrictive measures have been adopted against Russia. For instance, on 16 March 2022, Russia was expelled by the Council of Europe.⁴⁵ Similarly, on 7 April 2022, Russia was suspended

Russian and Ukrainian, and the Russian-speaking population in the eastern and southern regions of Ukraine. It is this uncontrolled crime that worries them. Therefore, if we see such uncontrolled crime spreading to the eastern regions of the country, and if the people ask us for help, while we already have the official request from the legitimate President, we retain the to use all available means to protect those people. We believe this would be absolutely legitimate. This is our last resort'. See 'Transcript: Putin defends Russian Intervention in Ukraine' (Washington Post, 4 March 2014) <https://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-inukraine/2014/03/04/9cadcd1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html> accessed on 7 January 2023. See also Timothy Stafford and Laura Dzelzyte, 'Crimea and the Hijacking of the Responsibility to Protect' (Human Security Centre, 18 March 2014) <<http://www.hscentre.org/opinion/crimea-hijacking-responsibility-protect/>> accessed on 7 January 2023.

⁴² See the statements of the Russian Permanent Representative at the UNSC 7125th meeting (3 March 2014) UN Doc S/PV.7125, p. 3.

⁴³ This language dates back to the General Assembly resolution 377 A (V) of 3 November 1950, also known as 'Uniting for Peace', where it has been acknowledged the faculty for the General Assembly to discuss an issue relating to the maintenance of the international peace and security in cases in which the Security Council is unable to address the situation due to the exercise of the veto power by one or more of its permanent members. UN Doc A/RES/377 (V).

⁴⁴ The UN General Assembly Resolution has been adopted with 141 voting in favour, thus fully satisfying the two-third majority needed to pass the resolution. Only five countries, notably Belarus, the Democratic People's Republic of Korea, Eritrea, Russia and Syria, voted against it, while 35 abstained. UN Doc A/ES-11/L.1.

⁴⁵ Council of Europe, Committee of Ministers, 'Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe' (Council of Europe, 16 March 2022) available at <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51> accessed on 12 December 2022.

from the Human Rights Council.⁴⁶ Furthermore, both States and international organisations imposed a wide range of sanctions aiming in particular at undermining Russia's economy with the overarching goal of putting pressure on the Russian Federation in order to stop its unprovoked and unjustified military aggression against Ukraine. Regarding this aspect, a relevant role is being played by the European Union. As a matter of fact, since the outbreak of the conflict, ten packages of sanctions have been adopted by the European Union,⁴⁷ varying from sanctions against individuals and entities to restrictions on business, media as well as on economic cooperation.⁴⁸

Focusing on the analysis of the R2P framework, the Russian President Putin, by announcing the starting of the 'special military operation' has implicitly made reference to this doctrine as one of the legal justifications of the military operations.⁴⁹ However, through an in-depth analysis of the Responsibility to Protect, multiple reasons can be found that delegitimize Putin's assumption of R2P as a lawful basis of Russia's military actions in Ukraine.

Firstly, according to the R2P doctrine, a State has the responsibility to protect its citizens within its own borders.⁵⁰ In line with this perspective, the meaningful role of the international community that is called to assist a State in protecting its populations and to take action, through the United Nations, only when a State is manifestly failing to protect its citizens living inside its territory becomes evident.⁵¹ Hence, the protection of Russians living in foreign countries falls beyond the scope of the Responsibility to Protect.

Secondly, there is no evidence that the crime of genocide is committed. The crime of genocide, referred to also as the 'crime of crimes',⁵² whose standard definition is contained in Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,⁵³ is to be deemed as a 'denial of the right of the existence of entire human groups'⁵⁴ whose seriousness has been witnessed by its consideration as an *erga omnes* obligation and even as a *jus cogens* norm.⁵⁵ Whether or not the crime of genocide has been committed in Ukraine has been recently discussed

⁴⁶ As regards the adoption of the resolution, 93 nations voted in favour, 24 against while 58 States abstained. UN Doc A/RES/ES-11/3. See also Rosa Freedman, 'Russia and the UN Human Rights Council: A Step in the Right Direction' (EJIL:Talk, 8 April 2022) available at <<https://www.ejiltalk.org/russia-and-the-un-human-rights-council-a-step-in-the-right-direction/>> accessed on 12 January 2023.

⁴⁷ Up to 16 March 2023, the European Union has adopted ten packages of sanctions. See <https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en> accessed on 16 March 2023.

⁴⁸ For further and updated information see <https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-solidarity-ukraine/eu-sanctions-against-russia-following-invasion-ukraine_en> accessed on 14 January 2023.

⁴⁹ Address by the President of the Russian Federation (n 2).

⁵⁰ Gareth Evans (n 39) 26.

⁵¹ UNGA, World Summit Outcome (n 8) para 139.

⁵² International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean Kambanda (Judgement and Sentence)* ICTR 97-23-S, 4 September 1998, para 16. See also William A. Schabas, *Genocide in International Law: The Crime of Crimes* (OUP 2009).

⁵³ Hereinafter, the 'Genocide Convention'. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

⁵⁴ UN General Assembly, *The Crime of Genocide*, 11 December 1946, A/RES/96.

⁵⁵ See Yearbook of the International Law Commission, 1966, vol. II, p. 248. See also, *inter alia*, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, p. 616, para. 31; *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, pp. 31-2, para 64.

by the International Court of Justice. As a matter of fact, on 26 February 2022, Ukraine brought proceedings before the ICJ against the Russian Federation by stating that Russia was acting in breach of the Genocide Convention by falsely accusing Ukraine of committing alleged genocide crimes in the regions of Donetsk and Luhansk and thus using the genocide charge as a pretext for the invasion.⁵⁶ On 16 March, the Court, by thirteen votes to two, issued its Order on provisional measures by indicating to the Russian Federation the immediate suspension of the military operations carried out in the Ukrainian territory as well as to ensure that any military or irregular unit directed or supported by it, as well as any organisation or person falling within its direction or control, would refrain from taking further steps in furtherance of the military operation conducted in Ukraine.⁵⁷ Regarding the supposed commission of genocide, in paragraph 59 of the Order, the Court noted that there is currently no evidence which proves the Russian allegation of the commission of genocide in the Ukrainian territory.⁵⁸ Furthermore, it took a step forward by stating that, even if the crime of genocide was committed, it should be deemed as strongly debatable to consider the Genocide Convention, in light of its object and purpose, as an instrument which provides the possibility to restore the unilateral use of force in order to prevent or punish an alleged genocide taking place in the territory of another State.⁵⁹ As a matter of fact, by reiterating its position undertaken on the *Bosnian Genocide* case,⁶⁰ the ICJ argued that every State, in discharging its duty to prevent and punish the commission of genocide, has to act in conformity with the limits enshrined in the international legal framework, and, in particular, in harmony with the core principles of the United Nations as established in Article 1 of the UN Charter.⁶¹ Accordingly, the fact that in the current scenario there is no evidence of the perpetration of the crime of genocide, one of the four international core crimes in accordance to which the R2P doctrine may be triggered, has to be seen as a further element showing how this doctrine has been misapplied by Russian authorities.

Thirdly, Russia's military intervention has not been previously authorised by the UN Security Council. With regards to this aspect, it is worth stressing that, as acknowledged in the *World Summit Outcome*, even if all the criteria envisaged in Pillar III are met, no military action can be undertaken by any country or group of countries without a prior Security Council approval.⁶² Together with self-defence, the authorisation of the Security Council acting under Chapter VII of the UN Charter represents an exception to the general rule concerning the prohibition of the use

⁵⁶ See International Court of Justice, Application Instituting Proceedings, Dispute Relating to Allegations of Genocide (Ukraine v. Russian Federation), available at <<https://www.icj-cij.org/en/case/182/institution-proceedings>> accessed on 25 November 2022. See also Marko Milanovic, 'Ukraine Files ICJ Claim against Russia' (EJIL:Talk, 27 February 2022), available at <<https://www.ejiltalk.org/ukraine-files-icj-claim-against-russia/>> accessed on 25 November 2022.

⁵⁷ International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the crime of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022, available at <<https://www.icj-cij.org/en/case/182>> accessed on 25 November 2022. See also Marko Milanovic, 'ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe' (EJIL:Talk, 16 March 2022) available at <<https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/>> accessed on 26 November 2022.

⁵⁸ *Allegations of Genocide under the Convention on the Prevention and Punishment of the crime of Genocide (Ukraine v. Russian Federation)* (n 58) para 59.

⁵⁹ *Ibid.*

⁶⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, p. 221, para 430.

⁶¹ In particular, with art. 1(1) of the UN Charter. See *Allegations of Genocide under the Convention on the Prevention and Punishment of the crime of Genocide (Ukraine v. Russian Federation)* (n 58) paras 57-8.

⁶² Gareth Evans (n 39) p. 27.

of force set out in Article 2(4) of the Charter.⁶³ As shown by practice, when military action had been previously authorised by the Security Council, forcible intervention within the R2P framework was considered lawful. For instance, in 2011, with the adoption of two UN Security Council resolutions dealing with the situation in Libya⁶⁴ and in Ivory Coast,⁶⁵ military actions for humanitarian purposes were carried out in compliance with international law. As a matter of fact, concerning Libya, UNSC Resolution 1973 authorised the use of ‘all necessary measures’, thus including the use of force ‘[...] to protect civilians and civilian populated areas under threat of attack’.⁶⁶ Regarding the military intervention in Ivory Coast, due to the mass atrocities committed and, despite the reaffirmation of the primary responsibility of Ivory Coast to take all feasible steps to ensure the protection of civilians when gross human rights violations are at stake, the UNSC Resolution 1975 provided for the United Nations Operation in *Côte d’Ivoire* (UNOCI)⁶⁷ the possibility to use ‘all necessary means’ for humanitarian reasons.⁶⁸ On the other hand, when such authorisation lacks, military intervention cannot be considered lawful since it is in contrast with international law, and in particular with Article 2(4) of the UN Charter. Accordingly, dealing with the present case, due to the lack of a previous authorisation by the Security Council, Russia’s use of force does not find a legal ground in order to justify a R2P-based military intervention.

Overall, it is safe to state that, since the requirements necessary to trigger the threshold set out in Pillar III were not fulfilled, the ongoing Russian ‘special military operation’ taking place in Ukraine must not be considered as carried out in accordance with the R2P doctrine. In order to do so and, in case of being able to provide evidence of the perpetration or foreseeable commission of atrocity crimes, Russia must have had to first employ all the peaceful diplomatic and humanitarian means available to help the populations supposedly victim of gross human rights violations. Only as a last resort, and with the prior authorisation of the Security Council, it would have been entitled to carry out a forcible intervention for humanitarian purposes.

V. Concluding Remarks

The Responsibility to Protect, as framed in occasion of the *World Summit Outcome*, is to be deemed as a significant instrument in order to guarantee the effectiveness of preventive mechanisms as well as prompt interventions for humanitarian purposes, even with forcible means, in the event of the commission of international core crimes such genocide, war crimes and crimes against humanity.

Regarding the interventionist dimension, in accordance with its third pillar, it could provide a legitimate legal basis in order to justify, in exceptional circumstances and, with the approval of the Security Council, external military action for humanitarian purposes. Hence, if the criteria set out under Pillar III are met, a R2P-based military intervention should be considered in accordance with the international legal framework and, in particular, with the principle of the sovereignty of States and the prohibition of the use of force. In other words, the Responsibility to Protect is to be

⁶³ See (n 19).

⁶⁴ See UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011).

⁶⁵ See UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 (2011).

⁶⁶ UNSC Res 1973 (n 65) para 4.

⁶⁷ Established since 2004. See UNSC 1528 (27 February 2004) UN Doc S/RES/1528 (2004).

⁶⁸ UNSC Res 1975 (n 66) para 6. For further reading concerning the military intervention in Libya and Ivory Coast, see Christian Henderson, ‘International Measures for the Protection of Civilians in Libya and Côte d’Ivoire’ (2011) 60 ILCQ 767. See also Ipinoyomi F, ‘Is Côte d’Ivoire a Test Case for R2P? Democratization as Fulfillment of the International Community’s Responsibility to Prevent’ (2012) 56(2) Journal of African Law 151.

deemed as an ally of the sovereignty which does not narrow but instead reinforces the duty of States to abstain from the use of force envisaged in the UN Charter.

Focusing on the Russian perspective, in spite of being a fervent opponent of the implementation of this doctrine, mainly because of the fear of possible military actions carried out by western great powers going beyond the humanitarian purposes, the Russian Federation has repeatedly abused and misused the R2P rationale in order to provide a legal basis under international law to justify its foreign policy resulting in different forcible interventions undertaken in the last decade, as occurred in Georgia, Crimea and currently, in Ukraine. However, focusing on the ongoing international armed conflict taking place in Ukraine, like acknowledged by the UN General Assembly, the Russian 'special military operation' is to be deemed as an act of aggression which cannot find any legitimate legal basis within the international legal order and, consequently, since the criteria embodied within the third pillar were not met, neither under the R2P framework.

Accordingly, the Russian unjustified and unprovoked war of aggression against Ukraine is to be deemed as a blatant violation of the prohibition of the use of force enshrined in Article 2(4) of the UN Charter, a serious breach of a peremptory norm of international law which must not go unpunished. To this end, the establishment of a special tribunal for the punishment of the crime of aggression against Ukraine, proposal which is currently object of in-depth discussion,⁶⁹ might represent a decisive step in order to investigate and prosecute the crime of aggression committed by Russia's political and military leadership.

⁶⁹ *Inter alia* see, Philippe Sands, 'Why we need a new Nuremberg trial to make Putin pay: From Britain's leading expert on crimes against humanity PHILIPPE SANDS, a powerfully personal plea for the world to hold a tribunal just like the one which condemned Hitler's henchmen' (Daily Mail, 4 March 2022) <<https://www.dailymail.co.uk/news/ukraine/article-10579137/PHILIPPE-SANDS-need-new-Nuremberg-trial-make-Putin-pay.html>> accessed on 16 March 2023; Gordon Brown, Dapo Akande, et al., 'Statement calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine' (4 March 2022) <<https://gordonandsarahbrown.com/wpcontent/uploads/2022/03/Combined-Statement-and-Declaration.pdf>> accessed on 16 March 2023; Jennifer Trahan, 'U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model' (Just Security, 7 March 2022) <<https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/>> accessed on 16 March 2023; Kevin Jon Heller, 'The Best Option: An Extraordinary Ukrainian Chamber for Aggression' (*Opinio Juris*, 16 March 2022) <<https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>> accessed on 16 March 2023.