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**The European Union and the Responsibility to Protect: halting and preventing international core crimes within the Common Foreign and Security Policy**

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*To my grandfather, Enrico*

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## LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security, and Justice
AIV	Advisory Council on International Affairs
AJIL	American Journal of International Law
ARIO	Articles on Responsibility of International Organizations
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art	Article
CAR	Central African Republic
CARD	European Defence Fund and the Coordinated Annual Review on Defence
CARICOM	Caribbean Community
CAVV	Advisory Committee on Issues of Public International Law
CETS	Council of Europe Treaty Series
CEUMC	Chairman of the European Union Military Committee
Cf	Compare
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMC	Crisis Management Concept
CSDP	Common Security and Defence Policy
CUP	Cambridge University Press
Doc	Document
DPRK	Democratic People's Republic of Korea
ECOWAS	Economic Community of West African States
Ed	Editor
EDA	European defence Agency
EEAS	European External Action Service
EJIL	European Journal of International Law

EPC	European Political Cooperation
EPF	European Peace Facility
ERRF	European Rapid Reaction Force
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	European Union
EUFOR	European Union Force
EUGHRSR	European Union Global Human Rights Sanctions Regime
EUGS	European Union Global Strategy
EUISS	European Union Institute for Security Studies
EUMC	European Union Military Committee
EUMS	European Union Military Staff
EUNAVFOR	European Union Naval Force
EUPO	European Union Police Mission
EUTM	European Union Training Mission
EWS	Early Warning System
Ff	Following
FRY	Federal Republic of Yugoslavia
HR	High Representative of the Union for Foreign Affairs and Security Policy
HRC	Human Rights Council
HRW	Human Rights Watch
Ibid	Ibidem
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Court for the Former Yugoslavia
IHL	International Humanitarian Law

ILC	International Law Commission
ILCQ	International and Comparative Law Quarterly
ILM	International Legal Materials
ILR	International Law Reports
Int'l J Hum Rts	The International Journal of Human Rights
Int'l Org L Rev	International Organizations Law Review
JCMS	Journal of Common Market Studies
JIT	Joint Investigation Team
KLA	Kosovo Liberation Army
MICH. J. INT'L L	Michigan Journal of International Law
MONUC	UN Organization Mission in the Democratic Republic of the Congo
MPCC	Military Planning and Conduct Capability
N	Number
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NECD	New European Consensus on Development
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
OACPS	Organization of African, Caribbean and Pacific States
OAS	Organization of American States
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OCMSA	Office of the Chief of Military Security Affairs
OHCHR	United Nations Human Rights Office of the Commissioner
OJ	Official Journal
OPT	Occupied Palestinian Territory
OSCE	Organization for Security and Co-operation in Europe
OTP	ICC Office of the Prosecutor
OUP	Oxford University Press
P5 Members	Permanent Five Members

Para	Paragraph
PESCO	Permanent Structured Cooperation
PIJ	Palestinian Islamic Jihad
PSC	Political and Security Committee
R2P	Responsibility to Protect
RDC	Rapid Deployment Capacity
RSF	Rapid Support Forces
SAF	Sudanese Armed Forces
SEA	Single European Act
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
TCN	Troop Contributing Nations
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UN SCOR	United Nations Security Council Official Records
UNCIO	United Nations Conference on International Organization
UNGA	United Nations General Assembly
UNOCI	United Nations Operation in Côte D'Ivoire
UNOPROFOR	United Nations Protection Force
UNPREDEP	United Nations Preventive Deployment Force in the former Yugoslav Republic of Macedonia
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
UNYB	Max Planck Yearbook of United Nations Law
US	United States
V	Versus

## ABSTRACT

Almost 20 years after that the United Nations and its member States committed to uphold the Responsibility to Protect, the uncertainties about its legal status remain unresolved. The European Union has consistently emphasised its support to the Responsibility to Protect since its inception, both internally and in other international fora. As an international legal person and global actor willing to take a more active stance in tackling the commission of mass atrocity crimes worldwide, it possesses significant potential to implement the Responsibility to Protect. In particular, the Common Foreign and Security Policy provides a wide array of tools at the European Union's disposal to halt and prevent international core crimes in third States.

Given this framework, the present work aims to appraise the European Union's contribution in clarifying the legal status of the Responsibility to Protect through its preventive and reactive engagement under the Common Foreign and Security Policy. It also intends to assess if and how the European Union's implementation of the Responsibility to Protect contributes to enhancing international law obligations stemming from the commission of serious *jus cogens* violations.

**Keywords:** Responsibility to Protect, United Nations, European Union, Common Foreign and Security Policy, genocide, war crimes, crimes against humanity, *jus cogens*

Casi 20 años después del reconocimiento de la Responsabilidad de Proteger por parte de las Naciones Unidas y sus Estados miembros, todavía no ha sido posible resolver de manera definitiva las dudas sobre su naturaleza jurídica. La Unión Europea ha respaldado la Responsabilidad de Proteger desde su inicio, tanto internamente como a nivel internacional. Como sujeto con personalidad jurídica y actor global comprometido en la lucha contra los crímenes internacionales, la Unión dispone de un potencial significativo para implementar la Responsabilidad de Proteger. En particular, la Política Exterior y de Seguridad Común proporciona a la Unión una amplia gama de herramientas

que puede utilizar para prevenir y reprimir los crímenes internacionales cometidos en terceros Estados.

Dentro de este contexto, el presente trabajo analiza el papel de la Unión Europea en aclarar la naturaleza jurídica de la Responsabilidad de Proteger a través de las acciones preventivas y represivas adoptadas en el marco de la Política Exterior y de Seguridad Común. Asimismo, la investigación se propone de evaluar si, y de qué manera, la implementación de la Responsabilidad de Proteger por parte de la Unión Europea contribuye al fortalecimiento de las obligaciones de derecho internacional derivadas de la comisión de violaciones graves de normas imperativas de derecho internacional.

**Palabras clave:** Responsabilidad de Proteger, Naciones Unidas, Unión Europea, Política Exterior y de Seguridad Común, genocidio, crímenes de guerra, crímenes de lesa humanidad, *ius cogens*

A quasi 20 anni dal riconoscimento della Responsabilità di Proteggere da parte delle Nazioni Unite e dei suoi Stati Membri, la sua natura giuridica resta ancora oggetto di dibattito. L'Unione Europea ha fornito il proprio sostegno alla Responsabilità di Proteggere fin dalla sua nascita, sia internamente che a livello internazionale. In quanto soggetto dotato di personalità giuridica e attore globale impegnato nella lotta contro i crimini internazionali, l'Unione Europea possiede un potenziale significativo per attuare la Responsabilità di Proteggere. In particolare, la Politica Estera e di Sicurezza Comune mette a disposizione dell'Unione una vasta gamma di strumenti utili per prevenire e reprimere crimini internazionali commessi negli Stati terzi.

All'interno di tale contesto, il presente lavoro analizza il contributo fornito dall'Unione Europea nel chiarire la natura giuridica della Responsabilità di Proteggere attraverso le azioni preventive e repressive adottate nell'ambito della Politica Estera e di Sicurezza Comune. La ricerca si propone inoltre di valutare se, e secondo quali modalità, l'attuazione della Responsabilità di Proteggere da parte dell'Unione Europea contribuisca

a rafforzare gli obblighi di diritto internazionale derivanti dalla commissione di gravi violazioni di norme imperative di diritto internazionale.

**Parole chiave:** Responsabilità di Proteggere, Nazioni Unite, Unione Europea, Politica Estera e di Sicurezza Comune, genocidio, crimini di guerra, crimini contro l'umanità, *ius cogens*

## RESUMEN AMPLIADO

La aprobación de la Responsabilidad de Proteger (R2P) por parte de las Naciones Unidas y sus Estados miembros refleja el cambio de paradigma que tuvo lugar a principios de los años 2000, en virtud del cual la soberanía ya no se concibe como control, sino como un término entrelazado con la noción de responsabilidad, tanto externa como interna. A diferencia de la intervención humanitaria, la R2P aborda la cuestión de la intervención armada permitiendo el uso de la fuerza por razones de carácter humanitario una vez obtenida la autorización por parte del Consejo de Seguridad de las Naciones Unidas, como se establece en el Pilar III de la R2P. Aunque el primer y segundo pilar de la *Responsibility to Protect* empujan esta doctrina hacia una dimensión normativa, las dudas relativas a su tercer pilar obstaculizan su completa afirmación dentro del marco jurídico internacional.

Tal y como se afirma en el Capítulo II, consideramos la R2P como un concepto multifacético que requiere un análisis conjunto con el marco jurídico internacional. En efecto, la R2P está vinculada con la prohibición del genocidio, los crímenes de lesa humanidad y la protección de las normas básicas del derecho internacional humanitario, que se consideran como normas imperativas de derecho internacional general, reconocidas por la comunidad internacional en su conjunto. Por lo tanto, en virtud de lo dispuesto en los Artículos 41(1) y 42(1) de los Proyectos de Artículos sobre la Responsabilidad de los Estados y las Organizaciones Internacionales por Hechos Internacionalmente Ilícitos, tanto los Estados como las Organizaciones Internacionales, incluida la Unión Europea (UE), tienen un deber positivo de cooperar para poner fin a las violaciones graves de normas de *ius cogens*. Estas obligaciones deben interpretarse junto con los deberes de *due diligence* derivados de la prohibición de los crímenes R2P, que juegan un papel crucial para consolidar la obligación de cooperar dentro del marco jurídico internacional.

Operando dentro de este contexto, los Capítulos III y IV destacan el papel clave desempeñado por la UE con el objeto de esclarecer la naturaleza jurídica de la R2P, así como para cumplir con las obligaciones de derecho internacional derivadas de la comisión

de violaciones graves de normas imperativas de derecho internacional relacionadas con la R2P. La UE ha apoyado firmemente la R2P desde su nacimiento, tanto a nivel interno como en otros foros internacionales, en particular en el seno de las Naciones Unidas. El estudio de las acciones emprendidas por la UE en el marco de la Política Exterior y de Seguridad Común (PESC) nos permite aclarar el vínculo entre su compromiso político en la implementación de la R2P y la consideración de su naturaleza jurídica. Aunque con la entrada en vigor del Tratado de Lisboa, la PESC se ha convertido en una parte integrante del ordenamiento jurídico de la UE, este sector sigue estando caracterizado por la presencia de una fuerte dimensión intergubernamental que podría terminar socavando el valor normativo de la R2P.

El método adoptado por la UE en el estudio de la naturaleza jurídica de la R2P tiene en cuenta su carácter multifacético, lo que requiere, por lo tanto, un análisis jurídico separado de sus componentes preventivo y represivo. En cuanto al primero, la UE, en calidad de organización regional, posee un potencial significativo para implementar de manera exhaustiva la Responsabilidad de Prevenir. Considerado como el objetivo principal de la *Responsibility to Protect*, a las declaraciones políticas de la UE han seguido la adopción de actos concretos emprendidos para promover este sector, como se evidencia con el fortalecimiento del *EU conflict Early Warning System* y la adopción del *Atrocity Prevention Toolkit*, cuyo establecimiento representa un momento significativo para la internalización de la *Responsibility to Prevent* por parte de la UE.

Respecto al perfil represivo, el Capítulo IV destaca las dificultades de la UE para adoptar una posición definitiva en relación con la implementación del tercer pilar de la R2P. Para aclarar este asunto, hemos analizado de forma separada el componente relativo a la intervención armada respecto a las otras soluciones contenidas en el tercer pilar. Sobre el primer aspecto, las dificultades estructurales de la Política Común de Seguridad y Defensa (PCSD) debilitan la capacidad de la UE de proporcionar una respuesta militar efectiva en la lucha contra los crímenes internacionales. La falta de una posición unívoca sobre este tema, unida al requisito de la unanimidad, impide a la UE llevar a cabo una intervención armada destinada a poner fin a la comisión de crímenes internacionales, incluso en aquellas circunstancias en las que haya habido una autorización previa por

parte del Consejo de Seguridad de las Naciones Unidas, como ocurrió para hacer frente a la situación en Libia. Desarrollos recientes, como la creación del Fondo Europeo de Apoyo a la Paz, podrían resolver parcialmente los problemas estructurales relacionados con la PCSD, en particular en lo que respecta a la financiación de las operaciones militares de la UE en terceros países. Teniendo en cuenta que la intervención armada debe considerarse como una medida de última instancia, la UE, con el objetivo de implementar el Pilar III de la R2P, demuestra un compromiso más firme en el uso de medios que no implican el uso de la fuerza, como las sanciones. En los últimos años, la UE ha adoptado un número creciente de medidas restrictivas contra Estados, individuos y entidades responsables o involucrados, *inter alia*, en la comisión de crímenes de R2P. La adopción del régimen de sanciones de la UE de alcance mundial en materia de derechos humanos ha consolidado aún más esta tendencia. En conjunto con las sanciones temáticas o geográficas, la práctica indica que este nuevo marco se ha empleado en contextos vinculados con la R2P, como en Siria, Myanmar y Ucrania. A la luz de las consideraciones anteriores, sostenemos que la UE ha reconocido parcialmente la naturaleza jurídica de la R2P bajo su Política Exterior y de Seguridad Común. A pesar de la integración por parte de la UE de los elementos preventivos y de los coercitivos que no implican el uso de la fuerza de la R2P, las incertidumbres derivadas del ámbito de la intervención armada obstaculizan un reconocimiento completo de la naturaleza jurídica del Pilar III de la R2P.

El análisis de la posición adoptada por la UE en el ámbito de la PESC respecto a la implementación de la Responsabilidad de Proteger pone de manifiesto que la R2P está profundamente arraigada en las acciones emprendidas por la Unión en este sector. Pese a no ser categorizadas como tales, las iniciativas de la Unión para la protección y promoción de los derechos humanos fundamentales, junto con el derecho internacional humanitario, vinculan los objetivos del Tratado de la Unión Europea (TUE) con los principios de la R2P. Estos principios se incorporan dentro de un marco más amplio que abarca los valores que la UE aspira a defender en sus relaciones externas. Considerando los efectos mutuamente reforzadores de la R2P y de las obligaciones derivadas de las normas imperativas de derecho internacional, la PESC representa un contexto adecuado para

evaluar la contribución de la UE en la implementación de la R2P y en asegurar el estricto respeto y desarrollo del derecho internacional, tal y como se establece en los Artículos 3(5) y 21 TUE. El Capítulo IV indica que, al emplear todos los medios razonablemente disponibles, la UE puede desempeñar un papel fundamental en el fortalecimiento de la obligación de cooperar por parte de Estados y Organizaciones Internacionales para poner fin a la comisión de violaciones graves de normas de *ius cogens*. Dentro del marco PESC, las sanciones proporcionan una contribución significativa para este fin. Sin embargo, para alcanzar dicho objetivo, las medidas restrictivas adoptadas por la Unión deben ser legítimas. La adopción de sanciones (que no pueden calificarse como represalias) a terceros Estados e individuos sin la previa autorización del Consejo de Seguridad de las Naciones Unidas sigue suscitando numerosas interrogantes en cuanto su conformidad con el derecho internacional. El vínculo que une estas medidas con las violaciones de *ius cogens* es, por lo tanto, crucial. De hecho, la interacción entre las sanciones autónomas de la UE y la obligación de poner fin a violaciones graves de normas de *ius cogens* podría permitir a Estados y Organizaciones Internacionales actuar en los casos en que el Consejo de Seguridad de las Naciones Unidas se encuentre paralizado debido al ejercicio del poder de veto. Dado que estas violaciones afectan a la comunidad internacional en su conjunto, cuando el organismo encargado de mantener la paz y la seguridad internacional es incapaz de actuar, los Estados y las Organizaciones Internacionales podrían, aunque de forma parcial, compensar su inactividad adoptando medidas, incluidas las sanciones, destinadas a poner fin a las violaciones de normas de carácter imperativo. La adopción de medidas similares por parte de los Estados no pertenecientes a la UE, en particular de los países candidatos, podría reforzar esta visión y, al mismo tiempo, aumentar la eficacia de las sanciones dirigidas a poner fin a las violaciones graves de las normas imperativas de derecho internacional.

Con el objetivo de reforzar el vínculo entre las sanciones de la UE y las violaciones de obligaciones *erga omnes*, el Tribunal de Justicia de la Unión Europea, tal como ha afirmado en la reciente decisión relativa al caso *RT France*, parece reconocer la legitimidad de estas medidas autónomas de la UE dirigidas a la protección de objetivos e intereses generales para toda la comunidad internacional, que incluso la UE, como sujeto

de derecho internacional, debe defender y promover. Cuando las sanciones se adoptan como respuesta a violaciones graves de normas de *ius cogens*, también podrían contribuir de manera significativa al proceso de cristalización de la obligación de cooperar para poner fin a la comisión de las mismas. Sin embargo, como se desprende del análisis comparado de las sanciones impuestas por la UE contra Rusia e Israel, los obstáculos estructurales de la acción europea en el ámbito de la PESC debilitan la contribución efectiva de la Unión en el estricto respeto y desarrollo del derecho internacional en sus relaciones con el resto del mundo. Cuando se trata de violaciones graves de normas de *ius cogens* asociadas a los crímenes R2P, los valores internacionales y los de la UE se entrelazan. Sin embargo, el péndulo que oscila entre retórica y valor normativo que caracteriza los artículos 3(5) y 21 TUE parece aún favorecer a la primera sobre la segunda, dado que los intereses estratégicos de la UE parecen prevalecer sobre su deber de actuar en conformidad con el derecho internacional.

# INTRODUCTION

SUMMARY: 1. The research topic – 1.1 The object: the Responsibility to Protect – 1.2 The role of the European Union – 2. The boundaries of the research – 3. Outline and structure of the work – 4. Methodology

## 1. The research topic

In 2005, the United Nations and its member States committed to uphold the Responsibility to Protect (R2P).<sup>1</sup> Crucially, while emphasising States' primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, they agreed on the international community's subsidiary role to take collective action when States manifestly fail to protect their populations from the perpetration of such crimes.<sup>2</sup> Almost two decades later, despite this solemn commitment, the promise of halting atrocity crimes remains unfulfilled.<sup>3</sup> The world is currently facing the highest number of violent conflicts since the Second World War.<sup>4</sup> The ongoing crises in Ukraine, Israel and the Occupied Palestinian Territory (OPT), along with current R2P scenarios in other countries, especially in Africa and the Middle East, indicate a significant growth and expansion of the commission of international core crimes.<sup>5</sup> Against this background, there is - now more than ever - an urgent need for the

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<sup>1</sup> UNGA, *World Summit Outcome* (24 October 2005) UN Doc A/RES/60/1, paras 138-139.

<sup>2</sup> *ibid.*

<sup>3</sup> UNGA, UNSC, Report of the Secretary-General, 'Responsibility to protect: the commitment to prevent and protect populations from atrocity crimes' (3 June 2024) UN Doc A/78/901-S/2024/434, para 6.

<sup>4</sup> UNGA, UN Economic and Social Council, Report of the Secretary-General 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations' (12 April 2023) UN Doc A/78/73-E/2023/61.

<sup>5</sup> See Global Centre for the Responsibility to Protect, 'R2P Monitor', Issue 70 (1 September 2024) at <<https://www.globalr2p.org/publications/r2p-monitor-issue-70-1-september-2024/>> accessed 30 October 2024.

international community to implement its commitment to the Responsibility to Protect, by preventing these atrocities and protecting populations effectively.

For the purposes of this research, it is worth recalling that, notwithstanding the persistent doubts surrounding the notion of ‘international community’,<sup>6</sup> the gradual emergence of a shared set of values and principles suggests that when the protection of these interests is at stake,<sup>7</sup> States and International Organizations<sup>8</sup> would be entitled and indeed bound to intervene to ensure effective protection of common values and general interests at the global level; such values and interests include those that the Responsibility to Protect seeks to safeguard. Together with States, regional organizations play a key role in halting and preventing mass atrocity crimes. Amongst them, we will focus on the European Union which, as an international legal person and global actor willing to take a more active stance in addressing the commission of international crimes worldwide, possesses significant potential to fully operationalise the R2P.<sup>9</sup>

Given this framework, the present work aims to assess the EU’s contribution in clarifying the legal status and implementation of the Responsibility to Protect through its preventive and reactive engagement in tackling international core crimes within its Common Foreign and Security Policy (CFSP). By examining relevant practice and legal issues arising within this domain, we will shed light on the EU’s role in operationalising R2P by employing forcible and non-forcible means at its disposal. Within a broader

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<sup>6</sup> This concept has been widely discussed among legal scholars. cf *inter alia*, Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1997) 250 *Collected Courses of the Hague Academy of International Law* 217; Roberto Ago, *Caratteri generali e origini storiche della comunità internazionale e del suo diritto. Introduzione al corso di diritto internazionale* (Editoriale Scientifica 2002); Emmanuelle Tourme Jouannet, ‘La communauté internationale vue par les juristes’ (2005) 6 *Annuaire Français de Relations Internationales* 3; Santiago Villalpando, *L’émergence de la Communauté Internationale dans la Responsabilité des Etats* (Graduate Institute Publications 2005); Russell Buchan, ‘A clash of normativities: International Society and International Community’ (2008) 10(1) *International Community Law Review* 3; Giorgio Gaja, *The Protection of General Interests in the International Community* (2013) 364 *Collected Courses of the Hague Academy of International Law* 9; Paolo Picone, *Comunità internazionale e obblighi erga omnes* (Jovene 2013).

<sup>7</sup> Christian J Tams, ‘International community’ in Jean d’Aspremont, Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019) 505, 506.

<sup>8</sup> Whose creation manifests the need to jointly address issues that transcend national borders. Inis L Claude, *Swords into Plowshares: The Problems and Progress of International Organization* (Random House 1971) 447.

<sup>9</sup> Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institute Press 2008) 183-184.

context, we will also assess if and how the EU's implementation of the Responsibility to Protect contributes to fostering respect for international law obligations stemming from the commission of serious *jus cogens* violations.<sup>10</sup>

### **1.1 The object: the Responsibility to Protect**

The present work focuses on a specific object - the Responsibility to Protect - and a concrete subject called to implement it: the European Union. Such notions, which are strictly intertwined, comprise the framework under which we will address the main research questions of this study.

Given the international community's failure to effectively respond to the commission of international core crimes, along with the controversial NATO humanitarian intervention in Kosovo,<sup>11</sup> the Responsibility to Protect is a renewed attempt to address the question posed by the former UN Secretary-General Kofi Annan concerning the possibility of reconciling two of the main pillars of international law: the inviolability of State sovereignty and the necessity to respond to serious and systematic human rights violations.<sup>12</sup>

Originally proposed in 2001 by the International Commission on Intervention and State Sovereignty,<sup>13</sup> the Responsibility to Protect was subsequently endorsed by the United Nations during the 2005 *World Summit*.<sup>14</sup> In particular, paragraphs 138 and 139 of this document state as follows:

'138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary

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<sup>10</sup> cf para 1.2.

<sup>11</sup> Defined as 'illegal but legitimate'. Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4.

<sup>12</sup> '[...] 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?'. 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.

<sup>13</sup> ICISS, *The Responsibility to Protect* (14 August 2002) UN Doc A/57/303, Annex.

<sup>14</sup> *World Summit Outcome* (n 1).

means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out’.

The Responsibility to Protect is based on three pillars: 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).<sup>15</sup> Provided that certain criteria are met, R2P Pillar III, which has been extensively discussed among legal scholars,<sup>16</sup> allows the UN Security Council to

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<sup>15</sup> UNGA, Report of the Secretary-General ‘Implementing the Responsibility to Protect’ (12 January 2009) UN Doc A/63/677.

<sup>16</sup> See, *inter alia*, Alicia L Bannon, Comment, ‘The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism’ (2005) 115 YALE LJ 1157; 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; Anne Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20 EJIL 513; James Pattison, *Humanitarian Intervention & the Responsibility to Protect. Who should Intervene?* (OUP 2010); 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. INT’L L. 765; Jared Genser, Irwin Cotler, *The Responsibility*

authorise the use of force for humanitarian reasons. In this context, we employ the term ‘force’ in line with a narrow interpretation of Article 2(4) UN Charter, which only encompasses armed force.<sup>17</sup>

As Chapter II will further assess, the wording used to frame R2P Pillar III,<sup>18</sup> together with the lack of relevant practice and corrective mechanisms addressing the issue of the veto in this domain, hinder the R2P from being completely separated from the political and moral justifications that have underpinned this concept since its inception, thereby obstructing its full affirmation within the international legal framework. The UN Security Council’s inaction in current R2P scenarios further confirms this view.<sup>19</sup>

Nevertheless, the Responsibility to Protect has to be regarded under the narrow-but-deep approach;<sup>20</sup> on the one hand, its material scope narrows to the crime of genocide, war crimes, crimes against humanity, and ethnic cleansing; on the other hand, it envisages an extensive array of tools that States and International Organizations can use to halt and prevent these mass atrocity crimes. According to this view, the international community’s Responsibility to Protect does not only entail the exercise of the use of force under R2P Pillar III, which should be considered as a measure of last resort; first and foremost, it allows for the adoption of various lawful measures aimed at assisting States in protecting their populations from the commission of international core crimes.

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*to Protect. The Promise of Stopping Mass Atrocities in our Time* (OUP 2011); Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016).

<sup>17</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art. 2(4). During the negotiations of the UN Charter, a few States advocated a broad interpretation of this concept encompassing, *inter alia*, economic coercion through the threat or use of economic measures. UNCIO, vol. VI, UN Doc 784/II/1/27 (5 June 1945) p. 335, para 7. However, the law and practice associated with Article 2(4) UN Charter provide a restricted interpretation of this provision. See, *inter alia*, UNGA Res 2625(XXV) (24 October 1970) UN Doc A/RES/25/2625; UNGA Res 3314(XXIX) (14 December 1974) UN Doc A/RES/29/3314. cf Christian Henderson, *The Use of Force and International Law* (CUP 2018) 55; Erin Pobjie, *Prohibited Force: The Meaning of ‘Use of Force’ in International Law* (CUP 2024) 125.

<sup>18</sup> Carsten Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 AJIL 99, 109.

<sup>19</sup> See Chapter II, para 1.

<sup>20</sup> Jennifer Welsh, ‘The “Narrow but Deep Approach” to Implementing the Responsibility to Protect: Reassessing the Focus on International Crimes’ in Sheri P Rosenberg, Tibi Galis, Alex Zucker (eds), *Reconstructing Atrocity Prevention* (CUP 2015) 81.

Notwithstanding the challenges in determining its legal status, it is worth emphasising that the Responsibility to Protect is grounded in international law,<sup>21</sup> and finds its legal basis in both treaty provisions and customary norms, which set forth the prohibition of genocide and crimes against humanity, and the obligation to respect and ensure respect of basic rules of international humanitarian law.<sup>22</sup> These provisions comprise peremptory norms of general international law,<sup>23</sup> which are recognised by the international community as a whole.<sup>24</sup> Accordingly, every member of the international community, including the European Union, has to respect and ensure the respect of these norms. As outlined in the Articles of Responsibility of States and International Organizations, the EU is also required to cooperate, through lawful means, to bring to an end serious breaches of these norms.<sup>25</sup>

## 1.2 The role of the European Union

The EU has been a staunch supporter of the Responsibility to Protect since its inception. This commitment has been recently renewed in the July 2024 statement by the

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<sup>21</sup> See, *inter alia*, John Heieck, *A Duty to Prevent Genocide: Due Diligence Obligations Among the P5* (Elgar 2018) 3; Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 REV. INT'L STUD. 445, 447-448; Laurence Boisson de Chazournes, Luigi Condorelli, 'De la "responsabilité de protéger" ou d'une nouvelle parure pour une notion déjà bien établie' (2006) 110 Revue Générale de Droit International Public 11, 13-16.

<sup>22</sup> See Chapter II, para 2.

<sup>23</sup> Regarding genocide, see, *inter alia*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, pp. 339-340; see also, *Attorney-General of the Government of Israel v. Adolf Eichmann* [1961] District Court of Jerusalem, [1961] 36 ILR 5. As for crimes against humanity, the fourth paragraph of the preamble to the 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity recalled that 'the prohibition of crimes against humanity is a peremptory norm of general international law (jus cogens)'. ILC, 'Report of the International Law Commission of its Seventy-First Session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, p. 11 (hereinafter '*Draft Conclusions*'). Concerning the basic rules of international humanitarian law, see, *inter alia*, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, p. 257, para 79. These norms are also listed in the Annex of the 2022 *Draft Conclusion on identification and legal consequences of peremptory norms of general international law*. UN Doc A/74/10, p. 89.

<sup>24</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331, art. 53.

<sup>25</sup> ILC, 'Report of the International Law Commission on the Work of its 53rd Session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 (hereinafter ARSIWA). See art. 41(1) ARSIWA; ILC, 'Report of the International Law Commission of its Sixty-third session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10 (hereinafter ARIO). See art. 42(1) ARIO.

Deputy Head of the EU Delegation, Ms. Hedda Samson, to the UN at the 78th Session of the UN General Assembly.<sup>26</sup> Along with underscoring the focus on preventive engagement, she stressed that ‘[...] if and when prevention efforts fail, we must collectively ensure a timely and decisive response’.<sup>27</sup>

It is worth noting that, according to the UN Secretary-General Report on R2P and regional organizations, the implementation of the Responsibility to Protect starts internally.<sup>28</sup> However, unlike other organizations,<sup>29</sup> the EU emphasises its external rather than internal policies in its implementation of R2P.<sup>30</sup> Remarkably, member States’ strict observance of the EU’s core values and principles, including democracy, the rule of law, and respect for human rights - which embed the values that the R2P aims to uphold -, is a fundamental requirement for being a member of this organization. The EU’s internal stability is crucial for the EU to be considered a credible actor in its external relations,<sup>31</sup> aimed at halting and preventing gross human rights violations, without imperialistic goals, but driven by the genuine need to protect and promote common values of the international community as a whole. With the entry into force of the Treaty of Lisbon, as envisaged in Articles 3(5) and 21(1) and (2) TEU, the promotion of the Union’s values in

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<sup>26</sup> EU statement on behalf of the European Union and its Member States, ‘Responsibility to Protect and the Prevention of genocide, war crimes, ethnic cleansing and crimes against humanity’ (1 July 2024) at [https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-un-general-assembly-responsibility-protect-and-prevention-genocide-war-crimes-ethnic\\_en?s=63](https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-un-general-assembly-responsibility-protect-and-prevention-genocide-war-crimes-ethnic_en?s=63) accessed 28 October 2024.

<sup>27</sup> *ibid.*

<sup>28</sup> UNSC, Report of the Secretary-General, ‘The role of regional and subregional arrangements in implementing the responsibility to protect’ (28 June 2011) UN Doc A/65/877-S/2011/393, para. 17. cf Jochem Rietveld, *Regional Approaches to the Responsibility to Protect. Lessons from Europe and West Africa* (Routledge 2023) 74.

<sup>29</sup> Such as the African Union. Art. 4(h) of the Constitutive Act of the African Union enshrines ‘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’. Constitutive Act of the African Union (adopted 11 July 2000; entry into force 26 May 2001).

<sup>30</sup> Chiara de Franco, Christoph Meyer, Karen E Smith, ‘Europe and the European Union’ in Alex Bellamy, Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 396.

<sup>31</sup> That has been challenged due to the EU’s reluctance to implement the procedure enshrined in art. 7 TEU, which applies when there is ‘[...] the existence of a serious and persistent breach by a Member State of the values referred to in Article 2’. Elin Hellquist, ‘Ostracism and the EU’s contradictory approach to sanctions at home and abroad’ (2018) 25(4) *Contemporary Politics* 393. cf Carmela Pérez-Bernárdez, ‘Las Sanciones de la UE como Instrumento de la Acción Exterior: una Apuesta Renovada por sus Valores Fundamentales’ in Francisco Aldecoa (ed), *El papel internacional de la Unión Europea: Propuestas para la Conferencia sobre el Futuro de Europa* (Los Libros de la Catarata 2021) 205, 231.

its external relations - including respect for human rights, principles of the United Nations Charter, and international law - acquired treaty foundation. These provisions reflect the EU's willingness to respect and contribute to the development of international law, which is conceived as a crucial instrument to achieve the external dimension of the European integration process.<sup>32</sup> However, it has not yet been possible to clarify the effects of such provisions, whose rhetorical dimension is often preferred to the normative framework.<sup>33</sup>

The fact that the Responsibility to Protect is rooted in the respect of the fundamental principles and values which include the promotion and protection of human rights, allows us to consider the EU's external action as a suitable framework for advancing the implementation of the R2P in third countries if they are unable or unwilling to protect their populations from international core crimes. This research will question whether and how the European Union's contribution to upholding universal values underlying the prohibition of international core crimes might facilitate the confirmation and enhancement of international law obligations arising from serious *jus cogens* violations.

Amongst the tools at the EU's disposal for implementing the Responsibility to Protect through its external action, the present work will focus on the Common Foreign and Security Policy; this sector is characterised by a strong intergovernmental component as illustrated by the general rule of unanimity within the European Council and the Council of the European Union (the Council) for most relevant decisions.<sup>34</sup> The CFSP is a significant domain for operationalising the Responsibility to Protect, as it allows the Union to adopt a series of preventive and repressive measures, taking a comprehensive approach to crisis management, covering all phases, from the preventive engagement to the post-conflict stabilisation phase. As Chapter IV will further assess, the CFSP is particularly relevant for assessing the EU's implementation of R2P Pillar III, focusing both on its forcible and non-forcible components.

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<sup>32</sup> Enzo Cannizzaro, 'I valori internazionalisti dell'Unione Europea e il loro effetto giuridico' in Alessandra Annoni, Serena Forlati, Pietro Franzina (eds), *Il Diritto Internazionale come Sistema di Valori. Scritti in Onore di Francesco Salerno* (Jovene editore 2021) 459.

<sup>33</sup> *ibid* 461.

<sup>34</sup> Treaty on European Union (29 July 1992) OJ C 191, p. 1-112 (hereinafter TEU), art. 24 TEU.

As for this latter dimension, the focus will be on analysing the EU sanctions issued in response to international core crimes. As a preliminary remark, the concept of sanction, which is still debated among legal scholars,<sup>35</sup> is generally used in practice to indicate both non-forcible measures adopted by the UN Security Council under Article 41 of the UN Charter and autonomous sanctions issued by individual States or regional organizations, including the EU.<sup>36</sup> While the term ‘international sanctions’ in its broadest sense might encompass the use of military force, the present work will refer to its more commonly narrow interpretation which regards sanctions as coercive measures short of the use of force.<sup>37</sup> Institutional or collective sanctions should be regarded as a tool at the disposal of International Organizations to respond to a breach of fundamental interests and values,<sup>38</sup> including the gross human rights violations envisaged within the R2P framework. On this aspect, scholars argued that the true essence of imposing sanctions lies precisely in providing an international institutional response to violations of core norms.<sup>39</sup> On the other hand, unilateral sanctions disclose a form of private justice in response to the injury suffered.<sup>40</sup>

The EU’s restrictive measures adopted against third States and individuals are issued within this complex framework, where the EU seeks to further confirm its role as

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<sup>35</sup> Linos-Alexandre Sicilianos, ‘Sanctions institutionnelles et contre-mesures: tendances récentes’ in Laura Picchio Forlati, Linos-Alexandre Sicilianos (eds), *Les sanctions économiques en droit international/Economic Sanctions in International Law* (Brill | Nijhoff 2016) 3; Laura Picchio Forlati, ‘The Legal Core of International Economic Sanctions’ *ibid* 99; Natalino Ronzitti, *Sanctions as Instrument of Coercive Diplomacy: An International Law Perspective*, in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill | Nijhoff 2016) 1. For a critical view on the use of unilateral sanctions, see HRC, ‘Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights’ Alena Douhan (8 July 2021) UN Doc A/HRC/48/59. For the latest version, see UN Doc A/HRC/57/55.

<sup>36</sup> cf Mirko Sossai, *Sanzioni delle Nazioni Unite e Organizzazioni Regionali* (RomaTre Press 2020) 13.

<sup>37</sup> Jeremy Farrall, ‘Sanctions’ in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2017) 603.

<sup>38</sup> Sossai (n 36) 16-17.

<sup>39</sup> Vera Gowlland-Debbas, ‘UN Sanctions and International Law: An Overview’ in Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Brill | Nijhoff 2001) 1, 7-9.

<sup>40</sup> Vera Gowlland-Debbas, ‘Security Council Change: The pressure of emerging international public policy’ (2009-10) 65(1) *International Journal* 119; Denis Alland, ‘The Definition of Countermeasures’ in James Crawford, Alain Pellet, Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 1127.

a global actor guided by a system of values and principles that shape its external action.<sup>41</sup> Being a ‘Union of values’<sup>42</sup> and acting according to its founding Treaties, including Articles 3(5) and 21(1) and (2) TEU, the Union upholds and promotes its values and interests *vis-à-vis* third parties. These provisions also recall the EU’s duty to ensure the strict observance and development of international law.<sup>43</sup>

Given that EU sanctions constitute an important ‘way to maintain and restore international peace and security in accordance with the principles of the UN Charter and of our common foreign and security policy’,<sup>44</sup> it is crucial to understand whether the restrictive measures - especially those adopted autonomously<sup>45</sup> - implemented in response to the commission of R2P crimes, which involve the violation of peremptory norms of international law, are adopted to pursue the EU’s strategic objectives or also as a reaction to internationally wrongful acts which affect the international community as a whole. In other words, this work will assess whether the Union, besides upholding its values in its external relations, actually feels bound by international law to safeguard universal values, such as those arising from peremptory norms of general international law. In particular, notwithstanding the broader debate on the lawfulness and effectiveness of ‘collective countermeasures’, which this work will only partially address, we will assess whether EU measures, specifically sanctions, adopted to tackle *jus cogens* violations might confirm and enhance States’ and International Organizations’ duty to cooperate to halt serious breaches of peremptory norms of general international law.<sup>46</sup> Accordingly, this study seeks to evaluate whether the European Union’s efforts to prevent and address international core crimes globally are merely indicative of policy objectives or demonstrate a commitment to fulfilling international legal obligations stemming from serious *jus cogens* violations. As an ancillary issue, one should also ask whether the EU

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<sup>41</sup> Sossai (n 36) 145.

<sup>42</sup> Marise Cremona, ‘Values in EU foreign policy’ in Elena Sciso, Roberto Baratta, Claudia Morviducci (eds), *I valori dell’Unione Europea e l’azione esterna* (Giappichelli 2016) 3.

<sup>43</sup> art. 3(5) TEU.

<sup>44</sup> Council of the European Union, ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’ (7 June 2004) 10198/1/04 para 1.

<sup>45</sup> Chapter IV, para 4.1.

<sup>46</sup> Chapter IV, para 5.2.

may, at least in part, mitigate the UN Security Council's inaction in halting R2P crimes. Special emphasis will also be given to the consistency of the EU's actions within this framework, and the related issue of double standards.<sup>47</sup> Another incidental question deals with the influence of the EU's decisions in this domain on its member States and non-EU countries, especially candidate States.

## 2. The boundaries of the research

After defining the object and subject of this work, we shall now proceed to set its boundaries. As envisaged in the World Summit Outcome, the Responsibility to Protect focuses on the crime of genocide, crimes against humanity, war crimes and ethnic cleansing.<sup>48</sup> For terminological clarity, it is important to emphasise that terms such as 'international core crimes' or 'atrocities crimes' will be used exclusively to refer to the R2P crimes examined in this study, even though these concepts may also encompass other serious crimes, including the crime of aggression.<sup>49</sup> Moreover, the present work will not address ethnic cleansing, which has not been recognised as an independent crime under international law so far. The United Nations Commission of Experts established to examine reported violations of international humanitarian law in the former Yugoslavia defined it as '[...] a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas'.<sup>50</sup> As outlined by the Commission of Experts, these practices might also amount to genocide, war crimes or crimes against humanity.<sup>51</sup>

Furthermore, as stressed by the International Commission on Intervention and State Sovereignty (ICISS), the Responsibility to Protect comprises three main elements: (1) the Responsibility to Prevent; (2) the Responsibility to React, and (3) the Responsibility to

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<sup>47</sup> Chapter IV, paras 4.4.1, 4.4.2. cf Pérez-Bernárdez (n 31) 231.

<sup>48</sup> *World Summit Outcome* (n 1) paras 138-139.

<sup>49</sup> See, *inter alia*, Christine Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (OUP 2020) 768.

<sup>50</sup> UNSC, 'Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)' UN Doc S/1994/674, Annex, p. 33, para 130.

<sup>51</sup> *ibid* para 129.

Rebuild.<sup>52</sup> Notwithstanding the relevance of this latter component, which aims to ensure full assistance with recovery, reconstruction, and reconciliation,<sup>53</sup> we will limit our study to the R2P preventive and reactive engagement. On the one hand, the analysis of these two facets is crucial to answering the research questions of the present work; on the other hand, the Responsibility to Rebuild is also strictly intertwined with transitional justice and accountability issues.<sup>54</sup> While we will not address these questions in detail, which require an in-depth analysis and might be further investigated in the future, it is noteworthy that the EU has taken an active role in the fight against impunity associated with international core crimes. Among other relevant actions,<sup>55</sup> it has supported the International Criminal Court (ICC) since its inception,<sup>56</sup> also by concluding an agreement on cooperation and assistance with it.<sup>57</sup> The EU has also recently amended the Eurojust Regulation,<sup>58</sup> empowering this EU agency to preserve, analyse and store evidence related to R2P crimes and make it available to national authorities and international judicial authorities, including the ICC.<sup>59</sup> As a result of this amendment, in February 2023 the *Core International Crimes Evidence Database* was launched; it serves as a tailor-made judicial

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<sup>52</sup> ICISS, The Responsibility to Protect (14 August 2002) UN Doc A/57/303, Annex, XI.

<sup>53</sup> *ibid.*

<sup>54</sup> Peter Hilpold, 'The Responsibility to Rebuild, Transitional Justice, and Afghanistan: A Debacle as a Consequence of the Denial of Ownership' (2022) 21(3) Chinese Journal of International Law 411.

<sup>55</sup> For an overview, see Michele Caianiello, 'The Role of the EU in the Investigation of Serious International Crimes Committed in Ukraine. Towards a New Model of Cooperation?' (2022) 30 (3-4) European Journal of Crime, Criminal Law and Criminal Justice 219.

<sup>56</sup> Council Common Position of 11 June 2001 on the International Criminal Court, OJ L 155, 12.6.2001, p. 19-20. Common Position was reviewed after the coming into force of the Rome statute in 2002, then repealed in 2003 and finally in 2011 with the Council Decision 2011/168/CFSP. Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76, 22.3.2011, p. 56-58. For an in-depth analysis of the International Criminal Court, see, *inter alia*, William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016); Julia Geneuss, Triestino Mariniello, 'Introduction. Twenty Years of the Rome Statute: Functions, Goals, Effectiveness – Challenges of the International Criminal Court' (2019) 19 (6) International Criminal Law Review 905.

<sup>57</sup> Council Decision of 10 April 2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, OJ L 115, 28.4.2006, p. 49.

<sup>58</sup> Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences, OJ L 148, 31.5.2022, p. 1-5.

<sup>59</sup> *ibid.* art. 4(1) j.

database set up by Eurojust to preserve, analyse and store evidence of core international crimes.<sup>60</sup> Concerning the situation in Ukraine, it is worth mentioning that in March 2022 Eurojust supported the establishment of a Joint Investigation Team (JIT) into alleged core international crimes committed in Ukraine.<sup>61</sup> While not the first, Ukraine's Joint Investigation Team should be considered the most relevant.<sup>62</sup> It involves Ukraine, six EU countries,<sup>63</sup> and the ICC Office of the Prosecutor (OTP). It is the first-ever OTP's participation in a JIT, aiming at strengthening criminal cooperation in activities of investigating international crimes committed in Ukraine.<sup>64</sup> Time will tell whether the actions undertaken following the outbreak of war in Ukraine in fighting international core crimes constitute an isolated episode or they should be regarded as a decisive concrete step of the EU's willingness to effectively contribute to the strengthening of international criminal justice.<sup>65</sup>

As previously outlined, this work will focus on the EU's action in implementing the preventive and reactive dimensions of the Responsibility to Protect within its Common Foreign and Security Policy. It is appropriate to mention that, alongside the CFSP, other areas of the EU's external action can be associated with the Responsibility

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<sup>60</sup> Eurojust, 'Core International Crimes Evidence Database', at <<https://www.eurojust.europa.eu/core-international-crimes-evidence-database>> accessed 29 October 2024. See also María Torres Pérez, 'Eurojust, veinte años de compromiso por la cooperación judicial penal en Europa. El futuro de la agencia ante la guerra en Ucrania' (2022) 44 *Revista Electrónica de Estudios Internacionales* 1, 9.

<sup>61</sup> The JIT represents one of the most advanced instruments used in international cooperation in criminal matters, which comprises a legal agreement between the competent authorities of two or more States to conduct criminal investigations. Anette Herz, 'The role of Europol and Eurojust in Joint Investigation Teams' in Connie Rijken, Gert Vermeulenen (eds), *Joint Investigation Teams in the European Union: From Theory to Practice* (TMC Asser Press 2006) 159.

<sup>62</sup> Eurojust, '20 Years On: Main Developments in the Fight Against Impunity for Core International Crimes in the EU' (23 May 2022) 20-21, at <<https://www.eurojust.europa.eu/publication/20-years-main-developments-fight-against-impunity-core-international-crimes-eu>> accessed 29 October 2024.

<sup>63</sup> It was initially formed by Lithuania, Poland and Ukraine. Estonia, Latvia, Slovakia and Rumania joined at a later stage. Eurojust, 'Joint investigation team into alleged crimes committed in Ukraine' at <<https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine>> accessed 29 October 2024.

<sup>64</sup> Eurojust, 'ICC participates in joint investigation team supported by Eurojust on alleged core international crimes in Ukraine' at <<https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes>> accessed 29 October 2024. For a critical analysis, see Suhong Yang, Yudan Tan, 'The Joint Investigation Team in Ukraine: Challenges and Opportunities for the International Criminal Court' (2023) 8(3) *European Papers* 1121.

<sup>65</sup> cf Caianiello (n 55) 236.

to Protect, although they will not be considered here. For instance, regarding the preventive realm, Trade, Development Cooperation, and Neighbourhood Policies include some references,<sup>66</sup> albeit nuanced, to the Responsibility to Protect. The human rights clauses in the EU's agreements with third States fit within this framework.<sup>67</sup> If the other party violates human rights or democratic principles, the EU is entitled to take appropriate measures, including suspending the agreement.<sup>68</sup>

As for the reactive prong, once a crisis has erupted, the EU can use other external policies beyond CFSP tools, including humanitarian aid<sup>69</sup> to, *inter alia*, assist populations in ongoing R2P scenarios. Since Russia's full-scale invasion in February 2022, the European Commission has allocated €950 million for humanitarian aid programmes in Ukraine.<sup>70</sup> Humanitarian aid has also been provided in other R2P contexts, especially in Africa and the Middle East.<sup>71</sup>

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<sup>66</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390 (hereinafter TFEU) arts. 207-208 TFEU. For the Neighbourhood Policy, art. 8 TEU.

<sup>67</sup> Diego J Liñán-Nogueras, Luis M Hinojosa-Martínez, 'Human rights conditionality in the external trade of the European Union: Legal and legitimacy problems' (2001) 7(3) *The Columbia Journal of European Law* 307; Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP 2005); Maria Julià Barceló, 'La Proyección Exterior de la Identidad Europea: Política Comercial Común y Condicionabilidad en Materia de Derechos Humanos' (2019) 2 Cuadernos Europeos De Deusto 287; Joan David Janer Torrens, 'The generalized scheme of preferences as a carrot-and-stick mechanism of EU trade policy in pursuit of non-trade policy objectives' in Luis M Hinojosa-Martínez, Carmela Pérez-Bernárdez (eds), *Enhancing the Rule of Law in the European Union's External Action* (Elgar 2023) 244.

<sup>68</sup> Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L 317, 15.12.2000, p. 3-353, art. 96. The Cotonou Agreement was replaced by the Samoa Agreement, which was signed on 15 November 2023 by the EU and its member states and OACPS members. Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part, OJ L, 2023/2862, 28.12.2023. The Samoa Agreement has not entered into force yet.

<sup>69</sup> art. 214 TFEU. Liv Feijen, *The Evolution of Humanitarian Protection in European Law and Practice* (CUP 2021). For a critical analysis of the EU's operations in the fields of Humanitarian Aid from an international legal and practical perspective see, *inter alia*, Carmela Pérez-Bernárdez, 'La problemática coordinación de la ayuda humanitaria de la Unión Europea' (2015) 30 *Revista Electrónica de Estudios Internacionales* 1.

<sup>70</sup> European Commission, European Civil Protection and Humanitarian Aid Operations, 'Ukraine' at <[https://civil-protection-humanitarian-aid.ec.europa.eu/where/europe/ukraine\\_en](https://civil-protection-humanitarian-aid.ec.europa.eu/where/europe/ukraine_en)> accessed 29 October 2024.

<sup>71</sup> European Commission, European Civil Protection and Humanitarian Aid Operations, 'Africa' at <[https://civil-protection-humanitarian-aid.ec.europa.eu/where/africa\\_en](https://civil-protection-humanitarian-aid.ec.europa.eu/where/africa_en)> accessed 29 October 2024; European Commission, European Civil Protection and Humanitarian Aid Operations, 'Middle East and Northern Africa' at <[https://civil-protection-humanitarian-aid.ec.europa.eu/where/middle-east-and-northern-africa\\_en](https://civil-protection-humanitarian-aid.ec.europa.eu/where/middle-east-and-northern-africa_en)> accessed 29 October 2024.

### **3. Outline and structure of the work**

The present work consists of four Chapters. Chapter I provides an overview of the historical roots that have led to affirming the Responsibility to Protect within the UN framework. It also examines the main elements of the R2P and its consistency with the international legal framework. Chapter II addresses the issue of the legal status of the Responsibility to Protect. Given the peremptory nature of the duties arising from R2P crimes, it also looks at R2P's underlying international law obligations envisaged for both States and International Organizations.

Having clarified these aspects, Chapter III starts zooming in on the EU's role in implementing the R2P preventive engagement within the Common Foreign and Security Policy. The choice of this domain, whose specific features are addressed in the first part of the Chapter, is due to the close interaction between the political and legal dimensions underpinning this policy field, which outlines a comprehensive set of tools for operationalising both the preventive and reactive components of the Responsibility to Protect. After covering the main developments that have contributed to the endorsement and consolidation of the Responsibility to Protect within the EU framework, the last part of the Chapter assesses the EU's contribution towards implementing the Responsibility to Prevent.

Finally, Chapter IV focuses on the interplay between the EU and the Responsibility to React under the CFSP, specifically highlighting the EU sanctions as a pivotal tool to implement the non-forcible component of R2P Pillar III. Within a broader context, the last part of Chapter IV sheds light on the EU's contribution towards enhancing international law obligations stemming from the commission of serious *jus cogens* violations, by clarifying discourses that emerged in the first part of the work.

### **4. Methodology**

The research is based on primary sources gathered between October 2021 and November 2024. In particular, we carried out a thorough analysis of the international and European legal framework, followed by an in-depth research of relevant case-law,

including the rulings from the International Court of Justice and the Court of Justice of the European Union. Moreover, we consulted official soft law documents as well as relevant academic literature. Secondary sources of information included, *inter alia*, open-source platforms and the legal databases of the University of Ferrara (Italy), University of Granada (Spain), *Centre de Droit Européen* (Belgium), the European Commission Library (Belgium), and the Peace Palace Library (The Netherlands).

The present work combines different research methodologies, including a chronological, thematic and comparative approach. Regarding the latter, we emphasise the interplay between the European and international legal framework in addressing the research questions of this study. Furthermore, the theoretical framework is complemented by an assessment of practical scenarios, focusing in particular, but not only on the EU's response to Russia's military aggression against Ukraine.

# CHAPTER ONE

## The ‘Responsibility to Protect’: From its origins to its endorsement

SUMMARY: 1. Introduction – 2. The Humanitarian Intervention Doctrine – 2.1 An overview – 2.2 The definitional aspects and the core elements of the Humanitarian Intervention doctrine – 2.3 Humanitarian intervention in practice: a focus on its intrinsic ambiguities – 2.4 A case study: the NATO humanitarian intervention in Kosovo and its unresolved legal issues – 3. A paradigm shift for the third millennium: the emergence of the Responsibility to Protect – 3.1 The 2000 Dutch Report – 3.2 Changing the narrative: The ICISS Report and the introduction of the Responsibility to Protect – 3.3 The affirmation of the Responsibility to Protect within the United Nations – 4. Responsibility to Protect, use of force and State sovereignty: a possible coexistence – 5. The debate within the United Nations – 5.1 The positions of States in the 2005 *In Larger Freedom* Report – 5.2 The positions of States in the 2009 *Implementing the responsibility to protect* Report – 6. The position of the European Union at the UN debates – 7. Concluding remarks.

### 1. Introduction

According to the preamble of the Rome Statute of the International Criminal Court (hereinafter the ICC Statute), international core crimes such as genocide, war crimes, and crimes against humanity are ‘unimaginable atrocities that deeply shock the conscience of humanity’ [which] ‘threaten the peace, security and well-being of the world’.<sup>1</sup> These crimes, which represent the most serious and heinous forms of violations of human rights, affect the international community as a whole, and, once perpetrated, they must not go unpunished.<sup>2</sup>

Various theories have followed each other over the years in order to provide a legal justification for third States’ intervention within the borders of those States in which these gross violations of human rights are committed. The present work will focus on one of

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

<sup>2</sup> *ibid.*

them, namely the Responsibility to Protect (also known as R2P). As will be further explained throughout this work, this doctrine could help providing a legal basis to justify, in exceptional circumstances, and only when specific criteria are satisfied, an external intervention with forcible means for humanitarian purposes.

However, the doctrine is highly controversial, due to the doubts regarding its legal status and potential contrast with core international law provisions, and it is anyway not yet possible to ensure its effective implementation. The current situations in Ukraine, or in Israel and the Occupied Palestinian Territory (OPT) show that the Responsibility to Protect is a very important topic to deal with, and which requires greater consideration.<sup>3</sup> Moreover, recent studies acknowledge that there are several ongoing crises, in particular in Africa and in the Middle East, where mass atrocity crimes are occurring and, as a consequence, urgent action is needed.<sup>4</sup> There are also other situations of concern where there is an imminent risk regarding the commission of mass atrocity crimes if an effective preventive action is not immediately initiated.<sup>5</sup>

## **2. The Humanitarian Intervention Doctrine**

Before providing an in-depth analysis of the Responsibility to Protect, it is worth focusing on the main steps which led to its formulation, starting from the analysis of the humanitarian intervention doctrine. In particular, this part will scrutinise the definitional aspects and the legal issues stemming from humanitarian intervention.

### **2.1 An overview**

The dilemma of humanitarian intervention is not new. As a matter of fact, it has been argued that intervention for humanitarian reasons could be traced back to the

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<sup>3</sup> See Global Centre for the Responsibility to Protect, 'R2P Monitor', Issue 70 (1 September 2024) at <<https://www.globalr2p.org/publications/r2p-monitor-issue-70-1-september-2024/>> accessed 30 October 2024, pp. 13-15, 25-26.

<sup>4</sup> *ibid* 1.

<sup>5</sup> *ibid* 29-32.

Christian medieval tradition of just war.<sup>6</sup> The issue of humanitarian intervention was further discussed during the seventeenth and eighteenth centuries within the context of natural law approaches to international law,<sup>7</sup> and in the nineteenth century under a positivist approach. At the time, the tension between respect for State sovereignty and the defence of humanity grew given that several European States, intending to stop the commission of mass atrocities - such as transatlantic slave trade - intervened with forcible means ‘in the cause of humanity’ in different geographical areas, especially in Africa.<sup>8</sup> However, it is only since the adoption of the UN Charter in 1945,<sup>9</sup> that scholars have begun detailed studies on the doctrine of the humanitarian intervention. This emphasis arises from the difficulty in reconciling its interpretation with some core provisions of the Charter, in particular Article 2(4), a basic pillar of the international legal system.

## **2.2 The definitional aspects and the core elements of the Humanitarian Intervention doctrine**

Before analysing the legal challenges of the Responsibility to Protect, it is important to understand what humanitarian intervention means and which are the main elements thereof.

It is worth noting that various definitions were proposed to address the topic of humanitarian intervention. For instance, at the beginning of the twenty-first century,

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<sup>6</sup> Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press 1996) 33-64; Simon Chesterman, *Just war or Just Peace? Humanitarian Intervention and International Law* (OUP 2001) 9. For a further analysis of the origins of the humanitarian intervention doctrine, *inter alia*, see Fabian Klose, ‘The Emergence of Humanitarian Intervention: the Centuries of “Enforcing Humanity”’ in Fabian Klose (ed), *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present* (CUP 2015) 1, 10.

<sup>7</sup> Thanks to the works of leading scholars such as Hugo Grotius who, in his masterpiece, *De jure belli ac pacis*, had the merits to provide for the first time a systematisation of practice and authorities on the law of war. See Chesterman (n 6) 9. See also Hugo Grotius, *De Jure belli ac pacis libri tres* (Clarendon Press 1925). For additional information, see Hedley Bull, ‘The Importance of Grotius in the Study of International relations’ in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds), *Hugo Grotius and International Relations* (Clarendon Press 1990) 65, 71.

<sup>8</sup> Fabian Klose, ‘Enforcing abolition: the entanglement of civil society action, humanitarian norm-setting, and military intervention’ in Fabian Klose (ed), *The Emergence of Humanitarian Intervention* (n 6) 91.

<sup>9</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

Fernando Tesón defined humanitarian intervention as ‘the proportionate transboundary help, including forcible help, provided by governments to individuals in another State who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive governments’.<sup>10</sup> Similarly, humanitarian intervention was understood as ‘the threat or use of force across states borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied’.<sup>11</sup> Nevertheless, unlike the former definition, this latter one mainly relies on ‘the threat of use of force’, which is understood as a core element of this doctrine.

Therefore, the use of military force for humanitarian purposes allows us to distinguish humanitarian intervention from other acts of humanitarian aid or assistance carried out by States or NGOs.<sup>12</sup> Following this path, James Pattison defined humanitarian intervention as the ‘forcible military action by an external agent in the relevant political community with the predominant purpose of preventing, reducing, or halting an ongoing or impeding grievous suffering or loss of life’.<sup>13</sup>

The foregoing discussion identifies four core elements of humanitarian intervention. First, there has to be a forcible military intervention. This requirement allows to exclude from the notion of humanitarian intervention other types of actions such as economic measures (e.g., embargoes), and diplomatic interventions (e.g., the cutting

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<sup>10</sup> Fernando R Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers 1997) 5. On the same path, other scholars defined humanitarian intervention as an ‘action by governments (or, more rarely, by organizations) to prevent or to stop governments, organizations, or factions in a foreign state from violently oppressing, persecuting, or otherwise abusing the human rights of people within that state’. See Brendan Simms, David J B Trim (eds), *Humanitarian Intervention: A History* (CUP 2011) 1. Despite some similarities, it is important to distinguish this type of intervention from ‘humanitarian intervention’ by a State protecting its citizens abroad, such as Israel’s *Entebbe raid* in Uganda in 1976. For further information, see Claus Kreß, Benjamin K Nußberger, ‘The Entebbe Raid - 1976’ in Tom Ruys, Olivier Corten, Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 220.

<sup>11</sup> JL Holzgrefe, ‘The Humanitarian Intervention Debate’ in JL Holzgrefe, Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2004) 18.

<sup>12</sup> See James Pattison, *Humanitarian Intervention & the Responsibility to Protect. Who should Intervene?* (OUP 2010) 26; Chesterman (n 6) 3; Klose (n 6) 22.

<sup>13</sup> Pattison (n 12) 28.

of diplomatic ties). Moreover, as highlighted before, the intervention has to be forcible; non-forcible means, which are not included within this definition, rather fall within the category of humanitarian assistance.<sup>14</sup> Second, concerning the circumstances in which humanitarian intervention could take place, it is important to note that, as mentioned in all of the proposed definitions, the commission of serious human rights violations should be at stake. Thus, to confirm whether the human rights violations meet the threshold of seriousness, it is crucial to thoroughly examine the context in which the external agent intends to intervene under the humanitarian intervention doctrine. Third, the transboundary requirement is another key feature of this doctrine.<sup>15</sup> Therefore, the intervention has to be external. This means that a State facing a humanitarian crisis in its territory does not act according to the humanitarian intervention doctrine. Nevertheless, if the same State intervenes in a third State for humanitarian reasons, its action, provided that the other conditions are met, could fall within the ambit of application of the doctrine. Finally, humanitarian intervention requires a humanitarian purpose.<sup>16</sup> As acknowledged by scholars, the humanitarian purpose has to be the predominant reason which motivates States to intervene in a third State with forcible means.<sup>17</sup> Therefore, the use of force for humanitarian reasons should be distinguished from other types of forcible intervention, such as collective security and self-defence. In this case, the main goal of the external agent is to take action to halt or prevent a humanitarian crisis in a third State where the denial of fundamental human rights is at stake.<sup>18</sup>

Accordingly, when put together, these four core elements provide a comprehensive understanding of the object and scope of the humanitarian intervention doctrine. Moreover, they clearly allow us to distinguish which kinds of actions may fall within or outside the humanitarian intervention doctrine.

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<sup>14</sup> See above (n 12).

<sup>15</sup> Pattison (n 12) 27; Klose (n 6) 8.

<sup>16</sup> *ibid* 27.

<sup>17</sup> *ibid* 27-28. See also Klose (n 6) 8.

<sup>18</sup> *cf* Pattison (n 12) 27.

### 2.3 Humanitarian intervention in practice: a focus on its intrinsic ambiguities

Having clarified the definitional aspects of this doctrine, it is worth dwelling on some instances in which humanitarian reasons have been either offered or assumed to justify forcible intervention in a third State.<sup>19</sup>

For instance, starting from the 1970s, and despite being officially justified on the grounds of self-defence, humanitarian reasons could be assumed in relation with India's intervention in Bangladesh (1971), Tanzania's intervention in Uganda (1979), and Vietnam's in Cambodia (1979).<sup>20</sup> A common feature in all the aforementioned situations is that in none of those cases there was a previous UN Security Council authorisation allowing the use of force.<sup>21</sup> Furthermore, with the only exception of the Tanzanian intervention in Uganda,<sup>22</sup> these types of actions were strongly condemned by the international community of States.<sup>23</sup>

Specifically, the Vietnamese military intervention in Cambodia was deemed illegal for breaching Cambodian sovereignty. The US stressed that, under those circumstances, unilateral intervention against Cambodia could not be justified; consequently, they sponsored a resolution in order to condemn this unlawful intervention.<sup>24</sup> During the UN Security Council meetings, various States labelled Vietnamese intervention as unlawful. In particular, France stated that, despite the deplorable conditions regarding the respect of human rights in Cambodia, justifying a military intervention on those grounds could

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<sup>19</sup> Louise Arbour, 'The Responsibility to Protect as a Duty of Care in International Law and Practice' (2008) 34 REV. INT'L STUD. 445, 446.

<sup>20</sup> As for India's forcible intervention in Bangladesh, see 1971 UNYB 144. Regarding Tanzania's use of force in Uganda, see 1979 UNYB 262. Concerning Vietnam's military action in Cambodia, see 1979 UNYB 274.

<sup>21</sup> cf Arbour (n 19) 446.

<sup>22</sup> Where Tanzanian forcible intervention in Uganda had the result of stopping massive atrocities carried out in Uganda. For this reason, even though there was no existing legal ground to justify such conduct, Tanzania did not face any legal responsibility. As a result, the international community interpreted the military action, despite the Tanzanian government's official justification as self-defence, as an act within the scope of humanitarian intervention. Chesterman (n 6) 77-79; Nicoleta Mirza, 'The (II) Legality of Humanitarian Intervention' (2020) 12 Amsterdam Law Forum 56, 62. See also UO Umozurike, 'Tanzania's Intervention in Uganda' (1982) 20 Archiv de Völkerrecht 301, 312-313.

<sup>23</sup> cf Arbour (n 19) 446.

<sup>24</sup> Chesterman (n 6) 79-80. See also Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2000) 90-91.

be extremely dangerous since it could ultimately jeopardise the very maintenance of law and order.<sup>25</sup> In addition to the absence of prior UN Security Council authorisation for forcible intervention, the military intervention in Cambodia was deemed unlawful due to Vietnam's self-interest-driven motivation, rather than a primary humanitarian objective, which is a crucial component of the humanitarian intervention doctrine.<sup>26</sup>

As outlined in the previous examples, in order to verify whether this doctrine complies with international law, it is necessary to focus on the provisions enshrined within the UN Charter.<sup>27</sup> In particular, Article 2(4), a cornerstone provision of the UN Charter,<sup>28</sup> enshrines that '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'.<sup>29</sup> There is broad consensus that the prohibition of the use of force is understood not only as a treaty obligation but also as customary international law and even with a *jus cogens* status.<sup>30</sup>

The prohibition of the use of force falls within the ambit of application of the principle of non-intervention which represents a well-established rule within the

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<sup>25</sup> UN SCOR, 2109<sup>th</sup> mtg. at 3 (12 January 1979) UN Doc S/PV.2109, para 36. Following the same path, the United Kingdom asserted: 'Whatever is said about human rights in Kampuchea, it cannot excuse Viet Nam, whose own human rights record is deplorable, for violating the territorial integrity of Democratic Kampuchea, an independent State Member of the United Nations'. See UN SCOR, 2110<sup>th</sup> mtg. at 3 (13 January 1979) UN Doc S/PV.2110, para 65.

<sup>26</sup> See Alex J Bellamy, Sara E Davies, Luke Glanville (eds), *The Responsibility to Protect and International Law* (Brill | Nijhoff 2011) 5. See also Arbour (n 19) 446.

<sup>27</sup> which has been defined as 'the starting point for analyzing the modern concept of humanitarian intervention'. See Kenneth Watkin, 'Humanitarian Intervention and the Responsibility to Protect: Where it Stands in 2020' (2020) 26 Sw J Int'l L 213, 219.

<sup>28</sup> *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda) Judgment*, I.C.J. Reports 2005, p.168, p. 223, para 148.

<sup>29</sup> See art. 2(4) UN Charter.

<sup>30</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, pp. 100-01, 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* (Brill | Nijhoff 1986) 147; Olivier Dorr, Albrecht Randelzhofer 'Article 2(4)' in Bruno Simma et al (ed), *Charter of the United Nations: A Commentary* (OUP 2012) 200, 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.

international legal framework.<sup>31</sup> The International Court of Justice emphasised the relevance of this principle on various occasions. For instance, in the *Nicaragua* case, it stated:

‘[...] the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference’ and that forbids ‘all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States’.<sup>32</sup>

Article 2(4) of the UN Charter<sup>33</sup> envisages that forcible operations have to be carried out in accordance with international law. Therefore, a military intervention for humanitarian purposes is lawful only if a State is acting in self-defence or once obtained the UN Security Council authorisation. The 1994 NATO intervention in Bosnia represents a vivid example of authorised humanitarian intervention. In that circumstance, the UN Security Council authorised the use of force by acknowledging that the situation in Bosnia constituted ‘a threat to international peace and security’.<sup>34</sup> In a subsequent resolution, by empowering the United Nations Protection Force (UNPROFOR) ‘to take the necessary measures, including the use of force’,<sup>35</sup> it provided a legal basis for the forcible engagement. On the contrary, when the previous authorisation lacks,<sup>36</sup> this doctrine should be considered unlawful since it is contrast with Article 2(4) of the UN Charter, a core pillar of the international legal order. Accordingly, if taken alone, humanitarian intervention cannot be deemed legal; rather, as noted by Chesterman, it remains at most in a ‘legal penumbra’ as it may be regarded as lawful only with external

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<sup>31</sup> The ICJ defined it as ‘a corollary of every state’s right to sovereignty, territorial integrity and political independence’. See Robert Jennings, Arthur Watts (eds), *Oppenheim’s International Law*, Volume I (Longmans 1992) 428.

<sup>32</sup> *Military and Paramilitary Activities in and against Nicaragua* (n 30) paras 202 and 205. On the same path, in the *DRC v. Uganda*, the Court reiterated the ambit of application of the principle of non-intervention. *Armed Activities on the Territory of the Congo* (n 28) para 164.

<sup>33</sup> The general prohibition of the use of force is reinforced in art. 2(7) of the UN Charter where it is stated that ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [...]’ except when the UNSC acting under Chapter VII authorises the application of enforcement measures.

<sup>34</sup> UNSC Res 770 (13 August 1992) UN Doc S/RES/770 (1992).

<sup>35</sup> UNSC Res 836 (4 June 1993) UN Doc S/RES/836 (1993) para 9.

<sup>36</sup> *Mirza* (n 22) 2.

recognition, either by the UN Security Council either by the States in which the forcible intervention takes place.<sup>37</sup>

However, during the 1990s, a growing interest in protecting and promoting international human rights led to a renewed focus on the issue of humanitarian intervention. In particular, scholars questioned whether the principle of non-intervention could be set aside by allowing the international community to intervene, even with forcible means, to put an end to gross and systemic human rights violations in those scenarios in which States are unable or unwilling to protect its citizens from the commission of mass atrocities.<sup>38</sup>

As mentioned above, the sovereignty of States represents one of the basic pillars of the international legal framework; any restriction of this principle has to be justified by equally compelling needs of the international community. Under this framework, human rights aim to play a fundamental role in, on the one hand, narrowing the object and purpose of the principle of non-intervention and, on the other, providing a legal basis to justify humanitarian intervention in third States.

From this perspective, questions have arisen concerning the legality of the humanitarian intervention and its legal consequences in case of inaction. For instance, following this approach, the international community faced fierce criticism for its lack of action in halting and preventing the commission of the crime of genocide in Rwanda. With a timely and effective intervention, the international community, which had substantial knowledge of the intensity of the genocide and necessary means to stop those massive atrocities,<sup>39</sup> could have arguably avoided the death of around 800.000 human beings.<sup>40</sup> Moreover, as stated by the UN Secretary-General, the inaction of the international community had also the effect of continuing to undermine confidence in the

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<sup>37</sup> Chesterman (n 6) 87.

<sup>38</sup> Gleider Hernández, *International Law* (OUP 2019) 361.

<sup>39</sup> See Mirza (n 22) 5-6. For further details, see also Christine Gray, *International Law and the Use of Force* (OUP 2018) 298-300.

<sup>40</sup> BBCNEWS, 'Rwanda genocide: 100 days of slaughter' (4 April 2019) at <<https://www.bbc.com/news/world-africa-26875506>> accessed 18 September 2024.

United Nations machinery.<sup>41</sup> Therefore, it is safe to state that the doctrine of humanitarian intervention is controversial ‘both when it happens, and when it has failed to happen’.<sup>42</sup>

#### **2.4 A case study: the NATO humanitarian intervention in Kosovo and its unresolved legal issues**

We use the 1999 NATO intervention in Kosovo as an emblematic case study which shows the difficulties and problems relating to the legal recognition of the humanitarian intervention doctrine.

To provide some background, it is worth recalling that Kosovo was one of the autonomous provinces of the Federal Republic of Yugoslavia (hereinafter FRY). Starting from the early 1990s, the nationalist policies set by the Serbian president Slobodan Milošević, aimed at changing the ethnic composition of Kosovo, resulted in a series of repressive measures against Albanians living in Kosovo which led to their economic marginalisation.<sup>43</sup> In order to counter the oppressive regime, and, once acknowledged the unfeasibility to face the crisis through non-violent resistance movement, the Kosovo Liberation Army (KLA) started low level guerrilla warfare, hoping for the assistance of the international community.<sup>44</sup> However, the FRY army responded to KLA attacks, and, in February 1998, with the Serbian massacre of 58 people in Prekazi, an armed conflict officially ensued.<sup>45</sup> In March 1999, in face of failing attempts to reach a diplomatic solution, NATO intervened against the Federal Republic of Yugoslavia with a seventy-eight-day bombing campaign.<sup>46</sup>

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<sup>41</sup> Report of the Secretary-General, *The causes of conflict and the promotion of durable peace and sustainable development in Africa*, UN Doc S/1998/318, para 11.

<sup>42</sup> ICISS, *The Responsibility to Protect* (14 August 2002) UN Doc A/57/303, Annex, p.1, para 1.1

<sup>43</sup> See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4. See also Thorsten Gromes, *A Humanitarian Milestone? Nato's 1999 intervention in Kosovo and trends in military responses to mass violence*, PRIF Report (February 2019) p. 3

<sup>44</sup> *Kosovo Report* (n 43) 2.

<sup>45</sup> *ibid.*

<sup>46</sup> Hernández (n 20) 361.

Even though some scholars considered the humanitarian intervention in Kosovo as a ‘humanitarian milestone’,<sup>47</sup> it is important to discuss the legality of such intervention since no UN Security Council authorisation was provided to allow NATO’s use of force.<sup>48</sup> The issue of legality of the NATO action in Kosovo has been extensively analysed ever since.

First, in order to appreciate State practice regarding the legal status of the humanitarian intervention doctrine, it is worth focusing on the debates which took place within UN Security Council. On 24 March 1999, the day after the beginning of the NATO bombing campaign, various States expressed their views regarding the military engagement.<sup>49</sup> Germany, speaking in the capacity of the Presidency of the Council of the European Union, argued that States of the European Union are under a moral obligation to avoid the recurrence of episodes of violence, culminating in grave human rights violations.<sup>50</sup> Others, such as the Netherlands and the United Kingdom, went even further by arguing that the NATO action was legal.<sup>51</sup> In particular, United Kingdom’s representative, Sir Jeremy Greenstock, stated that:

‘The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the Federal Republic of Yugoslavia would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions. Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian

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<sup>47</sup> See, *inter alia*, Aidan Hehir, *Humanitarian Intervention After Kosovo: Iraq, Darfur and the Record of Global Civil Society* (Palgrave Macmillan 2008) 5. On the same path, other scholars stated that the Kosovo intervention had to be regarded as the ‘the first war even fought’ as well as an ‘important precedent for the future’. See William Joseph Buckley (ed), *Kosovo. Contending Voices on Balkan Interventions* (William B Eerdmans Pub 2000) 240.

<sup>48</sup> Human Rights Watch reports that NATO airstrikes killed between 498 and 528 civilians. See <<https://www.hrw.org/reports/2000/nato/Natbm200-01.htm>> accessed 26 September 2024.

<sup>49</sup> UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999).

<sup>50</sup> *ibid* 17.

<sup>51</sup> For the position of the Netherlands, see UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999) p. 8; for the position of the United Kingdom, see UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999) pp. 11-12.

necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose'.<sup>52</sup>

The issue of the legality of humanitarian intervention was also addressed within the UN Security Council during the debates of a draft resolution aimed at condemning NATO's intervention in Kosovo. However, the draft resolution was ultimately rejected in a 12-3 vote by the UN Security Council with the vetoes from the UK, US and France.<sup>53</sup> Further indirect evidence can be found in a subsequent UN Security Council resolution which, once the conflict was ended, urged the FRY to halt acts of violence and repression in Kosovo and provide for a complete withdrawal of its army from the Kosovar territory.<sup>54</sup> However, on that occasion, the UN Security Council did not tackle the issue of the legality of NATO's intervention.

Contrary to this previous approach, the debates held at the International Court of Justice seem to provide a more exhaustive analysis to the question at stake. Since Yugoslavia instituted proceedings at the ICJ against nine NATO Members, it is worth focusing on the written pleadings to the Court of the States being sued by Yugoslavia where they provided their legal justification for the intervention.<sup>55</sup>

The Respondent States adopted three different positions. First, there were a group of States (France, Portugal, Italy and Canada) which failed to provide legal justifications

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<sup>52</sup> UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999) p. 12.

<sup>53</sup> UNSC Verbatim Record (26 March 1999) UN Doc S/PV.3989.

<sup>54</sup> UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 (1999) paras 3, 9.

<sup>55</sup> See *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 124. *Legality of Use of Force (Yugoslavia v. Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 259. *Legality of Use of Force (Yugoslavia v. France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 363. *Legality of Use of Force (Yugoslavia v. Germany), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 422. *Legality of Use of Force (Yugoslavia v. Italy), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 481. *Legality of Use of Force (Yugoslavia v. Netherlands), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 542. *Legality of Use of Force (Yugoslavia v. Portugal), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 656. *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 761. *Legality of Use of Force (Yugoslavia v. United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 826. *Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 916.

for the NATO's intervention in Kosovo.<sup>56</sup> Second, other States, including the United States, the United Kingdom, Spain, Germany and the Netherlands, justified their acts relying upon the concept of 'humanitarian catastrophe'.<sup>57</sup> The United Kingdom justified NATO's engagement as 'an exceptional measure to prevent an overwhelming humanitarian catastrophe'.<sup>58</sup> Finally, only Belgium included this doctrine as one of the legal justifications for the aerial bombardment attack.<sup>59</sup> Accordingly, it stated that, in exceptional circumstances, humanitarian intervention should be regarded as lawful, since it is carried out to protect fundamental values considered as peremptory norms of international law, as well as to prevent an impending humanitarian catastrophe.<sup>60</sup> Concerning the NATO's intervention in Kosovo, Belgium further clarified that the use of force was not meant to undermine the political independence and territorial integrity of the Federal Republic of Yugoslavia; accordingly, the armed humanitarian intervention should be considered as consistent with Article 2(4) of the UN Charter.<sup>61</sup>

Despite Belgium's attempt to anchor the doctrine of humanitarian intervention on a legal basis, the positions adopted within the international framework once the conflict was over highlighted the problematic nature of this doctrine and the lack of generalised consent among States. The *Kosovo Report* of the Independent International Commission on Kosovo stated that the NATO intervention in Kosovo was 'illegal but legitimate'. Even if in that case the use of forcible measures was recognised as legitimate, the NATO

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<sup>56</sup> Chesterman (n 6) 214.

<sup>57</sup> For the position of the US, see *Legality of Use of Force* (n 55) pleadings of the United States, 11 May 1999, CR 99/24, para 1.7. For the position of the UK, see *Legality of Use of Force* (n 55) pleadings of the United Kingdom, 11 May 1999, CR 99/23, paras 17-18. Concerning Spain, see *Legality of Use of Force* (n 55) pleadings of Spain, 11 May 1999, CR 99/22, para 1. Regarding Germany, see *Legality of Use of Force* (n 55), pleadings of Germany, 11 May 1999, CR 99/18, para 1.3.1. Finally, for the position of the Netherlands, see *Legality of Use of Force* (n 55) pleadings of the Netherlands, 11 May 1999, CR 99/20, para 40.

<sup>58</sup> See *Legality of Use of Force* (n 55) pleadings of the United Kingdom, 11 May 1999, CR 99/23, para 17.

<sup>59</sup> Jonathan I Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 32 *Vand J Transnat'l L* 1231, 1239.

<sup>60</sup> See *Legality of Use of Force* (n 55) pleadings of Belgium, 10 May 1999, CR 99/15 (uncorrected translation) p. 6. See also Chesterman (n 6) 213.

<sup>61</sup> *ibid.* On this aspect, Belgium further stated that NATO action had to be considered as 'a case of a lawful armed humanitarian intervention for which there is a compelling necessity'. See *Legality of Use of Force* (n 55) pleadings of Belgium, 10 May 1999, CR 99/15 (uncorrected translation) p. 7.

military intervention was considered per se as illegal since '[...] it did not receive prior approval from the United Nations Security Council'.<sup>62</sup>

One of the major issues regarding the effective implementation of the humanitarian intervention doctrine lies in the lack of State practice in considering the lawfulness of such action. Thus, there was no generalised consensus on the use of force, even if for humanitarian purposes, without the previous authorisation of the UN Security Council. Indeed, the legality of the aforementioned doctrine faced numerous objections. In 1999, States of the Non-Aligned Movement emphasised that the humanitarian intervention doctrine had no legal basis in the UN Charter or international law.<sup>63</sup>

In light of the previous considerations, the humanitarian intervention doctrine does not provide a solid legal basis for the use of force for humanitarian reasons, because of its contrast with core UN Charter provisions, its arbitrary character, as well as the possibility of being open to abuse by the strongest States to justify forcible intervention against the weakest ones. Furthermore, despite the wider awareness of fundamental human rights and the consequent rethinking of the sovereignty of States, the lack of a legal framework that explicitly regulates and defines the humanitarian intervention has created a certain degree of uncertainty in finding a balance between, on the one hand, the limits of State sovereignty and, on the other, the urgent need to intervene to stop gross human rights violations.<sup>64</sup>

This tension between these two contrasting poles was recognised in the 1999 Report of the former UN Secretary-General Kofi Annan where he underlined that:

'[...] with relatively few inter-State wars, traditional rationales for intervention have become decreasingly relevant, while humanitarian and human rights principles have increasingly been invoked to justify the use of force in internal wars, not always with the authorization of the Security Council'.<sup>65</sup>

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<sup>62</sup> Kosovo Report (n 43) 2.

<sup>63</sup> See The Twenty-third Annual Meeting of the Ministers for Foreign Affairs of the Group of 77 (24 September 1999) para 69, at <<https://www.g77.org/doc/Decl1999.html>> accessed 7 October 2024.

<sup>64</sup> See Mirza (n 22) 1.

<sup>65</sup> UN Secretary-General, 'Report on the Work of the Organization of its Fifty-Fourth Session', para 62, UN Doc A/67/1-S/1 (1999).

However, he also stressed that:

'enforcement actions without Security Council authorization threaten the very core of the international security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force'.<sup>66</sup>

Accordingly, despite a greater recognition of the protection of fundamental human rights, the humanitarian intervention doctrine does not represent the proper solution in order to justify a forcible intervention for humanitarian purposes in third States.

### **3. A paradigm shift for the third millennium: the emergence of the Responsibility to Protect**

In order to overcome the legal issues stemming from the humanitarian intervention doctrine, at the beginning of the 21<sup>st</sup> Century two Reports addressed the question of finding a balance between the principle of non-intervention and the prohibition of the use of force with the need to ensure an effective protection of fundamental human rights.

#### **3.1 The 2000 Dutch Report**

The Dutch government commissioned the first one, *Humanitarian Intervention* (also known as the Dutch Report), with the primary goal of clarifying the international legal issues associated with the humanitarian intervention doctrine.<sup>67</sup> On 12 October 2000, the Dutch Minister of Foreign Affairs, acting on behalf of the government, asked the Advisory Committee on Issues of Public International Law (CAVV) and the Advisory Council on International Affairs (AIV) to draft a joint advisory report addressing the issues raised by the humanitarian intervention doctrine. Specifically, he requested to focus on the legal status of the humanitarian intervention doctrine, as it appeared to lack

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<sup>66</sup> *ibid* para 66.

<sup>67</sup> Advisory Council on International Affairs, Advisory Committee on Issues of Public International Law, *Humanitarian Intervention* (April 2000).

a clear and accepted legal foundation.<sup>68</sup> One of the major issues tackled by CAVV and AIV regarded the existence of sufficient *opinio iuris* in order to consider the humanitarian intervention as a doctrine established in accordance with the international legal framework, and, in particular, the prohibition of the threat or use of force set out in Article 2(4) of the UN Charter. Alongside recalling that there were no legal grounds to consider humanitarian intervention lawful without the previous authorisation of the UN Security Council, the Report also emphasised that there was no clear evidence of such practice emerging.<sup>69</sup>

Nevertheless, due to a growing consideration of the centrality of human rights in the international framework, the Report underlined that, while interpreting and applying international law, the international community cannot adopt a passive attitude; instead, it has to act to halt and prevent gross human rights violations.<sup>70</sup> In this regard, there was a perceived need to focus on the increasing consideration given to the concept of the international duty to protect and promote fundamental human rights. According to both CAVV and AIV, this duty could serve as the basis for the further development of a customary law justification for humanitarian intervention without a UN Security Council mandate.<sup>71</sup>

In order to justify this view, apart from highlighting the importance of core human rights instruments in narrowing the sovereignty of States in favour of an effective protection of human rights,<sup>72</sup> special emphasis was given to domestic and international jurisprudence. Concerning domestic case-law, the Report recalled the 1999 final decision of the British House of Lords, dealing with Augusto Pinochet's extradition request, issued

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<sup>68</sup> *ibid* 3.

<sup>69</sup> *ibid* 23, 26. See also Watkin (n 27) 226.

<sup>70</sup> *ibid*.

<sup>71</sup> *Humanitarian intervention* (n 67) 23.

<sup>72</sup> Concerning human rights instruments, *inter alia*, see UNGA Res 217A (III), Universal Declaration of Human Rights (10 December 1948) UN Doc A/810 (1948) 71; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

by Spain.<sup>73</sup> While recognising the importance of the doctrine of State immunity within the international legal framework, six out of seven judges of the House of Lords concurred that the immunity enjoyed by Augusto Pinochet, former Chilean President, did not apply in relation to his extradition for the crime of torture.<sup>74</sup>

Focusing on international jurisprudence, a great emphasis was given on the *Barcelona Traction* case issued by the International Court of Justice. In particular, in paragraph 33 of the Judgment, the ICJ sketched the concept of *erga omnes* obligations, stating that there are certain obligations that, due to their importance, affect the international community as a whole and, as a consequence, '[...] all States can be held to have legal interest in their protection'.<sup>75</sup>

Due to the relevance of fundamental human rights within the international framework, their breach does only affect the State in whose territory the wrongful act is committed; it also allows the international community to take action to ensure the respect of these provisions. Accordingly, the Dutch Report had the merit of starting a paradigm shift by emphasising the need to focus on a duty to protect and promote fundamental human rights headed by the international community, which might justify a forcible intervention for humanitarian purposes when the commission of flagrant human rights violations is at stake.

### **3.2 Changing the narrative: The ICISS Report and the introduction of the Responsibility to Protect**

Pushed by the need to find a lawful solution to the question posed by Kofi Annan regarding the possibility to reconcile the inviolability of State sovereignty with the need to respond to 'gross and systematic violations of human rights that offend every precept

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<sup>73</sup> *Humanitarian intervention* (n 67) 24. See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) [1999] 2 A11 ER 97, HL.

<sup>74</sup> *ibid.* For a further analysis of the Pinochet case, see Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (CUP 2019) 512-514.

<sup>75</sup> *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, p. 32, para 33. In the following paragraph, the Court provided some examples of *erga omnes* obligations such as the prohibition of aggression and genocide, and the protection of fundamental rights of human beings such as the protection from slavery and racial discrimination.

of our common humanity’,<sup>76</sup> 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 (hereinafter ICISS).<sup>77</sup> The ICISS Report confirms the Dutch Report’s focus to the concept of Responsibility to Protect rather than the blurred one of humanitarian intervention. The Report clearly states that terms such as ‘humanitarian intervention’ and ‘right to intervene’ are not useful in order to address the legal issues at stake; rather, they should be viewed as outdated and unhelpful.<sup>78</sup> Thus, the shifting of the terms of the debate is justified by the need to focus more on concrete and urgent needs of the beneficiaries of the intervention rather than on States’ abstract claims and prerogatives.<sup>79</sup> Moreover, unlike the humanitarian intervention doctrine, which mainly focused on military intervention, the Report highlights the need to consider *ex-ante* and *ex-post* forcible intervention, focusing therefore both on preventing engagement and follow-up assistance.<sup>80</sup>

According to this new approach, sovereignty must no longer be understood as control but has to be directed towards the concept of both external and internal responsibility.<sup>81</sup> Concerning this aspect, one of the main points of the Report lies in the fact that States have a responsibility to protect their own citizens from avoidable catastrophe. However, according to the updated concept of sovereignty linked with the human rights dimension, if States are ‘unwilling or unable to do so, that responsibility must be borne by the broader community of States’.<sup>82</sup>

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<sup>76</sup> ‘[...] 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.

<sup>77</sup> ICISS, *The Responsibility to Protect* (n 42).

<sup>78</sup> *The Responsibility to Protect* (n 42) para 2.4. cf Patrick Butchard, *The Responsibility to Protect and the Failures of the United Nations Security Council* (Hart Publishing 2020) 30.

<sup>79</sup> *The Responsibility to Protect* (n 42) para 2.28.

<sup>80</sup> *ibid.*

<sup>81</sup> 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, 194. See also *The Responsibility to Protect* (n 42) paras 2.14, 2.15.

<sup>82</sup> *The Responsibility to Protect* (n 42) VIII.

Within this perspective, the ICISS Report identifies three main elements of the Responsibility to Protect: (1) the Responsibility to Prevent; (2) the Responsibility to React, and (3) the Responsibility to Rebuild.<sup>83</sup> As mentioned before, States in whose territory the violation of human rights is perpetrated have the primary duty to protect its populations. The international community's responsibility arises only when States are unwilling or unable to do so, failing therefore to comply with their duty to prevent. This is followed, once the conflict is ended, by the responsibility to rebuild, which aims at providing full assistance with recovery, reconstruction and reconciliation.<sup>84</sup>

Concerning the Responsibility to React, considered as the most sensitive issue of the Report, the use of forcible measures is permitted only in extreme and exceptional circumstances when peaceful measures turn out to be inadequate to ensure an effective response to gross human rights violations which genuinely 'shock the conscience of mankind' or which present such a clear and present danger to international security.<sup>85</sup> Furthermore, military intervention is triggered only if six conditions are met. These requirements are: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.<sup>86</sup>

The Report also identifies the UN Security Council as the appropriate body entitled to perform this task.<sup>87</sup> However, as the subsequent paragraphs will further examine, the existence of the veto power granted to Permanent Five Members of the UN Security Council could paralyse the Council. In particular, it could prevent this body from adopting a resolution addressing a concrete issue at hand even if such intervention would have been necessary for the maintenance of international peace and security. To tackle this issue, the ICISS proposed the adoption of a code of conduct according to which a permanent member, when its vital national interests were not at stake, would refrain from using the veto power to prevent the adoption of a UN Security Council resolution for which there

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<sup>83</sup> *ibid* XI.

<sup>84</sup> *ibid*.

<sup>85</sup> The Responsibility to Protect (n 42) paras 4.1, 4.13.

<sup>86</sup> *ibid* para 4.16. For a further analysis of the Just War principles concerning the use of force, Stephen C Neff, *War and the Law of Nations. A General History* (CUP 2005) 45-59.

<sup>87</sup> The Responsibility to Protect (n 42) XII.

would have been otherwise majority support.<sup>88</sup> Should the UN Security Council be unable or unwilling to act, the Report envisages the possibility to resort to alternative solutions. First, it mentions that it could be possible to rely on the UN General Assembly meeting in an Emergency Special Session under the established ‘Uniting for Peace’ procedures which could allow the UN General Assembly to take consideration of the matter.<sup>89</sup> Second, it also contemplates the possibility of regional or sub-regional organizations’ intervention acting under Chapter VIII of the Charter.<sup>90</sup> However, both solutions are problematic from a legal point of view, and they do ultimately need the UN Security Council authorisation in order to provide a legal foundation for their actions. As for the former proposal, it is considered not only unlikely, since the two-thirds vote in the General Assembly is needed, but also illegitimate.<sup>91</sup> Regarding the latter, the UN Security Council subsequent authorisation is required.<sup>92</sup> For these reasons, considering the UN Security Council as the legitimate body to intervene in such cases, as outlined in the Report, ‘the task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has’.<sup>93</sup>

The ICISS Report, despite its new approach focusing on the concept of the Responsibility to Protect rather than on the rejected doctrine of the humanitarian intervention, did not receive unanimous support by the international community. In particular, the fiercest critics came from a group of 132 States forming the so-called Non-Aligned Movement (NAM); they considered the Responsibility to Protect as another incarnation of moral imperialism, a mere expedient of the great powers to impose their

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<sup>88</sup> ‘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’. See *The Responsibility to Protect* (n 42) para 6.21.

<sup>89</sup> *ibid* para 6.29. UNGA, *Uniting for Peace* (3 November 1950) UN Doc A/RES/377. Within the Uniting for Peace procedure, on 1 March 2022, the General Assembly, due to the inaction of the Security Council, adopted a resolution firmly condemning the act of aggression carried out by the Russian Federation against Ukraine. See UNGA Res (1 March 2022) UN Doc A/ES-11/L.1.

<sup>90</sup> *The Responsibility to Protect* (n 42) para 6.31.

<sup>91</sup> See Benedetto Conforti, *The Law and Practice of the United Nations* (Brill | Nijhoff 2005) 225-226.

<sup>92</sup> *The Responsibility to Protect* (n 42) XIII. See also Watkin (n 27) 227.

<sup>93</sup> *ibid* XII.

interests and values on the weakest States.<sup>94</sup> Furthermore, they vividly criticised its lack of coherence by stating that while, on the one hand, this doctrine is aimed at reducing sovereignty in the name of universal humanitarian considerations, on the other, it expands sovereignty itself in an interventionist sense, thereby only limiting the sovereignty of the weakest States while extraordinarily reinforcing that of the strongest ones.<sup>95</sup> In other words, their primary concern was that the concept of R2P could be abused by great powers. As a matter of fact, it could be manipulated to justify a forcible intervention in third States going beyond mere humanitarian purposes, thus unlawfully interfering with the sovereignty of those States through the implementation of their foreign policies, and ultimately causing, for instance, regime change - as it actually occurred a few years later in relation with NATO's intervention in Libya.<sup>96</sup>

### **3.3 The affirmation of the Responsibility to Protect within the United Nations**

Within the UN framework, the UN Secretary-General first addressed the notion of Responsibility to Protect by creating a High-Level Panel on Threats, Challenge and Change, which, in 2004, issued the Report on 'A More Secure World: Our Shared Responsibility'.<sup>97</sup> On that occasion, the Panel endorsed the Responsibility to Protect as an emerging norm of international law. It emphasised that, as a measure of last resort, the UN Security Council can authorise forcible intervention in the event of genocide and other large-scale killing, ethnic cleansing, or serious violations of international humanitarian law which sovereign States have proved powerless or unwilling to prevent.<sup>98</sup> Following the same path of the ICISS Report, the UN Secretary-General,

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<sup>94</sup> See Arbour (n 19) 448; see also Focarelli (n 81) 202.

<sup>95</sup> Focarelli (n 81) 202.

<sup>96</sup> Which was previously authorised by the Security Council. See UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011). For further reading in relation to the military intervention in Libya, see, *inter alia*, Geir Ulfstein, Hege Føsum Christiansen, 'The Legality of NATO's Use of Force in Libya' (2013) 62 ILCQ 159; Christian Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire' (2011) 60 ILCQ 767.

<sup>97</sup> UN Secretary-General, *A More Secure World: Our Shared Responsibility* (2 December 2004) UN Doc A/59/565.

<sup>98</sup> *ibid.* para 203. See Jared Genser, Irwin Cotler, *The Responsibility to Protect. The Promise of Stopping Mass Atrocities in our Time* (OUP 2011) 13. See also Focarelli (n 81) 203; Watkin (n 27) 228-229; Butchard (n 78) 36-37; Klose (n 6) 312.

acknowledged the UN Security Council as the proper institutional body entrusted to authorise the use of force for humanitarian purposes; at least five basic conditions of legitimacy should be fulfilled to this effect, namely the seriousness of the threat, proper purpose, last resort, proportional means and the balance of consequences.<sup>99</sup>

A few months later, the UN Secretary-General issued his Report 'In Larger Freedom: Towards Development, Security and Human Rights for All'<sup>100</sup> in which he further qualified the Responsibility to Protect as an emerging international legal norm.<sup>101</sup> He also stressed the relevant role played by the UN Security Council in approving the use of force, along with the conditions that warrant its legality.<sup>102</sup> Despite acknowledging the sensitivity of this issue, the UN Secretary-General, firmly upheld the importance of the doctrine and called on member States to embrace it.<sup>103</sup>

Taking into account the growing impact and the broader discussion concerning this topic, during the 2005 *World Summit Outcome*, one of the largest meetings of heads of governments in history, the UN and its member States officially committed to the Responsibility to Protect.<sup>104</sup> Paragraphs 138 and 139 are to be deemed as the operative basis of the R2P doctrine. The first paragraph underlines that States have the responsibility to protect their populations from the commission of genocide, war crimes, ethnic cleansing and crimes against humanity. If compared to the ICISS and UN

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<sup>99</sup> *A More Secure World* (n 97) para 207. The criteria of legitimacy set out in the *A More Secure World* Report slightly differ from those of the ICISS Report, which, as mentioned before, were: right authority, just cause, right intention, last resort, proportional means and reasonable prospects. See (n 86). cf Bellamy (n 26) 64; Butchard (n 78) 37.

<sup>100</sup> UN Secretary-General, *In Larger Freedom, Towards Development, Security and Human Rights for All* (21 March 2005) UN Doc A/59/2005.

<sup>101</sup> *ibid* para 135. See also Butchard (n 78) 37.

<sup>102</sup> Concerning the Security Council previous authorisation, see *In Larger Freedom* (n 100) para 135. As regards 'Just War' criteria, para 126 states that '[...] When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success'. See *In Larger Freedom* (n 100) para 126. See also Bellamy (n 26) 64-65.

<sup>103</sup> On this aspect, he stressed: 'I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it'. See *In Larger Freedom* (n 100) para 135. See also Genser (n 98) 15; Butchard (n 78) 37.

<sup>104</sup> UNGA, *World Summit Outcome* (24 October 2005) UN Doc A/RES/60/1. See also Genser (n 98) 21-22.

Secretary-General's Reports, this section encapsulates a narrower approach in determining the application of the Responsibility to Protect. While according to the *World Summit Outcome* the Responsibility to Protect is triggered only when the commission of one of the abovementioned crimes is at stake, the ICISS Report envisaged a broader application, since it did not specify the context in which crimes such as rape or starvation could have been committed.<sup>105</sup> Paragraph 138 further clarifies that the Responsibility to Protect encompasses both the prevention and incitement of these crimes. As a matter of fact, the duty to prevent the commission of the abovementioned atrocities is grounded on existing international law. For instance, Article 1 of the Genocide Convention envisages that States have not only the duty to punish genocide but also an obligation to prevent the commission of the 'crime of crimes'.<sup>106</sup> The fourth sentence of paragraph 138 of the *World Summit Outcome* also recalls international community's role in encouraging and helping States to effectively exercise the responsibility to protect when necessary.<sup>107</sup>

As for paragraph 139, it envisages that the international community, in accordance with UN Charter Chapters VI and VIII, has the responsibility to employ appropriate diplomatic, humanitarian and other peaceful means, in order to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>108</sup> However, in exceptional circumstances, it could also be entitled to act with forcible means, provided that certain criteria are met. Thus, it points out that the international community, through the United Nations is:

'[...] prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be

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<sup>105</sup> The Responsibility to Protect (n 42) VIII; see also Butchard (n 78) 38.

<sup>106</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. See also *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. For a comprehensive study of this crime, see William A Schabas, *Genocide in International Law: The Crime of Crimes* (OUP 2009). cf Chapter II, para 2.

<sup>107</sup> 'The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability'. *World Summit Outcome* (n 104) para 138.

<sup>108</sup> *ibid* para 139.

inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.<sup>109</sup>

The *World Summit Outcome*, despite a more conservative approach than the ICISS Report,<sup>110</sup> represents a step forward in raising awareness of the Responsibility to Protect<sup>111</sup> since, on that occasion, it was officially recognised as a political imperative by the international community.<sup>112</sup>

As outlined in the 2009 UN Secretary-General's Report, *Implementing the responsibility to protect*, this doctrine is based on three pillars: 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).<sup>113</sup> The 'Three-Pillar' approach set out in the 2009 UN Secretary-General's Report entails the equality of each pillar which ensures the stability of the whole 'edifice' of the Responsibility to Protect.<sup>114</sup>

#### **4. Responsibility to Protect, use of force and State sovereignty: a possible coexistence**

According to R2P Pillar III, when a State fails to protect its own population from genocide, war crimes, ethnic cleansing or crimes against humanity and, when peaceful means turn out to be inadequate, the UN Security Council is entitled to authorise the use of force for humanitarian reasons. Leaving temporarily aside the issues concerning its legal status, it may be argued that this Pillar could represent the right compromise in order

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<sup>109</sup> *World Summit Outcome* (n 104) para 139.

<sup>110</sup> Genser (n 98) 27.

<sup>111</sup> The 2007 appointment of a Special Advisor on the Responsibility to Protect further reflected the growing interest in the Responsibility to Protect. See 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.

<sup>112</sup> cf Ramesh Thakur, Thomas G Weiss, 'R2P: From Idea to Norm—and Action?' (2009) 1(1) *Global Responsibility to Protect* 22, 29. For a further analysis, see also Jutta Brunnée, Stephen J Toope, 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2(3) *Global Responsibility to Protect* 191.

<sup>113</sup> UNGA, 'Implementing the Responsibility to Protect: Report of the Secretary-General' (12 January 2009) UN Doc A/63/677.

<sup>114</sup> *ibid* 9-10, para 12.

to reconcile forcible intervention for humanitarian reasons with other two ‘apparently’ incompatible topics: the prohibition of the use of force and the sovereignty of States. Therefore, R2P Pillar III mitigates the risk of unilateral forcible intervention by tying the use of force to the UN Security Council’s authorisation. On this point, scholars considered the *World Summit Outcome* as a critical turning point regarding humanitarian intervention as ‘[...] nowhere is there a discussion of a right to intervene but, rather, the resolution is confirmation of an international responsibility to react to genocide, crimes against humanity, ethnic cleansing and war crimes’.<sup>115</sup>

Unlike the rejected doctrine of the humanitarian intervention, which, as illustrated by the 1999 of NATO’s intervention in Kosovo, lacked a legal basis to justify coercive action,<sup>116</sup> the fact that within R2P Pillar such conduct could be lawful only with the UN Security Council authorisation provides a stronger legal basis for the legitimacy of the international community’s forcible intervention. Therefore, if the UN Security Council authorisation lacks, no collective action can take place.

Accordingly, if the threshold required to trigger forcible intervention under Pillar III is met, the use of force is to be deemed exercised in a manner consistent with international law and the UN Charter, specifically with Article 2(4). As pointed out by the UN Secretary-General Ban Ki-Moon in the 2009 Report, ‘the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter’.<sup>117</sup>

On the other hand, one could argue that, according to the wording of Pillar III, the principle of sovereignty of States, one of the cornerstones of the international legal order, could be threatened. However, despite the fact that there is an evident tension between this principle and R2P Pillar III, such conflict does not really exist. Sovereignty is not an absolute concept; rather, it should be considered as a legal status linked to the duty to

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<sup>115</sup> Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016) 25.

<sup>116</sup> Kosovo Report (n 43) 4.

<sup>117</sup> Implementing the Responsibility to Protect (n 113) 5, para 3.

protect a State's own population from gross human rights violations.<sup>118</sup> According to this approach, the notion of humanity is strictly connected with the notion of sovereignty;<sup>119</sup> accordingly, human rights play a fundamental role in determining 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.<sup>120</sup> Humanity is therefore an intrinsic element of the modern notion of sovereignty; disregarding it entails the suspension of State sovereignty and the possibility of intervening for the international community.<sup>121</sup> When a State is able and willing to protect its population, no external intervention is allowed. However, when a State is manifestly failing in its duty to protect, its sovereignty will be suspended and, the international community, after the UN Security Council authorisation, would be entitled to take forcible measures under R2P Pillar III to put an end to the commission of international core crimes such as genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>122</sup> Therefore, as long as a State respects its duty to protect its population, its sovereignty should not be questioned. Only when it fails to do so, the international community would have a 'residual responsibility' to take collective action.<sup>123</sup>

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<sup>118</sup> 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 Jonah Eaton, 'An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect' (2011) 32 MICH. J. INT'L L. 765, 781.

<sup>119</sup> Peters claimed that Humanity is the A and Ω of sovereignty. See Peters (n 118) 514.

<sup>120</sup> 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. cf Peters (n 118) 514.

<sup>121</sup> 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'. See Alicia L Bannon, Comment, 'The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism' (2005) 115 YALE LJ 1157, 1162.

<sup>122</sup> cf Peters (n 118) 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 Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 AJIL 99, 114.

<sup>123</sup> Hernández (n 20) 353.

Accordingly, as enshrined in the 2009 UN Secretary-General's Report, the Responsibility to Protect is as 'an ally of sovereignty, not an adversary' since it 'seeks to strengthen sovereignty, not weaken it'.<sup>124</sup>

## **5. The debate within the United Nations**

Once clarified the definitional aspects of the Responsibility to Protect, it is worth focusing on the debates which arose before and after its official endorsement during the *World Summit Outcome*. In particular, we focus on the wide discussions which took place within the UN General Assembly on the occasion of the presentation of the 2005 *In Larger Freedom* and 2009 *Implementing the responsibility to protect* Reports.

### **5.1 The positions of States in the 2005 *In Larger Freedom* Report**

Concerning the *In Larger Freedom* Report, amongst the twenty-eight States that addressed the Responsibility to Protect in 2005, almost half were in favour of this doctrine.<sup>125</sup> Focusing on States' positions supporting the Responsibility to Protect, it is safe to state that they share several key features of this doctrine. A common point lies in the fact that only the UN Security Council can authorise the military engagement.<sup>126</sup> In addition, Ukraine also pointed out that UN Security Council authorisation to the use of force should be deemed as a last resort measure.<sup>127</sup> Furthermore, several States highlighted that every State has the primary responsibility to protect its population, and, as a consequence, only if States are unable or unwilling to do so external intervention might be allowed.<sup>128</sup> Finally, concerning the human rights violations which trigger the

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<sup>124</sup> *Implementing the responsibility to protect* (n 113) 7 para 10 (a).

<sup>125</sup> See UN Docs A/59/PV.86-90.

<sup>126</sup> See, *inter alia*, Bulgaria, UN Doc A/59/PV.89, p. 10; Norway, UN Doc A/59/PV.88, p. 13; San Marino, UN Doc A/59/PV.86, p. 24; Ukraine, UN Doc A/59/PV.88, p. 22.

<sup>127</sup> UN Doc A/59/PV.88, p. 22.

<sup>128</sup> See, *inter alia*, Australia, UN Doc A/59/PV.88, p. 4; Bulgaria, UN Doc A/59/PV.89, p. 10; Liechtenstein, UN Doc A/59/PV.88, p. 13; Norway, UN Doc A/59/PV.88, p. 13; Ukraine, UN Doc A/59/PV.88, p. 22.

threshold of the Responsibility to Protect, reference was made to the crime of genocide, ethnic cleansing, war crimes, and crimes against humanity.<sup>129</sup>

The position of the States in favour of the implementation of the Responsibility to Protect is well described by the Norwegian statement, which reads as follows:

‘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’.<sup>130</sup>

The Responsibility to Protect was also fully supported by other great powers such as France and Canada.<sup>131</sup> Other States, like Uganda and Japan, even if generally in favour of the R2P doctrine, adopted a more cautious approach. The representative of Uganda, Mr. Butagira, despite welcoming the notion of the Responsibility to Protect, worried about its potential interference with the sovereignty of States, emphasised the need to establish well-defined parameters in order to consider this doctrine consistent with

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<sup>129</sup> Bulgaria, UN Doc A/59/PV.89, p. 10; Liechtenstein, UN Doc A/59/PV.88, p. 13; New Zealand, UN Doc A/59/PV.88 p 9; Norway, UN Doc A/59/PV.88, p. 13; Ukraine, UN Doc A/59/PV.88, p. 22.

<sup>130</sup> UN Doc A/59/PV.88, p. 13.

<sup>131</sup> For the position of France, see UN Doc A/59/PV.87, p. 5. For the position of Canada, see UN Doc A/59/PV.89, p. 27.

international law.<sup>132</sup> Indonesia adopted an even more cautious approach by stressing the need to further discuss the political and legal aspects of the Responsibility to Protect.<sup>133</sup>

Finally, the United States of America endorsed a quite ambiguous position. The US omitted any reference of the Responsibility to Protect in his speech to the General Assembly.<sup>134</sup> However, in an open letter sent by the Permanent Representative of the United States of America to the United Nations, he underlined the right of the UN Security Council to authorise the use of force for humanitarian purposes.<sup>135</sup> He further stressed that, despite the possible existence of a ‘moral obligation’ to act, there was no existing legal obligation for the UN Security Council to authorise forcible intervention for humanitarian reasons. Accordingly, he emphasised that the international community was only ‘prepared to take action’, a wording that finally was adopted in paragraph 139 of the 2005 *World Summit Outcome*.<sup>136</sup> Ambassador Bolton was thus in favour of the non-prescriptive character of R2P, shifting from its proposed mandatory character to a ‘case-by-case basis’ intervention.<sup>137</sup>

On the other hand, nine States participating in the post-2005 *In Larger Freedom* debates expressed their negative view concerning the Responsibility to Protect.<sup>138</sup> In

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<sup>132</sup> He stated that: ‘The notion of the “responsibility to protect” is welcome, but its parameters should be well defined to avoid the temptation to interfere in the internal affairs of States. It should be confined to cases of genocide, ethnic cleansing and crimes against humanity, and the prior authorization of the Security Council should be obtained before there is such intervention to protect citizens’. UN Doc A/59/PV.88, p. 8. On the same path, the representative of Japan stated: ‘Japan embraces the assessment of the Secretary-General that, in light of the experience gained in the post-cold-war period, the time is now upon us to look into the issue of “responsibility to protect”. However, even if military intervention as a last resort cannot be completely excluded, we are of the view that there are many instances in which measures other than military means can and should be exhausted by the international community to deal with a given situation, and that will have to be further explored. We need to re-emphasize here our concept of human security, to which I alluded before, that puts primary emphasis on the protection and empowerment of individuals as a basic guiding principle to realizing prevention and the consolidation of peace in post-conflict situations’. UN Doc A/59/PV.87, p. 29.

<sup>133</sup> ‘With reference to the “responsibility to protect”, it is our view that, although there are some moral justifications for the Secretary-General’s recommendation in that regard, we feel that a number of political and legal questions remain to be addressed’. UN Doc A/59/PV.88, p. 26.

<sup>134</sup> UN Doc A/59/PV.87, pp. 22-24.

<sup>135</sup> Letter from Ambassador John Bolton, Permanent Representative of the United States of America to the United Nations (30 August 2005).

<sup>136</sup> *ibid.* See also *World Summit Outcome* (n 104) para 139.

<sup>137</sup> cf Eaton (n 118) 787-788.

<sup>138</sup> Respectively Algeria, Cuba, Egypt, Indonesia, Iran, Pakistan, Syria, Venezuela, and Viet Nam. See UN Docs A/59/PV.86-90.

particular, some of them considered the Responsibility to Protect as an unclear and blurred concept, which required further investigation in order to provide a better qualification of it.<sup>139</sup> On this path, worried about its ambiguity, Algeria pointed out that it was extremely difficult to distinguish R2P from the rejected notion of humanitarian intervention.<sup>140</sup> Moreover, it also clearly rejected the view that the Responsibility to Protect should be considered as an existing, or even an emerging, legal norm. On this aspect, the representative of Algeria claimed that:

‘[...] there is no legal basis in the Charter or in international law for a right or duty to intervene. It would be overly hasty to define the “responsibility to protect” as a new norm prescribing an international collective obligation’.<sup>141</sup>

One of the major criticisms raised by States opposing the affirmation of the Responsibility to Protect laid in the fact that the way in which the Responsibility to Protect was framed could ultimately undermine the principle of non-intervention and, therefore, the respect for the sovereignty of States. Thus, almost all the opposing States claimed that the Responsibility to Protect could become a threat to the principle of the national sovereignty of States, being used as a pretext to interfere in the internal affairs of the countries.<sup>142</sup> In other words, they emphasised that R2P could be used in an interventionist sense, as an excuse for the powerful States to expand their sovereignty against the weakest ones.<sup>143</sup>

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<sup>139</sup> For instance, the representative of Egypt stated that: ‘[...] the legal underpinnings of the theory remain unclear’. See UN Doc A/59/PV.86, p. 13. Similarly, the representative of Iran defined the R2P doctrine as a vague and highly controversial concept which has been the subject of a wide range of interpretations. UN Doc A/59/PV.87, p. 17

<sup>140</sup> UN Doc A/59/PV.86, p. 9.

<sup>141</sup> *ibid.* Egypt and Vietnam supported this view. For Egypt, see UN Doc A/59/PV.86, p. 13. Regarding Vietnam, see UN Doc A/59/PV.89, p. 22.

<sup>142</sup> As regards this issue, the representative of Syria stated that ‘In accordance with the principle of non-interference in the internal affairs of States, and in order not to undermine the peace, stability or sovereignty of States, which are safeguarded by the Charter, we believe that we should not use the pretext of the needs of the twenty-first century to restrict the concept of State sovereignty so as to allow intervention. Neither should the concept of sovereignty revert to its nineteenth-century definition so as to relax restrictions on the use of force and allow so-called preventive action’. UN Doc A/59/PV.90, p. 19. See also the positions adopted by Algeria, UN Doc A/59/PV.86, p. 9; Egypt, UN Doc A/59/PV.86, p. 13; Iran, UN Doc A/59/PV.87, p. 17; Tanzania, UN Doc A/59/PV.90, p. 26.

<sup>143</sup> Cuba, UN Doc A/59/PV.89, p. 15; Iran, UN Doc A/59/PV.87, p. 17; Pakistan, UN Doc A/59/PV.86, p. 5; Venezuela, UN Doc A/59/PV.89, p. 24.

Ultimately, they firmly believed that, rather than the absence of an interventionist doctrine, the failure to protect people victims of grave human rights violations was due to the lack of political will to halt and prevent the commission of those atrocities.<sup>144</sup> Thus, they argued that one of the main reasons which determined in the past the failure of the international community to tackle situations in which the commission of heinous crimes such as genocide or war crimes was at stake, lied precisely in the lack of political will by States - especially those which were among the main supporters of the R2P doctrine - to take the appropriate measures envisaged within the UN Charter.<sup>145</sup>

Accordingly, the ambiguity underlying the Responsibility to Protect, the lack of normative support, its contrast with core UN Charter provisions, coupled with the possibility of its discretionary use by powerful States against the weakest ones, led those States to strongly criticise the Responsibility to Protect as an existing, or even emerging, legal norm.

## **5.2 The positions of States in the 2009 *Implementing the responsibility to protect* Report**

The 2009 debates provide a clear overview of States' positions of the interpretation of the *World Summit Outcome* as laid out in the 2009 UN Secretary-General's Report. In light of the growing importance of the Responsibility to Protect, several States expressed their view on this topic.<sup>146</sup>

As the next paragraph will discuss more thoroughly, all the EU's member States participating in the debates endorsed the Responsibility to Protect.<sup>147</sup> As regards P5

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<sup>144</sup> See Iran, UN Doc A/59/PV.87, p. 17; Pakistan, UN Doc A/59/PV.86, p. 5.

<sup>145</sup> *ibid.* The representative of Cuba, bringing the example of the invasion of Iraq, condemned the hypocrisy of powerful States in dealing with the R2P issue. Accordingly, he stressed that: 'When the illegal war against Iraq broke out, some of the most ardent defenders of the so-called "responsibility to protect" decided to remain silent, while others allied themselves with the attacker. As a result, hundreds of thousands of Iraqi civilians died in a cruel attack. Nor did such defenders blink an eye when we learned of the indescribable torture committed in the jails of Iraq and Afghanistan and at the Guantánamo naval base'. UN Doc A/59/PV.89, p 15.

<sup>146</sup> UN Doc A/63/PV.96-101.

<sup>147</sup> See para 5.

Members, both the UK, France and the US fully supported its implementation.<sup>148</sup> They considered R2P as one of the major achievements of the *World Summit Outcome* which, following its endorsement, needed to be respected and implemented.<sup>149</sup> In this regard, the US representative strongly supported the R2P doctrine by pointing out that:

‘The responsibility to protect complements principles of international humanitarian and human rights law to which we have all committed. It reflects our collective recognition of past failures to save the innocent from the worst forms of atrocity and abuse. That is important progress, and the United States supports it’.<sup>150</sup>

A positive - even if more cautious - approach was taken by Jamaica, speaking on behalf of the Caribbean Community (CARICOM). Therefore, the Caribbean Community generally expressed its appreciation in relation with the *Implementing the Responsibility to Protect Report*.<sup>151</sup> However, its major concern relied upon R2P Pillar III since, as stated by Mr. Wolfe, the representative of Jamaica, ‘a reformed Security Council is an important precondition for the implementation of pillar three’.<sup>152</sup> Accordingly, he stated that only through a UN Security Council reform addressing the issue of the veto power - aiming at ensuring more impartiality to the functioning of this body - it would have been possible to raise confidence within the international community and provide an effective implementation of this Pillar.<sup>153</sup> The representative of Ecuador further stressed that the UN Security Council could not be considered as an objective, effective and impartial actor since its working methods did not reach the desired transparency and neutrality.<sup>154</sup>

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<sup>148</sup> For France, see UN Doc A/63/PV.97, pp. 9-10; for the United Kingdom, see UN Doc A/63/PV.97, pp. 6-7; for the United States, see UN Doc A/63/PV.97, pp. 17-18.

<sup>149</sup> See UN Doc A/63/PV.97, p. 6. On this aspect, France claimed that: ‘The responsibility to protect therefore already largely exists. Heads of State and Government recognized it as a universal principle nearly four years ago. It is increasingly becoming an expectation among populations throughout the world, as well as among members of the international community in general. We are therefore meeting not to discuss the definition of the concept, but rather to debate the means to strengthen its implementation and its respect, as the Secretary-General calls on us to do in his report (A/63/677)’. UN Doc A/63/PV.97, p. 9.

<sup>150</sup> UN Doc A/63/PV.97, p. 17.

<sup>151</sup> UN Doc A/63/PV.100, p. 6.

<sup>152</sup> *ibid* 7.

<sup>153</sup> *ibid*.

<sup>154</sup> UN Doc A/63/PV.98, p. 9.

Therefore, he emphasised the need of a comprehensive reform in order to ensure the UN Security Council's legitimacy and effectiveness in its functioning.<sup>155</sup>

On the other hand, the representative of Egypt, speaking on behalf of the Non-Aligned Movement, voiced his scepticism about the implementation of the Responsibility to Protect. He expressed doubts about the implementation of the Responsibility to Protect, stating that the UN General Assembly, being the appropriate venue for such dialogue, needed to further discuss some unresolved issues.<sup>156</sup> In line with the 2005 debates, Cuba, Iran and Venezuela reiterated their opposition to the implementation of the Responsibility to Protect.<sup>157</sup> During the 2009 debates, other States, including Bolivia, Ecuador, and North Korea also expressed their negative view.<sup>158</sup> In particular, criticisms arose regarding the respect of State sovereignty, the effectiveness of military intervention for humanitarian purposes, and the improper use of the Responsibility to Protect by powerful States to justify their interference in the internal affairs of the weakest ones.<sup>159</sup> The abovementioned issues represent the three major obstacles which hinder an effective implementation of the Responsibility to Protect.

As for the UN Security Council P5 Members, both China and Russia claimed that time was not ripe for an effective implementation of the Responsibility to Protect. Worried about the possibility of a wide arbitrarily interpretation of this doctrine against targeted countries, Russia endorsed a conservative position by pointing out that the conditions in order to provide an effective implementation of the Responsibility to Protect had not been reached yet.<sup>160</sup> 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'.<sup>161</sup> This cautious approach was ultimately endorsed by the UN General Assembly in its neutral resolution on the 2009 Secretary-General's Report in which it

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<sup>155</sup> *ibid.*

<sup>156</sup> UN Doc A/63/PV.97, pp. 5-6.

<sup>157</sup> Cuba, see UN Doc A/63/PV.99, pp. 21-23; Iran, UN Doc A/63/PV.100, pp.10-11; Venezuela, UN Doc A/63/PV.99, pp. 3-6

<sup>158</sup> Bolivia, UN Doc A/63/PV.99, pp. 8-9; Ecuador; UN Doc A/63/PV.98, pp. 8-10; North Korea, UN Doc A/63/PV.100, pp. 17-18.

<sup>159</sup> UN Doc A/63/PV.100, pp. 17-18.

<sup>160</sup> UN Doc A/63/PV.100, p. 12.

<sup>161</sup> UN Doc A/63/PV.98, p. 24.

simply ‘took note’ of the Report and committed the Assembly ‘to continue its consideration of the responsibility to protect’.<sup>162</sup>

Accordingly, despite States’ increased participation and some explicit recognition of the distinction between the Responsibility to Protect and the rejected doctrine of humanitarian intervention,<sup>163</sup> it is safe to state that it was not possible to overcome the uncertainties already expressed by some States in the previous debates which prevent a unanimous support of the Responsibility to Protect.

## **6. The position of the European Union at the UN debates**

Following the analysis of the position undertaken by States within the UN framework, it is worth focusing on the actions and positions adopted by the European Union in the aforementioned discussions. After maintaining a relatively silent stance on both the humanitarian intervention doctrine and the ICISS Report, since 2005 the European Union has started to actively endorse the Responsibility to Protect. During the 2005 *In Larger Freedom* debates, it strongly supported the affirmation of the R2P doctrine. Apart from considering that the Responsibility to Protect lies primarily with States, it pointed out that, when they fail to protect their populations, the international community is called to a strong response in order to halt the commission of gross human rights violations.<sup>164</sup> Considering its close connection with neighbouring States, candidates or potential candidates aiming at acceding to the European Union, joined its position.<sup>165</sup>

A few years later, during the 2009 debates which followed the 2009 *Implementing the Responsibility to Protect* Report, the representative of Sweden, speaking on behalf of the European Union, underlined the full EU’s support of the Responsibility to Protect. He also emphasised the importance of the practical implications of the 2009 Report in order

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<sup>162</sup> UNGA Res 63/308 (7 October 2009) UN Doc A/RES/63/308.

<sup>163</sup> Including Mexico, UN Doc A/63/PV.99, p. 18; Morocco, UN Doc A/63/PV.98, p.13; Republic of Korea, UN Doc A/63/PV.97, p. 19.

<sup>164</sup> UN Doc A/59/PV.85, pp.10-11.

<sup>165</sup> As a matter of fact, it was stated that: ‘The acceding countries Bulgaria and Romania (now EU Member States since 2007), the candidate countries Turkey and Croatia and the countries of the stabilization and association process and potential candidates Albania, the former Yugoslav Republic of Macedonia and Serbia and Montenegro align themselves with this statement’. UN Doc A/59/PV.85, p. 7.

to provide an effective implementation of the R2P doctrine.<sup>166</sup> Even on that occasion, several non-EU Members endorsed the EU position.<sup>167</sup>

Focusing on R2P Pillar III, the European Union, through reaffirming its position adopted in 2005, stressed that, when a State is manifestly failing to protect its populations, the international community should be entitled to a responsibility to protect those populations, providing therefore an effective contribution to the maintenance of international peace and security.<sup>168</sup> In its concluding remarks, the EU highlighted the importance of the role played by regional organizations in ensuring and implementing all the three pillars of the Responsibility to Protect. In that regard, it stated its readiness to contribute as a regional organization and global actor to the implementation of R2P overarching goals.<sup>169</sup>

The EU's proactive role in endorsing the Responsibility to Protect can also be found in the debates held within the UN Security Council framework. For instance, on 9 December 2005, during the debates regarding the UN Secretary-General Report on the protection of civilians in armed conflict,<sup>170</sup> the United Kingdom, speaking on behalf of the European Union, embraced the Responsibility to Protect as one of the most important aspects stressed during the *World Summit Outcome*, which also applies concerning the protection of civilians in armed conflict.<sup>171</sup> The EU's support to the Responsibility to Protect also came out in subsequent debates within the UN Security Council over the same topic.<sup>172</sup> It is worth noting that, in all those circumstances, the UN Security Council Resolution 1674 (2006) was cited as an example in which the Responsibility to Protect

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<sup>166</sup> UN Doc A/63/PV.97, pp. 3-6.

<sup>167</sup> Armenia, UN Doc A/63/PV.100, p.14; Bosnia and Herzegovina, UN Doc A/63/PV.97, pp. 15-16; Croatia, UN Doc A/63/PV.99, p.15; Georgia, UN Doc A/63/PV.101, p. 7; the former Yugoslav Republic of Macedonia UN Doc A/63/PV.100, p.8; the Republic of Moldova UN Doc A/63/PV.97, p. 5 and Turkey UN Doc A/63/PV.99, p.21.

<sup>168</sup> UN Doc A/63/PV.97, p. 4

<sup>169</sup> *ibid* 5.

<sup>170</sup> UNSC Report of the Secretary-General on the protection of civilians in armed conflict (28 November 2005) UN Doc S/2005/740.

<sup>171</sup> UN Doc S/PV.5319 (Resumption 1) pp. 8-10. Bulgaria, Romania, Turkey, Croatia, Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Serbia and Montenegro, Iceland and Ukraine aligned with the EU position. See UN Doc S/PV.5319 (Resumption 1) pp. 8-9.

<sup>172</sup> UN Doc S/PV.5476, pp. 22-3; UN Doc S/PV.5703, pp. 29-30; UN Doc S/PV.5781 (Resumption 1) pp. 2-3.

was used to justify the active engagement of the UN Security Council.<sup>173</sup> Moreover, during the latter debate held on 20 November 2007, it was further stressed the role of the international community to protect States' population by 'proactive means' when they are unwilling or unable to tackle their internal problems.<sup>174</sup>

In light to the previous observations, it is safe to consider the European Union as an active member in supporting and ensuring the implementation of the Responsibility to Protect. Moreover, thanks to the influence it exerted on neighbouring States wishing to become EU Members, several non-EU States participating in the debates joined the EU position.

## 7. Concluding remarks

The Responsibility to Protect is the result of a slow process that started with the decline of the humanitarian intervention doctrine, whose failure was due, *inter alia*, to its arbitrary character and, in particular, the difficulty of reconciling it with core UN Charter provisions, specifically Article 2(4) and 2(7), basic pillars of the international legal framework. As highlighted in the paradigmatic case of the NATO humanitarian intervention in Kosovo, humanitarian intervention was considered a doctrine stuck in a 'legal penumbra' that was not ultimately able to offer a solution to the interrogative posed by Kofi Annan, which aims at finding a balance between, on the one hand, the limits of State sovereignty and, on the other, the urgent need to intervene to stop gross human rights violations.

Considering the failure of the humanitarian intervention doctrine, and given a renewed interest in the centrality of human rights within the international framework, the Dutch and the ICISS Reports provided a paradigm shift which links sovereignty with the notion of both external and internal responsibility.

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<sup>173</sup> UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 (2006) para 4. Since its implementation, the Responsibility to Protect has been invoked in more than 80 resolutions of the UN Security Council. <<https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/>> accessed 20 September 2024. See UN Doc S/PV.5476, p. 22; UN Doc S/PV.5703, p.30; UN Doc S/PV.5781 (Resumption 1) p. 2.

<sup>174</sup> UN Doc S/PV.5781 (Resumption 1) p. 2.

The Responsibility to Protect was ultimately recognised by the United Nations during the 2005 *World Summit Outcome*, and further specified in the 2009 *UN Secretary-General's Report*, which embraced the R2P three-pillar approach. According to this framework, while every State bears the primary responsibility to protect its population from mass atrocity crimes, if it is unable or unwilling to do so, this responsibility rests on the international community as a whole.

In particular, when the criteria set out in R2P Pillar III are fulfilled, the UN Security Council should authorise third States' forcible intervention for humanitarian reasons. Unlike the humanitarian intervention doctrine, this Pillar appears to offer a more comprehensive response to Annan's question, as it permits forcible intervention only with prior UN Security Council authorisation. Accordingly, if the threshold required to trigger forcible intervention under Pillar III is met, the use of force is to be deemed exercised in a manner consistent with the UN Charter, specifically Article 2(4). Forcible intervention under R2P Pillar III aligns with the modern notion of States' sovereignty, which has to be considered as a legal status linked to the duty of protecting its population from gross human rights violations. Therefore, as long as a State respects its duty to protect its population, its sovereignty should not be questioned. Only when it fails to do so, the international community would have a 'residual responsibility' to take collective action.

The relevance of the Responsibility to Protect was also acknowledged during the debates which took place before and after its official endorsement in 2005. However, while the majority of States fully endorsed the Responsibility to Protect, a minority expressed strong opposition to its recognition as an existing, or even emerging, legal norm within the international legal framework, worried about the possibility of its discretionary use by powerful States to justify forcible intervention against the weakest ones. This cautious approach was ultimately adopted by the UN General Assembly which did not recognise the Responsibility to Protect as a binding international law provision.

Contrary to this view, the European Union fully and continuously endorsed the Responsibility to Protect since the outset of the debates within the United Nations, showing, therefore, its willingness to implement R2P overarching goals, in its capacity as a regional organization and global actor.

## CHAPTER TWO

### The ‘Responsibility to Protect’ and due diligence obligations

SUMMARY: 1. Appraising the legal status of the Responsibility to Protect: theory and practice – 2. The Responsibility to Protect and its underlying legal obligations – 2.1 The concept of due diligence obligations – 2.2 The duty to prevent and punish genocide – 2.2.1 The extraterritorial reach of the duty to prevent genocide: a focus on the capacity to influence – 2.2.2 The content of the extraterritorial obligation to prevent genocide – 2.3 The duty to prevent crimes against humanity – 2.4 The duty to prevent war crimes – 3. States and a positive duty of cooperation within ARSIWA – 3.1 An appraisal of its legal status – 3.2 The content of the positive duty to cooperate – 4. International Organizations and a positive duty to cooperate within ARIIO – 5. The Responsibility to Protect and the failures of the United Nations Security Council: the problem of the veto and its limits – 5.1 Internal limits 5.2 External limits – 6. Concluding remarks.

#### 1. Appraising the legal status of the Responsibility to Protect: theory and practice

Having examined its historical roots, we will now focus on the analysis of the legal status of the Responsibility to Protect. Political interferences and divergences between States do not facilitate a univocal conception of R2P, which some consider a political catchword,<sup>1</sup> or a soft law provision,<sup>2</sup> rather than a legally binding doctrine. By contrast, the *A More Secure World* and *In Larger Freedom* Reports qualified the Responsibility to Protect as an ‘emerging norm’ of international law.<sup>3</sup> If on the one hand, this interpretation

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<sup>1</sup> Carsten Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 *American Journal of International Law* 99, 118-119; Alex J Bellamy, Ruben Reike, ‘The Responsibility to Protect and International Law’ (2010) 2 *Global Responsibility to Protect* 267, 269; Hitoshi Nasu, ‘The UN Security Council’s Responsibility and the “Responsibility to Protect”’ (2011) 15 *Max Planck Yearbook of United Nations Law* 377.

<sup>2</sup> See Jennifer Welsh, Maria Banda, ‘International Law and the Responsibility to Protect: Clarifying or Expanding States’ Responsibilities?’ (2010) 2(3) *Global Responsibility to Protect* 213.

<sup>3</sup> UN Secretary-General, *A More Secure World: Our Shared Responsibility* (2 December 2004) UN Doc A/59/565, para 203; UN Secretary-General, *In Larger Freedom, Towards Development, Security and Human Rights for All* (21 March 2005) UN Doc A/59/2005, para 135.

aligns with a branch of the legal scholarship,<sup>4</sup> on the other hand, criticisms have been made concerning its effective implementation.<sup>5</sup>

Although there is no consensus on the legal nature of the Responsibility to Protect, a common element amongst the proposed theories lies in considering the UN Security Council entitled to authorise forcible intervention for humanitarian purposes once the criteria set out in R2P Pillar III are met. However, considering the seriousness of the crimes encapsulated within this Pillar, one might argue that a duty, rather than a right, would arise under such circumstances.<sup>6</sup> Hence, some scholars claim that, according to R2P Pillar III, the UN Security Council bears an affirmative duty of care to protect the population victim of mass atrocity crimes.<sup>7</sup> In such situations, they maintain that R2P interacts with the emerging notion of ‘international public interest’, which underlies the UN Security Council’s obligation to act and, consequently, the duty to abstain from a series of conducts, such as inaction or the exercise of the veto power, which are contrary to the pursuit of this goal.<sup>8</sup>

However, the existence of an obligation to intervene is questioned by the carefully chosen broad wording of the 2005 *World Summit Outcome*. In this respect, it is worth zooming in on paragraph 139, and specifically on the notion of ‘preparedness’ of States to take collective action and on the possibility of opting for a forcible intervention on ‘a case-by-case basis’, after the UN Security Council authorisation.<sup>9</sup> As to the notion of ‘preparedness’, the wording used - ‘we are prepared to take collective action’ - suggests a voluntary intervention rather than a mandatory one.<sup>10</sup> Being ready for a forcible intervention does not imply having the obligation to take such action. Secondly, the

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<sup>4</sup> See also Jonah Eaton, ‘An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect’ (2011) 32 MICH. J. INT’L L. 765, 766.

<sup>5</sup> Carsten Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (n 1) 101.

<sup>6</sup> David Aronofsky, ‘The International Legal Responsibility to Protect against Genocide, War Crimes and Crimes Against Humanity: Why National Sovereignty does not Preclude its Exercise’ (2007) 13 ILSA Journal of International & Comparative Law 317.

<sup>7</sup> Eaton (n 4) 781. See also See Alicia L Bannon, ‘The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism’ (2005) 115 YALE LJ 1157, 1162.

<sup>8</sup> Louise Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (2008) 34 REV. INT’L STUD. 445, 453.

<sup>9</sup> UNGA, World Summit Outcome (24 October 2005) UN Doc A/RES/60/1, para 139.

<sup>10</sup> Stahn (n 1) 109.

possibility to act on a case-by-case basis implies the lack of a systematic duty to intervene acknowledging instead only the possibility to act after an evaluation of the concrete issue at stake.<sup>11</sup> This framing seems to be more oriented towards accommodating the fear of some States that R2P may move towards a prescriptive direction, forcing third States to act whenever the threshold established in R2P Pillar III might be triggered.<sup>12</sup> Due to this general fear and, despite the attempt of the *Implementing the Responsibility to Protect* Report to push this doctrine into a prescriptive direction, there is still no consensus on the existence of an obligation for the international community to act under the R2P framework.<sup>13</sup>

Furthermore, if R2P were to be recognised as the object of a legally binding obligation, corrective mechanisms should have been put in place to deal with the exercise of the veto power by Permanent Members which, as the last part of the Chapter will show, is the main obstacle for ensuring the effective implementation of the Responsibility to Protect. This power is not questioned; instead, P5 Members were only invited to ‘[...] refrain from the use of their veto power’.<sup>14</sup> Additionally, even if all the requirements to allow forcible intervention are met, no legal consequences are currently foreseen in case of UN Security Council inaction.<sup>15</sup> The 2005 *World Summit Outcome* lacks a mechanism that could have tackled the absence of political will by the UN Security Council, and this further militates against the existence of a duty to intervene conferred upon the UN Security Council.<sup>16</sup>

State practice further confirms the R2P’s non-binding nature. As a matter of fact, in the first years following the 2005 *World Summit Outcome*, various situations arose,

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<sup>11</sup> *ibid.*

<sup>12</sup> In 2009, while debating the Secretary-General’s Report, the Egyptian representative, speaking on behalf of the Non-Aligned Movement (NAM), expressed the concern that an expansive application of responsibility to protect would lead to abuse and interference. See Eaton (n 4) 796.

<sup>13</sup> Eaton (n 4) 800.

<sup>14</sup> UN Secretary-General, *A More Secure World ...* (n 3) para 256.

<sup>15</sup> Stahn (n 1) 118.

<sup>16</sup> See Eaton (n 4) 782. Furthermore, it is worth mentioning that the lack of political will, jointly with the lack of authorization as well as the lack of operational capacity were identified as the three key challenges of an actual implementation of the R2P doctrine. cf Rebecca J Hamilton, ‘The Responsibility to Protect: From Document to Doctrine-But What of Implementation?’ (2006) 19 *Harvard Human Rights Journal* 289, 296.

such as in the Democratic Republic of Congo, Uganda, Zimbabwe, and Myanmar, in which R2P, especially its Pillar III, could have been triggered.<sup>17</sup> Nevertheless, in all those cases, both the UN Security Council's and third States' response was rather passive.

However, in 2011, the UN Security Council Resolutions 1973 and 1975, addressing respectively the situations in Libya,<sup>18</sup> and Ivory Coast,<sup>19</sup> seemed to take a decisive step towards a greater role of R2P, and the possibility of authorising military intervention under its third Pillar. In fact, UN Security Council 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'.<sup>20</sup> Moreover, UN Security Council Resolution 1973 empowered the United Nations Operation in *Côte d'Ivoire*<sup>21</sup> to use 'all necessary means' for humanitarian reasons to address the mass atrocities committed in the country.<sup>22</sup>

While the abovementioned resolutions appeared to advance the crystallization of R2P Pillar III, States' subsequent lack of commitment outlined a heterogeneous context characterised by different visions that ultimately undermine the effective implementation of this Pillar. The most striking example is represented by the Syrian case where the UN Security Council remained blocked for more than two years<sup>23</sup> due to strong divergences between the US, UK, and France, on the one hand, and Russia and China, on the other, which vetoed a draft resolution proposed to condemn Syria's crackdown.<sup>24</sup> On that occasion, Russia justified its decision by pointing out that, not exercising its veto, would have led to the rise of a future model in which, as happened in Libya, humanitarian intervention might have been used as a pretext for regime change.<sup>25</sup> China argued that,

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<sup>17</sup> See Neville F Dastoor, 'The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect' (2009) 22 *Harvard Human Rights Journal* 25, 33.

<sup>18</sup> See UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011).

<sup>19</sup> See UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 (2011).

<sup>20</sup> UNSC Res 1973 (n 18) para 4.

<sup>21</sup> Known as UNOCI and established since 2004. See UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528 (2004).

<sup>22</sup> UNSC Res 1975 (n 19) para 6.

<sup>23</sup> 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.

<sup>24</sup> UN SCOR, 6627th mtg. at 2 (4 October 2011) UN Doc S/PV.6627.

<sup>25</sup> *ibid* para 4.

while on the one hand, the UN Security Council had the right to encourage the Syrian government to adopt a policy aimed at ending the commission of serious human rights violations, on the other, it also had the duty to respect Syria's sovereignty, independence, and territorial integrity.<sup>26</sup>

The UN Security Council's inaction in current R2P scenarios, particularly in Myanmar, Ukraine, Israel and the Occupied Palestinian Territory, further confirms this negative trend.

Focusing on the situation in Myanmar, the *Report of the Special Rapporteur on the situation of human rights in Myanmar*, highlights that a relentless war against the people of Myanmar has been taking place since the *coup d'état* carried out by the military junta on 21 February 2021.<sup>27</sup> According to the Report, Junta forces killed more than 4,600 civilians, and displaced over 2.4 million people since the *coup d'état*.<sup>28</sup> Considering that many of these attacks amounted to war crimes and crimes against humanity,<sup>29</sup> a desirable effective response under the R2P framework was required. Nevertheless, all the attempts to trigger an R2P response within the UN Security Council failed due to Russia and China's threatened vetoes.<sup>30</sup> On 21 December 2022, almost one year after the *coup d'état*, the UN Security Council adopted Resolution 2669, which, *inter alia*, demanded an immediate end to all forms of violence throughout the country and urged all parties to respect human rights, fundamental freedoms and the rule of law.<sup>31</sup> However, this resolution, which was not adopted under UN Charter Chapter VII, has been labelled as not strong enough to address the systematic gross human rights violations committed in

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<sup>26</sup> *ibid* para 5.

<sup>27</sup> HRC, 'Report of the Special Rapporteur on the situation of human rights in Myanmar' Thomas H Andrews (20 March 2024) UN Doc A/HRC/55/65.

<sup>28</sup> *ibid* para 6.

<sup>29</sup> UN Doc A/HRC/55/65 para 18. See also HRC, 'Report of the Independent Investigative Mechanism for Myanmar' (11 July 2024) UN Doc A/HRC/57/18 para 19.

<sup>30</sup> Abdul Ghafur Hamid, 'Security Council Resolution 2669 (2022) on the Situation in Myanmar: Too Little, Too Late?' (EJIL:Talk, 4 January 2023) at <<https://www.ejiltalk.org/security-council-resolution-2669-2022-on-the-situation-in-myanmar-too-little-too-late/>> accessed 9 October 2024.

<sup>31</sup> With a vote of 12 in favour to none against, and 3 abstentions (China, India, and the Russian Federation). See UNSC Res 2669 (21 December 2022) UN Doc S/RES/2669 (2022) p. 2.

Myanmar by the military junta.<sup>32</sup> Amongst other criticisms,<sup>33</sup> it is worth noting that it did not call for the implementation of R2P, lacking therefore the necessary strength required to properly deal with the case at hand.<sup>34</sup>

As regards the situation in Ukraine, on 24 February 2022, the president of the Russian Federation, Vladimir Putin, announced the start of a ‘special military operation’ in Ukraine.<sup>35</sup> Russia’s exercise of its veto power prevented the UN Security Council from adopting a draft resolution addressing this situation.<sup>36</sup> However, on 1 March 2022, the UN General Assembly, meeting in an emergency session under the ‘Uniting for Peace’ procedure,<sup>37</sup> adopted a resolution that qualified Russian ‘special military operation’ as an act of aggression.<sup>38</sup> Following this resolution, Russia was, *inter alia*, expelled by the Council of Europe,<sup>39</sup> and suspended from the Human Rights Council.<sup>40</sup> Additionally, both

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<sup>32</sup> See, *inter alia*, OHCHR, ‘Myanmar: Action needed to stop carnage, says UN expert after adoption of Security Council resolution’ (22 December 2022) at <<https://www.ohchr.org/en/press-releases/2022/12/myanmar-action-needed-stop-carnage-says-un-expert-after-adoption-security>> accessed 5 October 2024.

<sup>33</sup> Hamid (n 30).

<sup>34</sup> UN News, ‘UN expert on Myanmar: Security Council resolution not strong enough on “systematic gross human rights violations”’ (22 December 2022) at <<https://news.un.org/en/story/2022/12/1131932>> accessed 7 October 2024.

<sup>35</sup> Address by the President of the Russian Federation (24 February 2022) at <<http://en.kremlin.ru/events/president/news/67843>> accessed 15 October 2024.

<sup>36</sup> UNSC, Draft Resolution (25 February 2022) UN Doc S/2022/155.

<sup>37</sup> This language dates back to the UN General Assembly resolution 377 A (V) of 3 November 1950, also known as ‘Uniting for Peace’. This procedure enables the UN General Assembly to discuss an issue relating to the maintenance of international peace and security when the Security Council fails to exercise its primary responsibility in those situations due to the exercise of veto power by one or more of its permanent members. UNGA, Uniting for Peace (3 November 1950) UN Doc A/RES/377. Concerning the situation in Ukraine, this special session was called by the Security Council itself. UNSC Res 2623 (27 February 2022) UN Doc S/RES/2623 (2022).

<sup>38</sup> 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. UNGA Res (1 March 2022) UN Doc A/ES-11/L.1.

<sup>39</sup> 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’ (16 March 2022) at <<https://search.coe.int/cm/?i=0900001680a5da51>> accessed 12 October 2024. For further information see, *inter alia*, Ana Salinas de Frías, ‘Los efectos jurídicos derivados de la pérdida de la condición de estado miembro del Consejo de Europa por la Federación Rusa’ (2022) 74(2) Revista Española De Derecho Internacional 105.

<sup>40</sup> As regards the adoption of the resolution, 93 nations voted in favour, 24 against, while 58 States abstained. UNGA Res (7 April 2022) 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) at

States and International Organizations started to impose a wide range of sanctions on Russia. In this respect, the European Union is playing a relevant role, having so far adopted fourteen packages of restrictive measures since the outbreak of the conflict,<sup>41</sup> that vary from sanctions against individuals and entities to restrictions on business, media as well as on economic cooperation.<sup>42</sup>

Due to the Russian war of aggression against Ukraine, on 4 March 2022, the Human Rights Council established an Independent International Commission of Inquiry on Ukraine, entrusted with investigating all alleged violations and abuses of human rights, as well as violations of international humanitarian law,<sup>43</sup> and which confirmed the commission of international crimes in Ukraine, including war crimes.<sup>44</sup> However, the UN Security Council did not take any action under Chapter VII of the UN Charter.

Concerning the situation in Israel and the Occupied Palestinian Territory, on 7 October 2023, Hamas and other Palestinian armed groups launched large-scale attacks in southern Israel.<sup>45</sup> As a consequence of this military offensive, it is estimated that at least 1,200 Israelis were killed, and more than 230 people were taken as hostages.<sup>46</sup> Following these attacks, Israel immediately counterattacked by launching a massive bombing campaign coupled with ground operations in the Gaza Strip. According to the United Nations Office for the Coordination of Humanitarian Affairs, since 7 October 2023, at

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<<https://www.ejiltalk.org/russia-and-the-un-human-rights-council-a-step-in-the-right-direction/>> accessed 12 October 2024.

<sup>41</sup> Up to 10 September 2024, the European Union has adopted fourteen packages of sanctions. See <<https://www.consilium.europa.eu/en/policies/sanctions-against-russia/>> accessed 10 September 2024.

<sup>42</sup> For further and updated information, see <[https://commission.europa.eu/topics/eu-solidarity-ukraine/eu-sanctions-against-russia-following-invasion-ukraine\\_en](https://commission.europa.eu/topics/eu-solidarity-ukraine/eu-sanctions-against-russia-following-invasion-ukraine_en)> accessed 14 October 2024.

<sup>43</sup> HRC, 'Situation of human rights in Ukraine stemming from the Russian aggression' (4 March 2022) UN Doc A/HRC/RES/49/1.

<sup>44</sup> UNGA, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 October 2022) UN Doc A/77/533, para 109. For updated information, see UNGA, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 March 2024) UN Doc A/HRC/55/66.

<sup>45</sup> New York Times, 'Here is what to know about the surprise attack on Israel' (7 October 2023) at <<https://www.nytimes.com/2023/10/07/world/middleeast/israel-gaza-attack.html>> accessed 9 October 2024.

<sup>46</sup> OCHA, 'Hostilities in the Gaza Strip - Flash update 82' (2 January 2024) at <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-82>> accessed 18 October 2024; HRW, 'Building the Evidence for Crimes Committed in Israel on October 7' (31 January 2024) at <<https://www.hrw.org/news/2024/01/31/interview-building-evidence-crimes-committed-israel-october-7>> accessed 18 October 2024.

least 42,000 Palestinians have been killed, and more than 100,000 injured.<sup>47</sup> The UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem and Israel, confirmed the commission of war crimes by both sides involved in the conflict.<sup>48</sup> The gravity of this situation requires a prompt and effective intervention of the UN Security Council. However, in the weeks following the beginning of the conflict, despite the UN Secretary-General's request to address this situation to avert a humanitarian catastrophe in Gaza, the use or threat of the veto power prevented the UN Security Council from adopting draft resolutions demanding an immediate ceasefire.<sup>49</sup> Only on 25 March 2024, the UN Security Council finally adopted Resolution 2728 demanding 'an immediate ceasefire for the month of Ramadan'.<sup>50</sup> Before this Resolution, the UN General Assembly was again able to overcome the UN Security Council's inaction. On 12 December 2023, acting under the Uniting for Peace procedure,<sup>51</sup> it adopted a resolution demanding an immediate humanitarian ceasefire, the unconditional release of all hostages as well as ensuring humanitarian access.<sup>52</sup> Despite its political significance, it is worth noting that the UN General Assembly can only partially replace UN Security Council's inaction, as it cannot authorise the adoption of military measures under its Uniting for Peace Resolutions.<sup>53</sup> As laid out in these

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<sup>47</sup> OCHA, 'Reported impact snapshot - Gaza Strip' (22 October 2024) at <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-22-october-2024>> accessed 23 October 2024.

<sup>48</sup> UNGA, 'Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel' (11 September 2024) UN Doc A/79/232 paras 89, 91, 95, 100, 102, 107-112.

<sup>49</sup> UN Meetings Coverage and Press Releases, 'Secretary-General Urges Security Council to Call for Ceasefire in Gaza, Declaring That Humanitarian Situation Is Now at "Breaking Point"' (8 December 2023) at <<https://press.un.org/en/2023/sc15518.doc.htm>> accessed 21 October 2024. Until March 2024, UN Security Council had adopted only two out of the seven draft resolutions on this crisis. However, none of them called for an immediate ceasefire. UNSC Res 2712 (15 November 2023) UN Doc S/RES/2712 (2023); UNSC Res 2720 (22 December 2023) UN Doc S/RES/2720 (2023).

<sup>50</sup> UNSC Res 2728 (25 March 2024) UN Doc S/RES/2728 (2024).

<sup>51</sup> See (n 37).

<sup>52</sup> The UN General Assembly Resolution was adopted with 153 countries voting in favour, 23 abstaining, and 10 countries voting against, including Israel and the United States. UNGA Res (10 December 2023) UN Doc A/ES-10/L.27.

<sup>53</sup> Which was recommended by the UN General Assembly only once, in relation with the Korean conflict. UNGA Resolution 498 (V) (1 February 1951) UN Doc A/RES/498(V). For further detail on the UN General Assembly Uniting for peace Resolutions, see, *inter alia*, Andrew J Carswell, 'Unlocking the

paradigmatic cases, the Responsibility to Protect cannot yet be considered legally binding as such, lacking both constant practice and *opinio iuris*. Rather, one might consider it, at best, as an emerging norm of international law.<sup>54</sup> In other words, despite some evidence going towards a perspective dimension, the Responsibility to Protect, particularly, its third Pillar, should still be seen as a mere candidate norm for which further codification or implementation is required to ensure its crystallization into binding international law.<sup>55</sup>

## 2. The Responsibility to Protect and its underlying legal obligations

As previously highlighted, one might say that the Responsibility to Protect, if taken alone, cannot be deemed legally binding. However, its concrete effects and implications can only be properly appreciated within a broader perspective, namely by focusing on the legal obligations that currently underpin it. Even though R2P is still considered soft law, this doctrine is actually grounded on existing international law,<sup>56</sup> with at least some hard law obligations underlying it. Hence, scholars argue that R2P is ‘rooted on pre-existing treaty obligations, notably in common article 1 of the 1949 Geneva Conventions, article 1 of the 1948 Genocide Convention, and in the Human Rights Covenants’.<sup>57</sup> Thus, considering the Responsibility to Protect as a ‘multifaceted concept’,<sup>58</sup> it cannot be

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UN Security Council: The *Uniting for Peace* Resolution’ (2013) 18(3) *Journal of Conflict and Security Law* 453.

<sup>54</sup> Stahn (n 1) 118. Regarding the notion of R2P as an emerging norm, Eaton (n 4) 767.

<sup>55</sup> Max Matthews, ‘Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur’ (2008) 31 *Boston College International & Comparative Law Review* 137, 147; Andreas S Kolb, *The UN Security Council Members’ Responsibility to Protect. A Legal Analysis* (Springer 2018) 29.

<sup>56</sup> See, *inter alia*, John Heieck, *A Duty To Prevent Genocide: Due Diligence Obligations Among the P5* (Elgar 2018) 3; Louise Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’ (n 8) 447-448; Laurence Boisson de Chazournes, Luigi Condorelli, ‘De la “responsabilité de protéger” ou d’une nouvelle parure pour une notion déjà bien établie’ (2006) 110 *Revue Générale de Droit International Public* 11, 13-16.

<sup>57</sup> Anne Peters, ‘The Security Council’s Responsibility to Protect’ (2011) 8 *Int’l Org L. Rev.* 1, 7. On the same vein, Louise Arbour suggested that R2P ‘[...] is anchored in existing law, in institutions and in lessons learned from practice. Its vitality flows from its inherent soundness and justice, as well as from the concept’s comparative advantages over formulations of humanitarian intervention’. Arbour (n 8) 447-448.

<sup>58</sup> Stahn (n 1) 118; see also Andreas S Kolb, *The Responsibility to Protect in International Law: Rights and Obligations to Save Humans from Mass Murder and Ethnic Cleansing in Light of State Practice and Ethical Considerations* (Kovač 2011) 132.

analysed in isolation; instead, it has to be understood under the mutually reinforcing effects that the R2P discourse and longstanding regimes of international law may have.<sup>59</sup> In other words, since R2P is a doctrine anchored in existing law, it has to be paired together with hard law obligations enshrined in international legal provisions. The concept of ‘due diligence obligations’, which we discuss in the next paragraph, is crucial for appraising States’ obligations to prevent the commission of genocide, war crimes, and crimes against humanity.

## 2.1 The concept of due diligence obligations

The notion of due diligence comes from the Latin word *diligentia*, which describes a standard of care that a subject might consider reasonable or appropriate to take in a particular circumstance.<sup>60</sup> The concept of due diligence is defined by the UN as follows:

‘Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case [...]’.<sup>61</sup>

In order to fully catch its meaning, it is worth focusing on its opposite, namely the undue diligence. Hence, if on the one hand undue diligence refers to the existence of unlawful negligence, on the other, due diligence expresses the absence of such negligence.<sup>62</sup>

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<sup>59</sup> Kolb (n 55) 33.

<sup>60</sup> Robert Sprague, Sean Valentine, ‘Due Diligence’, in Encyclopedia Britannica, at <<https://www.britannica.com/money/due-diligence-professional-standard>> accessed 19 October 2024. See also Anne Peters, Heike Krieger, Leonard Kreuzer, ‘Due Diligence in the International Legal Order. Dissecting the Leitmotif of Current Accountability Debates’, in Anne Peters, Heike Krieger, Leonard Kreuzer, *Due Diligence in the International Legal Order* (OUP 2020) 1, 2. See also Alice Ollino, *Due Diligence Obligations in International Law* (CUP 2022) 3.

<sup>61</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (United Nations 2012) 4.

<sup>62</sup> See Robert Kolb, ‘Reflections on Due Diligence and Cyberspace’ (2015) 58 *German Yearbook of International Law* 113, 116. In modern law, the term negligence has been defined as ‘the failure to take reasonable care in what one does to protect others whom one can reasonably foresee will be put at risk by what one does’. cf John Gardner, ‘Reasonable Person Standard’, in Hugh LaFollette, *The International Encyclopedia of Ethics* (Wiley Online Library 2019).

Accordingly, while undue diligence has been framed as the ‘omission of the required standard of care’, the neglect ‘[...] to take all available measures’,<sup>63</sup> by contrast, due diligence has to be understood as a standard of care that can be applied to assess whether a certain subject (a State) has exercised best possible efforts or done the utmost to prevent or minimise concrete harm.<sup>64</sup>

Therefore, due diligence obligations are not considered as obligations of result. Instead, they are ‘obligations of conduct’; as Riccardo Pisillo-Mazzeschi pointed out, while ‘the obligation of result is an obligation to “succeed”, the obligation of diligent conduct is an obligation to “make every effort”’.<sup>65</sup>

The concept of due diligence was first framed in the *Alabama Claims arbitration* case,<sup>66</sup> and began to take shape within the international legal framework during the second half of the nineteenth and early twentieth century.<sup>67</sup> While first referred to in arbitral awards,<sup>68</sup> due diligence has progressively become a prominent concept of international law which arose strong interest among legal scholars.<sup>69</sup> It is a well-established principle

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<sup>63</sup> Kolb (n 62) 116.

<sup>64</sup> *ibid* 115, 117. See also Peters, Krieger, Kreuzer (n 60) 5.

<sup>65</sup> Riccardo Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9, 47-48.

<sup>66</sup> *Alabama Claims Arbitration (United States v Great Britain)* (1872), XXIX UNRIAA, 125, 129. See also Kolb (n 62) 114.

<sup>67</sup> For a further analysis of the historical evolution of the due diligence standard, see Giulio Bartolini, ‘The Historical Roots of the Due Diligence Standard’ in Heike Krieger, Anne Peters, Leonhard Kreuzer (eds), *Due Diligence in the International Legal order* (OUP 2020) 23.

<sup>68</sup> See, *inter alia*, *Alabama Claims Arbitration* (n 66); Frederick Wipperman (*USA v Venezuela*) (1890), in John Moore, *History and Digest of the International Arbitrations to which the United States has been a party* (Washington: Government Printing Office 1898) vol. III, 3041; *William E. Chapman (USA v United Mexican States)* UNRIAA IV, 632, 634; *Laura M. B. Janes (USA v United Mexican States)* (1925) UNRIAA IV, 82, 87; *Thomas H. Youmans (USA v United Mexican States)* (1926) UNRIAA IV, 110, 114; *George Adams Kennedy (USA v United Mexican States)* (1927) UNRIAA IV, 194, 199; *Lillian Greenlaw Sewell (USA v United Mexican States)* (1930) UNRIAA IV, 626, 632.

<sup>69</sup> For an in-depth analysis of the due diligence standard in international law, see, *inter alia*, Riccardo Pisillo Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (n 65) 9; Joanna Kulesza, *Due Diligence in International Law* (Brill | Nijhoff 2016); Sarah Cassella (ed), *Le Standard de Due Diligence et la Responsabilité Internationale* (Pedone 2018); Anne Peters, Heike Krieger, Leonard Kreuzer (eds), *Due Diligence in International Law* (OUP 2020); Samantha Besson, *La Due Diligence en droit international*, (2020) 409 *Collected Courses of The Hague Academy of International Law* 153; Ollino (n 60). Regarding the articulation of due diligence in, *inter alia*, the obligations of prevention, cessation, and reparation, Serena Forlati, ‘L’objet des différentes obligations primaires de diligence: prévention, cessation, répression?’ in Sarah Cassella (ed), *Le Standard de Due Diligence et la Responsabilité Internationale* (Pedone 2018) 39.

in international law envisaged in abundant and constantly developing decisions made by international courts, especially those rendered by the International Court of Justice,<sup>70</sup> and the International Tribunal on the Law of the Sea.<sup>71</sup> International treaties and various international law codification projects also incorporate the due diligence standard.<sup>72</sup>

As regards its scope, due diligence was at first mainly related to the protection of aliens.<sup>73</sup> However, it has progressively being applied to other fields of international law, including those which envisage extraterritorial legal obligations - most notably, international human rights law, international criminal law and international humanitarian law<sup>74</sup> - which the following sections will examine in-depth. Under this perspective, when the commission of heinous crimes such as genocide, war crimes, and crimes against humanity is at stake, States may be compelled to act in order to prevent and put an end to the commission of atrocities crimes. The notion of due diligence might come into play in this regard.<sup>75</sup>

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<sup>70</sup> See, *inter alia*, *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, p. 22; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, pp. 55-56, para 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, p. 665, pp. 706-707, para 104.

<sup>71</sup> See, *inter alia*, ITLOS Seabed Dispute Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, p. 10, paras 110-112, 117-120, 131-132. See also ITLOS, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Report 2015, paras 123-132.

<sup>72</sup> Samantha Besson, *La Due Diligence en droit international* (n 69) 172. Concerning international treaties, see, *inter alia*, Vienna Convention on Diplomatic Relations (adopted 18 April 1961; entered into force 24 April 1964) 500 UNTS 95, art. 22(2); United Nations Convention on the Law of the Sea (adopted 10 December 1982; entered into force 16 November 1994) 1833 UNTS 397, arts. 58, 62, 94, 139, 192, 194; Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210, art. 5(2). As regards codifications projects, see Open-ended intergovernmental working group (OEIGWG), HRC, Revised Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and others Business Enterprises (16 July 2019) at <[https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf)> accessed 19 October 2024.

<sup>73</sup> See Bartolini (n 67) 25-26. See also Ollino (n 60) 22.

<sup>74</sup> Besson (n 69) 174.

<sup>75</sup> ‘a concept well understood in international human rights law in relation to the positive obligation of a State to act in response to threats to human rights, notably to the life and security of the person within its own jurisdiction’. See Arbour (n 8) 452.

Due diligence is a standard *variable*,<sup>76</sup> that is, it is flexible and context-dependent,<sup>77</sup> it is important to take into account the fact that due diligence special regimes might encompass their specific standard of care which cannot be automatically applied in other branches of international law.<sup>78</sup> Accordingly, it is worth focusing on each of the abovementioned crimes to understand the content and ambit of application of their respective due diligence obligations.

## 2.2 The duty to prevent and punish genocide

The Responsibility to Protect is closely tied up with the overarching goal of halting and preventing the commission of the crime of genocide. According to the former High Commissioner for Human Rights, Louise Arbour, the heart of the responsibility to protect doctrine lies upon the obligation to prevent and punish genocide.<sup>79</sup> Hence, Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>80</sup> beyond highlighting the fact that genocide represents a crime under international law, whether committed in time of peace or war, also enshrines States' obligation to prevent and punish its commission.<sup>81</sup>

At first, doubts arose about the legal status of this provision as well as the scope of the obligation to prevent genocide for which, as acknowledged by Schabas, the Convention does not provide 'the slightest clue'.<sup>82</sup> Subsequently, the International Court of Justice recognised the binding nature of this provision in the *Bosnian Genocide* case.<sup>83</sup> The Court ultimately refuted Serbia's argument that Article I was merely hortatory by

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<sup>76</sup> Besson (n 69) 276.

<sup>77</sup> Peters, Krieger, Kreuzer (n 60) 5. Forlati (n 69) 43.

<sup>78</sup> Besson (n 69) 221-222.

<sup>79</sup> Arbour (n 8) 450.

<sup>80</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art. 1. (hereinafter the 'Genocide Convention').

<sup>81</sup> As a matter of fact, it states: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'. See art. 1 Genocide Convention. For an in-depth analysis of the crime of genocide in international law, see, *inter alia*, William A Schabas, *Genocide in International Law: The Crime of Crimes* (OUP 2009).

<sup>82</sup> *ibid* 81.

<sup>83</sup> *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.

holding Serbia responsible for failing to act under its duty to prevent genocide committed by Bosnian Serb forces in Srebrenica.<sup>84</sup>

The *Bosnian Genocide* case is a defining moment unveiling the nature of the duty to prevent genocide. While obligations to prevent are generally hard to classify within the international legal framework,<sup>85</sup> grasping the object and purpose of the duty to prevent genocide is an even more complicated task due to its interconnection with political, social, and cultural ties.<sup>86</sup> On this issue, the Court pointed out that, as stated by the International Law Commission, obligations of prevention are usually understood as ‘[...] best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur’.<sup>87</sup> Accordingly, the Court confirmed that this was understood as the correct reading of the duty to prevent genocide enshrined in Article 1 of the Genocide Convention.<sup>88</sup>

### **2.2.1 The extraterritorial reach of the duty to prevent genocide: a focus on the capacity to influence**

Another relevant point of the *Bosnian Genocide* case concerns the scope of the duty to prevent genocide which, as stated by the Court, should not be considered as territorially limited. As a matter of fact, paragraph 183 reads as follows:

‘[...] the substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question’.<sup>89</sup>

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<sup>84</sup> *ibid* paras 162-165, 438.

<sup>85</sup> Larissa van den Herik, Emma Irving, ‘Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity’, in Anne Peters, Heike Krieger, Leonard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 200, 204.

<sup>86</sup> Mark Toufayan, ‘The World Court’s Distress when Facing Genocide: A Critical Commentary on the Application of the Genocide Convention Case (*Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro)*) (2005) 40 *Texas International Law Journal* 233, 255.

<sup>87</sup> ILC, ‘Report of the International Law Commission on the work of its fifty-third session’ (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, p. 62, para 14.

<sup>88</sup> Serena Forlati, ‘The Legal Obligation to Prevent Genocide: Bosnia v. Serbia and Beyond’ (2011) 31 *Polish Yearbook of International Law* 189, 200.

<sup>89</sup> *Bosnian Genocide* (n 83) para 183.

Despite divergent opinions aimed at narrowing the ambit of application of the extraterritorial reach of the duty to prevent genocide,<sup>90</sup> the Court ultimately embraced a global duty to prevent.<sup>91</sup> Nevertheless, focusing on the consequences linked to the breach of the obligation to prevent genocide, the Court incorporated the principle of ‘common but differentiated responsibilities’,<sup>92</sup> according to which a State might be held responsible for the breach of this duty only if it ‘manifestly failed to take all measures to prevent genocide which were within its power’.<sup>93</sup> To this end, the Court laid out what it describes as ‘various parameters’ to determine whether a State has duly discharged this obligation. In particular, the focus was on the ‘[...] capacity to influence effectively the action of persons likely to commit, or already committing, genocide’.<sup>94</sup> To assess the capacity of influence of the State, the Court highlighted the importance given to factors such as the proximity of the State to the scene of the events, the strength of the political links, and other ties that a State may have with the genocidaires.<sup>95</sup>

Within this perspective, the Court stated that the obligation to prevent genocide applies not only to the State where the crime of genocide is perpetrated but also to other States, which may be held responsible for having acted in breach of this duty. Accordingly, in the case at hand, Serbia was held responsible for acting in breach of Article 1 of the Genocide Convention due to its failure to prevent the genocide that occurred in Srebrenica in July 1995, even if the acts were not committed within its territory but in Bosnia-Herzegovina, a neighbouring and independent State since 1992.<sup>96</sup> The influence exerted by Serbia towards the perpetrators of the genocide, the Bosnian Serb forces, stemmed from the strong political, military, and financial ties existing

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<sup>90</sup> *Bosnian Genocide* (n 83) Separate Opinion of Judge Tomka, p. 310, p. 348, para 67; Declaration of Judge Leonid Skotnikov, p. 366, pp. 377-378.

<sup>91</sup> *Bosnian Genocide* (n 83) para 430.

<sup>92</sup> Heieck (n 56) 51.

<sup>93</sup> *Bosnian Genocide* (n 83) para 430.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (CUP 2020) 78.

between Serbia and the *Republika Srpska* and the VRS.<sup>97</sup> This influence, coupled with the failure to comply with the two provisional measures orders of 1993,<sup>98</sup> led the Court to declare Serbia responsible for the violation of the duty to prevent genocide set out in Article 1 of the Genocide Convention. Therefore, this case shows that a test of due diligence applies to all States parties to the Genocide Convention.

Even if States with strong political ties or nearer to the ‘theatre of crisis’ might be considered as relevant duty bearers concerning the obligation to prevent genocide,<sup>99</sup> the Genocide Convention envisages that all States parties have to act in compliance with this duty, even non-neighbouring ones which cannot use the lack of proximity as a pretext to avoid responsibility.<sup>100</sup> Indeed, also States other than those with geographical and political ties with the main perpetrators of the crime of genocide might ultimately be held responsible for breaching the obligation to prevent this crime. In particular, P5 Members of the UN Security Council bear a stronger responsibility since, through the use of the veto power, they can block the implementation of measures that, *inter alia*, could contribute to preventing the commission of the *crime of crimes*.<sup>101</sup> Accordingly, States having the capacity to exert influence on genocidaires and, in particular, P5 Members of the UN Security Council,<sup>102</sup> should be held responsible for not having employed all the measures reasonably available to them to prevent genocide, even if the crime occurred within the territory of another State.

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<sup>97</sup> As a matter of fact, the Court stated that: ‘[...] during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close’. See *Bosnian Genocide* (n 83) para 434. The Armed Forces of the Republika Srpska consisted of the Army of the Republika Srpska, and the units of the Ministry of Interior of the Republika Srpska. cf ICTY, *Borovčanin* (IT-02-64), Annex A (6 September 2002) at <<https://www.icty.org/en/case/borovcanin#ind>> accessed 23 October 2024.

<sup>98</sup> *Bosnian Genocide* (n 83) para 435.

<sup>99</sup> This would be due to the information they possess, their capacity of influence, and their better geographical position could ensure a prompt and effective response. cf *Arbour* (n 8) 454.

<sup>100</sup> *ibid.*

<sup>101</sup> Schabas (n 81). See also Chapter II, para 5.

<sup>102</sup> Considered as those which bear the strongest obligations of due diligence. cf *Arbour* (n 8) 453.

Scholars further developed the ‘capacity of influence’ parameter by arguing that this concept encompasses additional aspects, including diaspora bonds, economic and even social media ties.<sup>103</sup> This latter element is currently under in-depth scrutiny since it might represent a major tool for inciting genocide; it might also give rise to significant legal issues, including those linked with the responsibility of non-State actors for breaching due diligence obligations.<sup>104</sup> Social media and updated digital technologies<sup>105</sup> should also be seen as technological means that increase the amount of information available to States making it more difficult for them to prove the lack of actual or constructive knowledge about the commission of genocide. In other words, States should bear a higher burden of proof to deny the fulfilment of the temporal requirement established to trigger the duty to prevent genocide, which consists of being ‘aware, or should normally have been aware, of the serious danger that acts of genocide would be committed’.<sup>106</sup> Remarkably, the ITLOS Seabed Disputes Chamber emphasises that ‘measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge’.<sup>107</sup> Following this approach, the impact of technological means might ultimately extend the scope of social and legal responsibilities, especially the responsibility to prevent possible future harm.<sup>108</sup>

### **2.2.2 The content of the extraterritorial obligation to prevent genocide**

Once acknowledged the extraterritorial reach of the duty to prevent genocide, it is worth focusing on its content. Taking into account the aim of preventing the commission of genocide, in the *Bosnian Genocide* case, the Court set forth the obligation for States parties to the Genocide Convention ‘to employ all means reasonably available to them,

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<sup>103</sup> Van den Herik, Irving (n 85) 206.

<sup>104</sup> *ibid* 215.

<sup>105</sup> Including satellite imagery, social media and radio monitoring, and mobile phone technology. Van den Herik, Irving (n 85) 211 ff.

<sup>106</sup> *Bosnian Genocide* (n 83) para 431.

<sup>107</sup> ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 71) para 117.

<sup>108</sup> Fleur Johns, Wouter Werner, ‘The Risks of International Law’ (2008) 21 *Leiden Journal of International Law* 783, 784.

so as to prevent genocide so far as possible'.<sup>109</sup> As acknowledged in the previous pages, this is to be deemed as an obligation of conduct, not one of result.<sup>110</sup> States incur responsibility not for the mere fact that the crime of genocide is committed but for having failed to take all measures that were within their power, and through which it would have been possible to contribute to preventing the commission of the *crime of crimes*. Hence, the Court stated:

'[...] if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent, it is under a duty to make use of these means as the circumstances permit'.<sup>111</sup>

Therefore, the Court here invoked the notion of 'due diligence'<sup>112</sup> according to which States have a positive obligation to do their best to ensure that the commission of the acts listed in Article 3 of the Genocide Convention does not occur.<sup>113</sup>

In order to assess State's compliance with the obligation to prevent genocide, the critical issue lies in the identification of the means that are 'reasonably available' to States.<sup>114</sup> Being highly discretionary, specific tools at States' disposal to comply with their duty to prevent genocide might include measures of diplomatic, social, or economic nature.<sup>115</sup> States and International Organizations can also adopt targeted sanctions. As we will further discuss in Chapter IV, the European Union plays a key role in this domain. As a matter of fact, amongst other tools at its disposal, on 7 December 2020, the EU adopted the *EU Global Human Rights Sanctions Regime*, a regime that provides for

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<sup>109</sup> *Bosnian Genocide* (n 83) para 430.

<sup>110</sup> *ibid.*

<sup>111</sup> *Bosnian Genocide* (n 83) para 431. In line with this interpretation, in a more recent case the ICJ underlined Myanmar's duty to take all measures within its power to prevent the commission of genocide of the members of the Rohingya group residing in its territory. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, p. 28, para 79.

<sup>112</sup> *Arbour* (n 8) 452.

<sup>113</sup> *Bosnian Genocide* (n 83) para 432. As a matter of fact, art. 3 of the Genocide Convention prohibits the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

<sup>114</sup> *Forlati* (n 88) 201.

<sup>115</sup> With the possibility of including targeted sanctions as well. *Van den Herik, Irving* (n 85) 208.

targeted sanctions, including asset freezes and travel bans on individuals and entities responsible for or involved in serious human rights violations or abuses committed worldwide, including genocide.<sup>116</sup> Along with economic measures, States might also employ political pressure and accountability initiatives in discharging their duty to prevent the commission of genocide.

Notwithstanding the ‘structural impossibility in assessing the conduct required to fulfil the obligation of prevention’,<sup>117</sup> with the risk of exceeding international law boundaries or endorsing a completely passive approach,<sup>118</sup> the obligation to prevent underpins States’ duty to establish and, subsequently publicly justifying, the most appropriate course of conduct that needs to be taken to tackle a concrete issue at stake.<sup>119</sup> As pointed out by Martti Koskenniemi, the interpretation given to the duty to prevent fully aligns with the concept of due diligence, which he describes as a ‘technique that transposes complex and controversial inquiries on content to less controversial questions on informed decision-making and process’.<sup>120</sup> Between these two poles, scholars suggested setting up a monitoring committee on the obligation to prevent genocide or instituting a platform on which States with the capacity to influence might be invited to explain their specific conduct *vis-à-vis* a concrete case at hand.<sup>121</sup> However, labelled as too sensitive and particularly intrusive in States’ foreign policy issues, none of these proposals has yet been implemented.

To conclude, despite the discretionary character of the content of the obligation to prevent genocide, if a State can positively interfere with the source of the risk and takes

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<sup>116</sup> Council of the European Union, Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses. OJ L 410/13, 13-19; Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 1-12.

<sup>117</sup> Forlati (n 88) 201.

<sup>118</sup> See Christian Tams, ‘Commentary on Article 1’ in Christian Tams, Lars Bester, Björn Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H.Beck/Hart/Nomos 2014) 33, 54.

<sup>119</sup> Van den Herik, Irving (n 85) 207.

<sup>120</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 1989) 391. See also ILA Study Group on Due Diligence in International Law, Second Report (July 2016) 3, at <<https://www.ila-hq.org/en/committees>> accessed 22 October 2024.

<sup>121</sup> Van den Herik, Irving (n 85) 209.

no action in addressing the concrete case at stake, its inaction may ultimately lead to a breach of its due diligence obligations enshrined in the international legal order.

### 2.3 The duty to prevent crimes against humanity

Regarding crimes against humanity, Article 3(2) of the Draft Articles on Prevention and Punishment of Crimes against Humanity reads, ‘each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict’.<sup>122</sup> Although not legally binding, this provision should nevertheless be read in the broader context of the relevant legal framework. It is worth highlighting that international human rights law provides obligations to prevent violations of fundamental human rights.<sup>123</sup> When these violations occur as a part of a widespread or systematic attack, resulting in crimes against humanity, preventive obligations become even more significant.

Moreover, taking into account Article 1 of the Genocide Convention, scholars claimed that the duty to prevent genocide and the obligation to prevent crimes against humanity have to be regarded as twin provisions with the same contents, scope, and nature.<sup>124</sup> To justify this approach, they relied, *inter alia*, on the similarity in the structure and the wording of these provisions, as well as the inclusion of these heinous crimes within the R2P framework.<sup>125</sup> Additionally, as stated by Philippe Sands, the definition of both genocide and crimes against humanity, despite their different focus - the former on the protection of the group as such while the latter more inclined towards an individualised approach - rest upon an overarching principle, namely the value of human life.<sup>126</sup> Marko Milanović emphasised that ‘[...] States have a duty to prevent and punish

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<sup>122</sup> ILC, ‘Report of the International Law Commission of its Seventy-First Session’ (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, p. 13.

<sup>123</sup> For instance, the duty to prevent torture. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (adopted 10 December 1984; entered into force 26 June 1987) 1465 UNTS 85, art. 2(1). Isobel Renzulli, ‘A Critical Reflection on the Conceptual and Legal Foundations of the Duty to Prevent Torture’ (2016) 20 Int’l J Hum Rts 1244.

<sup>124</sup> Van den Herik, Irving (n 85) 203.

<sup>125</sup> *ibid* 203–204. See also World Summit Outcome (n 9) para 139.

<sup>126</sup> Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld and Nicholson 2016) 378–381.

genocide in exactly the same way as they have to prevent and punish crimes against humanity or other massive human rights violations, however flimsy that duty might be'.<sup>127</sup>

Following this comparative approach, and even though these two crimes are grounded on different legal bases, it is, therefore, possible to infer that the ICJ findings on the *Bosnian Genocide* case in which the Court set forth States' due diligence obligation to prevent the commission of genocide by employing all means reasonably available to them,<sup>128</sup> can thus be applied *mutatis mutandis* to the duty to prevent crimes against humanity. On the other hand, considering this special link between these two provisions, discussions in the context of the ILC's work on crimes against humanity also inform the obligation to prevent genocide.<sup>129</sup> Accordingly, both the obligations to prevent genocide and crimes against humanity are to be deemed as 'best efforts' obligations, which require States to undertake all reasonable measures aimed at preventing the commission of these atrocity crimes.<sup>130</sup>

## 2.4 The duty to prevent war crimes

Due diligence also plays a significant role in international humanitarian law.<sup>131</sup> Common Article 1 of the 1949 Geneva Conventions sets out the obligation for States Parties to 'undertake to respect and to ensure respect for the Geneva Conventions in all circumstances'.<sup>132</sup> While the obligation to respect the Geneva Conventions points out the

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<sup>127</sup> Marko Milanović, 'State Responsibility for Genocide' (2006) 17(3) EJIL 553, 571.

<sup>128</sup> *Bosnian Genocide* (n 83) para 430.

<sup>129</sup> Van den Herik, Irving (n 85) 204.

<sup>130</sup> ILC, 'Report of the International Law Commission on the work of its fifty-third session' (n 87) p. 62, para 14.

<sup>131</sup> ILA Study Group on Due Diligence in International Law, First Report (7 March 2014) p. 11, at <<https://www.ila-hq.org/en/committees>> accessed 19 October 2024.

<sup>132</sup> 1949 Geneva Conventions, Common Article 1. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. Identical language about the obligation to 'respect and to ensure respect' can also be found in art. 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and

basic principle of *pacta sunt servanda* envisaged in Article 26 of the Vienna Convention on the Law of Treaties,<sup>133</sup> the duty to ‘ensure respect’ embraces a twofold dimension, both internal and external. The internal component, which focuses on private players’ conduct carried out under the jurisdiction of a contracting State,<sup>134</sup> underpins that each High Contracting Party has the duty to ensure the observance of the legal provisions enshrined in the Geneva Conventions within its territory by its population as a whole.<sup>135</sup>

On the other hand, the external component encapsulates the duty of third States, even if not directly involved in an armed conflict, to take action to ensure respect of the provisions of the Conventions by the other High Contracting Parties, whether they are parties to the conflict or not.<sup>136</sup> Focusing on the external dimension of Common Article 1, the duty to ensure respect of the Geneva Conventions is to be deemed as an obligation of means<sup>137</sup> which requires States ‘to take all possible appropriate measures in an attempt to prevent or end violations of International Humanitarian Law’.<sup>138</sup> The ICJ has acknowledged this duty on several occasions. In the *Nicaragua* case, the Court emphasised the US obligation to ensure respect for the Geneva Conventions, even if it was not considered a party directly involved in the armed conflict.<sup>139</sup> Moreover, several

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relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, and in art. 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (adopted 8 December 2005).

<sup>133</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331.

<sup>134</sup> Marco Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 401, 412.

<sup>135</sup> Knut Dörmann, Jose Serralvo, ‘Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations’ (2014) 96 *International Review of the Red Cross* 707, 708-709.

<sup>136</sup> *ibid* 709. See also Sassòli (n 134) 411-412.

<sup>137</sup> Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflict* (ICRC 2008) 10.

<sup>138</sup> *ibid*. ICRC Commentaries also explain that Common Article 1 imposes an obligation to ensure respect by other States which ‘should do everything in their power to ensure that the humanitarian principles underlying the Conventions are universally applied’. See Jean Pictet (ed), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 16.

<sup>139</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. *Merits, Judgment*. *I.C.J. Reports 1986*, p. 14, p. 114, para 220. The Court reiterated this approach in subsequent judgments. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004*, p. 136, pp. 199-200, para 158. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgment*, *I.C.J. Reports*

UN Security Council resolutions urged third States not directly involved in an armed conflict to ensure compliance with the Geneva Conventions as enshrined in Common Article 1, considered as a ‘basic norm of behaviour’.<sup>140</sup>

In addition to that, the duty to ‘ensure respect’ outlined in Common Article 1 should also be regarded as a general principle that encapsulates other autonomous due diligence obligations.<sup>141</sup> As a matter of fact, due diligence obligations can be found in the rules concerning the dissemination and training of international humanitarian law where, for instance, it has been acknowledged States’ duty to integrate international humanitarian law into military training.<sup>142</sup>

To conclude, Common Article 1 is a provision that provides for extraterritorial obligations *vis-à-vis* the 1949 Geneva Conventions.<sup>143</sup> Accordingly, High Contracting Parties to the 1949 Geneva Conventions, even if not directly involved in an armed conflict, are nonetheless bound by an obligation of diligent conduct consisting of taking all necessary measures at their disposal to prevent international humanitarian law violations. According to the *Bosnian Genocide* case,<sup>144</sup> the assessment of States’ compliance with the due diligence obligation to ‘ensure respect’ should therefore be based on States’ ‘capacity to influence’ the conduct of the belligerent State acting in breach of IHL provisions.<sup>145</sup>

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2005, p. 168, p. 241, para 211. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para 279, at <<https://www.icj-cij.org/case/186>> accessed 27 October 2024.

<sup>140</sup> Luigi Condorelli, Laurence Boisson de Chazournes, ‘Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests’ (2000) 82 *International Review of the Red Cross* 67, 77. As regards UNSC Resolutions, *inter alia*, see UNSC Res 681 (20 December 1990) UN Doc S/RES/681 (1990). See also UNSC Res 955 (6 November 1994) UN Doc S/RES/955 (1994).

<sup>141</sup> Marco Longobardo, ‘Due Diligence in International Humanitarian Law’ in Anne Peters, Heike Krieger, Leonhard Kreuzer, *Due Diligence in the International Legal Order* (OUP 2020) 183, 186.

<sup>142</sup> *ibid* 186-187.

<sup>143</sup> Trahan (n 96) 84.

<sup>144</sup> *Bosnian Genocide* (n 83) para 430.

<sup>145</sup> Longobardo (n 141) 186.

### 3. States and a positive duty of cooperation within ARSIWA

The concept of due diligence is also tightly intertwined with the field of State responsibility. Hence, Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) enshrines an extraterritorial legal obligation binding third States, even if the wrongdoing is committed in another State.<sup>146</sup> As a matter of fact, Article 41(1) envisages States' positive duty to cooperate to bring to an end serious breaches of an obligation arising under a peremptory norm of general international law.<sup>147</sup> This provision has to be interpreted narrowly since States are bound by a positive duty to cooperate only in cases of serious violations of peremptory norms, thus involving '[...] a gross or systematic failure by the responsible State to fulfil the obligation';<sup>148</sup> moreover, there is general reluctance by States to expand their obligations for wrongdoing committed by third States.<sup>149</sup>

#### 3.1 An appraisal of its legal status

Even though States' cooperation is already implemented and often regarded as the only way to provide an effective remedy,<sup>150</sup> some doubts may arise as regards its legal nature. Hence, as pointed out in 2001 by the International Law Commission, rather than legally binding, Article 41(1) was considered more as a provision reflecting a progressive development of international law.<sup>151</sup>

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<sup>146</sup> ILC, 'Report of the International Law Commission on the Work of its 53rd Session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, 31 (hereinafter ARSIWA). See art. 41 ARSIWA.

<sup>147</sup> *ibid* 114.

<sup>148</sup> art. 40(2) ARSIWA. The ILC in its commentary on art. 40 lists some factors which may help in establishing the seriousness of a violation. For instance, it should be taken into account the intent to violate the norm, the scope and number of individual violations, and the gravity of their consequences for the victims. ARSIWA (n 146) 113.

<sup>149</sup> Elena Kastelli, 'Commentary: R2P as a transforming and transformative concept in the context of responsibility as liability' in Barnes Richard, Tzevelekos Vassilis (eds), *Beyond Responsibility to Protect: Generating Change in International Law* (Intersentia 2016) 415, 420.

<sup>150</sup> Hitoshi Nasu, 'The UN Security Council's Responsibility and the "Responsibility to Protect"' (n 1) 389. See also ARSIWA (n 146) 114.

<sup>151</sup> '[...] it may be open to question whether general international law at present prescribes a positive duty of cooperation'. cf ARSIWA (n 146) 114; Kastelli (n 149) 420 s.

Almost two decades later, as laid out in Draft Conclusion 19 of the 2022 *Draft Conclusion on identification and legal consequences of peremptory norms of general international law*,<sup>152</sup> the International Law Commission has considered the duty to cooperate to bring to an end serious breaches of obligations arising under *jus cogens* norms as an already existing international legal obligation.<sup>153</sup> To support this view, the ILC relied upon both domestic and international jurisprudence. As regards the ICJ case-law, the ILC cited the *Wall* and *Chagos* Advisory Opinions, both dealing with the obligation to respect the right of self-determination. As a matter of fact, in the *Wall*, the Court, focusing on the *erga omnes* obligation to respect the Palestinian right of self-determination, pointed out the existence of a duty to cooperate to bring to an end breaches of ‘obligations to respect the right ... to self-determination, and certain ... obligations under international humanitarian law’.<sup>154</sup> Similarly, in *Chagos*, the Court highlighted the *erga omnes* character of the obligation to respect the right of self-determination and the consequent duty for all States to cooperate with the United Nations to bring to an end the breach of the corresponding obligations.<sup>155</sup>

Legal scholars criticised the references provided by the Court.<sup>156</sup> In particular, they disagreed with the juxtaposition between *erga omnes* obligations and those associated with the breach of a *jus cogens* provision, considering them as two different types of obligations. Hence, they argued that, unlike a serious breach of a peremptory norm of general international law, the breach of an *erga omnes* obligation does not automatically imply the duty upon States to put an end to such breach.<sup>157</sup>

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<sup>152</sup> ILC, ‘Report of the International Law Commission on the work of its seventy-third session’ (18 April–3 June and 4 July–5 August 2022) UN Doc A/77/10, 10 (hereinafter ‘*Draft Conclusions*’).

<sup>153</sup> *ibid* 70-71. To support this position the Commission relied, *inter alia*, upon the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. UNGA Res 2625 (XXV) (24 October 1970) annex, para 1, UN Doc A/RES/2625(XXV).

<sup>154</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, p. 199, para 155.

<sup>155</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019*, p. 95, pp. 139-140, para 182.

<sup>156</sup> Rebecca Barber, ‘Cooperating through the General Assembly to End Serious Breaches of Peremptory Norms’ (2022) 71 ICLQ 1, 15 ff.

<sup>157</sup> *ibid* 15-16.

States also discussed the customary status of the duty to cooperate envisaged in Draft Conclusion 19.<sup>158</sup> Despite a few dissenting voices,<sup>159</sup> they generally supported its customary character,<sup>160</sup> or, at least, its progressive development within international law.<sup>161</sup> In between, other States, such as Italy and Poland, asked the Commission to further clarify the jurisprudence cited by the ICJ as well as to refer more to recent developments that could be used to underpin Draft Conclusion 19.<sup>162</sup>

Even if the ILC work is not legally binding as such, it should still be seen as a persuasive ‘subsidiary means for the determination of rules of law’,<sup>163</sup> which the ICJ often cites in its decisions and advisory opinions.<sup>164</sup> Accordingly, ILC provisions, including Draft Conclusion 19(1), should be seen as an ‘offer of interpretation’ to States to which they might rely in carrying out their international relations and which might be used by international courts and tribunals as subsidiary means to determine rules of law.<sup>165</sup> Furthermore, as the next paragraph will further assess, it is worth recalling that the duty to cooperate envisaged in Draft Conclusion 19 should not be read in isolation, but rather in conjunction with the due diligence obligations stemming from the prevention and punishment of R2P crimes.

### **3.2 The content of the positive duty to cooperate**

Before dwelling on the content of the positive duty to cooperate, it is important to clarify whether this duty comprises an individual obligation or a collective one. According to the ILC commentaries, Article 41(1) ARSIWA can be interpreted as

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<sup>158</sup> ILC, ‘Fifth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, Comments and observations received from Governments’ (9 March 2022) UN Doc A/CN.4/748, 84-90.

<sup>159</sup> United States of America, UN Doc A/CN.4/748, p. 89.

<sup>160</sup> See, *inter alia*, Cyprus, UN Doc A/C.6/74/SR.24, p. 8, para 35; Nicaragua, UN Doc A/C.6/74/SR.23, p. 13, para 73; Cuba, UN Doc A/C.6/74/SR.25, p. 4, para 21.

<sup>161</sup> Israel, UN Doc A/CN.4/748, p. 85; United Kingdom, UN Doc A/CN.4/748, p. 89.

<sup>162</sup> Italy, UN Doc A/CN.4/748, p. 86; Poland, UN Doc A/C.6/74/SR.23, p. 20, para 124.

<sup>163</sup> Statute of the International Court of Justice (18 April 1946) 33 UNTS 993, art 38(1).

<sup>164</sup> Barber (n 156) 18.

<sup>165</sup> Rosalyn Higgins, ‘Keynote Address H.E. Judge Rosalyn Higgins, President of the International Court of Justice’ (19 May 2008) 2, at <<https://www.icj-cij.org/public/files/press-releases/8/14488.pdf>> accessed 20 October 2024.

providing a positive duty to cooperate to end serious breaches of obligations arising under peremptory norms of general international law which should be carried out through a ‘joint and coordinated effort by all States’.<sup>166</sup> This wording indicates that the duty to cooperate is a collective obligation binding each and every State of the international community.<sup>167</sup> As acknowledged in the *Bosnian Genocide* case, the effectiveness of these obligations lies in universality, being the ‘combined effort’ of the States the essence of the duty to cooperate.<sup>168</sup> However, focusing on its content, neither ARSIWA nor the 2022 *Draft Conclusions* further specify what measures States should take to meet this obligation.<sup>169</sup> It is only established that cooperation must be carried out ‘through lawful means’, indicating the UN system as the preferred framework for cooperative action.<sup>170</sup>

Absent any more precise guidance, the concept of due diligence outlined in the *Bosnian Genocide* case,<sup>171</sup> which turns out to be extremely useful in providing substance to State obligations that are ‘somewhat indeterminate or unclear’, could help to clarify the contours of the duty to cooperate.<sup>172</sup> In the *Bosnian Genocide* case the Court emphasised that due diligence allows to ‘substantiate a provision [the obligation to prevent genocide] that had previously been labelled as normatively empty’;<sup>173</sup> similarly, the due diligence standard might help us specifying the content to the duty to cooperate to end serious breaches of *jus cogens* norms.<sup>174</sup> As a matter of fact, within this framework, the due diligence standard requires States to use all available means at their disposal which are likely to halt the commission of these serious breaches.

Moreover, as pointed out by the International Law Association Study Group on Due Diligence in International Law, one has to take into account the fact the due diligence

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<sup>166</sup> ARSIWA (n 146) 114; see also Kastelli (n 149) 420.

<sup>167</sup> Kastelli (n 149) 421.

<sup>168</sup> *Bosnian Genocide* (n 83) para 430.

<sup>169</sup> Barber (n 156) 19.

<sup>170</sup> *Draft Conclusions* (n 152) 72.

<sup>171</sup> Barber (n 156) 20.

<sup>172</sup> ILA Study Group on Due Diligence in International Law, Second Report (n 120) 47. On the same path, due diligence is understood as an ‘*agent du développement du droit international*’. Forlati (n 69) 62.

<sup>173</sup> Barber (n 156) 20.

<sup>174</sup> *ibid.*

standard might vary depending on the ‘importance of the interest requiring protection’.<sup>175</sup> On this point, it is worth recalling that the prohibition of genocide, crimes against humanity, and basic rules of international humanitarian law have acquired the status of peremptory norms.<sup>176</sup> As regards the prohibition of genocide, its peremptory character was already acknowledged in the ILC Commentary to Article 50 of the Draft Articles on the Law of Treaties,<sup>177</sup> and further stressed by subsequent domestic and international courts jurisprudence.<sup>178</sup> Likewise, the prohibition of crimes against humanity is a *jus cogens* norm, clearly accepted and recognised as such.<sup>179</sup> Regarding war crimes, basic rules of international humanitarian law applicable in armed conflict considered ‘intransgressible’ in character are to be deemed as peremptory norms as well.<sup>180</sup> Therefore, since *jus cogens* norms rank at the highest level of the sources of international law, it is expected that the due diligence required to accomplish the duty to cooperate to end serious breaches of obligations arising under this category of norms should be of the highest order.<sup>181</sup>

As noted in the previous sections, in order to discern whether States have duly complied with the due diligence standard, a higher threshold is put upon those having the ‘capacity to influence’ the actions of the persons resulting in serious breaches of peremptory norms.<sup>182</sup> Besides the role played by the UN Security Council and its members,<sup>183</sup> it is also important to focus on the positions assumed by States parties to other UN organs.

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<sup>175</sup> ILC Study Group on Due Diligence in International Law, Second Report (n 167) 21.

<sup>176</sup> According to art. 53 of the Vienna Convention on the Law of Treaties ‘[...] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.

<sup>177</sup> Whose content has been reproduced in art. 53 of VCLT. cf Yearbook ILC, 1966, vol. II, p. 248.

<sup>178</sup> See, *inter alia*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, *I.C.J. Reports 1993*, p. 325, pp. 339-340; see also, *Attorney-General of the Government of Israel v. Adolf Eichmann* [1961] District Court of Jerusalem, [1961] 36 ILR 5.

<sup>179</sup> Report of the International Law Commission Seventy-first session (n 122) 11.

<sup>180</sup> *ibid* 113; cf also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, p. 257, para 79.

<sup>181</sup> Barber (n 156) 24.

<sup>182</sup> See (n 94).

<sup>183</sup> See Para 5.

Focusing on the UN General Assembly, it is worth recalling that this policy-making organ - when the UN Security Council is unable to act due to the exercise of the veto power - might adopt, under the Uniting for Peace procedure, a resolution dealing with a situation concerning the maintenance of international peace and security.<sup>184</sup> Considering this procedure as one of the available tools at States' disposal to positively influence the conduct of the perpetrators, States which abstained or voted against might ultimately be considered as acting in breach of the required due diligence standard. Arguably, duly diligent UN General Assembly Members are normally required to support resolutions aiming at halting serious breaches of *jus cogens* provisions.<sup>185</sup>

The UN General Assembly's qualification of the Russian 'special military operation' against Ukraine as an act of aggression seems to provide a favourable indication of States' commitment to fulfil their duty to cooperate in addressing serious violations of peremptory norms.<sup>186</sup> Moreover, the wide majority of States condemning Russia's actions within the UN General Assembly might increase political pressure on Russia to comply with international law.<sup>187</sup>

#### **4. International Organizations and a positive duty to cooperate within ARIO**

Following Articles 40 and 41 ARSIWA, Articles 41 and 42 of the Articles on the Responsibility of International Organizations (ARIO) also enshrine a special regime for responsibility in case of serious *jus cogens* violations.<sup>188</sup> According to some, Article 41 ARIO should be seen as overlapping in content with Article 40 ARSIWA.<sup>189</sup>

On the same vein, focusing on the special consequences triggered by serious breaches of obligations of *jus cogens* norms, Article 42 ARIO provides for International Organizations duties corresponding to those applying to States according to Article 41

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<sup>184</sup> See (n 37).

<sup>185</sup> Barber (n 156) 23.

<sup>186</sup> UNGA Res (1 March 2022) UN Doc A/ES-11/L.1.

<sup>187</sup> See (n 38).

<sup>188</sup> ILC, 'Report of the International Law Commission of its Sixty-third session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, 133-134 (hereinafter ARIO).

<sup>189</sup> *ibid* 134.

ARSIWA.<sup>190</sup> More concretely, it sets the obligation to cooperate to bring an end through lawful means any serious breach as well as not to recognise as lawful or to render aid or assistance for a situation created by the breach.

As laid out in the ARIO's Commentaries, the obligations envisaged in Article 42 ARIO refer primarily to a serious breach of an obligation arising from a *jus cogens* provision committed by an International Organization; nonetheless, Article 42 might be applied even in those cases where a breach was allegedly committed by a State.<sup>191</sup> For instance, with regard to the International Organizations' duty not to recognise as lawful a situation created by one of those breaches, reference has been made to the UN Security Council Resolution 662/1990 calling upon States, International Organizations, and specialised agencies not to recognise Iraq's annexation of Kuwait as lawful.<sup>192</sup> Similarly, within a regional framework, the European Community's *Declaration on Yugoslavia and on the Guidelines on the Recognition of New States* ensured the European Community and its Member States' commitment not to recognise entities which come into existence as the result of an aggression.<sup>193</sup>

International Organizations' duty to cooperate envisaged in Article 42(1) ARIO should also be discussed. In order to grasp its scope, it is worth recalling that International Organizations, unlike States, are functional in nature.<sup>194</sup> Their existence and competences are instrumental to performing the functions entrusted to them. As the ICJ stated in the *Nuclear Weapons Advisory Opinion*:

'international organizations are subjects of international law which do not, unlike states, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the states which create them with powers, the

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<sup>190</sup> *ibid.*

<sup>191</sup> *ibid.* 135.

<sup>192</sup> UNSC Res 662/1990 (9 August 1990) UN Doc S/RES/662 (1990).

<sup>193</sup> European Community, 'Declaration on Yugoslavia and on the Guidelines on the Recognition of New States' (16 December 1991) (1992) 31 ILM 1485, 1487.

<sup>194</sup> Henry G Schermers, Niels M Blokker, *International Institutional Law: Unity within Diversity* (Brill | Nijhoff 2018) 20.

limits of which are a function of the common interests whose promotion those states entrust to them'.<sup>195</sup>

Accordingly, as stressed by Virally, while the aim of the State is integrated (*finalité intégrée*), that of the International Organizations is functional (*finalité fonctionnelle*).<sup>196</sup> In other words, due to the principle of speciality - also referred to as the principle of conferral -<sup>197</sup> International Organizations can only perform their functions in accordance with the powers entrusted to them by their creators.<sup>198</sup>

Therefore, considering International Organizations' functional personality, it was rightly pointed out that the duty to cooperate set out in Article 42(1) ARIO 'is not designed to vest International Organizations with functions that are outside their respective mandates'.<sup>199</sup> On the other side of the coin, it is also claimed that this provision is without prejudice to any other functions that might be entrusted to an International Organization regarding certain breaches of obligations under peremptory norms of general international law, such as those attributed to the United Nations in case of an act of aggression.<sup>200</sup>

As a subject of international law with international legal personality,<sup>201</sup> the European Union is a global actor which plays a significant role in halting and preventing the commission of serious breaches of *jus cogens* norms. Articles 3(5) and 21 of the Treaty on the European Union (TEU) provide the legal basis for the EU to carry out its external relations taking into account, *inter alia*, the need to preserve peace, prevent conflicts, and strengthen international security as well as to consolidate and support

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<sup>195</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, p. 78, para 25.

<sup>196</sup> Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in *Mélanges offerts à Charles Rousseau – La communauté internationale* (Pedone 1974) 277.

<sup>197</sup> cf CJEU, Opinion 2/94 (28 March 1996) *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140, para 24; Opinion 1/08 (30 November 2009) ECLI:EU:C:2009:739, paras 110, 131.

<sup>198</sup> Leonardo Diaz Gonzalez, Special Rapporteur ILC, 'Second report on relations between States and international organizations (second part of the topic)' Yearbook ILC 1985, Vol. II (I) 110.

<sup>199</sup> ARIO (n 188) 135.

<sup>200</sup> *ibid.*

<sup>201</sup> Treaty on European Union (29 July 1992) OJ C 191, p. 1-112, art. 47.

democracy, the rule of law, human rights and the principles of international law.<sup>202</sup> Therefore, ending the commission of serious breaches of *jus cogens* norms is a necessary corollary of the EU's external action overarching goals. As the following chapters will scrutinise in-depth, EU constituent instruments envisage a set of specific tools which it might use to achieve this goal. As highlighted in paragraph 11 of the ILC Commentaries to Draft Conclusion 19 on identification and legal consequences of *jus cogens*, when an International Organization has discretion to act, the obligation to cooperate provides for a duty to exercise discretion by considering the goal of bringing into an end serious breaches of peremptory norms of general international law.<sup>203</sup> For these reasons, the EU, notwithstanding its different mandate and functions as compared to the United Nations - which is the proper framework to carry out such cooperation - has nonetheless some powers which might be used to effectively contribute towards achieving the major goal of halting the commission of serious *jus cogens* violations. Therefore, despite its functional personality and the limits inherent in its mandate, the EU has to cooperate to end serious violations of peremptory norms of general international law and might be required to use its discretionary powers to fully comply with it.

States took different positions as for the interpretation of the duty to cooperate envisaged in paragraph 11 of the ILC commentaries on Draft Conclusion 19. For instance, Italy argued that Draft Conclusion 19 should also apply to International Organizations,<sup>204</sup> suggesting the deletion of the non-prejudice provision outlined in paragraph 11.<sup>205</sup> Among other reasons, Italy justified its position by considering the increasing role played by International Organizations within the international legal system and, taking into account that, *inter alia*, Article 42 ARIO provides for specific consequences related to serious violations of peremptory norms.<sup>206</sup> France asked the ILC to further clarify the role of International Organizations in the context of Draft Conclusion 19, highlighting an

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<sup>202</sup> *ibid.* See, *inter alia*, art. 21(2)(b), art. 21(2)(c) TEU. cf Chapter III, para 1.1.

<sup>203</sup> *Draft Conclusions* (n 152) 75-76.

<sup>204</sup> Italy, UN Doc A/CN.4/748, p. 86; see also Belarus, UN Doc A/C.6/74/SR.24, p. 16, para 81; Estonia, UN Doc A/C.6/74/SR.26, p. 11, para 82.

<sup>205</sup> UN Doc A/CN.4/748, p. 86.

<sup>206</sup> *ibid.*

apparent discrepancy between the obligations set out in paragraphs 4, 5, 7 and the non-prejudice provision enshrined in paragraph 11 of the ILC commentaries.<sup>207</sup>

Due to the uncertainties surrounding the effective crystallization of International Organizations' duty to cooperate,<sup>208</sup> the 'due diligence' standard might also apply to International Organizations.<sup>209</sup> This is particularly relevant for those having the capacity of positively influencing the conduct of the perpetrators of serious *jus cogens* violations, which bear an even greater responsibility to put an end to those breaches.

According to this view, and keeping in mind the International Organizations' subsidiary, and yet important role<sup>210</sup> under international law, they should employ all the means at their disposal to cooperate to halt and prevent the commission of serious breaches of *jus cogens* norms. While the following chapters provides an in-depth analysis of the tools at the EU's disposal to pursue this goal, the next section will focus on the legal issues arising from the exercise of the veto power bestowed upon UN Security Council P5 Members on such occasions.

## **5. The Responsibility to Protect and the failures of the United Nations Security Council: the problem of the veto and its limits**

As previously mentioned, the main problem in ensuring the effective implementation of R2P, particularly its Pillar III, lies in the veto power bestowed to the P5 Members,<sup>211</sup> a 'passive' instrument that could prevent the UN from fulfilling its role in the application of the Responsibility to Protect. The veto power was extensively

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<sup>207</sup> France, *Commentaires et Observations de la République Française relatifs aux Projets de Conclusion de la Commission du Droit International sur 'Les Normes Impératives du Droit International General (Jus Cogens)'* p. 37, para 104, at <[https://legal.un.org/ilc/sessions/73/pdfs/french/jc\\_france.pdf](https://legal.un.org/ilc/sessions/73/pdfs/french/jc_france.pdf)> accessed 27 October 2024. See also UN Doc A/CN.4/747 p. 58, para 186.

<sup>208</sup> The Netherlands asked the ILC to further clarify whether paragraph 11 of Draft Conclusion 19 should be deemed as a developing or already existing rule of international law. UN Doc A/CN.4/748, p. 87.

<sup>209</sup> Serena Forlati, 'Due Diligence' in Christina Binder, Manfred Nowak, Jane A Hofbauer, Philipp Janig (eds), *Elgar Encyclopedia of Human Rights* (Elgar 2022) 531, 535.

<sup>210</sup> UN Doc A/CN.4/748, p. 39.

<sup>211</sup> See art. 27(3) UN Charter.

debated during the United Nations Conference on International Organization;<sup>212</sup> its endorsement represented a *conditio sine qua non* for P5 Members' acceptance of the UN Charter, and, consequently, for the establishment of the United Nations.<sup>213</sup> The justification provided by P5 Members for its inclusion in the Charter was that it could not be expected that they would assume an obligation to act in extremely important matters, such as those related to the maintenance of international peace and security, on the basis of a decision in which they had not concurred.<sup>214</sup>

Almost 80 years after the adoption of the UN Charter, P5 Members have repeatedly resorted to this power,<sup>215</sup> which prevented the UN Security Council from addressing crises scenarios where the commission of gross human rights violations was at stake.<sup>216</sup> Therefore, the veto power is to be deemed as the major obstacle in ensuring an effective implementation of R2P Pillar III. Hence, even when the commission of core international crimes is at stake, the simple threat of its use might prevent the tabling of a draft resolution and ultimately lead the UN Security Council to inaction.<sup>217</sup>

Due to the relevance of the veto power in ensuring an effective implementation of R2P Pillar III, it is important to deeply scrutinise its legal status by focusing on existing legal limits envisaged both within and outside the UN Charter.

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<sup>212</sup> Trahan (n 96) 17-18.

<sup>213</sup> See Andreas Zimmermann, 'Article 27' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf (eds) *The Charter of the United Nations: A Commentary* (OUP 2012) 882.

<sup>214</sup> 'in view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred'. See 'Statement by the delegations of the four sponsoring governments on voting procedure in the Security Council', in United Nations Information Organization, *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, volume 11, at <<https://digitallibrary.un.org/record/1300969/files/>> accessed 5 October 2024, p. 713, para 9.

<sup>215</sup> Dag Hammarskjöld Library, Security Council Veto List, at <<https://research.un.org/en/docs/sc/quick>> accessed 6 October 2024.

<sup>216</sup> As was in the Syrian context where due to the exercise of the veto power by China and Russia the Security Council couldn't authorise forcible intervention for humanitarian purposes. See (n 24).

<sup>217</sup> Trahan (n 96) 32.

## 5.1 Internal limits

Limitations to the use of the veto power are, firstly, enshrined within the UN Charter. As stated by the ICJ in the *Admission of a State to the United Nations* Advisory Opinion, the UN Security Council cannot be deemed as an organ above all law since it has the legal obligation to observe the provisions enshrined in the Charter.<sup>218</sup>

According to Article 24(2), the UN Security Council, in discharging its duties ‘[...] shall act in accordance with the Purposes and Principles of the United Nations’.<sup>219</sup> In fact, Article 24(2) should be read in conjunction with Articles 1(1) and 1(3) of the Charter. Article 1(1) deals with the requirement of acting in conformity with the principles of justice and international law.<sup>220</sup> Even if, due to the positioning of this provision, one might argue that it should only apply in situations related to UN Charter Chapter VI,<sup>221</sup> scholars maintained that Article 1(1) applies also when the UN Security Council is acting under Chapter VII dealing with issues related to the maintenance of the international peace and security.<sup>222</sup> Furthermore, under Article 1(3), the UN Security Council has to take measures consistent with the overarching goal of achieving international cooperation as well as promoting and encouraging respect for human rights.<sup>223</sup> Hence, if human rights violations - including those caused by the perpetration of mass atrocity crimes - infringe

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<sup>218</sup> *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948*, p. 57, p. 64.

<sup>219</sup> art. 24(2) UN Charter. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, p. 52.

<sup>220</sup> art. 1(1) UN Charter.

<sup>221</sup> On the occasion of the San Francisco Conference, the delegate of Egypt proposed to shift the placement of the wording ‘in conformity with the principles of justice and international law’ by allocating it immediately after ‘to maintain international peace and security’ since he considered that it was indispensable that the principles of justice and law should always be present in the deliberations of the Security Council. See United Nations Information Organization, *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, volume 6, at <<https://digitallibrary.un.org/record/1300969/files/>> accessed 10 October 2024, p. 23-24. Due to the fact that this proposal did not reach the two-thirds majority required, it was ultimately rejected.

<sup>222</sup> Dapo Akande, ‘The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?’ (1997) 46(2) *International & Comparative Law Quarterly* 309, 320-321.

<sup>223</sup> art. 1(3) UN Charter.

the ‘purposes and principles’ of the UN,<sup>224</sup> the UN Security Council, being an organ of the United Nations and, according to Articles 1(1) and 1(3) of the UN Charter, is not entitled to act beyond the limits enshrined within the Charter.<sup>225</sup>

While various proposals have been put forward to justify the UN Security Council’s bindingness with the Purposes and Principles of the United Nations,<sup>226</sup> it is worth focusing on two of them. First, following a systematic approach and, in particular, focusing on the caption that underlies Article 24(2), entitled ‘Functions and Powers’, the veto right set out in Article 27(3) of the Charter is to be deemed as a ‘power’ of the P5 Members of the UN Security Council. Therefore, it has to be used according to the criteria established in Article 24(2).<sup>227</sup> Second, under a logical approach, since UN Members are bound by the ‘Purposes and Principles’ of the Charter, permanent Members cannot be granted power broader than UN Member States that created the Charter.<sup>228</sup>

Thus, it is logical to infer that P5 Members cannot freely act in breach of UN Charter provisions since they are also bound by Article 24(2) of the UN Charter.<sup>229</sup>

## 5.2 External limits

Externally, the exercise of the veto power has to be read in accordance with *jus cogens* obligations arising under international law as well as with treaty obligations that bind States, including P5 Members.

As highlighted above,<sup>230</sup> the prohibition of genocide, crimes against humanity, and basic rules of international humanitarian law applicable in armed conflict considered ‘intransgressible’ in character are to be deemed as peremptory norms of international law.

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<sup>224</sup> Akande (n 222) 324. See also, *inter alia*, Rüdiger Wolfrum, ‘Article 1’ in Bruno Simma, and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 108; Andreas Paulus, ‘Article 2’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2012) 121.

<sup>225</sup> *ibid.* 319.

<sup>226</sup> Trahan (n 96) 192-193.

<sup>227</sup> *ibid.*

<sup>228</sup> Mónica Lourdes de la Serna Galván, ‘Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?’ (2011) 11 *Anuario Mexicano de Derecho Internacional* 147, 152.

<sup>229</sup> *ibid.*

<sup>230</sup> See para 3(2).

The UN Security Council, as an organ of the United Nations - whose international legal personality has been acknowledged by the ICJ - is a subject of international law;<sup>231</sup> consequently, it has to act following international law provisions.<sup>232</sup> Being a subject of international law implies its bindingness to legal obligations arising within the international legal framework and, in particular, to *jus cogens*, the highest form of international law.<sup>233</sup> Accordingly, considering this special category of norms as the highest international law source, the use of veto power envisaged in the UN Charter, a subsidiary source of law compared to *jus cogens*, has to be consistent with them.<sup>234</sup>

As previously examined,<sup>235</sup> since both ARIO and ARSIWA envisage that States are under a positive obligation to cooperate to bring to an end serious breaches of peremptory norms of general international law,<sup>236</sup> the exercise of the veto power may jeopardise the respect of this duty. Moreover, it is worth highlighting that P5 Members have to act in conformity with *jus cogens* obligations not only as members of the UN Security Council but also as States. According to this view, P5 Members cannot by acting in the discharge of their functions as members of the UN Security Council derogate from *jus cogens* obligations which bind them under international law. As a matter of fact, Article 61(1) ARIO<sup>237</sup> enshrines the prohibition for States parties to an International Organization to

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<sup>231</sup> Trahan (n 96) 159. See, *inter alia*, *Namibia* Advisory Opinion (n 219) p. 294, para 115 (dissenting opinion of judge Sir Gerald Fitzmaurice). Akande (n 222) 320.

<sup>232</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, p. 65 (dissenting opinion of judge Weeramantry).

<sup>233</sup> Mahmoud Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 L. & Contemp. Prob. 63, 67; Hannah Yiu, 'Jus Cogens, the Veto and the Responsibility to Protect: A New Perspective' (2009) 7 New Zealand Yearbook of International Law 207, 232; Heieck (n 56) 185.

<sup>234</sup> cf Trahan (n 96) 148.

<sup>235</sup> See Paras 3,4.

<sup>236</sup> See art. 41(1) ARSIWA, art. 42(1) ARIO. On this point, scholars have argued that, when the breach of *jus cogens* norms is at stake '[...] the matter should no longer be considered purely as one of international peace and security under the SC's sole jurisdiction, but one where the use of veto by the permanent five to prevent intervention would be unlawful as a breach of *jus cogens*'. Yiu (n 233) 208.

<sup>237</sup> art. 61(1) ARIO reads as follows: 'A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation'.

circumvent their legal obligations by acting within the framework of the International Organization.<sup>238</sup>

Focusing on treaty provisions, since States, *inter alia*, have a duty to prevent and punish genocide as well as to ensure respect for the 1949 Geneva Conventions,<sup>239</sup> - obligations arising under peremptory norms of international law, which make Article 103 of the Charter inapplicable,<sup>240</sup> - any veto exercised by P5 Members on those occasions should be deemed in breach of their due diligence obligations.

Taking a step further, it is noteworthy that the ‘capacity of influence’ test set out in the *Bosnian Genocide* case, ‘varies greatly from one State to another’.<sup>241</sup> Despite enjoying wide discretion in employing the instruments envisaged in Chapter VII of the UN Charter, Members of the UN Security Council, as actors holding the most influential positions under the international legal framework, hold an even heavier responsibility than other States to ensure the protection of civilians everywhere.<sup>242</sup> In particular, this heightened responsibility rests upon P5 Members because of their disposal of more extensive means, capacity to effectively influence, and access to timely information which comes also from their privileged legal position within the UN Security Council.<sup>243</sup> Hence, P5 Members have to bear this responsibility since, through the use of the veto power, they can block the implementation of measures that, *inter alia*, could contribute to prevent the commission of gross human rights violations. Being endowed with both the authority and the capacity to intervene in such situations, once the criteria enshrined in R2P Pillar III are met, armed intervention to halt the commission of mass atrocity crimes (i.e. genocide) arguably falls within the scope of ‘reasonably available’ measures which permanent

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<sup>238</sup> For a detailed analysis of art. 61 ARIIO, see Odette Murray, ‘Piercing the Corporate Veil: The Responsibility of Member States of an International Organization’ (2011) 8 *International Organizations Law Review* 291. See also Sassòli (n 134) 431.

<sup>239</sup> See (n 132).

<sup>240</sup> Article 103 states that ‘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’. art. 103 UN Charter.

<sup>241</sup> *Bosnian Genocide* (n 83) para 430.

<sup>242</sup> cf Arbour (n 8) 453.

<sup>243</sup> Heieck (n 56) 51.

Members of the UN Security Council might use.<sup>244</sup> This reasoning applies, for instance, in relation with Russia's and China's use of veto power which prevented referral of the situation in Syria to the International Criminal Court, to counter the genocide against the Yazidis;<sup>245</sup> it is to be deemed as a conduct in breach of States' due diligence obligation to employ all necessary means available to them to prevent the commission of this crime. The same conclusion can be drawn regarding the veto exercised by P5 Members in relation with the ongoing crises in Ukraine and the Occupied Palestinian Territory.<sup>246</sup>

Accordingly, the use of the veto in case of a UN Security Council draft resolution aimed at halting and preventing the commission of genocide, war crimes, or crimes against humanity cannot be considered exercised in accordance with both UN Charter provisions and P5 Members' external obligations envisaged in the international legal system. Therefore, greater emphasis should be given to these existing legal obligations underlying the wielding of the veto power. Since the UN Security Council cannot be considered as *legibus solutus*, the scope of the veto power has to be narrowed by existing legal limits consisting of hard law obligations envisaged both within and outside the UN Charter.<sup>247</sup> On this point, the *Tadić* judgment stated that:

'It is clear from this text (art. 39 of the UN Charter) that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any

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<sup>244</sup> Arbour (n 8) 453-454; Giorgio Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 397, 405; Bellamy, Reike (n 1) 284-285.

<sup>245</sup> See UNSC, Draft Resolution (22 May 2014) UN Doc S/2014/348, vetoed by Russia and China. Trahan (n 96) 85.

<sup>246</sup> See Para 1.

<sup>247</sup> cf Trahan (n 96) 52.

case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).<sup>248</sup>

## 6. Concluding remarks

Almost twenty years after the affirmation of the R2P doctrine within the United Nations, doubts are still present concerning its actual legal nature. In particular, focusing on R2P's third Pillar, the way in which the Responsibility to Protect was framed in the *World Summit Outcome*, the lack of corrective mechanisms dealing with the veto power issue, and the reluctance to acknowledge the prescriptive dimension of the doctrine, make it difficult to develop a thorough understanding of the Responsibility to Protect. Hence, rather than legally binding, we should consider it, at best, as an emerging norm of international law. State practice aligns with this outcome. With the only exception of the controversial interventions in Libya and Ivory Coast, the UN Security Council did not authorise the use of force under R2P Pillar III in other similar scenarios. The Syrian, and more recently, the situations in Ukraine, Israel and the Occupied Palestinian Territory, further confirm this negative trend.

Considering the Responsibility to Protect as a 'multifaceted concept', in order to get the full picture of its legal status, it was worth focusing on existing legal obligations underlying it. As a matter of fact, R2P is grounded in international law and, for this reason, it has to be read in accordance with hard law obligations set out within the international legal framework. Within this context, the relevance of due diligence obligations arising from international legal instruments such as the Genocide Convention and the 1949 Geneva Conventions is not to be underestimated. For instance, as outlined in Article 1 of the Genocide Convention, States have an obligation to prevent and punish its commission. This duty should not be considered as territorially limited; as stated by the ICJ in the *Bosnian Genocide* case, it applies to every State which has at its disposal means that could have a deterrent effect in relation to the commission of the *crime of*

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<sup>248</sup> See *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY-94-1-AR72, (1996) 35 ILM 32 (2 October 1995) para 28.

*crimes*. Moreover, bearing in mind that the prohibition of genocide, crimes against humanity, and basic rules of international humanitarian law have acquired the status of peremptory norms, according to Article 41(1) ARSIWA and Article 42(1) ARIO, both States and International Organizations have a positive duty to cooperate to end serious *jus cogens* breaches. The same conclusion has recently been reached by the ILC in Draft Conclusion 19 of the 2022 *Draft Conclusion on identification and legal consequences of peremptory norms of general international law*.

Due diligence obligations' role is crucial to further consolidating the obligation to cooperate within the international legal framework. Considering *jus cogens* norms ranked at the highest level of the sources of international law, it is expected that the due diligence required by States and International Organizations to accomplish the duty to cooperate to halt serious breaches of obligations arising under this category of norms should be of the highest order. As the next chapters will further discuss, the EU, as an International Organization willing to take a more active stance in the fight against mass atrocity crimes worldwide, can and should play a relevant role in this domain.

Given the uncertainties about the legal nature of the positive duty to cooperate, a UN Security Council resolution would represent the most suitable solution to compel States to take measures - even forcible ones, if the requirements under R2P Pillar III are met - to halt and prevent massive human rights violations. As confirmed by the current scenarios in Ukraine, Israel and the Occupied Palestinian Territory, the veto power granted to P5 Members of the UN Security Council represents the main obstacle to ensuring an effective implementation of the Responsibility to Protect. Nevertheless, as envisaged both within and outside the UN Charter, this power cannot be used indiscriminately since legal limits to its use are provided both within and outside the Charter. Accordingly, the UN Security Council, being one of the main organs of the United Nations, which is a subject of international law, is bound to act in accordance with the legal obligations arising within the international legal framework, in particular those stemming from peremptory norms of international law. Its more active engagement might also encourage States, especially those that are still reluctant, to take military measures in support of populations affected by the commission of mass atrocity crimes. Moreover,

following the 'capacity to influence' test set out in the *Bosnian Genocide* case, member States of the UN Security Council and, in particular, P5 Members, which through the adoption of a resolution could halt and prevent the commission of genocide, bear the strongest obligations of due diligence. Thus, in case of inaction, they might be held responsible for not having employed all the measures reasonably available to them to prevent *jus cogens* violations.

## CHAPTER THREE

### **The European Union's endorsement of the Responsibility to Protect and its preventive engagement within the Common Foreign and Security Policy**

SUMMARY: 1. The special character of the Common Foreign and Security Policy – 1.1 An overview – 1.2. Relevant actors and functioning mechanisms – 2. The Common Security and Defence Policy – 2.1 Introductory remarks – 2.2 Available tools and procedures – 3 The principle of conferral: vertical and horizontal dimensions – 3.1 The distribution of competences between the European Union and member States – 3.2 The coordination between the Common Foreign and Security Policy and the other external policies of the European Union – 4. The affirmation of the Responsibility to Protect within the EU framework – 4.1 Early years – 4.2 The first decade – 4.3 The last decade – 5 Preventive engagement – 5.1 The EU conflict Early Warning System – 5.2 The Atrocity Prevention Toolkit – 6. Concluding remarks.

#### **1. The special character of the Common Foreign and Security Policy**

Amongst the various EU external policies, the analysis of the Common Foreign and Security Policy is crucial to understanding the role played by the EU as a global actor in endorsing and implementing the Responsibility to Protect. The following paragraphs will look at the historical roots and main features of this policy field.

##### **1.1 An overview**

Discussions on European foreign policy started in the 1950s.<sup>1</sup> However, considering foreign policy as an issue at the heart of national sovereignty, falling therefore within the category of 'high politics', this topic was not included in the 1958 Rome

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<sup>1</sup> Panos Koutrakos, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) 3 Swedish Institute for European Policy Studies 1, 11; Ramses A Wessel, 'Common Foreign, Security and Defence Policy' in Ramses A Wessel, Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart 2020) 283, 286; Luigi Lonardo, *EU Common Foreign and Security Policy after Lisbon: Between Law and Geopolitics* (Springer 2023) 49. Araceli Mangas-Martín, Diego J Liñán-Nogueras, *Instituciones y Derecho de la Unión Europea* (Tecnos 2024) 647-648.

Treaty, which indeed focused on ‘low politics’ such as commercial policy.<sup>2</sup> In 1970, pushed by the need to develop a culture of cooperation and harmonisation in the foreign policy field, the six founding members of the European Community issued the Luxemburg Report, which introduced the European Political Cooperation (EPC), considered the precursor to the Common Foreign and Security Policy (CFSP).<sup>3</sup> A few years later, the Copenhagen and London Reports further complemented the Luxemburg Report.<sup>4</sup> Despite lacking legally binding value, these documents defined the procedures and objectives for coordinated actions that could maximise member States’ influence on the international arena.<sup>5</sup> The EPC acquired treaty foundation in 1986 under the Single European Act (SEA),<sup>6</sup> according to which member States were allowed ‘[...] to inform and consult each other on any foreign policy matters of general interest’.<sup>7</sup> The EPC lasted until 1993 when the Common Foreign and Security Policy eventually replaced it.

The Treaty of Maastricht introduced the CFSP within the EU institutional framework.<sup>8</sup> According to this treaty, the newly established European Union was divided into three pillars: the European Communities, the Common Foreign and Security Policy, and the cooperation in the fields of Justice and Home Affairs. Unlike the First Pillar, which had a supranational dimension, the Second and Third Pillars were essentially formalised intergovernmental cooperation, with a marginal role to be played by the EU Institutions. Focusing on the CFSP Pillar, the Commission did not enjoy the exclusive right to submit proposals to the Council, while the European Parliament was merely

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<sup>2</sup> Uwe Schmalz, ‘The Amsterdam Provisions on External Coherence: Bridging the Union’s Foreign Policy Dualism?’ (1998) 3(3) *European Foreign Affairs Review* 421, 422; Bastian Giegerich, *Foreign and Security Policy* (OUP 2017) 439.

<sup>3</sup> ‘Report by the Foreign Ministers of the Member States on the problems of political unification’ (27 October 1970) *Bulletin of the European Communities* (November 1970, n° 11) 9-14, known also as the Davignon Report.

<sup>4</sup> ‘Second report on European political cooperation on Foreign Policy’ (23 July 1973) *Bulletin of the European Communities* (September 1973, n° 9) 14-21; ‘Report on European political cooperation’ (13 October 1981) *Bulletin of the European Communities* (1981, n° Supplement 3) 14-17.

<sup>5</sup> Koutrakos (n 1) 11.

<sup>6</sup> Single European Act (29 June 1987) OJ L 169, p. 1-28, art. 30. See also Schmalz (n 2) 422.

<sup>7</sup> art. 30(2)(a) SEA.

<sup>8</sup> Jan Wouters, Frank Hoffmeister, Geert de Baere, Thomas Ramopoulos (eds), *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP 2021) 359.

consulted concerning ‘[...] the main aspects and the basic choices of the common foreign and security policy’.<sup>9</sup> The Court of Justice of the European Union (CJEU) had no jurisdiction in this sector.

Following the entry into force of the Lisbon Treaty in 2009, and the subsequent dismissal of the three-pillar structure, the CFSP is no longer regarded as the Second Pillar of the Union, but as a ‘part and parcel of the EU legal order’.<sup>10</sup> Nevertheless, it remains subject to specific rules and procedures.<sup>11</sup> First of all, focusing on the structure of the treaties, it can be noticed that, under the Lisbon Treaty, almost all the EU external policies are regulated in Part V of the TFEU.<sup>12</sup> On the other hand, the CFSP, together with the neighbourhood and enlargement policies,<sup>13</sup> remains the only substantive external policy field based on the TEU.<sup>14</sup> Furthermore, the CFSP retains a significant intergovernmental dimension, as evidenced by its decision-making procedure, which generally requires unanimity, as well as the circumscribed powers conferred in this domain to the Commission, the European Parliament, and the CJEU.<sup>15</sup> While the Parliament’s competence in CFSP matters has remained substantially unchanged since the Treaty of Maastricht, the Commission’s role has been considerably narrowed. As a matter of fact, with the Lisbon Treaty, its role of initiative - which it previously shared with member States - has been transferred to the High Representative, being therefore only entitled to support the proposals made by this new actor on CFSP issues.<sup>16</sup> On the other hand, the Treaty of Lisbon has granted some powers to the CJEU in the CFSP field. Hence, according to Article 24(1) TEU, the Court is entitled to assess compliance with Article

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<sup>9</sup> Treaty on European Union (29 July 1992) OJ C 191, p. 1-112, art. 22(1) TEU, art. 21 TEU.

<sup>10</sup> Opinion of Advocate General Wahl (7 April 2016) in Case C-455/14 P, ECLI:EU:C:2016:212, para 46.

<sup>11</sup> CJEU, judgment of 6 October 2020, *Bank Refah*, C-134/19 P, ECLI:EU:C:2020:793, para 47.

<sup>12</sup> entitled ‘The Union’s External Action’, arts. 205-222 TFEU.

<sup>13</sup> For the neighbourhood policy, art. 8 TEU; for the enlargement policy, see art. 49 TEU. See also Paul James Cardwell, ‘On “Ring-Fencing” the Common Foreign and Security Policy in the Legal Order of the European Union’ (2015) *Northern Ireland Legal Quarterly* 443, 445.

<sup>14</sup> Marise Cremona, ‘The position of CFSP/CSDP in the EU’s constitutional architecture’ in Steven Blockmans, Panos Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Elgar 2018) 5.

<sup>15</sup> art. 24(1) TEU.

<sup>16</sup> art. 30(1) TEU.

40 TEU and review the legality of certain decisions as provided under the second paragraph of Article 275 TFUE.<sup>17</sup> However, as Paragraph 3.2 will further investigate, the contours of its jurisdiction within this domain are not yet fully defined.<sup>18</sup> The recent Court of Justice of the European Union's case-law seems to push towards expanding such boundaries. In particular, in the landmark *KS and KD* judgment, the CJEU's Grand Chamber has recently held that CFSP acts and omissions - especially those related to basic principles of the EU legal order, in particular respect for the rule of law and fundamental rights - fall within the Court's judicial scrutiny as long as they are not directly related to the political or strategic choices made by the EU in the context of the CFSP.<sup>19</sup>

In order to enhance the EU's position as a strong global actor, and considering its vocation 'to deal with aspects of foreign and security policy',<sup>20</sup> the Treaty of Lisbon has provided the Union with a single external mandate covering all its relations with the wider world, which are strictly intertwined with international law principles, objectives, and mechanisms.<sup>21</sup> Article 3(5) TEU states as follows:

'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.<sup>22</sup>

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<sup>17</sup> Article 24(1) TEU states as follows: 'The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.'

<sup>18</sup> Mangas-Martín, Liñán-Nogueras (n 1) 655-656.

<sup>19</sup> CJEU, judgment of 10 September 2024, *KS and KD v Council and Others*, Joined Cases C-29/22 P And C-44/22 P, ECLI:EU:C:2024:725. See, *inter alia*, paras 72, 118.

<sup>20</sup> European Council, Conclusions of the Rome European Council (14-15 December 1990) SN 424/1/90, 4-5.

<sup>21</sup> Cremona (n 14) 6.

<sup>22</sup> art. 3(5) TEU. The EU has to 'contribute to the strict observance and the development of international law'. CJEU, judgment of 21 December 2011, C-366/10, *Air Transport Association of America and others*, ECLI:EU:C:2011:864, para 101.

It is worth noting that this provision includes specific foreign policy purposes, *inter alia*, contributing to peace, security, and the protection of EU citizens. In order to reach these ambitious goals, Article 21 TEU provides a set of principles and objectives which apply to all the EU's external policies.<sup>23</sup> As regards the principles, Article 21(1) TEU states that, within the international framework, the Union's external actions should be guided by overarching principles that have inspired its creation, development, and enlargement, including '[...] democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.<sup>24</sup>

Article 21(2) TEU instead envisions the EU's external action objectives. For the purposes of this research, it is important to stress that this provision enshrines that, in its external relations, the EU should act taking into account the goals of consolidating and supporting democracy, the rule of law, human rights, and the principles of international law,<sup>25</sup> as well as preserving peace, preventing conflicts and strengthening international security, following the purposes and principles of the UN Charter.<sup>26</sup> Focusing on Article 21(2)(c) TEU, it is worth noting that, unlike the Treaty of Maastricht,<sup>27</sup> together with the preservation of peace and the enhancement of international security, this new provision introduces, for the first time, the goal of preventing conflict, testifying to the wider scope of the security and defence policy.<sup>28</sup> As the following paragraphs will further discuss, the inclusion of this objective is particularly relevant for the purposes of the EU's implementation of the R2P, since it allows the Union to adopt a set of tools aimed at preventing the commission of mass atrocity crimes worldwide. Accordingly, the CFSP

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<sup>23</sup> Ramses A Wessel, 'General principles in EU Common Foreign and Security Policy' in Katja S Ziegler, Päivi J Neuvonen, Violeta Moreno-Lax (eds), *Research Handbook on General Principles in EU Law Constructing Legal Orders in Europe* (Elgar 2022) 607, 608.

<sup>24</sup> art. 21(1) TEU.

<sup>25</sup> art. 21(2)(b) TEU.

<sup>26</sup> art. 21(2)(c) TEU.

<sup>27</sup> art. 11(1) Treaty of Maastricht.

<sup>28</sup> Koutrakos (n 1) 22.

framework envisaged in the Lisbon Treaty allows the EU to carry out a more proactive foreign policy, focusing, *inter alia*, on its preventive engagement against serious international crimes, which is considered the most important element of the Responsibility to Protect.<sup>29</sup>

While the Treaty of Maastricht established both general objectives covering the EU's external policies as well as a specific set of CFSP goals,<sup>30</sup> which could be used to cover 'all areas of foreign and security policy', with the Lisbon Treaty the specific CFSP goals have been incorporated into the set of overall objectives covering all the EU external action.<sup>31</sup> Scholars argued that the first three of the objectives listed in Article 21(2) TEU are 'among those traditionally assigned' to the CFSP,<sup>32</sup> while objectives (d) to (g) are strictly related to other areas of external action, *inter alia*, development cooperation, trade, environmental protection, and humanitarian aid.<sup>33</sup> However, these objectives are not exclusive to the CFSP;<sup>34</sup> rather, according to Article 23 TEU, its action should be guided by each of these goals without distinction.<sup>35</sup> If on the one hand, all the objectives specified in Article 21(2) TEU were employed to pursue non-CFSP competences, on the other, the same eight letters might be used to implement CFSP goals.<sup>36</sup> This interpretation fully aligns with the overarching aim of ensuring a homogeneous and integrated external action, despite being characterised by different policies with heterogeneous implications and applicable procedures.<sup>37</sup> As a matter of fact, the actions undertaken by the EU should be carried out under the duty of consistency envisaged in Article 21(3) TEU, which points

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<sup>29</sup> 'Prevention is the single most important element of the Responsibility to protect because it is morally, politically, financially, and prudentially better to prevent atrocity crimes than to react to stop them once underway'. Alex J Bellamy, Edward C Luck, *The Responsibility to Protect: From Promise to Practice* (Polity Press 2018) 140.

<sup>30</sup> art. 11(1) Treaty of Maastricht.

<sup>31</sup> Cremona (n 14) 15. See also Maria Eugenia Bartolini, 'La Politica Estera e di Sicurezza Comune' in Maria Eugenia Bartolini, Sara Poli (eds), *L'Azione Esterna dell'Unione Europea* (Editoriale Scientifica 2021) 235, 236.

<sup>32</sup> Opinion of Advocate General (19 July 2012) in Case C-130/10, ECLI:EU:C:2012:50, para 63.

<sup>33</sup> Piet Eeckhout, *EU External Relations Law* (OUP 2011) 169.

<sup>34</sup> Luigi Lonardo, 'Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union' (2018) 14 *EuConst* 584, 607.

<sup>35</sup> Cremona (n 14) 15.

<sup>36</sup> Lonardo (n 34) 607.

<sup>37</sup> Koutrakos (n 1) 21.

out the need for consistency between the different areas of the Union's external action and between these and its other policies.<sup>38</sup>

However, while, on the one hand, this new approach aligns with the desire to prevent fragmentation and enhance the coherence of the EU's external actions,<sup>39</sup> on the other, as this chapter will show,<sup>40</sup> it could further complicate the delimitation of the CFSP's scope as well as the choice of the appropriate legal basis between CFSP and non-CFSP policies.<sup>41</sup>

## 1.2 Relevant actors and functioning mechanisms

As seen before, the CFSP is subject to specific rules and procedures, which provide, on the one hand, a marginal role for the European Parliament, Commission, and the Court, while granting, on the other, specific functions to the European Council and the Council of the European Union (the Council).

Focusing on the European Council, the Lisbon Treaty has further emphasised its importance in enhancing the EU's external action, particularly in the CFSP field,<sup>42</sup> where this institution plays a leading role.<sup>43</sup> As a matter of fact, the European Council is entitled to '[...] identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy'.<sup>44</sup> In order to do that, together with the Council, the European Council is endowed with decision-making power; it can adopt decisions on the strategic interests and objectives related to the CFSP,<sup>45</sup> which form the basis for the CFSP decisions issued by the Council.<sup>46</sup>

Therefore, the European Council plays a leading role in shaping the EU's priorities which are reflected, *inter alia*, in the European Council Conclusions. Within the R2P lens,

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<sup>38</sup> art. 21(3) subpara (2) TEU.

<sup>39</sup> Lonardo (n 34) 607; Koutrakos (n 1) 20; Cremona (n 14) 15.

<sup>40</sup> para 3.2

<sup>41</sup> cf Lonardo (n 34) 607.

<sup>42</sup> See Youri Devuyt, 'The European Council and the CFSP after the Lisbon Treaty' (2012) 17 EFA Rev 327.

<sup>43</sup> Wessel (n 1) 294.

<sup>44</sup> art. 22(1) TEU, art. 26(1) TEU.

<sup>45</sup> *ibid.*

<sup>46</sup> Wessel (n 1) 295.

it is noteworthy that, even before the endorsement of the Responsibility to Protect within the UN framework, the June 2005 Presidency Conclusions already emphasised ‘[...] the importance which it attributes to the concept of responsibility to protect, which must be implemented by the Security Council’.<sup>47</sup>

As for the Council, considered the main CFSP decision-making institution,<sup>48</sup> it is entrusted to adopt decisions necessary for defining and implementing the Common Foreign and Security Policy in accordance with the general guidelines and strategic lines provided by the European Council.<sup>49</sup> In addition to that, together with the High Representative, it is in charge of ensuring ‘the unity, consistency and effectiveness of action by the Union’.<sup>50</sup> Accordingly, as Chapter IV will further assess, its role is crucial in ensuring the EU’s commitment to fight against the commission of R2P crimes by employing the tools at its disposal, including sanctions.<sup>51</sup>

Other important actors, namely the High Representative of the Union for Foreign Affairs and Security Policy (High Representative) and the Political and Security Committee (PSC), provide a significant contribution to this sector, along with the institutions. One of the main innovations of the Lisbon Treaty is the institution of the High Representative.<sup>52</sup> Its origins date back to the Treaty of Amsterdam where the figure of the ‘High Representative for Common Foreign and Security Policy’ was first envisaged.<sup>53</sup> The Treaty of Lisbon has considerably expanded her/his competences since, nowadays, the High Representative - appointed by a qualified majority of the European

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<sup>47</sup> Presidency Conclusions of the Brussels European Council, 16 and 17 June 2005, 10255/1/05, para 37.

<sup>48</sup> *ibid.* See also Bartolini (n 31) 248.

<sup>49</sup> art. 26(2) TEU.

<sup>50</sup> art. 26(2) subpara 2 TEU.

<sup>51</sup> Chapter IV, paras 4, 5.

<sup>52</sup> Koutrakos (n 1) 34. For an in-depth analysis of the role and functions of the High Representative, see, *inter alia*, Frank Hoffmeister, Annika Bruckert, ‘The High Representative Revisited in 2023: An Ever More Powerful Institutional Actor in the EU’s Common Foreign and Security Policy’ in Philipp B Donath, Alexander Heger, Moritz Malkmus, Orhan Bayrak (eds), *Der Schutz des Individuums durch das Recht. Festschrift für Rainer Hofmann zum 70. Geburtstag* (Springer 2023) 157.

<sup>53</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997, p. 1-144, art. 18. As outlined in art. 18(3) of the Treaty of Amsterdam, the function of the High Representative for the common foreign and security policy was performed by the Secretary-General of the Council of the European Union.

Council, with the agreement of the President of the Commission - is not only in charge of conducting the EU's CFSP, but also presides over the Foreign Affairs Council and is one of the Vice-Presidents of the Commission.<sup>54</sup> Therefore, the Lisbon Treaty confers the High Representative a double mandate: on the one hand, she/he conducts the EU's Common Foreign and Security Policy while, on the other, she/he has to ensure the consistency of the external action.<sup>55</sup> Its institution should therefore be regarded as an attempt to strengthen the EU's position in the international scenario as well as ensure greater coherence in its external policy,<sup>56</sup> acting as an institutional bridge across the various areas of the EU's external action.<sup>57</sup> This latter goal is further acknowledged in Article 26(2) TEU, which enshrines the High Representative's duty to ensure the unity, consistency, and effectiveness of action by the Union.

Despite its formal mandate primarily relating to the CFSP, the High Representative essentially acts as a bridge between the intergovernmental and supranational aspects of the EU's external action.<sup>58</sup> In fact, together with member States, she/he has the power to submit proposals to the Council regarding CFSP initiatives.<sup>59</sup> The High Representative is also entitled to implement CFSP decisions adopted by the European Council and the Council as well as represent the EU in CFSP matters.<sup>60</sup> It is also crucial to emphasise that the European External Action Service (EEAS) assists the High Representative in carrying out his duties.<sup>61</sup>

The Political and Security Committee is another relevant actor in this domain. Existing since the 2001 Treaty of Nice,<sup>62</sup> and having its origins in the Political Committee

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<sup>54</sup> art. 18 TEU.

<sup>55</sup> art. 18(2) TEU, art. 18(4) TEU. She/he also presides over the Foreign Affairs Council. art. 18(3) TEU. This is why scholars also refer to a 'triple hatted position' of the HR. cf Bart van Vooren, 'A legal-institutional perspective on the European External Action Service' (2011) 48(2) Common Mark Law Rev 475, 496.

<sup>56</sup> Koutrakos (n 1) 35; Wessel (n 1) 298.

<sup>57</sup> Eeckhout (n 33) 166.

<sup>58</sup> Bartolini (n 31) 249.

<sup>59</sup> art. 30(1) TEU.

<sup>60</sup> see art. 27(1) TEU, art. 27(2) TEU. For further details, Koutrakos (n 1) 35-37.

<sup>61</sup> For an in-depth analysis of the European External Action Service, see Mauro Gatti, *European External Action Service. Promoting Coherence through Autonomy and Coordination* (Brill | Nijhoff 2016).

<sup>62</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 80, 10.3.2001, p. 1-87.

under the European Political Cooperation,<sup>63</sup> the PSC is nowadays composed of member States' representatives and is in charge of monitoring '[...] the international situation in the areas covered by the common foreign security policy and contribute to the definition of policies'.<sup>64</sup> Amongst other functions, the PSC, once authorised by the Council, can take relevant decisions to exercise political control and strategic direction of crisis management operations.<sup>65</sup> In relation to the ongoing situation in Ukraine, the PSC has recently appointed the Head of Mission and the Combined Arms Training Commander of the European Union Advisory Mission for Civilian Security Sector Reform in Ukraine (EUAM Ukraine).<sup>66</sup> In March 2024, it also appointed the Head of Mission of the European Union Police Mission for the Palestinian Territories (EUPOL COPPS).<sup>67</sup>

Beyond the adoption of international agreements in the CFSP-covered areas, decisions are the standard formal act for defining and implementing the CFSP.<sup>68</sup> Indeed, CFSP legal acts cannot take the form of regulations or directives. According to Article 25(b) TEU, it is possible to adopt decisions defining actions to be undertaken (art. 25(b)(i) TEU) or positions to be taken by the EU (art. 25(b)(ii) TEU), as well as decisions defining arrangements for the implementation of the first two (art. 25(b)(iii) TEU). It is also feasible to issue decisions determining the objectives of and defining and implementing general guidelines for the Common Foreign and Security Policy,<sup>69</sup> as well as others

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<sup>63</sup> Davignon Report (n 3); see also art. 30(10)(c) SEA.

<sup>64</sup> art. 38 subpara 1 TEU.

<sup>65</sup> art. 38 subparas 2 and 3 TEU.

<sup>66</sup> Political and Security Committee Decision (CFSP) 2023/1024 of 16 May 2023 on the appointment of the Head of Mission of the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) (EUAM Ukraine/1/2023) OJ L 137, 25.05.2023, p. 25. On 23 May 2023, the PSC adopted the Decision extending the mandate of the Head of the Mission, Mr Rolf Michael Hay Pereira Holmboe, until 31 May 2025. Political and Security Committee Decision (CFSP) 2024/1567 of 23 May 2024 extending the mandate of the Head of Mission of the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine) (EUAM Ukraine/1/2024) OJ L 2024/1567, 30.5.2024. Political and Security Committee Decision (CFSP) 2023/2206 of 12 October 2023 on the appointment of the Combined Arms Training Commander for the European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine) and repealing Decision (CFSP) 2022/2096 (EUMAM Ukraine/2/2023) OJ L 2023/2206, 16.10.2023.

<sup>67</sup> Political and Security Committee Decision (CFSP) 2024/1031 of 26 March 2024 on the appointment of the Head of Mission of the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) (EUPOL COPPS/1/2024) OJ L 2024/1031, 2.4.2024, p. 2.

<sup>68</sup> Cremona (n 14) 19.

<sup>69</sup> art. 26(1) TEU, art. 26(2) TEU.

dealing, for instance, with the determination of a common approach directed towards systematic cooperation among member States on matters of general interest.<sup>70</sup> It is important to stress that these provisions should be read together with Article 24(1) TEU, which excludes the adoption of legislative acts in the CFSP field.<sup>71</sup>

Decisions on operational action and Union's positions should be considered as the typical instruments of the CFSP.<sup>72</sup> Apart from being adopted to implement European Council's decisions defining the strategic interests and objectives of the Union, decisions could also be adopted autonomously by the Council triggering, however, different decision-making procedures. While, on the one hand, self-standing Council CFSP decisions would fall within the general rule of unanimity, on the other, the former would be adopted by qualified majority voting.<sup>73</sup> Despite their non-legislative character,<sup>74</sup> both of these types of decisions should be regarded as legal acts with a binding effect.<sup>75</sup> Focusing on decisions defining actions,<sup>76</sup> they are considered measures of operational character,<sup>77</sup> which envisage the objectives, scope, conditions for implementation, duration (if necessary), and the means to be made available to the EU to carry out the operational action where required by the international situation, whose assessment is primarily political.<sup>78</sup> The Council has interpreted this provision broadly,<sup>79</sup> since it has been used to support international regulatory regimes,<sup>80</sup> provide assistance measures to

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<sup>70</sup> art. 32 TEU.

<sup>71</sup> Cremona (n 14) 19; Bartolini (n 31) 240.

<sup>72</sup> Bartolini (n 31) 241.

<sup>73</sup> art. 31 TEU.

<sup>74</sup> Unequivocally excluded by Article 24(1) second subparagraph TEU and Article 31(1) first subparagraph TEU.

<sup>75</sup> Thomas Ramopoulos, 'Article 28 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 231, 232.

<sup>76</sup> art. 25(b)(i) TEU, art. 28 TEU.

<sup>77</sup> Koutrakos (n 1) 29.

<sup>78</sup> art. 28(1) TEU.

<sup>79</sup> Ramopoulos (n 75) 233.

<sup>80</sup> See, *inter alia*, Council Decision (CFSP) 2021/698 of 30 April 2021 on the security of systems and services deployed, operated and used under the Union Space Programme which may affect the security of the Union, and repealing Decision 2014/496/CFSP, OJ L 170, 12.5.2021, p. 178-182; Council Decision (CFSP) 2021/919 of 7 June 2021 amending Decision (CFSP) 2018/1939 on Union support for the universalisation and effective implementation of the International Convention for the Suppression of Acts of Nuclear Terrorism, OJ L 201, 08/06/2021, p. 27.

third States, as envisaged, *inter alia*, in the European Peace facility,<sup>81</sup> establish organs with legal personality,<sup>82</sup> and set up civilian and military CSDP missions.<sup>83</sup>

Decisions defining the EU's position on a particular geographical or thematic matter, unlike decisions on operational actions, do not possess operational character; instead, they provide a framework in which the EU and its member States can act.<sup>84</sup> As Chapter IV will further investigate,<sup>85</sup> these types of decisions, enshrined in Article 29 TEU, are particularly relevant since this provision has been used as the legal basis to adopt restrictive measures against third countries, including Russia,<sup>86</sup> as well as against natural or legal persons, groups or non-state entities.<sup>87</sup> Apart from that, Article 29 TEU has also been employed, for instance, to define the EU's position to support the International Criminal Court.<sup>88</sup>

Together with hard law instruments, soft law plays a crucial role in this domain; in the last few decades, it has become increasingly important under both the international and EU legal frameworks.<sup>89</sup> Although not explicitly singled out in the treaties, there are

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<sup>81</sup> Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, OJ L 102, 24.3.2021, p. 14-62, art. 1(2)(b).

<sup>82</sup> Including the European Security and Defence College (ESDC) and the European Union Institute for Security Studies (EUISS). See Council Decision (CFSP) 2020/1515 of 19 October 2020 establishing a European Security and Defence College, and repealing Decision (CFSP) 2016/2382, OJ L 348, 20/10/2020, p. 1-14; Council Decision 2014/75/CFSP of 10 February 2014 on the European Union Institute for Security Studies, OJ L 41, 12.2.2014, p. 13-17.

<sup>83</sup> Ramopoulos (n 75) 233-234.

<sup>84</sup> Thomas Ramopoulos, 'Article 29 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 236, 237.

<sup>85</sup> Chapter IV, paras 4, 5.

<sup>86</sup> See, *inter alia*, Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31.7.2014, p. 13-17; Council Decision (CFSP) 2022/264 of 23 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine OJ L 42I, 23.2.2022, p. 95-97; Council Decision (CFSP) 2024/746 of 23 February 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L, 2024/746, 23.2.2024.

<sup>87</sup> See, *inter alia*, Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, OJ L 255, 21.9.2016, p. 25-32.

<sup>88</sup> Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, OJ L 76, 22/03/2011, p. 56-58.

<sup>89</sup> For further information see, *inter alia*, Teresa Fajardo del Castillo, *El soft law en el Derecho Internacional y Europeo: Su capacidad para dar respuesta a los desafíos normativos actuales* (Tirant lo Blanch 2024); Bart Van Vooren, 'A Case Study of "Soft Law" in EU External Relations: The European

some informal instruments, including the High Representative declarations,<sup>90</sup> which allow the Union to express its stance on a particular development in the world,<sup>91</sup> recommending or condemning a specific course of action.<sup>92</sup> Despite their lack of legal character, declarations may even have a stronger political impact than formal decisions.<sup>93</sup> Moreover, given their flexibility and, if adopted following the TEU and TFEU relevant provisions, they can also impact on various CFSP aspects, including, directly or indirectly, R2P issues. For instance, in the aftermath of the Russian invasion in Ukraine, the High Representative delivered a declaration condemning Russian war of aggression as a ‘flagrant violation of international law and the core principles on which the international rules-based order is built’ as well as reiterating the EU’s ‘support and commitment to Ukraine’s independence, sovereignty and territorial integrity within its internationally recognised borders’.<sup>94</sup>

To sum up, even though with the Lisbon Treaty the CFSP became ‘part and parcel of the EU legal order’,<sup>95</sup> it is still characterised by a strong intergovernmental dimension that guides the decisions taken by the European Council and the Council, the two main EU bodies that shape this sector. Acting in accordance with the principles and objectives enshrined within the treaties, they can provide a significant contribution to the R2P’s operationalisation, primarily through the use of soft law instruments. As the next Chapter

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Neighbourhood Policy’ (2009) 34 *European Law Review* 696, 704-706; Ivan Smyth, ‘The Use of Soft Law Instruments in the European Union’s External Relations. A Delicate Balance between Pragmatism, Transparency and Democratic Oversight’ in Stephan Marquardt, Steven Blockmans (eds) *The European Union’s Contribution to International Peace and Security. Liber Amicorum in honour of Gert-Jan van Hegelsom* (Brill | Nijhoff 2023) 68.

<sup>90</sup> Within the CFSP field, it is also possible to adopt other informal documents such as strategies, action plans, statements or Memoranda of Understanding. cf Wessel (n 21) 617-618. For further details, see Ramses A Wessel, ‘Normative Transformations in EU External Relations: The Phenomenon of “Soft” International Agreements’ (2021) 44 *West European Politics* 72.

<sup>91</sup> Koutrakos (n 1) 31; Wessel (n 1) 307.

<sup>92</sup> Bartolini (n 31) 247.

<sup>93</sup> Wessel (n 1) 307.

<sup>94</sup> Council of the European Union, ‘Ukraine: Declaration by the High Representative on behalf of the European Union on the invasion of Ukraine by armed forces of the Russian Federation’ (24 February 2022) at <<https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/ukraine-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-invasion-of-ukraine-by-armed-forces-of-the-russian-federation/>> accessed 2 September 2024.

<sup>95</sup> Opinion of Advocate General Wahl (n 10) para 46.

will show, hard law instruments, especially sanctions, play also a crucial role in the EU's implementation of the R2P.<sup>96</sup>

## 2. The Common Security and Defence Policy

### 2.1 Introductory remarks

The Common Security and Defence Policy (CSDP), considered an integral part of the CFSP,<sup>97</sup> has nowadays developed into a major policy area in EU external relations.<sup>98</sup> As for its historical roots, it stems from a series of failed attempts, starting from the effort to establish a European Defence Community which would have led to the creation of a European army,<sup>99</sup> or the 1961 *Plan Fouchet* aimed at creating a Union of States with uniform policies in various fields, including foreign policy and defence.<sup>100</sup> The Maastricht treaty's provisions on security and defence,<sup>101</sup> as well as the listing of the 'Petersberg tasks' in the 1997 Amsterdam Treaty, reflected the 1990s' renewed optimism for the establishment of a common security and defence policy.<sup>102</sup> As a result of the bilateral meeting in Saint-Malo in 1998, France and UK issued the *Saint-Malo Declaration*.<sup>103</sup> This document is considered the starting point for the Common Security and Defence

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<sup>96</sup> Chapter IV, paras 4, 5.

<sup>97</sup> art. 42(1) TEU. See also, *inter alia*, Bartolini (n 31) 289; Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 382; Mangas-Martín, Liñán-Nogueras (n 1) 650-654.

<sup>98</sup> Wessel (n 1) 313.

<sup>99</sup> Julia Schmidt, *The European Union and the Use of Force* (Brill | Nijhoff 2020) 32; see also Ramses A Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International 1999) 1-5; Panos Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013) 5-9.

<sup>100</sup> Draft Treaty - Fouchet Plan II (18 January 1962) art. 2. Selection of texts concerning institutional matters of the Community from 1950 to 1982. European Parliament, Committee on Institutional Affairs (1982) 119-121. See also Draft Treaty - Fouchet Plan I (2 November 1961) Selection of texts concerning institutional matters of the Community from 1950 to 1982. European Parliament, Committee on Institutional Affairs (1982) 112-115.

<sup>101</sup> art. J.1(2) Treaty of Maastricht. Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 383.

<sup>102</sup> Western European Union, Council of Ministers, 'Petersberg Declaration' (19 June 1992) at <[https://www.cvce.eu/en/obj/petersberg\\_declaration\\_made\\_by\\_the\\_weu\\_council\\_of\\_ministers\\_bonn\\_19\\_june\\_1992-en-16938094-bb79-41ff-951c-f6c7aae8a97a.html](https://www.cvce.eu/en/obj/petersberg_declaration_made_by_the_weu_council_of_ministers_bonn_19_june_1992-en-16938094-bb79-41ff-951c-f6c7aae8a97a.html)> accessed 7 September 2024. See also art. 17 Treaty of Amsterdam.

<sup>103</sup> Franco-British Joint Declaration on European Defence, adopted at the Franco-British summit (3-4 December 1998) art. 1, at <[https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable_en.pdf)> accessed 7 September 2024.

Policy, at the time named the European Security and Defence Policy (ESDP).<sup>104</sup> Apart from highlighting the pivotal role of the Western European Union and NATO in collective defence, it also stressed the need to have the capacity for autonomous action by deploying armed forces that can react rapidly to risk scenarios.<sup>105</sup>

Following the *Saint-Malo Declaration*, which gave rise to a fruitful debate about the security role of the Union within the international framework,<sup>106</sup> numerous European Council summit meetings further specified the military and civilian capabilities required to carry out the ‘Petersberg tasks’, which included humanitarian and rescue missions, and crisis management tasks, including peacemaking.<sup>107</sup> With its first military crisis management operation in 2003,<sup>108</sup> the ESDP became operational, marking therefore an important moment in overcoming member States’ previous reluctances over this field and contributing to shaping and strengthening the EU’s role as an international military actor operating following the UN principles.<sup>109</sup>

The ESDP was renamed Common Security and Defence Policy after the Lisbon Treaty entered into force. Already mentioned in Article 24(1) TEU, the CSDP is further described in Articles 42-46 TEU, and in Protocols 1, 10, 11, as well as Declarations 13 and 14.<sup>110</sup> Being an integral part of the Common Foreign and Security Policy, most CFSP

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<sup>104</sup> Koutrakos (n 99) 18; Schmidt (n 99) 49; Jochen Rehr (ed), *Handbook on CSDP: The Common Security and Defence Policy of the European Union*, Volume I, (Armed Forces Printing Centre 2021) 17.

<sup>105</sup> *Saint-Malo Declaration*, arts. 2-4.

<sup>106</sup> Jolyon Howorth, *Security and Defence Policy in the European Union* (Palgrave Macmillan 2007) 36-37.

<sup>107</sup> Cologne European Council, Presidency Conclusions (3-4 June 1999) 150/99, Annex III, *European Council Declaration on Strengthening the Common European Policy on Security and Defence*, p. 33. Helsinki European Council, Presidency Conclusions (10-11 December 1999) 00300/1/99, Annex 1 to Annex IV, *Presidency Progress Report to the Helsinki European Council on Strengthening the Common European Policy on Security and Defence*. For further information, see Schmidt (n 99) 50-55.

<sup>108</sup> ‘Operation Concordia’. Council Decision 2003/202/CFSP relating to the launch of the EU military operation in the Former Yugoslav Republic of Macedonia OJ L 76, 22.3.2003, p. 43-44, art. 1.

<sup>109</sup> Schmidt (n 99) 30.

<sup>110</sup> Protocol (No 1) on the Role of National Parliaments in the European Union, OJ C 202, 7.6.2016, p. 203-205; Protocol (No 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union, OJ C 115, 9.5.2008, p. 275-277; Protocol (No 11) on Article 42 of the Treaty on European Union, OJ C 202, 7.6.2016, p. 278. Declaration concerning the common foreign and security policy, OJ C 202, 7.6.2016, p. 343 (Declaration 13); Declaration concerning the common foreign and security policy, OJ C 202, 7.6.2016, p. 343 (Declaration 14).

rules apply to CSDP.<sup>111</sup> The CSDP is characterised by a strong intergovernmental dimension, which is even more accentuated if compared to the CFSP. This is shown, for instance, in the CSDP decision-making procedure, where the unanimity rule is required,<sup>112</sup> as the exceptions envisaged in Articles 31(2) and 31(3) TEU cannot be applied to issues having military or defence implications.<sup>113</sup> Taking into account the principles and objective envisaged in Article 21 TEU, the CSDP has to be conducted to provide the EU with an international capacity to carry out ‘[...] missions outside the Union for peace-keeping, conflict prevention and strengthening international security following the principles enshrined in the United Nations Charter’.<sup>114</sup> The Lisbon Treaty has also extended and provided a clearer common understanding of the Petersberg Tasks.<sup>115</sup> As a matter of fact, Article 43(1) TEU enshrines a non-exhaustive list of tasks, including ‘[...] joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation’.<sup>116</sup> According to this list, peace enforcement is also understood as a CSDP military task.<sup>117</sup>

## 2.2 Available tools and procedures

As part of the CFSP, the Council and the European Council play a crucial role in the CSDP, while the Commission, European Parliament, and the Court are granted limited powers. The general preference to keep this domain as intergovernmental as possible has resulted in conferring even more circumscribed powers to these latter institutions. The power to submit proposals serves as an illustration of this. In fact, unlike the CFSP, the Commission cannot work together with the HR on an initiative, which can only be

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<sup>111</sup> Wessel (n 1) 319.

<sup>112</sup> art. 42(4) TEU, with the only exceptions envisaged in art. 45(2) TEU, art. 46(2) TEU.

<sup>113</sup> art. 31(4) TEU. It is worth recalling that art. 31(1) TEU allows dissenting States (no more than one-third) to abstain without preventing the act from being adopted. cf Bartolini (n 31) 295. Under this provision, Cyprus abstained regarding the launch of the EU’s mission in Kosovo (EULEX KOSOVO).

<sup>114</sup> art. 42(1) TEU.

<sup>115</sup> Schmidt (n 99) 59.

<sup>116</sup> art. 43(1) TEU. cf Koutrakos (n 99) 58-59.

<sup>117</sup> Jo Coelmont, ‘Europe’s Military Ambition’ in Sven Biscop, Franco Algieri (eds), *The Lisbon Treaty and ESDP: Transformation and Integration* (2008) Egmont Paper 24 5, 6.

submitted by the HR or a member State.<sup>118</sup> The Commission's reduced position is counterbalanced by additional functions assigned to the HR, which, supported by the EEAS,<sup>119</sup> has the responsibility to ensure coordination of the civilian and military aspects of the tasks envisaged in Article 43(1) TEU.<sup>120</sup> Together with the HR, the PSC plays a pivotal role in the CSDP field.<sup>121</sup> In fact, it not only provides opinions to the Council regarding the definition and implementation of the EU's interventions, but also ensures political oversight and strategic direction of peace missions, including the coordination between military and civilian aspects.<sup>122</sup> Alongside these actors, with the Lisbon Treaty, the European Defence Agency has become part of the EU's primary law.<sup>123</sup> Composed by the 27 EU member States,<sup>124</sup> it is entrusted to identify and promote operational requirements, develop military capabilities in crisis management, promote and strengthen the industrial and technological base of the defence sector, define European capabilities and armaments policy, and assist the Council in evaluating the improvement of military capabilities.<sup>125</sup>

The institutionalisation of CSDP also led to the establishment of other organs. In spite of not being regulated by primary law, it is worth focusing, *inter alia*, on the European Union Military Committee (EUMC) and the European Union Military Staff (EUMS).<sup>126</sup> Regarding the former,<sup>127</sup> it is the highest military body set up within the Council. Composed by member States' Chiefs of Defence, its main function is to provide

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<sup>118</sup> art. 42(4) TEU.

<sup>119</sup> For further details, Koutrakos (n 99) 47-51.

<sup>120</sup> art. 43(2) TEU.

<sup>121</sup> Wessel (n 1) 318.

<sup>122</sup> art. 38 TEU. cf Bartolini (n 31) 294.

<sup>123</sup> art. 42(3) TEU. The EDA was originally set up with Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L 245, 17.7.2004, p. 17-28.

<sup>124</sup> In March 2023, Denmark became the 27<sup>th</sup> member State of the European Defence Agency. For further information, see European Defence Agency, 'Denmark joins the European Defence Agency' (23 March 2023) at <<https://eda.europa.eu/news-and-events/news/2023/03/23/denmark-joins-the-european-defence-agency>> accessed 11 September 2024.

<sup>125</sup> art. 42(3) TEU, art. 45(1) TEU.

<sup>126</sup> For an overview of other CSDP actors: EEAS, 'CSDP structure, instruments and agencies' at <[https://www.eeas.europa.eu/eeas/csdp-structure-instruments-and-agencies\\_en](https://www.eeas.europa.eu/eeas/csdp-structure-instruments-and-agencies_en)> accessed 6 September 2024.

<sup>127</sup> It was officially set up by 2001/79/CFSP. Council Decision of 22 January 2001 setting up the Military Committee of the European Union, OJ L 27, 30.1.2001, p. 4-6.

the PSC military advice and recommendations.<sup>128</sup> As for the latter,<sup>129</sup> which operates under the EUMC's direction and the direct authority of the HR, it has to provide the HR and EU bodies with military expertise on the EU's missions and tasks. In the research sector, two key research institutes are noteworthy: the European Union Satellite Centre and the European Union Institute for Security Studies (EUISS).<sup>130</sup> The Satellite Centre supports the CSDP by supplying satellite images to use in the EU's peacekeeping missions, while the EUISS carries out relevant academic research on significant CSDP topics.<sup>131</sup>

As for its legal instruments, the Council can adopt decisions or international agreements. As an integral part of the CFSP, most of these rules apply to this domain. For instance, it is possible to adopt a CSDP decision using Article 28 TEU as a legal basis. More specific legal bases, namely Articles 42(4) and 43(2) TEU, complement Article 28 TEU. Since the Lisbon Treaty's entry into force, practice has seemed to move in the direction of establishing military missions by using both CFSP and CSDP legal bases.<sup>132</sup> However, recent practice appears to have shifted, as some EU military crisis management operations have solely relied on CSDP legal bases.<sup>133</sup> This approach, however, is not

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<sup>128</sup> Wessel (n 1) 318.

<sup>129</sup> Established with Council Decision of 22 January 2001 on the establishment of the Military Staff of the European Union, OJ L 27, 30.1.2001, p. 7-11.

<sup>130</sup> Regarding the European Union Satellite Centre, Council Joint Action of 20 July 2001 on the establishment of a European Union Satellite Centre, OJ L 200, 25.7.2001, p. 5-11; Council Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre, OJ L 188, 27.6.2014, p. 73-84. As for the EUISS, see Council Joint Action of 20 July 2001 on the establishment of a European Union Institute for Security Studies, OJ L 200, 25.7.2001, p. 1-4; Council Decision 2014/75/CFSP of 10 February 2014 on the European Union Institute for Security Studies, OJ L 41, 12.2.2014, p. 13-17.

<sup>131</sup> Bartolini (n 31) 295.

<sup>132</sup> See, for example, Council Decision 2010/437/CFSP of 30 July 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 210, 11/08/2010, p. 33-34; Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 301, 12.11.2008, p. 33-37.

<sup>133</sup> See, for example, Council Decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 89, 27.3.2012, p. 69-71; Council Decision 2014/827/CFSP of 21 November 2014 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 335, 22.11.2014, p. 19-21. cf Schmidt (n 99) 67-68.

consistent since a few recent EU military missions have been also based on Article 28 TEU in combination with Articles 42(4) and 43(2) TEU.<sup>134</sup>

Many decisions are also issued for the purpose of concluding international agreements,<sup>135</sup> following the procedure enshrined in Article 218 TFEU. The majority of the international agreements reached by the Union regards the participation of third States in the EU's CSDP operations;<sup>136</sup> their goal is to facilitate the participation of third States in the EU's military operations, by ensuring, however, the autonomy of the Union's decision-making.<sup>137</sup> Alongside third States' participation agreements in CSDP military operations, the EU has also often concluded status of forces agreements (SOFAs),<sup>138</sup> or status of mission agreements (SOMAs);<sup>139</sup> they define the legal rights and duties of the military forces (SOFAs) or civilian personnel (SOMAs) in the third country where the EU operation is based.<sup>140</sup>

To conclude, even within the CSDP field, soft law plays a crucial role in shaping and defining Union's actions. As a matter of fact, the EU has released a wide range of CSDP policy documents over the last few decades. Amongst them, it is worth highlighting the *EU Global Strategy*.<sup>141</sup> Considered the start of a new chapter in the EU's approach to

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<sup>134</sup> Council Decision (CFSP) 2016/610 of 19 April 2016 on a European Union CSDP Military Training Mission in the Central African Republic (EUTM RCA), OJ L 104, 20.4.2016, p. 21-26.

<sup>135</sup> For further details on CSDP international agreements, Koutrakos (n 99) 183-209.

<sup>136</sup> For further details, Rehrl (n 104) 174-175; Koutrakos (n 99) 193-198.

<sup>137</sup> Wessel (n 1) 321.

<sup>138</sup> The EU usually employs a Draft Model Agreement on SOFAs. Council of the European Union, 'Draft Model Agreement on the status of the European Union- led forces between the European Union and a Host State' (20 July 2007) 11894/07.

<sup>139</sup> Agreement between the member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the member States put at the disposal of the European Union to act in this context (EU SOFA) OJ C 321, 31.12.2003, p. 6-16.

<sup>140</sup> Wessel (n 1) 321.

<sup>141</sup> EEAS, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (June 2016) at <[https://www.eeas.europa.eu/sites/default/files/eugs\\_review\\_web\\_0.pdf](https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf)> accessed 8 September 2024. For a critical analysis of the EU Global Strategy see, *inter alia*, Jolyon Howorth, 'EU Global Strategy in a Changing World: Brussels' Approach to the Emerging Powers' (2016) 37 Contemporary Security Policy 389.

security and defence,<sup>142</sup> it focused on building resilience as well as strengthening the EU's security and defence.<sup>143</sup> Moreover, beyond cooperating with third States and regional partners, it also underlined the need for the EU to act autonomously when required.<sup>144</sup> In other words, along with global partners, including NATO,<sup>145</sup> whose relations should be deepened and strengthened, guided by a strong sense of responsibility,<sup>146</sup> the *EU Global Strategy* emphasised the EU's autonomy and strategic ambition, which should be used to enhance peace and safeguard security within and beyond its borders.<sup>147</sup>

Following this renewed interest in further enhancing the Common Security and Defence Policy, the EU has taken concrete steps to implement the *EU Global Strategy*. For instance, it pushed the activation of Permanent Structured Cooperation (PESCO), as well as the establishment of a European Defence Fund and the Coordinated Annual Review on Defence (CARD).<sup>148</sup> Recent practice also follows this trend, as witnessed by the adoption of a relevant policy paper, the *EU Strategic Compass*.<sup>149</sup> As the next chapter will show, soft law CSDP instruments, including the *Strategic Compass*, might also contribute to strengthening the Union's position in implementing the Responsibility to Protect.<sup>150</sup>

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<sup>142</sup> Schmidt (n 99) 60.

<sup>143</sup> EU Global Strategy (n 141) 18-19.

<sup>144</sup> *ibid* 20.

<sup>145</sup> The EU Global Strategy mentions NATO 15 times.

<sup>146</sup> EU Global Strategy (n 141) 18.

<sup>147</sup> *ibid* 19.

<sup>148</sup> Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ L 331, 14.12.2017, p. 57-77; Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, OJ L 170, 12.5.2021, p. 149-177.

<sup>149</sup> Council of the European Union, 'A Strategic Compass for Security and Defence' (21 March 2022) 7371/22, at <<https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf>> accessed 12 September 2024.

<sup>150</sup> Chapter IV, para 3.3.

### 3. The principle of conferral: vertical and horizontal dimensions

Once acknowledged the main aspects of the CFSP institutional framework, along with the peculiarities of the CSDP dimension, it is worth focusing on the distinctive features that characterise the distribution of competences within the CFSP realm.

As envisaged in Chapter II, International Organizations are functional.<sup>151</sup> Therefore, they have to act according to the competences entrusted to them.<sup>152</sup> The same applies to the EU, which, under the principle of conferral, has to act '[...]' within the limits of the competences conferred upon it by member States in the Treaties to attain the objectives set out therein'.<sup>153</sup> Although it is not often referred to in case-law as a general principle, the principle of conferral occupies a prominent place in the Lisbon Treaty;<sup>154</sup> it is considered one of the cornerstones of the EU legal order.<sup>155</sup> It is also understood as having constitutional significance,<sup>156</sup> which allows determining the structure, functioning, and exercise of the EU law.<sup>157</sup> From a sequential point of view, the principle of conferral, which applies to both the EU's internal and external actions,<sup>158</sup> is regarded

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<sup>151</sup> See, *inter alia*, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66, p. 78, para 25.

<sup>152</sup> Henry G Schermers, Niels M Blokker, *International Institutional Law: Unity within Diversity* (Brill | Nijhoff 2018) 20. It is worth recalling that, as outlined in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, along with the constituent instruments, it is also important to take into account International Organizations' established practice. Article 2(1)(j) states that 'rules of the organization' [...] means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization'. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted on 21 March 1986; not yet in force) UN Doc A/CONF.129/15, Article 2(1)(j). Implied powers also apply to the EU framework, as acknowledged by well-established CJEU's case-law, starting from the 1971 *ERTA* judgment. See, *inter alia*, CJEU, judgment of 31 March 1971, *Commission v Council*, Case C-22/70, ECLI:EU:C:1971:32.

<sup>153</sup> art. 5(2) TEU.

<sup>154</sup> Inge Govaere, 'To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (OUP 2018) 71.

<sup>155</sup> *ibid* 71. cf Luis M Hinojosa-Martínez, *El Reparto de Competencias Entre la Unión Europea y sus Estados Miembros* (Tirant lo Blanch 2006) 172.

<sup>156</sup> Opinion 2/00 (6 December 2001) EUCLI:EU:C:2001:664, para 5.

<sup>157</sup> Govaere (n 154) 72.

<sup>158</sup> Opinion 2/94 (28 March 1996) *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140, para 24. See also Marise Cremona, 'External Competences and the Principle of Conferral' in Robert Schütze, Takis Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (OUP 2018) 1110.

as the first of all the EU's structural principles to take into account.<sup>159</sup> Accordingly, the EU's role and functions might become relevant only after having acknowledged the existence of its competence on the matter.<sup>160</sup>

As the following paragraphs will scrutinise in-depth, the principle of conferral presents both a vertical and horizontal dimension.<sup>161</sup> The former focuses on the distribution of competences between the Union and its member States; the latter deals with the issue of coordination between the CFSP and the other EU's external policies. For the purposes of this research, the analysis of these dimensions is crucial to understand the framework within which the EU can act to implement the Responsibility to Protect, as well as separate the CFSP's actions undertaken to reach this goal from those related to other EU external policies.

### **3.1 The distribution of competences between the European Union and member States**

Focusing on its vertical dimension, it is important to underline that this principle has to be considered first and foremost the core value that determines the delimitation of competence between the EU and member States.<sup>162</sup> In other words, it allows member States to separate the powers they have given to the EU from those they have retained themselves.<sup>163</sup> Articles 2-6 TFEU provide a catalogue of the EU competences. In particular, they set out three types of categories: exclusive (Article 3 TFEU), shared (Article 4 TFEU), and 'supporting, coordinating and supplementing' competences (Articles 5 and 6 TFEU). Furthermore, it is firmly and repeatedly stressed that powers that are not conferred to the EU by the Treaties remain in member States' hands.<sup>164</sup> Articles 2-6 TFEU also envisage two policy-specific competences which, in principle, do

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<sup>159</sup> Wessel (23) 617.

<sup>160</sup> For further information on the EU's structural principles, see Anne Thies, 'Principles of EU External Action' in Ramses A Wessel, Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart 2020) 29, 29-58.

<sup>161</sup> Wessel (23) 617; Thies (n 160) 38.

<sup>162</sup> Govaere (n 154) 72.

<sup>163</sup> Thies (n 160) 36.

<sup>164</sup> art. 4(1) TEU, art. 5(2) TEU.

not fall within the abovementioned general categories: the competence to provide arrangements for the coordination of the member States' economic and employment policies,<sup>165</sup> and the CFSP. As for this latter policy, Article 2(4) TFEU enshrines that the Union shall have competence '[...] to define and implement a common foreign and security policy, including the progressive framing of a common defence policy'.<sup>166</sup>

The nature of the Union's competence in the CFSP field has been a legal issue ever since its inception,<sup>167</sup> and is not yet fully solved,<sup>168</sup> due to the fact that it is not explicitly defined in one of the three general categories of competences envisaged in Articles 2-6 TFEU.<sup>169</sup> While the CFSP non-exclusive nature was clear since its outset,<sup>170</sup> it is also safe to state that, although it might be tempting, it cannot be considered as a competence falling under Articles 5 and 6 TFEU.<sup>171</sup> Neither should be regarded as a shared competence, even if the TFEU envisages that competences that are neither exclusive nor complementary should be considered as shared.<sup>172</sup> As a matter of fact, shared competences are understood as having a pre-emptive effect, according to which member States shall exercise their competence as long as the Union has not exercised its powers on the same topic.<sup>173</sup> Nevertheless, this would undermine Declarations 13 and 14, which expressly exclude the erosion of State competence within the CFSP field as a consequence of a corresponding exercise of competence by the EU institutions.<sup>174</sup> It is also stressed

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<sup>165</sup> art. 2(3) TFEU.

<sup>166</sup> art. 2(4) TFEU.

<sup>167</sup> Robert Schütze, *European Constitutional Law* (CUP 2012) 200.

<sup>168</sup> Ramses A. Wessel, Leonhard den Hertog, 'EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?' in Malcolm Evans, Panos Koutrakos (eds), *The International Responsibility of the European Union. European and International Perspectives* (Hart Publishing 2013) 339.

<sup>169</sup> The nature of that competence is not clarified, in contrast with the preceding paragraphs of Article 2, which defines exclusive and shared competences. Eeckhout (n 33) 165 ff.

<sup>170</sup> Eeckhout (n 33) 171. Marise Cremona, 'EU External Relations: Unity and Conferral of Powers' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014) 65, 78; Wessel, den Hertog (n 168) 344.

<sup>171</sup> Marise Cremona, 'Defining competences in EU external Relations' in Alan Dashwood and Marc Maresceau (eds), *Law and practice of EU external relations: salient features of a changing landscape* (CUP 2008) 34; Cremona (n 14) 6.

<sup>172</sup> art. 4(1) TFEU. cf Cremona (n 14) 6.

<sup>173</sup> art. 2(2) TFEU.

<sup>174</sup> Declaration 13. See also Bartolini (n 31) 238.

that the CFSP does not prejudice the specific character of member States' security and defence policy.<sup>175</sup>

Accordingly, the CFSP is best seen as a category of its own,<sup>176</sup> considered by prominent scholars as a parallel competence,<sup>177</sup> according to which both the EU and Member States have a role to play. In fact, the adoption of CFSP measures should not, in principle, preclude corresponding actions by member States.<sup>178</sup> Hence, taking also into account the specificities attributed to the CFSP by the Treaties, the CFSP should be seen as a competence *sui generis*,<sup>179</sup> which runs in parallel with member States' competences in the same domain.<sup>180</sup> However, the fact that the CFSP will not affect member States' responsibilities and powers concerning the formulation and conduct of their foreign policy<sup>181</sup> does not mean that they are not legally bound by the EU's decisions in this domain; hence, strong coordination is both legally required and politically desirable.<sup>182</sup> The TEU envisages three main obligations for member States in this area.<sup>183</sup> Firstly, Article 24(3) TEU enshrines member States' duty to actively and unreservedly support the EU's CFSP in a spirit of loyalty and mutual solidarity, and to comply with the Union's action in this domain. Therefore, this provision has a twofold dimension: on the one hand, it sets forth a positive duty to take action under the EU policy, while on the other, it also envisages a negative duty not to behave in a manner that would be incompatible with Union's action.<sup>184</sup> Second, with the aim of undertaking a common approach on any CFSP issue, member States shall consult one another within the European Council and the

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<sup>175</sup> *ibid.* See also Declaration 14. Wessel, den Hertog (n 168) 344.

<sup>176</sup> Geert de Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 109-112; Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis* (CUP 2010) 77.

<sup>177</sup> Bartolini (n 31) 238; Cremona (n 171) 69; Wessel, den Hertog (n 168) 343.

<sup>178</sup> *ibid.* In the field of development cooperation, see CJEU, judgment of 2 March 1994, *European Parliament v Council*, C-316/91, ECLI:EU:C:1994:76; judgment of 3 December 1996, *Portugal v Council*, C-268/94, ECLI:EU:C:1996:461.

<sup>179</sup> Bartolini (n 31) 238; Schütze (n 167) 200.

<sup>180</sup> Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 360.

<sup>181</sup> Declaration 14.

<sup>182</sup> Eeckhout (n 33) 171.

<sup>183</sup> Koutrakos (n 1) 26.

<sup>184</sup> *ibid.*

Council.<sup>185</sup> The duty of consultation, already envisaged in the SEA,<sup>186</sup> is linked with the need to emphasise that EU foreign policy cannot replace national ones. Rather, it has to be viewed as the result of an ongoing and evolving process of establishing a culture of cooperation between member States in this specific field.<sup>187</sup> Third, member States are also bound to act in accordance with decisions defining actions or a position to a particular matter of a geographical or thematic nature. While on the one hand, decisions defining actions shall commit member States in the positions they adopt and in the conduct of their activity,<sup>188</sup> on the other hand, decisions defining positions bind member States to ensure that their national policies conform to the Union's positions.<sup>189</sup>

### **3.2 The coordination between the Common Foreign and Security Policy and the other external policies of the European Union**

Alongside the vertical delimitation of competence between the EU and its member States, the principle of conferral also concerns the horizontal division of the EU's competences between the different institutions of the European Union.<sup>190</sup>

As a matter of fact, the EU's external actions might encompass both CFSP and non-CFSP objectives, which, however, entail different instruments and decision-making procedures. The relationship between these two dimensions is not straightforward; conversely, it has to be assessed starting from the analysis of the treaties, in conjunction with the CJEU's jurisprudence, which plays a significant role in strengthening CFSP legal basis *vis-à-vis* non-CFSP policies.<sup>191</sup>

Within this framework, the reference norm is Article 40 TEU, which states as follows:

‘The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by

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<sup>185</sup> art. 32 TEU.

<sup>186</sup> art. 30(2) SEA.

<sup>187</sup> Koutrakos (n 1) 27.

<sup>188</sup> art. 28(2) TEU.

<sup>189</sup> art. 29 TEU.

<sup>190</sup> Thies (n 160) 38.

<sup>191</sup> cf, *inter alia*, *KS and KD v Council and Others* (n 19).

the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter'.<sup>192</sup>

Article 40 TEU is understood as the most rigorous application of the principle of conferral,<sup>193</sup> a key provision governing the borderline between the inter-governmental CFSP and the supranational external Union policies.<sup>194</sup> On the one hand, in order to protect the EU's supranational procedures and powers, this provision envisages that the CFSP shall not affect other external non-CFSP policies listed in the TFEU. In other words, starting from ex-Article 47 TEU,<sup>195</sup> it prevents from using CFSP competences when a measure could be adopted under the Union's supranational ones.<sup>196</sup> However, while ex-Article 47 TEU focused only on the protection of the EU's supranational procedures and powers, the Lisbon Treaty added a second paragraph, which is understood as a counterweight to the first.<sup>197</sup> In fact, by establishing that external non-CFSP policies cannot affect the exercise of the EU's competences under the CFSP, Article 40 TEU also prevents these policies from interfering with the realm of the CFSP.<sup>198</sup> As a result, unlike the asymmetrical protection offered by ex-Article 47 TEU,<sup>199</sup> this new provision equally protects CFSP and non-CFSP competences.<sup>200</sup> In other words, in this new perspective,

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<sup>192</sup> art. 40 TEU.

<sup>193</sup> Enzo Cannizzaro, 'The Value of the EU International Values' in Wybe Th. Douma, Christina Eckes, Peter van Elsuwege, Eva Kassoti, Andreas Ott, Ramses A Wessel (eds), *The Evolving Nature of EU External Relations Law* (Springer 2021) 3, 13.

<sup>194</sup> Schütze (n 167) 197.

<sup>195</sup> art. 47 Treaty of Amsterdam.

<sup>196</sup> Cannizzaro (n 193) 13.

<sup>197</sup> Govaere (n 154) 80.

<sup>198</sup> *ibid.* See also Cannizzaro (n 193) 13; Cremona (n 14) 7-8.

<sup>199</sup> Koutrakos (n 1) 61.

<sup>200</sup> Hans Merket, *The EU and the Security-Development Nexus. Bridging the Legal Divide* (Brill | Nijhoff 2016) 264; Koutrakos (n 1) 61; Thomas Ramopoulos, 'Article 40 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 267. See also Opinion of Advocate General Bot (19 July 2012) in Case C-130/10, ECLI:EU:C:2012:50, para. 9; Opinion of Advocate General Bot (24 June 2014) in Case C-658/11, ECLI:EU:C:2014:41, para. 86.

the bias in favour of the EU's supranational powers and procedures no longer applies,<sup>201</sup> since the without prejudice clause envisaged in Article 40 TEU applies both in non-CFSP and CFSP fields, reflecting, therefore, the logic of the single legal order envisaged in the Treaty of Lisbon.<sup>202</sup>

From a substantive point of view, the relationship between CFSP and non-CFSP should therefore be seen under the *lex generalis/lex specialis* lens, according to which, special EU external competences might be applicable whenever an action can be fully founded on that competence.<sup>203</sup> On the other hand, if these latter competences are only incidental to the general foreign policy goal, the action should fall within the CFSP legal basis.<sup>204</sup> Nevertheless, it is worth stressing that, rather than focusing on the nature of the CFSP competence, the main goal of Article 40 TEU lies in the application of the procedures and the institutional balance for the exercise of the EU's external competences.<sup>205</sup> Accordingly, considering the CFSP specific institutional balance and decision-making process, Article 40 TEU aims to determine the boundaries between CFSP and non-CFSP competences in order to trigger the appropriate legal basis and corresponding Institutions' powers and procedures without one sector interfering with the other.<sup>206</sup>

Taking into account the different decision-making procedures between the CFSP and non-CFSP policies, the choice of the appropriate legal basis, considered an aspect of constitutional significance,<sup>207</sup> is arguably the most compelling issue in this field. As a matter of fact, even if, in exceptional circumstances, it could be adopted an act under various legal bases, in accordance with well-established case-law, this is expressly forbidden where the procedures required by each legal basis are incompatible with each

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<sup>201</sup> Cremona (n 158) 1117.

<sup>202</sup> *ibid.*

<sup>203</sup> Schütze (n 167) 198.

<sup>204</sup> *ibid.*

<sup>205</sup> Cremona (n 14) 8.

<sup>206</sup> *ibid.*

<sup>207</sup> Opinion 2/00 (6 December 2001) ECLI:EU:C:2001:664, para 5.

other, as is the case for the adoption of CFSP and non-CFSP acts.<sup>208</sup> In order to shed light on the correct choice of the legal basis for acts that might have both a CFSP and non-CFSP nature, it is worth focusing on the case-law of the Court of Justice of the European Union. According to Article 275 TFEU, the Court, whose jurisprudence has changed over time, is entitled to monitor compliance with Article 40 TEU.

In the pre-Lisbon era, as acknowledged in *ECOWAS*,<sup>209</sup> the Court stressed that, under ex-Article 47 TEU, when a measure could be adopted under specific external competences, the EU could not resort to a CFSP legal basis ‘[...] in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community’.<sup>210</sup> In other words, the Court pointed out that, due to ex-Article 47 TEU, the Community policies had priority over the CFSP.<sup>211</sup> However, subsequent case-law highlighted a different perspective, as witnessed by the paradigmatic *Financial Sanctions* case.<sup>212</sup> This case was brought to the Court by the European Parliament since it contested the choice of the appropriate legal basis of Regulation 1286/2009/EU, which amended Regulation (EC) 881/2002 imposing specific restrictive measures directed against persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban.<sup>213</sup> The European Parliament sought a more prominent role in the adoption of counter-terrorism measures,<sup>214</sup> arguing that the abovementioned Regulation should be annulled since its appropriate legal basis would be Article 75 TFEU - that is, within the

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<sup>208</sup> See, *inter alia*, CJEU, judgement of 11 June 2014, *Commission v Council*, C-377/12, ECLI:EU:C:2014:1903, para 34; judgement of 19 July 2012, *Parliament v Council*, C-130/10, ECLI:EU:C:2012:472, para 45; judgment of 11 June 1991, *Titanium dioxide*, C-300/89, ECLI:EU:C:1991:244, paras 17-21; judgment of 25 February 1999, *Parliament v Council*, Joined Cases C-164/97 and C-165/97, ECLI:EU:C:1999:99, para 14; judgment of 29 April 2004, *Commission v Council*, C-338/01, ECLI:EU:C:2004:253, para 57; judgment of 10 January 2006, *Commission v Council*, C-94/03, ECLI:EU:C:2006:2, para 52; judgment of 10 January 2006, *Commission v Parliament and Council*, C-178/03, ECLI:EU:C:2006:4, para 57.

<sup>209</sup> CJEU, judgment of 20 May 2008, *ECOWAS*, C-91/05, ECLI:EU:C:2008:288. For a summary of *ECOWAS* case, see Eeckhout (n 33) 174-180.

<sup>210</sup> *ECOWAS*, C-91/05, para 77.

<sup>211</sup> Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 359.

<sup>212</sup> *Parliament v Council*, C-130/10.

<sup>213</sup> Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 346, 23.12.2009, p. 42-46.

<sup>214</sup> Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 369.

Area of Freedom, Security, and Justice - rather than a CFSP provision, namely Article 215 TFEU.<sup>215</sup> However, the Court ultimately dismissed the claim and upheld the Regulation by stating that the CFSP legal basis identified by the Council was correct. First of all, the Court ruled on the dual CFSP and non-CFSP legal bases issue. Reiterating well-established case-law,<sup>216</sup> the Court highlighted that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other.<sup>217</sup> As for the case at stake, considering the incompatibilities between CFSP and AFSJ legal bases,<sup>218</sup> the Court pointed out:

‘[...] even if the contested regulation does pursue several objectives at the same time or have several components indissociably linked, without one’s being secondary to the other, the differences in the procedures applicable under Articles 75 TFEU and 215(2) TFEU mean that it is not possible for the two provisions to be cumulated, one with the other, in order to serve as a twofold legal basis for a measure such as the contested regulation’.<sup>219</sup>

In addition to ruling out the possibility of a dual legal basis act, the introduction of the ‘centre of gravity’ test marked a significant departure from previous jurisprudence. As a matter of fact, the Court moved away from *ECOWAS*, by pointing out that, rather than on the nature of the CFSP specific procedures, the focus should be given to the aim and content analysis of the measure.<sup>220</sup> Departing from *ECOWAS*, the Court employed the centre of gravity test,<sup>221</sup> by stressing that, to establish the proper legal basis of acts that are at the intersection between CFSP and non-CFSP policies,<sup>222</sup> this choice had to be made by taking into account ‘the purpose and content’ of the instrument in dispute.<sup>223</sup>

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<sup>215</sup> Cremona (n 158) 1117.

<sup>216</sup> *Parliament v Council*, C-130/10, para 45.

<sup>217</sup> *ibid.*

<sup>218</sup> *ibid* paras 47,48. See Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 369.

<sup>219</sup> *Parliament v Council*, C-130/10, para 49.

<sup>220</sup> *ibid* para 80. cf Cremona (n 14) 12.

<sup>221</sup> Govaere (n 154) 82-83.

<sup>222</sup> Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 359.

<sup>223</sup> *Parliament v Council*, C-130/10, para 43, which reads as follows: ‘If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component’.

The Court did acknowledge that combating terrorism and its financing might fall within the AFSJ goals;<sup>224</sup> however, this objective is expressly mentioned as a goal of the EU's external action in the preservation of international peace and security.<sup>225</sup> Therefore, it might be accomplished also through the CFSP, especially since Article 215(2) TFEU allows the adoption of restrictive measures aiming, *inter alia*, to fight terrorism.<sup>226</sup> In the light of this reasoning, the Court upheld the view that Article 215(2) TFEU is the proper legal basis for Regulation 1286/2009/EU since, on the other hand, Article 75 TFEU could not be regarded as a more specific legal basis.<sup>227</sup>

The 'centre of gravity' test has also been applied in subsequent case-law. For instance, the European Parliament once again challenged the Council Decision in the *Mauritius Agreement* case,<sup>228</sup> which concerned the conditions of transferring suspected pirates from the European Union-led naval force to the Republic of Mauritius.<sup>229</sup> This agreement was concluded within the framework of the EU's military mission 'Atalanta',<sup>230</sup> which contributed to the deterrence, prevention, and repression of acts of piracy and armed robbery off the coast of Somalia. Interestingly, in this case, the European Parliament did not challenge the main CFSP nature of the agreement - based on Article 37 TEU. Rather, it took into account its other incidental external relations objectives linked with non-CFSP policies, namely judicial and police cooperation in criminal matters, as well as development cooperation, in order to conclude that the agreement could not be considered as 'exclusively related to CFSP, and, as a consequence, in accordance with Article 218(6) TFEU, its consent was required.<sup>231</sup> It is

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<sup>224</sup> *Parliament v Council*, C-130/10, para 61.

<sup>225</sup> art. 21(2)(c) TEU. *Parliament v Council*, C-130/10, para 61.

<sup>226</sup> *Parliament v Council*, C-130/10, para 63.

<sup>227</sup> *ibid* paras 65, 66.

<sup>228</sup> CJEU, judgment of 24 June 2014, *Mauritius Agreement*, C-658/11, ECLI:EU:C:2014:2025.

<sup>229</sup> Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ L 254, 30.9.2011, p. 1-2.

<sup>230</sup> Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 301, 12.11.2008, p. 33-37. In March 2012, the operating mandate was extended until December 2014.

<sup>231</sup> Koutrakos (n 1) 55; Govaere (n 154) 83-84.

worth recalling that, as a general rule, Article 218(6) TFEU establishes that the Council needs to obtain the consent of the European Parliament to adopt a decision concluding an international agreement. However, if the agreement relates exclusively to the CFSP, its consent is not required.<sup>232</sup> In this instance, the Court again rejected the European Parliament's interpretation. Following the centre of gravity test reasoning envisaged in the *Financial Sanctions* case,<sup>233</sup> it stated that the Council decision could be based solely on a substantive CFSP legal basis, Article 37 TEU; considering that this provision is the predominant aim or component of the decision,<sup>234</sup> the agreement has to be seen as exclusively related to the CFSP also from a procedural point of view.<sup>235</sup> In order to further clarify this last issue, the Court stressed that for both EU's internal acts and international agreements it is '[...] the substantive legal basis of a measure that determines the procedures to be followed in adopting that measure'.<sup>236</sup> In line with this view, and considering the exclusive substantive CFSP legal basis of the agreement, the Court concluded that the employment of the procedure laid out in the first clause of the second subparagraph of Article 218(6) TFEU was correct.<sup>237</sup>

The *Tanzania Agreement* case is another example of the application of the centre of gravity test in which, similarly to the *Mauritius* case, the European Parliament requested the annulment of the Council decision adopting the EU-Tanzania agreement on the transfer of individuals suspected of piracy at sea by EU personnel to the Tanzanian authorities.<sup>238</sup> Considering its implications in the AFSJ field, the Parliament argued that, the agreement should have been adopted not only under Article 37 TEU, but taking also into account Articles 82 and 87 TFEU as legal bases.<sup>239</sup> Nevertheless, even in this case, the Court, considering the agreement as 'intimately linked' with Operation Atlanta,<sup>240</sup>

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<sup>232</sup> art. 218(6) TFEU.

<sup>233</sup> *Mauritius Agreement*, C-658/11, paras 43-45.

<sup>234</sup> *ibid* para 45.

<sup>235</sup> Cremona (n 158) 1122.

<sup>236</sup> *Mauritius Agreement*, C-658/11, para 57.

<sup>237</sup> *ibid* para 58.

<sup>238</sup> CJEU, judgment of 14 June 2016, *Tanzania Agreement*, C-263/14, ECLI:EU:C:2016:435.

<sup>239</sup> *cf* Koutrakos (n 1) 55.

<sup>240</sup> *Mauritius Agreement*, C-658/11, para 51.

whose absence would have rendered the agreement itself devoid of purpose,<sup>241</sup> acknowledged that the actions under the EU-Tanzania agreement were carried out exclusively within the framework of the abovementioned operation,<sup>242</sup> which falls within the scope of the CFSP.<sup>243</sup> By applying the centre of gravity test, the Court stated that, since the agreement fell predominantly within the scope of the CFSP, it could be exclusively based on the CFSP basis (Article 37 TEU).<sup>244</sup> As for the *Mauritius Agreement*, this case further confirms the Court's preference for a single legal basis, which should also be explicit.<sup>245</sup> Therefore, in the light of the centre of gravity test, when the predominant purpose of an international agreement falls within the scope of the CFSP, and although some of its provisions may be incidentally related to other policy fields, it is, therefore, possible to adopt the agreement on the sole CFSP legal basis.<sup>246</sup>

Accordingly, the abovementioned case-law points out that, following the more balanced view introduced by Article 40 TEU regarding the relation between CFSP and non-CFSP competences, the CFSP no longer has to be seen as purely supplementary.<sup>247</sup> According to the 'centre of gravity' test and Court's preference for the identification of a single external legal basis, it might even be employed as the exclusive legal basis for CFSP measures, including international agreements. As for the R2P realm, these findings are particularly relevant to complete the analysis of the framework in which the EU, through its actions, can act to implement the Responsibility to Protect and, ultimately, contribute to halting and preventing the commission of mass atrocity crimes worldwide.

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<sup>241</sup> *ibid.*

<sup>242</sup> *ibid* para 54.

<sup>243</sup> *ibid* para 53; cf Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 391.

<sup>244</sup> *Mauritius Agreement*, C-658/11, para 55. cf Wouters, Hoffmeister, de Baere, Ramopoulos (n 8) 391.

<sup>245</sup> Cremona (n 158) 1125.

<sup>246</sup> See, *inter alia*, *Tanzania Agreement*, C-263/14, para 47; CJEU, judgment of 28 March 2017, *Rosneft*, C-72/15, ECLI:EU:C:2017:236, para 72.

<sup>247</sup> Eeckhout (n 33) 165.

#### 4. The affirmation of the Responsibility to Protect within the EU framework

While the previous paragraphs provide the CFSP's relevant theoretical background, considered as the starting point from which examining the significant EU practice in operationalising R2P, the following sections will assess the main developments which have led to the affirmation and consolidation of the Responsibility to Protect within the EU framework. The analysis of this aspect is a fundamental prerequisite in order to assess the EU's preventing and reactive engagement in implementing the Responsibility to Protect.

##### 4.1 Early years

Even before the UN's endorsement of the Responsibility to Protect, the EU repeatedly showed its determination to be an international actor willing to act in mass atrocity cases.<sup>248</sup> In fact, in the 2001 *Presidency Conclusions of the Gothenburg European Council*, the European Union highlighted the importance of conflict prevention and crisis management tasks - aspects which are at the heart of the Responsibility to Protect - thus laying the groundwork for the future endorsement of this doctrine.<sup>249</sup> In order to contribute to international peace and security under the principles of the UN Charter, it was further emphasised the EU's commitment to improving its ability to undertake the full range of conflict prevention and crisis management tasks, by employing military and civilian means.<sup>250</sup> The EU placed special emphasis on conflict prevention, considered one of the main objectives of its external action.<sup>251</sup> Enhancing economic, political, and military cooperation with the UN was considered crucial to accomplish this goal.<sup>252</sup>

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<sup>248</sup> David Carment, Sean Winchester, Joe Landry, 'The Role of Regional Organizations' in Alex Bellamy, Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 335, 344.

<sup>249</sup> Presidency Conclusions, Gothenburg European Council, 15 and 16 June 2001, SN 2001/01 REV 1, paras 47-54.

<sup>250</sup> *ibid* para 47.

<sup>251</sup> *ibid* para 52.

<sup>252</sup> *ibid* para 53.

The 2003 *European Security Strategy* (ESS) reiterated the importance of conflict prevention.<sup>253</sup> Within the threefold crisis management agenda, consisting of prevention, response, and post-conflict reconstruction,<sup>254</sup> prevention was identified as the best tool to prevent situations from escalating or deteriorating.<sup>255</sup> Accordingly, the EES called for a more coherent and active external action which should be carried out through the coordination of the various instruments at the EU's disposal, including political, diplomatic, military, civilian, trade, and development activities. As a matter of fact, it was believed that only a European Union more committed to contributing to the maintenance of international peace and security could aspire to achieve greater political weight within the international framework.<sup>256</sup>

On the other hand, in order to strengthen the crisis response component, in May 2004, the General Affairs and External Relations Council approved the *Headline Goal 2010*;<sup>257</sup> it sought to create rapid reaction battlegroups capable of acting in an effective and timely manner in situations concerning the protection of civilians. Considering the EU as an international actor ready to share responsibility for global security,<sup>258</sup> member States aligned on the need to react quickly to a situation of crisis. Therefore, the *Headline Goal 2010* called for rapid decision-making as well as deployment of forces.<sup>259</sup> Strong and efficient interoperability, deployability, and sustainability were required to reach this goal.<sup>260</sup>

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<sup>253</sup> Council of the European Union, 'A Secure Europe in a Better World - European Security Strategy' (12 December 2003) at <<https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf>> accessed 8 September 2024.

<sup>254</sup> ESS, p. 11.

<sup>255</sup> Darina Dvornichenko, Vadym Barsky, 'The EU and Responsibility to Protect: case studies on the EU's response to mass atrocities in Libya, South Sudan and Myanmar' (2020) 7(1) *Intereulaweast* 117, 120.

<sup>256</sup> ESS, p. 11.

<sup>257</sup> Council of the European Union, General Affairs and External Relations, External Relations, 2582nd Council Meeting (17 May 2004) 9210/04 (Presse 149) para 4. As for the *Headline Goal 2010*, see Council of the European Union, *Headline Goal 2010* (6309/6/04).

<sup>258</sup> *Headline Goal 2010*, para 1.

<sup>259</sup> The Council should have adopted a decision within 5 days of the approval of the Crisis Management Concept and forces should have been deployed no more than 10 days after the EU's decision to launch the operation. 2582nd Council Meeting (n 257) para 4; *Headline Goal 2010*, para 4.

<sup>260</sup> *ibid*, para 6.

In the months leading up to the World Summit, the EU and its member States voiced their support for R2P both inside and outside the United Nations.<sup>261</sup> Within the UN framework, in which the EU and its member States have shown a strong degree of cohesion in the field of human rights,<sup>262</sup> the Luxemburg ambassador, speaking on behalf of the European Union, acknowledged the Union's endorsement of R2P by pointing out that when mass atrocities occur, the international community has to respond with strong and resolute action.<sup>263</sup> Regarding the EU framework, the Commission, in its 2005 June Communication, requested the EU to support R2P and approve it during the Summit.<sup>264</sup> A few weeks later, the External Relations Council endorsed the Commission's Communication by further stressing the importance of this topic.<sup>265</sup>

Therefore, the aforementioned documents demonstrate how EU external action field efforts align with R2P's fundamental objectives, particularly prevention. The European Council reaffirmed the importance of prevention in the 2005 June Presidency Conclusions, even before the affirmation of the Responsibility to Protect within the World Summit.<sup>266</sup>

## 4.2 The first decade

As shown in Chapter I, following the World Summit Outcome, the EU continued to fully endorse R2P on the occasion of subsequent UN debates.<sup>267</sup> Internally, the EU's support to R2P was also reiterated by the Council, the European Parliament, and the

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<sup>261</sup> Chiara de Franco, Christoph Meyer, Karen E Smith, 'Europe and the European Union' in Alex Bellamy, Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 391, 394.

<sup>262</sup> For further information, see Carmela Pérez-Bernárdez, 'The Consistency of the European Union's Human Rights Policy at the United Nations' in Piet Eeckhout, Manuel López-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart 2016) 325.

<sup>263</sup> UN Doc A/59/PV.85, pp. 10-11.

<sup>264</sup> Commission of the European Communities, Communication from the Commission to the Council and the European Parliament. 'The 2005 UN Summit - Addressing the global challenges and making a success of the reformed UN' (15 June 2005) COM(2005) 259 final, p. 14, para 8.1.3.

<sup>265</sup> European Union External Relations Council, 'Conclusions on "The UN Summit"' (18 July 2005) Press Release 10815/05 (Presse 178) pp. 12-13.

<sup>266</sup> Presidency Conclusions of the Brussels European Council, 16 and 17 June 2005, 10255/1/05, para 37.

<sup>267</sup> Specifically concerning those taking place during the 2005 *In Larger Freedom* and the 2009 *Implementing the Responsibility to Protect* debates. Chapter I, para 5.

Commission in two important joint statements: the 2006 *European Consensus on Development*,<sup>268</sup> and the 2008 *European Consensus on Humanitarian Aid*.<sup>269</sup> Therefore, the three main EU institutions underlined their commitment to support the Responsibility to Protect under the outcomes of the World Summit,<sup>270</sup> as well as strengthen the ‘[...] role for the regional and sub-regional organizations in the process of enhancing international peace and security, including their capacity to coordinate donor support in the area of conflict prevention’.<sup>271</sup> As regards the Council itself, it is worth focusing on the 2008 *Report on the Implementation of the European Security Strategy*.<sup>272</sup> In this Report, the Union identified global challenges and defined strategic objectives to be addressed within the CFSP field.<sup>273</sup> Amongst them, the Council underscored the EU’s shared responsibility to protect populations from international core crimes under the R2P framework.<sup>274</sup> Moreover, as envisaged in the *EU priorities for the 64th United Nations General Assembly*,<sup>275</sup> the Council renewed its commitment to R2P, by stressing its efforts to make this concept operational focusing specifically on the preventive realm.<sup>276</sup> Subsequent practice followed this trend. In particular, in the *EU’s priorities for the 66th session of the UN General Assembly*, alongside welcoming the Security Council Resolutions reference to R2P,<sup>277</sup> it was further emphasised:

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<sup>268</sup> Joint statement by the Council and the representatives of the governments of the member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’ (24 February 2006) OJ C 46, pp. 1-19, para 37.

<sup>269</sup> Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (30 January 2008) OJ C 25, pp. 1-12, para. 17.

<sup>270</sup> Geert de Baere, ‘The EU and the Responsibility to Protect’ in Bart Van Vooren, Steven Blockmans, Jan Wouters (eds), *The EU’s Role in Global Governance* (OUP 2013) 95, 102.

<sup>271</sup> The European Consensus (n 269) para 37; cf Dvornichenko, Barsky (n 255) 121; de Baere (n 270) 102.

<sup>272</sup> Report on the Implementation of the European Security Strategy: Providing Security in a Changing World (11 December 2008) S407/08, pp. 2, 12.

<sup>273</sup> Dvornichenko, Barsky (n 255) 121.

<sup>274</sup> Report on the Implementation of the European Security Strategy (n 272) p. 12.

<sup>275</sup> Council of the European Union, ‘EU priorities for the 64th United Nations General Assembly’ (9 June 2009) 10809/09, para 8.

<sup>276</sup> Council of the European Union, General Affairs and External Relations, General Affairs, 2950th Council meeting (15 June 2009) 10938/09 (Presse 173) p. 14.

<sup>277</sup> Reference has been made to, *inter alia*, UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011), UN Doc S/RES/1975 (2011) on the situation in Ivory Coast. Council of the European Union, ‘EU

‘The EU will strive for the operationalization of the concept of Responsibility to Protect (R2P) on the basis that the concept is not open for renegotiation. The EU will apply a “narrow but deep approach” to R2P-related policies and will particularly focus on its preventive pillar’.<sup>278</sup>

Despite the Commission and European Parliament’s marginal role on CFSP issues, both institutions have also actively contributed to the recognition and operationalisation of R2P within the EU framework. As for the Commission, in its 2013 *Joint Communication on the EU’s Comprehensive Approach to External Conflict and Crises*,<sup>279</sup> it confirmed the EU’s need to act in its external relations by covering all stages of the cycle of conflict or other external crises,<sup>280</sup> including situations where the commission of mass atrocities is at stake,<sup>281</sup> focusing specifically on preventive engagement.<sup>282</sup> Based on the Commission’s findings, the Council, in its 2014 *Conclusions on the EU’s comprehensive approach*, further stressed the significance of preventive action, highlighting the important role played by CSDP missions and operations, considered as an essential element in the EU’s comprehensive approach, and for which an enhanced political engagement was required.<sup>283</sup>

The European Parliament has made a direct and far more incisive call to the EU’s engagement towards R2P. Despite lacking institutional decision-making powers in CFSP and CSDP matters, the European Parliament adopted several resolutions and

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Priorities for the 66th Session of the General Assembly of the United Nations’ (10 June 2011) 11298/11, para 6.

<sup>278</sup> *ibid* para 6. See also Council of the European Union, ‘EU Priorities for the 68th Session of the General Assembly of the United Nations’ (24 June 2013) 11521/13, para 8.

<sup>279</sup> Joint Communication to the European Parliament and the Council: ‘The EU’s comprehensive approach to external conflict and crises’ (11 December 2013) JOIN(2013) 30 final.

<sup>280</sup> *ibid*, p. 2.

<sup>281</sup> Dvornichenko, Barsky (n 255) 122.

<sup>282</sup> Joint Communication to the European Parliament and the Council (n 279) pp. 6-7.

<sup>283</sup> Council of the European Union, ‘Council conclusions on the EU’s comprehensive approach’ (12 May 2014) paras 6-7, at <<https://www.consilium.europa.eu/media/28344/142552.pdf>> accessed 12 September 2024.

recommendations that endorsed the Responsibility to Protect.<sup>284</sup> Amongst them, it is worth focusing on its April 2013 recommendation to the Council on the *UN principle of the 'Responsibility to Protect' ('R2P')*,<sup>285</sup> which is considered the most substantial European statement on R2P to date.<sup>286</sup> This document is relevant for several reasons. First, the European Parliament renewed the EU's commitment to R2P by adopting an interinstitutional 'Consensus on R2P',<sup>287</sup> reaffirming the need '[...] to work towards establishing R2P as a new norm of international law, within the scope agreed to by UN member states at the 2005 World Summit'.<sup>288</sup> This view goes in the direction of acknowledging the normative dimension of this doctrine, embracing the paradigm shift regarding the notion of State sovereignty already proposed by the Dutch and ICISS reports.<sup>289</sup> Accordingly, sovereignty should not be considered an absolute concept; rather it should be regarded as closely intertwined with the duty to protect States' population from gross human rights violations, which constitutes a limitation of it.<sup>290</sup> Second, the Parliament restricted R2P's scope of application by excluding from this field humanitarian emergencies caused by natural disasters.<sup>291</sup> Furthermore, following the

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<sup>284</sup> See, *inter alia*, European Parliament resolution on the outcome of the United Nations World Summit of 14-16 September 2005 P6 TA(2005)0362; European Parliament resolution of 10 March 2011 on the Southern Neighbourhood, and Libya in particular P7 TA(2011)0095; European Parliament resolution of 7 July 2011 on the situation in Syria, Yemen and Bahrain in the context of the situation in the Arab world and North Africa P7 TA(2011)0333; European Parliament resolution of 13 September 2012 on Syria (2012/2788(RSP)) P7 TA(2012)0351.

<sup>285</sup> European Parliament recommendation to the Council of 18 April 2013 on the UN principle of the 'Responsibility to Protect' ('R2P') (2012/2143(INI)) P7 TA(2013)0180.

<sup>286</sup> Edward Newman, Cristina G Stefan, 'Normative Power Europe? The EU's Embrace of the Responsibility to Protect in a Transitional International Order' (2020) 58(2) *JCMS* 472, 476.

<sup>287</sup> European Parliament recommendation on the UN principle of the 'Responsibility to Protect' (n 285) para 1 (a).

<sup>288</sup> *ibid* para 2 (f).

<sup>289</sup> Advisory Council on International Affairs, Advisory Committee on Issues of Public International Law, *Humanitarian Intervention* (April 2000); ICISS, *The Responsibility to Protect* (14 August 2002) UN Doc A/57/303, Annex.

<sup>290</sup> Anne Peters, 'Humanity as the  $\Lambda$  and  $\Omega$  of Sovereignty' (2009) 20 *EJIL* 513, 515; Jonah Eaton, 'An Emerging Norm - Determining the Meaning and Legal Status of the Responsibility to Protect' (2011) 32 *MICH. J. INT'L L.* 765, 781.

<sup>291</sup> European Parliament recommendation on the UN principle of the 'Responsibility to Protect' (n 285) AB. A few States, France in particular, opposed to this view. Carment, Landry, Winchester (n 248) 344.

doubts expressed concerning humanitarian intervention in Libya,<sup>292</sup> the prohibition of humanitarian intervention as an excuse for political action was also emphasised.<sup>293</sup> Alongside these limitations, the parliamentary recommendation also underlined the weaknesses linked with the notion of R2P as shaped within the UN framework. Despite acknowledging the UN Security Council as the only internationally legitimate body entitled to authorise interventions without the consent of the injured State, it recalled the need to act when the criteria set out in Pillar III are triggered.<sup>294</sup> Against its inaction,<sup>295</sup> the European Parliament reiterated proposals to narrow the use of veto power in case of genocide, war crimes, ethnic cleansing, or crimes against humanity.<sup>296</sup> It also pointed out the need to reopen discussions about UN Security Council reform.<sup>297</sup> Third, from a substantive point of view, the recommendation again emphasised the preventive dimension of the Responsibility to Protect,<sup>298</sup> which must be prioritised over military intervention, considered as a last resort mechanism. According to the narrow-but-deep criterion,<sup>299</sup> other non-military coercive tools must be preferred, including preventive diplomacy, sanctions, accountability mechanisms and mediation,<sup>300</sup> whose effective

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<sup>292</sup> See, *inter alia*, Geir Ulfstein, Hege Føsum Christiansen, 'The Legality of NATO's Use of Force in Libya' (2013) 62 ILCQ 709; Christian Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire' (2011) 60 ILCQ 767.

<sup>293</sup> European Parliament recommendation on the UN principle of the 'Responsibility to Protect' (n 285) AB.

<sup>294</sup> *ibid* para 1 (i).

<sup>295</sup> As happened, at the time the recommendation was issued, regarding the situation in Syria. UN SCOR, 6627th mtg. at 2 (4 October 2011) UN Doc S/PV.6627.

<sup>296</sup> Including the proposal of adopting a voluntary code of conduct which would limit the use of the veto power in cases of genocide, war crimes, ethnic cleansing or crimes against humanity. European Parliament recommendation on the UN principle of the 'Responsibility to Protect' (n 285) 2 (f).

<sup>297</sup> *ibid* para 1 (i). The question of UN Security Council reform has been extensively discussed during informal meetings taken on the occasion of the 79<sup>th</sup> Session of the UN General Assembly. cf United Nations, 'Reform of the Security Council' at <<https://www.un.org/en/ga/screform/>> accessed 22 November 2024. It is worth noting that, since 2008, the UN General Assembly has decided to commence intergovernmental negotiations in informal plenary of the Assembly to deal with the issue at hand. UN General Assembly, 'Question of equitable representation on and increase in the membership of the Security Council and related matters' UN Doc A/62/49 (Vol. III) 106-107.

<sup>298</sup> *ibid* N, O.

<sup>299</sup> Jennifer Welsh, 'The "Narrow but Deep Approach" to Implementing the Responsibility to Protect: Reassessing the Focus on International Crimes' in Sheri P Rosenberg, Tibi Galis, Alex Zucker (eds), *Reconstructing Atrocity Prevention* (CUP 2015) 81.

<sup>300</sup> See, *inter alia*, European Parliament resolution of 16 December 2015 on preparing for the World Humanitarian Summit: Challenges and opportunities for humanitarian assistance (2015/2051(INI)) P8 TA(2015)0459.

employment would allow the Union to play a leadership role in the field of conflict prevention.<sup>301</sup>

Although not legally binding, and with a rather ambitious agenda, this recommendation should nevertheless be considered as a significant substantial statement which ‘call for consensus and coordination across the EU on R2P’.<sup>302</sup> Therefore, it has the potential to genuinely contribute to the evolution and implementation of the R2P as a generally recognised norm.<sup>303</sup>

### 4.3 The last decade

Over the last decade, the European Union has reiterated and strengthened its support to R2P. The 2016 *EU Global Strategy* (EUGS) is understood as further evidence of the EU’s commitment to promote R2P, together with international humanitarian law, international human rights law, and international criminal law. Some scholars considered this document as a missed opportunity to provide significant support for the EU’s substantial normative commitment to R2P, due to the lack of a more robust statement as well as specific programmes to ensure the implementation of the Responsibility to Protect.<sup>304</sup> Taken from a different angle, we should instead consider the *EU Global Strategy* as further evidence supporting the EU’s commitment to R2P, since it calls for the EU to take a proactive stance in responding rapidly, responsibly, and decisively to crises, including when the commission of R2P crimes is at stake. Together with fostering the promotion of the Responsibility to Protect,<sup>305</sup> this document also underlines the EU’s readiness to act individually to address external crises, notwithstanding the lack of action of its global partners. Accordingly, it represents a defining moment for the EU to

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<sup>301</sup> European Parliament recommendation to the Council of 18 April 2013 (n 285) O; Julia Schmidt, ‘The European Union and the Responsibility to Protect’ (2019) 24(3) *European Foreign Affairs Review* 309, 317.

<sup>302</sup> Newman, Stefan (n 286) 476.

<sup>303</sup> Pinar Gözen Ercan, Defne Günay, ‘How can a “Responsible” European Union Contribute to the Implementation of the Responsibility to Protect?’ (2019) 27(4) *European Review* 490, 501.

<sup>304</sup> Newman, Stefan (n 286) 479-480.

<sup>305</sup> *EU Global Strategy* (n 141) 42.

consolidate its position as a global actor ready to prevent and react to worldwide crises, including R2P situations.

The focus on prevention is explicitly reiterated in the 2017 *Strategic Approach to Resilience in the EU's external action*<sup>306</sup> and the *New European Consensus on Development* (NECD);<sup>307</sup> they further underlined the EU's engagement to R2P,<sup>308</sup> as well as the need for the EU to support efforts towards early detection and prevention of atrocities.<sup>309</sup> The Council reached the same outcome in its 2018 *Conclusions on the Integrated Approach to External Conflicts and Crises*; alongside emphasising the importance of R2P,<sup>310</sup> it also underpinned the need to inculcate a culture of early action aimed at better addressing the risks of emerging and escalating violent conflicts.<sup>311</sup> More recently, the 2021-2027 Commission's multi-annual indicative programme on 'Peace, Stability and Conflict Prevention',<sup>312</sup> further emphasises the EU's commitment to R2P's preventive realm. As a part of the *Neighbourhood, Development and International Cooperation Instrument - Global Europe*,<sup>313</sup> this thematic programme identifies as one of its priorities the need to enhance early warning, conflict prevention, and resolution.<sup>314</sup> In order to reach this goal, it highlights the importance of supporting '[...] national and international initiatives, in particular by civil society, on conflict prevention and

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<sup>306</sup> European Commission, Joint Communication to the European Parliament and the Council, 'A Strategic Approach to Resilience in the EU's External Action' (7 June 2017) JOIN(2017) 21 final.

<sup>307</sup> European Commission: Directorate-General for International Cooperation and Development, *The new European consensus on development - 'our world, our dignity, our future'*, Publications Office, 2017, para 66. On the NECD, see Schmidt (n 301) 310, 321.

<sup>308</sup> NECD (n 307) para 66.

<sup>309</sup> *ibid*; Joint Communication to the European Parliament and the Council of 7 June 2017 (n 306) p. 20.

<sup>310</sup> Council of the European Union, Council Conclusions on the Integrated Approach to External Conflicts and Crises (22 January 2018) 5413/18, para 4.

<sup>311</sup> *ibid* para 12.

<sup>312</sup> European Commission, Multiannual Indicative Programme 2021-2027, 'Thematic Programme on Peace, Stability and Conflict Prevention' p. 14, at <[https://international-partnerships.ec.europa.eu/system/files/2022-01/mip-2021-c2021-8985-peace-stability-conflict-prevention-annex\\_en.pdf](https://international-partnerships.ec.europa.eu/system/files/2022-01/mip-2021-c2021-8985-peace-stability-conflict-prevention-annex_en.pdf)> accessed 13 September 2024.

<sup>313</sup> Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument - Global Europe, OJ L 209, 14.6.2021, p. 1-78.

<sup>314</sup> Multiannual Indicative Programme 2021-2027 (n 312) p. 1.

peacebuilding, including on Responsibility to Protect and prevention of atrocity crimes'.<sup>315</sup>

Over the last few years, other EU actors have also contributed, through its soft law powers, to actively support and promote the Responsibility to Protect. Besides the ongoing commitment of the European Parliament,<sup>316</sup> considered the major advocate of R2P within the EU,<sup>317</sup> the HR and the EEAS have also played an increasingly important role in the endorsement and operationalisation of R2P. While the EEAS's actions will be in-depth scrutinised in the next section, focusing on HR's actions, it is worth highlighting that this actor renewed the EU's commitment to R2P on several occasions. For instance, Federica Mogherini deemed R2P as 'an integral part of the EU's foreign and security policy',<sup>318</sup> for the implementation of which the EU works closely with international partners, especially the UN and the ICC. The same has been argued by his successor, Josep Borell;<sup>319</sup> indeed, he repeatedly stressed the Union's support for R2P through its CFSP, emphasising the importance of conflict prevention by employing CFSP tools, including conflict analysis, early warning, and action, dialogue, and mediation.<sup>320</sup>

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<sup>315</sup> *ibid* p. 14.

<sup>316</sup> See, *inter alia*, European Parliament resolution of 4 February 2016 on the systematic mass murder of religious minorities by the so-called 'ISIS/Daesh' (2016/2529(RSP)) P8 TA(2016)0051, L; European Parliament resolution of 4 July 2017 on addressing human rights violations in the context of war crimes, and crimes against humanity, including genocide (2016/2239(INI)) P8 TA(2017)0288, paras 7, 8, 45; European Parliament recommendation of 5 July 2018 to the Council on the 73rd session of the United Nations General Assembly (2018/2040(INI)) P8 TA(2018)0312, C, Q, S; European Parliament resolution of 16 September 2021 on a new EU-China strategy (2021/2037(INI)) P9 TA(2021)0382, para 35; European Parliament resolution of 14 December 2022 on the implementation of the New European Agenda for Culture and the EU Strategy for International Cultural Relations (2022/2047(INI)) P9 TA(2022)0444, para 78.

<sup>317</sup> Jochem Rietveld, *Regional Approaches to the Responsibility to Protect. Lessons from Europe and West Africa* (Routledge 2023) 71; Schmidt (n 301) 317.

<sup>318</sup> EEAS, 'Statement by HR/VP Federica Mogherini on the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime' (9 December 2017) at <[https://www.eeas.europa.eu/node/37088\\_en](https://www.eeas.europa.eu/node/37088_en)> accessed 15 September 2024. See also, EEAS, 'Joint Statement by HRVP Federica Mogherini and UN Special Representative for Children and Armed Conflict Virginia Gamba on the International Day Against the Use of Child Soldiers' (12 February 2019) at <[https://www.eeas.europa.eu/node/58000\\_en](https://www.eeas.europa.eu/node/58000_en)> accessed 15 September 2024.

<sup>319</sup> Recently substituted by Kaja Kallas. European Council Decision (EU) 2024/2086 of 24 July 2024 appointing the High Representative of the Union for Foreign Affairs and Security Policy, OJ L, 2024/2086, 26.7.2024. She is expected to officially start her mandate on 1 December 2024, which will last until 31 October 2029.

<sup>320</sup> See, *inter alia*, EEAS, 'Statement by HR/VP Josep Borrell on the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime'

The Union has also reaffirmed its support to R2P outside the EU, notably through its statements made before the UN General Assembly.<sup>321</sup> Following the 2005 R2P's endorsement within the UN framework, the EU has consistently supported the Responsibility to Protect, making it an integral part of its foreign and security policy.<sup>322</sup> Considering the role that regional organizations can play in halting and preventing atrocity crimes,<sup>323</sup> the importance of preventive engagement,<sup>324</sup> in conjunction with a timely and effective response when preventive efforts turn out to be unsuccessful, should be stressed.<sup>325</sup> Although the EU recognised the UN Security Council's important role and functions, it asked P5 Members not to veto draft resolutions when R2P international core crimes are at stake; rather, it invited them to employ all the tools at their disposal to protect people from the commission of international core crimes.<sup>326</sup> All these considerations are well encapsulated in the July 2024 statement made by the Deputy Head of the EU Delegation to the UN at the 78th Session of the UN General Assembly, in which she stressed:

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(8 December 2019) at <[https://www.eeas.europa.eu/eeas/statement-hrvp-josep-borrell-international-day-commemoration-and-dignity-victims-crime-genocide-and\\_en](https://www.eeas.europa.eu/eeas/statement-hrvp-josep-borrell-international-day-commemoration-and-dignity-victims-crime-genocide-and_en)> accessed 15 September 2024; EEAS, 'International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime: Statement by High Representative/Vice-President Josep Borrell' (8 December 2023) at <[https://www.eeas.europa.eu/eeas/international-day-commemoration-and-dignity-victims-crime-genocide-and-prevention-crime-statement-3\\_en](https://www.eeas.europa.eu/eeas/international-day-commemoration-and-dignity-victims-crime-genocide-and-prevention-crime-statement-3_en)> accessed 15 September 2024.

<sup>321</sup> Newman and Stefan underline that: 'the EU has been the only regional organization to contribute to each of the nine UN General Assembly informal interactive dialogues on R2P'. Newman, Stefan (n 286) 476. On this aspect, it is worth recalling that, since 2011, the EU is an observer member with enhanced status at the UN General Assembly. UNGA, 'Participation of the European Union in the work of the United Nations' (10 May 2010) UN Doc A/RES/65/276. For further information, see Carmela Pérez-Bernárdez, 'Respuestas del sistema diplomático ante el Servicio Europeo de Acción Exterior (SEAE): el caso de la Unión Europea en la Asamblea General de las Naciones Unidas' (2011) 44 Cuadernos Europeos de Deusto 111.

<sup>322</sup> UN Doc A/73/PV.93, p. 4; UN Doc A/75/PV.64, p. 7; UN Doc A/77/PV.83, p. 4.

<sup>323</sup> Carment, Landry, Winchester (n 248) 336 ss; Newman, Stefan (n 286) 475. See also UN Doc A/65/877-S/2011/393, para 24.

<sup>324</sup> UN Doc A/72/PV.99, p. 6, UN Doc A/75/PV.64, p. 7. In 2022, Mr Skoog, Head of the Delegation of the European Union to the United Nations pointed out: 'The prevention of atrocities is never negotiable. Preventing violent conflict is key to saving populations, many among them children and youth, from the scourge of war and the suffering that follows' UN Doc A/76/PV.86, p 14. The following year, his successor stated: 'The prevention of atrocities is a must. Preventing violent conflict is key to saving populations from the scourge of war and the resulting suffering'. UN Doc A/77/PV.83, p 5.

<sup>325</sup> UN Doc A/77/PV.83, p 5; UN Doc A/73/PV.93, pp 4-5.

<sup>326</sup> UN Doc A/72/PV.99, p 7; UN Doc A/73/PV.93, p 5; UN Doc A/76/PV.86, p 14; UN Doc A/77/PV.83, p 5.

‘Prevention of atrocities must be a non-negotiable priority, both at national and international level. If and when prevention efforts fail, we must collectively ensure a timely and decisive response. The Security Council, as the primary bearer of the duty to maintain international peace and security, needs to assume its responsibility and take urgent action to protect civilian populations at risk of mass atrocities’.<sup>327</sup>

Accordingly, the abovementioned EU political statements and strategy documents, which have been interpreted as possible indicators of ‘norm acceptance’,<sup>328</sup> provide a systematic reiteration of the EU’s commitment to the Responsibility to Protect.<sup>329</sup> Consequently, it is necessary to further investigate whether the reiterated support to R2P prompted the EU to take concrete actions implementing the Responsibility to Protect, in both its preventive and reactive dimensions. While the next paragraph will assess the EU’s preventive engagement in implementing R2P, Chapter IV will scrutinise its reactive component which, given its multi-faceted dimension, require an in-depth analysis.

## 5. Preventive engagement

As seen before, preventive engagement occupies a prominent place with the R2P framework.<sup>330</sup> Since the launch of the Gothenburg programme in 2001, conflict prevention has begun to take shape among the EU’s foreign policy goals. Subsequent CFSP policies highlighted the importance of this objective which found treaty accommodation with the Lisbon Treaty.<sup>331</sup> Given this framework, the following paragraphs will focus on the EU’s preventive tools and the current developments

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<sup>327</sup> EU statement on behalf of the European Union and its Member States, ‘Responsibility to Protect and the Prevention of genocide, war crimes, ethnic cleansing and crimes against humanity’ (1 July 2024) at [https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-un-general-assembly-responsibility-protect-and-prevention-genocide-war-crimes-ethnic\\_en?s=63](https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-un-general-assembly-responsibility-protect-and-prevention-genocide-war-crimes-ethnic_en?s=63) accessed 28 October 2024.

<sup>328</sup> De Franco, Meyer, Smith (n 261) 395.

<sup>329</sup> cf Stefan Kadelbach, ‘The European Union’s Responsibility to Protect’ in Peter Hilpold (ed), *The Responsibility to Protect (R2P). A New Paradigm of International Law?* (Brill | Nijhoff 2015) 237.

<sup>330</sup> Bellamy, Luck (n 29) 140.

<sup>331</sup> art. 21(2)(c) TEU.

undertaken to strengthen this component and ensure an effective implementation of the R2P's preventive dimension.

### 5.1 The EU conflict Early Warning System

Considering the importance that the EU attaches to conflict prevention, it started to put in place a set of tools to pursue this objective in its external relations. Amongst them, it is worth focusing on the EU Conflict Early Warning System (EWS). Generally speaking, early warning is defined as the ability to collect and analyse information in order to provide strategic choices for preventive engagement or, as may be required, an informed response.<sup>332</sup> This tool is crucial since, through early identification and understanding of risk factors, there should be more chances for a timely and effective response in addressing the underlying causes of conflict.<sup>333</sup>

Even before being incorporated into the EU framework, the configuration of an early warning system was already envisaged within the United Nations, as outlined, first, in the World Summit Outcome,<sup>334</sup> and then reiterated in subsequent UN documents.<sup>335</sup> In particular, the UN Secretary-General Report 'Early warning, assessment and the responsibility to protect' further highlighted the relevance of the role played by regional organizations in preventing conflict through early warning, having therefore a direct impact in accomplishing the R2P goals.<sup>336</sup> According to Articles 33(1) and 52(2) UN Charter, preventive diplomacy first begins with local and regional initiatives and secondly should be further complemented by UN global efforts.<sup>337</sup> The UN Secretary-General

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<sup>332</sup> Sharon Rusu, 'Principles and Practice of Conflict Early Warning' *Conflict* (2001) 1(2) *Security & Development* 125, 132. See also Sarah Bressan, Aurora Bergmaier, 'From conflict early warning to fostering resilience? Chasing convergence in EU foreign policy' (2021) 28(7) *Democratization* 1357, 1359.

<sup>333</sup> Council of the European Union, *European Security Strategy: a secure Europe in a better world* (2009) Publications Office, p. 34.

<sup>334</sup> UN Doc A/RES/60/1 para 139.

<sup>335</sup> UNGA, Report of the Secretary-General, 'Progress report on the prevention of armed conflict' (18 July 2006) UN Doc A/60/891, paras 47, 63; UNGA, Report of the Secretary-General, 'Implementing the Responsibility to Protect' (12 January 2009) UN Doc A/63/677, paras 22, 37-38, 50-51. For further information, Micah Zenko, Rebecca R Friedman, 'UN Early Warning for Preventing Conflict' (2011) 18(1) *International Peacekeeping* 21.

<sup>336</sup> UNGA, Report of the Secretary-General, 'Early warning, assessment and the responsibility to protect' (14 July 2010) UN Doc A/64/864 para 11.

<sup>337</sup> *ibid.*

Report ‘The role of regional and subregional arrangements in implementing the responsibility to protect’ also reiterates the emphasis on regional preventive engagement.<sup>338</sup> The Report emphasises that, due to their proximity, regional organizations can ‘[...] play a critical role in helping to ensure the accurate and timely flow of information and analysis from the country level to global decision-makers while lessening the risk of misinterpretation, misinformation and deliberate distortion’.<sup>339</sup> Moreover, they can contribute to structural prevention, and collaborate for a timely and effective response.<sup>340</sup> Within the preventive realm, regional organizations can also encourage States to comply with obligations enshrined in the international legal framework and help them monitoring and tackling internal tensions before they escalate into atrocity crimes.<sup>341</sup>

Following UN initiatives, various regional organizations have established an early warning system aimed at preventing conflicts.<sup>342</sup> As for the EU, considering the wide range of tools at its disposal, it has been regarded as the regional organization which possesses the greatest potential to fully operationalise R2P, focusing in particular on conflict prevention.<sup>343</sup> Already envisaged in the 2011 Council Conclusions on Conflict Prevention,<sup>344</sup> after two years of regional pilot exercises in eight countries in the wider Sahel region (2012) and five in Central Asia (2013), the EU conflict EWS became fully operative in 2014.<sup>345</sup> Since its inception, the EU conflict EWS has been constantly rolled

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<sup>338</sup> UNSC, Report of the Secretary-General, ‘The role of regional and subregional arrangements in implementing the responsibility to protect’ (28 June 2011) UN Doc A/65/877-S/2011/393.

<sup>339</sup> *ibid.* para 27.

<sup>340</sup> *ibid.* paras 23, 30-37.

<sup>341</sup> *ibid.* para 17.

<sup>342</sup> For instance, see African Union, ‘Continental Early Warning System’ at <<https://www.peaceau.org/en/page/28-continental-early-warning-system-cews>> accessed 28 September 2024; OSCE, ‘Early warning and early action’ at <<https://www.osce.org/secretariat/107485>> accessed 28 September 2024; OAS, ‘Early Warning System of the Americas’ at <<https://www.oas.org/ext/en/security/early-warnings-system>> accessed 28 September 2024. For further information, see Sofia Palli, *Early Warning Systems as a Conflict Prevention Tool: Recommendations for the Arab Region* (23 May 2017) E/ESCWA/ECRI/2017/WP.3, 19-34.

<sup>343</sup> Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institute Press 2008) 183-184.

<sup>344</sup> Council of the European Union, ‘Conflict Prevention - Council conclusions’ (20 June 2011) 11820/11.

<sup>345</sup> Palli (n 342) 20.

out and refined.<sup>346</sup> As underlined in its latest version, the EU conflict EWS is designed as a ‘[...] robust, evidence-based risk management tool that identifies, assesses and helps prioritise situations at risks of violent conflict for non-EU countries’.<sup>347</sup> Within the R2P lens, it is crucial to acknowledge the repeated emphasis on enhancing conflict early warning in order to collaborate more closely and effectively with international partners on issues related to the Responsibility to Protect.<sup>348</sup> Moreover, it has been explicitly stressed that mass atrocities crimes fall within the framework of the situations at risk of violent conflict that the EU has to assess and prioritise through the use of its EWS.<sup>349</sup> Therefore, as acknowledged by scholars, EU conflict EWS is to be deemed an important tool for the implementation of the Responsibility to Protect.<sup>350</sup> Due to the inclusion of indicators for atrocity prevention, R2P constitutes one of the dimensions of the EU Conflict EWS.<sup>351</sup> The current version of the EWS should also be read in accordance with other EEAS and EU Commission relevant documents, including the 2016 *EU Global Strategy*, the *European Consensus on Development*,<sup>352</sup> as well as the Joint Communication *A Strategic Approach to Resilience in the EU’s external action*,<sup>353</sup> in which it is further stressed the importance of early warning to enhance conflict prevention, and, as a consequence, also implement R2P.

Concerning its structure, the EWS is composed by a multistage procedure involving different EU actors, including EU delegations, EEAS, and Commission staff, as well as

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<sup>346</sup> *ibid.* See, *inter alia*, European Commission, Joint Staff Working Document, ‘Conflict Early Warning System: Objectives, Process and Guidance for Implementation’ (14 January 2016) SWD(2016) 3 final; European Commission, Joint Staff Working Document, ‘Conflict Early Warning System: Objectives, Process and Guidance for Implementation - 2017’ (27 July 2017) SWD(2017) 282 final; European Commission, Joint Staff Working Document, ‘Conflict Early Warning System: Objectives, Process and Guidance for Implementation - 2020’ (10 March 2021) SWD(2021) 59 final.

<sup>347</sup> Conflict Early Warning System 2020, 3.

<sup>348</sup> Conflict Early Warning System 2016, 3; Conflict Early Warning System 2017, 3; Conflict Early Warning System 2020, 2.

<sup>349</sup> *ibid.*, 4; 4; 3.

<sup>350</sup> Rietveld (n 317) 74

<sup>351</sup> Schmidt (n 301) 321.

<sup>352</sup> European Commission: Directorate-General for Development and Relations with African, Caribbean and Pacific States, *The European Consensus on development*, Publications Office, 2006, para 89; NECD (n 307) paras 65-66.

<sup>353</sup> Joint Communication to the European Parliament and the Council of 7 June 2017 (n 306) para 4(2).

the Council and member States.<sup>354</sup> As a preparatory component, a risk scanning is undertaken aiming at compiling all available risk information into a single document. Following this preliminary step, the first component, ‘Prioritisation’, focuses on selecting early warning priorities for resource allocation and political action. The second component is the shared assessment and follow-up phase conducted by geographic and thematic experts to pinpoint possible solutions in preparation for early preventive or peacebuilding actions. The last component is the monitoring phase which evaluates the resulting actions and assesses their impact in helping to address the underlying risks of conflict in priority countries.<sup>355</sup> Over the years, this system has undergone further improvements aimed, *inter alia*, at bridging the gap between early warning and early action.<sup>356</sup> As a matter of fact, it has been recently added a new component, consisting of a follow-up mission to the country concerned. The purpose of this mission is to review its initial findings, update the assessment of structural risk factors, conduct a thorough evaluation of the most relevant priority risk domains and related preventive actions as well as assess the implementation of previously identified options for action.<sup>357</sup> As stressed since its inception, the EWS is not a predictive tool,<sup>358</sup> since it is not an easy task to identify the exact triggers for violence. However, considering the existence of certain structural factors and indicators,<sup>359</sup> which are frequently linked with a possible conflict scenario, the EU conflict EWS might turn into a valuable tool for identifying and mitigating conflict risk.<sup>360</sup>

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<sup>354</sup> For further information, Conflict Early Warning System 2020, 9-10.

<sup>355</sup> *ibid* 4-7.

<sup>356</sup> EEAS, ‘EU Conflict Early Warning System’ Factsheet (September 2014) 4, at <[https://eeas.europa.eu/archives/docs/cfsp/conflict\\_prevention/docs/201409\\_factsheet\\_conflict\\_earth\\_warning\\_en.pdf](https://eeas.europa.eu/archives/docs/cfsp/conflict_prevention/docs/201409_factsheet_conflict_earth_warning_en.pdf)> accessed 15 September 2024.

<sup>357</sup> Conflict Early Warning System 2020, 2, 5-6.

<sup>358</sup> EEAS, ‘EU Conflict Early Warning System’ (n 356) 1.

<sup>359</sup> Such as the Global Conflict Risk Index. For further information, see European Commission, Disaster Risk Management Knowledge Centre, Global Conflict Risk Index, at <<https://drmkc.jrc.ec.europa.eu/initiatives-services/global-conflict-risk-index#documents/1435/list>> accessed 3 September 2024. See also European Commission: Joint Research Centre, Guy Schvitz, Christina Corbane, Marie Sophie Van Damme, Ioannis Galariotis, et al., *The Global Conflict Risk Index 2022 - Revised data and methods* (2022) Publications Office of the European Union.

<sup>360</sup> Newman, Stefan (n 286) 479.

Within a broader perspective, in addition to ensuring an effective implementation of the Responsibility to Protect, this system also increases the amount of information available to the Union and its member States regarding the commission of serious international crimes, including the crime of genocide, by making it more difficult for them to prove the failure to take preventive measures based on ignorance of the actual commission of such crimes.<sup>361</sup> As a consequence, the threshold of justification for not taking preventive measures in scenarios where the EU has decided to prioritise is significantly increased, thus having possible consequences with regard to the international responsibility of States and International Organizations in case an R2P crime is eventually committed.

## 5.2 The Atrocity Prevention Toolkit

The Atrocity Prevention Toolkit is another relevant tool at the EU's disposal for preventing international core crimes. Even in this case, it was inspired by what was already envisaged within the UN framework. In 2014, the UN published the *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*,<sup>362</sup> which produced a list of 14 risk factors for atrocity crimes. Whereas the first eight risk factors are common to all crimes, the other six are equally divided for the types of R2P crimes, namely genocide, crimes against humanity, and war crimes.<sup>363</sup> A prompt assessment of risk factors is crucial in order to increase the opportunities for early prevention through the identification of effective measures that can be taken by States and the international community.<sup>364</sup>

Following this initiative, several regional organizations, whose action can be more effective in responding early to signs of concern,<sup>365</sup> have integrated atrocity prevention lenses into already existing conflict prevention mechanisms.<sup>366</sup> As for the EU, in 2018 the

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<sup>361</sup> cf Serena Forlati, 'The Legal Obligation to Prevent Genocide: Bosnia v. Serbia and Beyond' (2011) 21 Polish Yearbook of International Law 189, 198.

<sup>362</sup> UN Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A tool for prevention* (2014) at <<https://www.ohchr.org/sites/default/files/2021-11/Genocide-Framework-of-Analysis-English.pdf>> accessed 15 September 2024.

<sup>363</sup> *ibid* p. 6.

<sup>364</sup> *ibid* 4.

<sup>365</sup> UN Doc A/HRC/41/24, paras 24.

<sup>366</sup> *ibid* paras 25-29.

EEAS adopted the Atrocity Prevention Toolkit.<sup>367</sup> Unlike the previous documents mentioned so far, which are neither placed under an explicit ‘R2P umbrella’ nor systematically employed in mass atrocity preventive efforts,<sup>368</sup> the Toolkit, as suggested by its original title, ‘EU Responsibility to Protect - Atrocity Prevention Toolkit’, is regarded as the most comprehensive policy document<sup>369</sup> in ensuring the implementation of ‘the global commitment of the Responsibility to Protect’.<sup>370</sup> Considered as part of the EWS,<sup>371</sup> and with a specific focus on preventive engagement,<sup>372</sup> the Toolkit, which was drafted based on a recommendation of the 2017 Strategic Approach to Resilience in the EU’s external action,<sup>373</sup> incorporates structural risk indicators and warning signs that alert to the potential commission of core crimes. It also offers guidance on how to respond and act at short, medium, and longer-term atrocity scenarios.<sup>374</sup> The Toolkit is specifically designed to support EU practitioners, including EU Delegations, with ‘specific hands-on knowledge’ in identifying and addressing atrocity crimes.<sup>375</sup> As a matter of fact, it has been stressed that ‘[...] EU Delegations, in cooperation and coordination with CSDP missions and operations whenever present on the field, play a key role in identifying early warning signs and devising policy options to prevent atrocity crimes’.<sup>376</sup> Cooperation with other relevant EU actors is therefore crucial. Notably, in 2016 the Union established

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<sup>367</sup> EEAS, ‘EU Responsibility to Protect - Atrocity Prevention Toolkit’ (September 2018) at <[https://www.eeas.europa.eu/sites/default/files/eu\\_r2p\\_atrocity\\_prevention\\_toolkit.pdf](https://www.eeas.europa.eu/sites/default/files/eu_r2p_atrocity_prevention_toolkit.pdf)> accessed 16 September 2024. On the APT, see Schmidt (n 301) 321; Newman, Stefan (n 286) 480; Rietveld (n 317) 73 ff.

<sup>368</sup> De Franco, Meyer, Smith (n 261) 400.

<sup>369</sup> Newman, Stefan (n 286) 480.

<sup>370</sup> EEAS, Atrocity Prevention Toolkit (n 367) 4.

<sup>371</sup> Schmidt (n 301) 322.

<sup>372</sup> Jan Wouters, Francisca Costa Reis, ‘Localizing the responsibility to protect: European and Brazilian perspectives’ in Michelle Egan, Kolja Raube, Jan Wouters, Julien Chaisse (eds), *Contestation and Polarization in Global Governance. European Responses* (Elgar 2023) 247, 255-256; Newman, Stefan (n 286) 480; Rietveld (n 317) 106.

<sup>373</sup> Joint Communication to the European Parliament and the Council of 7 June 2017 (n 306) para 4(2).

<sup>374</sup> For further details, EEAS, Atrocity Prevention Toolkit (n 367) 4 ff.

<sup>375</sup> As already stated by Federica Mogherini. ‘Statement by HR/VP Federica Mogherini on the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of this Crime’ (9 December 2017) at <[https://www.eeas.europa.eu/node/37088\\_en](https://www.eeas.europa.eu/node/37088_en)> accessed 16 September 2024. See also Rietveld (n 317) 73; Newman, Stefan (n 286) 480; Schmidt (n 301) 322.

<sup>376</sup> EEAS, Atrocity Prevention Toolkit (n 367) 4.

the EU R2P Focal Point,<sup>377</sup> which makes the European Union the first regional organization to have its own focal point that works closely with member States and participates constructively in the exchange of information and best practices at the annual meetings of the Global Network of R2P Focal Points.<sup>378</sup> In 2019, the Organization of American States became the second regional organization, after the EU, to appoint an R2P focal point.<sup>379</sup> As acknowledged in the 16<sup>th</sup> report of the UN Secretary-General on the Responsibility to Protect, alongside the EU and OAS, 61 States have appointed R2P focal points.<sup>380</sup>

Notwithstanding certain shortcomings,<sup>381</sup> the Toolkit is a relevant tool at the EU's disposal to halt and prevent atrocity crimes. Following the EWS, it should be regarded as a further step in reducing the gap between early signs of atrocities and early action, showing therefore an effective commitment to improving the implementation of R2P.<sup>382</sup> Hence, the Atrocity Prevention Toolkit prioritises proactive rather than reactive response,<sup>383</sup> with the goal of generating a positive impact at a much earlier stage to reduce or mitigate the risk of an atrocity scenario, and, as a consequence, strengthening its overall action in the R2P framework.<sup>384</sup> The Toolkit, together with other policies, has been interpreted as a sign of norm accommodation, particularly concerning its internalisation of the Responsibility to Prevent.<sup>385</sup> Therefore, it seems to embrace the previous call for

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<sup>377</sup> Edward Newman, Cristina G Stefan, 'Europe's Progress and the Road Ahead at R2P's 15th Anniversary' (2020) 12(4) *Global Responsibility to Protect* 369, 370.

<sup>378</sup> Global Network of R2P Focal Points, at <<https://www.globalr2p.org/the-global-network-of-r2p-focal-points/>> accessed 16 September 2024.

<sup>379</sup> Cristina G Stefan, 'The Responsibility to Protect: Locating Norm Entrepreneurship' (2021) 35(2) *Ethics & International Affairs* 197, 210.

<sup>380</sup> UN Doc A/78/901-S/2024/434, para 3.

<sup>381</sup> For instance, as pointed out by Newman/Stefan: 'the Toolkit - unlike the Global Strategy - is targeted primarily at EU officials, not international political stakeholders. It is not intended to signal global normative leadership or positioning'. Newman, Stefan (n 286) 480.

<sup>382</sup> Schmidt (n 301) 322.

<sup>383</sup> Considered as one of the major weaknesses of the EU. Newman, Stefan (n 286) 480; Wouters, Costa Reis (n 372) 256.

<sup>384</sup> Newman, Stefan (n 286) 480.

<sup>385</sup> Rietveld (n 317) 74.

action to establish a ‘culture of early action’,<sup>386</sup> through the adoption of ‘the necessary tools for identifying and preventing any atrocity crime at an early stage’.<sup>387</sup>

Apart from providing authoritative support and strong engagement to the Responsibility to Prevent, the Atrocity Prevention Toolkit might also be regarded as further evidence of the EU’s implementation, as an international organization, of the duty to prevent the breach of *jus cogens* provisions, specifically those linked with the prohibition of the commission of mass atrocity crimes. To strengthen this view, a first step would be explicitly mentioning this goal, which is not included in the Toolkit, in future documents and actions within this domain. To conclude, it is also worth noting that, despite the emphasis given on preventive engagement, the Atrocity Prevention Toolkit also provides a wide range of reactive tools, including sanctions. As the next Chapter will further discuss, if employed properly, sanctions could also ensure an effective contribution to the implementation of Responsibility to React through non-forcible means, as envisaged in the World Summit Outcome.<sup>388</sup>

## 6. Concluding remarks

With the entry into force of the Lisbon Treaty and the subsequent dismissal of the three-pillar structure, the Common Foreign and Security Policy (CFSP) is understood as a ‘part and parcel of the EU legal order’.<sup>389</sup> Considering its vocation to address foreign and security policy issues, the TEU has granted the Union specific functions to conduct its external relations with the wider world, with the aim, *inter alia*, to ensure respect and contribute to the development of international law. Within the R2P lens, it is noteworthy the inclusion of conflict prevention as a specific goal, which has to be read together with the possibility of undertaking peace enforcement military missions in third States under the Common Security and Defence Policy (CSDP) realm, considered an integral part of

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<sup>386</sup> Council of the European Union, Council Conclusions on the Integrated Approach to External Conflicts and Crises (22 January 2018) 5431/18, para 12; Joint Communication to the European Parliament and the Council of 7 June 2017 (n 306) 19.

<sup>387</sup> European Parliament Resolution of 4 July 2017 (n 316) para 7.

<sup>388</sup> UN Doc A/RES/60/1 para 139.

<sup>389</sup> Opinion of Advocate General Wahl (n 10) para 46.

the CFSP. Because of its strong intergovernmental dimension, this policy field is characterised by specific rules and procedures, which, on the one hand, confer circumscribed powers to the European Parliament, Commission, and the Court while assigning, on the other, specific functions to the European Council and the Council. The High Representative, the European External Action Service (EEAS), and the Political and Security Committee (PSC) also carry out important functions. Alongside decisions and international agreements, the CFSP is mainly shaped by soft law provisions, which, despite lacking legal character, might even have greater political impact than hard law provisions. Relevant policy documents, including the *EU Global Strategy* and the *Atrocity Prevention Toolkit*, as well as High Representative's declarations, could therefore actively contribute to the process of recognition and implementation of the Responsibility to Protect.

Moreover, the CFSP has to be carried out according to the principle of conferral, which presents both a vertical and horizontal dimension. Hence, on the one hand, it allows determining the delimitation of competence between the EU and member States; it is understood as a *suis generis* competence running in parallel with member States' competences in the same domain. On the other hand, Article 40 TEU introduces a reciprocal non-affectation clause between CFSP and other Union policies. Following this balanced view, and according to the centre of gravity test, reiterated in consistent case-law, it might even be employed as the exclusive legal basis for CFSP acts which could also be adopted to pursue R2P goals, as the next Chapter will further clarify. This theoretical framework, which underscores the specificities of the CFSP, should therefore be regarded as the starting point for the practical assessment of the EU's implementation of R2P within this domain.

When it comes to practice, the Union, either directly or indirectly, has repeatedly stressed its support to R2P through its (informal) acts. Amongst them, special emphasis should be given to the 2013 European Parliament's recommendation to the Council on the 'UN principle of the "Responsibility to Protect"'. Considered the most substantial European statement on R2P to date, and despite its limited role in the CFSP framework, the Parliament's recommendation highlighted the R2P's weaknesses and scope of

application, while also advocating for a broader international consensus to establish R2P as a new norm of international law. It would be interesting to observe whether it will address this issue again, considering the current complex geopolitical landscape characterised by numerous R2P scenarios that require a strong and effective international response. Along with the institutions, other EU actors, including the EEAS and the High Representative, have actively participated in the process of endorsing and operationalising the Responsibility to Protect. The EU's commitment to R2P has also been emphasised outside the EU, specifically in its statements before the UN General Assembly. If examined jointly, the EU's political statements and strategy documents underline the Union's full commitment to the Responsibility to Protect. At the same time, they are also understood as possible indicators of 'norm acceptance', especially regarding its preventive realm.

In order to implement the R2P's preventive component, and according to the crucial role played by regional organizations in conflict prevention, the EU - regarded as the regional organization which possesses the greatest potential to operationalise the R2P's preventive realm - started to equip itself with preventive tools, including the EU conflict Early Warning System (EWS), directed towards identifying, assessing, and prioritising situations at risk of violent conflict in non-EU countries. To support this positive trend, the EU has also recently adopted the Atrocity Prevention Toolkit, considered the most comprehensive policy document aimed at implementing the EU's global commitment to the Responsibility to Protect. The Toolkit, which includes structural indicators and warning signs, as well as specific instructions on how to react in short, medium, and longer-term atrocity scenarios, is considered a significant tool at the EU's disposal for halting and preventing international core crimes, and, in particular, bridging the gap between early signs of atrocities and early action. Accordingly, it reflects the EU's internalisation of the Responsibility to Prevent. To further consolidate this view, EU practitioners, especially EU Delegations, should meticulously rely on the structural risk indicators and warning signs envisaged within the Toolkit that alert to the potential commission of core crimes.

## CHAPTER FOUR

### The European Union's responsibility to react within the Common Foreign and Security Policy

SUMMARY: 1. Introductory remarks – 2. CSDP military operations – 2.1 Planning – 2.2 Funding: an appraisal of the European Peace Facility – 2.3 The Assistance Measures Pillar – 2.4 Decision making: command and control aspects – 3. CSDP military operations and the Responsibility to Protect – 3.1 Assessment of practice – 3.2 The Libyan crisis – 3.3 Ongoing developments: the Rapid Deployment Capacity – 4. An appraisal and recent developments of the EU sanctions regime: ensuring the cessation of international core crimes – 4.1 Introductory remarks – 4.2 Early practice: the cases of Libya, Syria and Myanmar – 4.3 The EU Global Human Rights Sanctions Regime – 4.4 EU Sanctions in ongoing R2P scenarios – 4.4.1 EU Sanctions against Russia – 4.4.2 EU Sanctions against Israel – 5. The implications of the European Union's response in international law – 5.1 The duty to cooperate – 5.2 Sanctions and collective countermeasures – 6. Concluding remarks

#### 1. Introductory remarks

When preventive efforts fail, a timely and decisive response is required.<sup>1</sup> According to R2P Pillar III, if a State is manifestly failing to protect its population, and no other options are available, the international community would be allowed to employ coercive means, including force,<sup>2</sup> if it is authorised by the UN Security Council.<sup>3</sup> Under this Pillar, States and International Organizations should therefore be ready to undertake offensive

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<sup>1</sup> EU statement on behalf of the European Union and its Member States, 'Responsibility to Protect and the Prevention of genocide, war crimes, ethnic cleansing and crimes against humanity' (1 July 2024) <[https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-un-general-assembly-responsibility-protect-and-prevention-genocide-war-crimes-ethnic\\_en?s=63](https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-un-general-assembly-responsibility-protect-and-prevention-genocide-war-crimes-ethnic_en?s=63)> accessed 27 September 2024; see also EU statement on behalf of the European Union and its Member States, 'Responsibility to Protect and the Prevention of genocide, war crimes, ethnic cleansing and crimes against humanity' (26 June 2023) at <[https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-un-general-assembly-responsibility-protect\\_en](https://www.eeas.europa.eu/delegations/un-new-york/eu-statement-%E2%80%93-un-general-assembly-responsibility-protect_en)> accessed 27 September 2024.

<sup>2</sup> See Introduction, para 2.1. As outlined in the Introduction, we employ the restrictive meaning of the definition of force under art. 2(4) UN Charter, which only refers to armed force.

<sup>3</sup> UNGA, *World Summit Outcome* (24 October 2005) UN Doc A/RES/60/1 para 139; UNGA, 'Implementing the Responsibility to Protect: Report of the Secretary-General' (12 January 2009) UN Doc A/63/677 para 49.

military actions to protect populations victims of mass atrocity crimes. As seen in the previous Chapter, forcible intervention is one of the tools at the EU's disposal when it undertakes military crisis operations.<sup>4</sup> It cannot be taken in isolation; rather it is to be regarded as a last resort measure, which should be employed according to an integrated approach to crisis management that envisages other non-forcible means, including economic sanctions, positive incentives, and diplomatic efforts.<sup>5</sup>

Against this background, this Chapter will examine the EU's reactive engagement in implementing R2P Pillar III; specifically, we will focus on the main developments and current challenges linked with using forcible and non-forcible means to operationalise the Responsibility to Protect. Finally, we will also shed light on the EU's contribution towards enhancing international law obligations stemming from the commission of serious *jus cogens* violations.

## **2. CSDP military operations**

Given the importance of military operations in implementing the forcible component of R2P Pillar III, they deserve a thorough examination, from both a legal and practical point of view. This paragraph will assess the planning, decision-making, and funding issues of the CSDP military operations.

### **2.1 Planning**

Before their activation, military operations require efficient military planning. Military planning is understood as the '[...] iterative process which needs to analyse all relevant factors to shape the military mission to achieve specific EU political/military objectives'.<sup>6</sup> It comprises four interdependent levels: the Political Strategic level, the

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<sup>4</sup> Chapter II, para 2.1.

<sup>5</sup> Council of the EU, 'EU Concept for Military Planning at the Political Strategic Level' (23 February 2015) 6432/15, para 1 (hereinafter *Military Planning*). cf Julia Schmidt, *The European Union and the Use of Force* (Brill | Nijhoff 2020) 72.

<sup>6</sup> *Military Planning* para 8. For an in-depth analysis of the planning and launching of military missions, see, *inter alia*, Maria Julià Barceló, 'El Factor Tiempo en el Proceso de Planificación, Creación y Despliegue de las Misiones de Paz de la Unión Europea' (2015) 67(1) *Revista Española de Derecho Internacional* 123.

Military Strategic level, the Operational level, and the Tactical Level.<sup>7</sup> Focusing on the political-strategic level,<sup>8</sup> military planning includes both advance and crisis response planning.<sup>9</sup> The latter typically leads to the formulation of a crisis management concept (CMC).<sup>10</sup> Following a previous analysis of the situation and relevance of the military action undertaken by the Political and Security Committee (PSC), the CMC - which is drafted by the European External Action Service - '[...] defines the political strategic objectives for CSDP engagement, and provides CSDP option(s) to meet EU objectives'.<sup>11</sup> Together with the CMC, the operation plans and rules of engagement also offer guidance on how to use force in a specific scenario.<sup>12</sup> For instance, apart from highlighting the need to conduct EU's military operations according to the existing international, European, and national legal framework, rules of engagement are also important to establish the framework in which the military commander and forces - including individuals - might act, even with forcible means.<sup>13</sup>

Since the EU does not have its own army, member States' political commitment to contribute to the mission is crucial.<sup>14</sup> This is why the Force Generation Process is a fundamental step in order to allow the launch of an EU-led military mission. The Force Generation Process is understood as the 'process leading to the formal identification of units made available to the EU by Troop Contributing Nations (TCN) and/or international organisations and to their assembly as an EU force to meet the requirements of the EU-led military operation/mission'.<sup>15</sup> Third States can also take part in the Force Generation Process.<sup>16</sup> This Process starts with Force Sensing, consisting of informal talks with

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<sup>7</sup> *ibid* para 9.

<sup>8</sup> For the other three levels, see EU Concept for Military Command and Control - Rev 8 (23 April 2019) 8798/19 (hereinafter *Military Command and Control*).

<sup>9</sup> *Military Planning* para 12.

<sup>10</sup> *ibid* para 23.

<sup>11</sup> *ibid.* Schmidt (n 5) 72.

<sup>12</sup> *ibid* 73.

<sup>13</sup> Council of the EU, 'EU Concept for EU-led Military Operations and Missions' (19 December 2014) 17107/ 14, para 34(c) (hereinafter *Military Operations*).

<sup>14</sup> Council of the European Union, 'EU Concept for Force Generation' (11 November 2015) 14000/15, para 1.

<sup>15</sup> *ibid* para 8.

<sup>16</sup> *ibid* para 9.

member States to understand their potential interest in capability contribution.<sup>17</sup> After that, the Force Generation phase takes place; it is a formal and binding step in which member States confirm the offers made in the previous stage.<sup>18</sup> Finally, if military operations are expected to last longer than 12 months, the Force Anticipation phase might be used to establish formal but non-binding mid- and long-term contributions.<sup>19</sup>

The military planning phase is therefore lengthy and elaborate. While it facilitates a comprehensive examination of the factors influencing the launch of a military mission, it may also extend the duration required for prompt and effective action, which is crucial in R2P scenarios.

## **2.2 Funding: an appraisal of the European Peace Facility**

The decision to participate in a CSDP military operation is affected by the potential costs linked with the operation; it is arguably one of the main obstacles to the operationalisation of CSDP military missions.<sup>20</sup> As envisaged in Article 41(2) TEU, the Union's budget does not cover the costs for the military missions.<sup>21</sup> Accordingly, most of the expenses for a European military operation will be consequently allocated to participating member States following the principle 'costs lie where they fall'. To address this issue, the analysis of the recently established European Peace Facility (EPF), with an emphasis on the common costs of military operations, is noteworthy.<sup>22</sup> The EPF, which replaces the Athena mechanism and the African Peace Facility,<sup>23</sup> is an off-budget instrument which aims to provide an active contribution to preserving peace, preventing conflicts, and

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<sup>17</sup> *ibid* para 8(a).

<sup>18</sup> *ibid* para 8(b).

<sup>19</sup> *ibid* para 8(c).

<sup>20</sup> Schmidt (n 5) 74. Stéphane Rodrigues, 'Financing European Defence: The End of Budgetary Taboos' (2023) 8(3) *European Paper* 1155, 1156.

<sup>21</sup> art. 41(2) TEU.

<sup>22</sup> Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, OJ L 102, 24.3.2021, p. 14-62.

<sup>23</sup> Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena) and repealing Decision 2011/871/CFSP, OJ L 84, 28.3.2015, p. 39-63; Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th European Development Fund, OJ L 58, 3.3.2015, p. 1-16.

strengthening international security.<sup>24</sup> Established to facilitate ‘the launch of new operations’ and ‘enhance the effectiveness and predictability of ongoing efforts’,<sup>25</sup> the EPF comprises two financing pillars: the Operations Pillar and Assistance Measures Pillar.

The Operations Pillar, based on articles 42(4) and 43(2) TEU, allows financing the common costs of the EU’s military missions.<sup>26</sup> At the time of writing, it has been already employed to finance 8 active EU military operations and one civilian-military mission.<sup>27</sup> Unlike the previous funding mechanisms which have been replaced, the EPF increases the costs that are funded in common.<sup>28</sup> Moreover, thanks to its flexibility, it can also be employed to finance certain incremental costs that are not covered within Annexes II-V of the Council Decision (CFSP) 2021/509.<sup>29</sup>

Accordingly, the EPF provides the Union with enhanced autonomy and flexibility, strengthening its capacity to assist and reinforce military operations and serving as further evidence of its united and responsible external engagement stressed in the *Global Strategy*.<sup>30</sup> Furthermore, it encourages greater participation from member States, which will have lower costs to bear and the possibility of being reimbursed, including for some ‘nation-borne costs’, including lodging, fuel, and similar costs linked to national contingents.<sup>31</sup>

### 2.3 The Assistance Measures Pillar

Alongside the Operations Pillar, the EPF comprises the Assistance Measures Pillar. This pillar, according to Articles 28 and 30 TEU, finances non-EU countries and regional

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<sup>24</sup> Council Decision (CFSP) 2021/509, art. 1.

<sup>25</sup> Council of the European Union, ‘Proposal of the High Representative of the Union for Foreign Affairs and Security Policy, with the support of the Commission, to the Council for a Council Decision establishing a European Peace Facility’ (13 June 2018) 9736/18, p. 2.

<sup>26</sup> Council Decision (CFSP) 2021/509, art. 2(a).

<sup>27</sup> Council of the European Union, ‘European Peace Facility’ at <<https://www.consilium.europa.eu/en/policies/european-peace-facility/>> accessed 27 September 2024.

<sup>28</sup> Council Decision (CFSP) 2021/509, annexes II-V.

<sup>29</sup> *ibid* art. 44(6), art. 44(7).

<sup>30</sup> Council Decision (CFSP) 2021/509, Recital 2.

<sup>31</sup> *ibid* art. 48.

or International Organizations to enhance military and defence capacities as well as support military aspects of peace support operations.<sup>32</sup> Crucially, unlike the Athena mechanism and the African Peace Facility, the EPF enables the arms supply to third States. Under this pillar, on 28 February 2022, the Council adopted the Decision (CFSP) 2022/338 which established an assistance measure for supplying to the Ukrainian Armed Forces military equipment designed to deliver lethal force.<sup>33</sup> The EPF initial ceiling, worth more than 5 billion euros, has recently been raised to 17 billion euros; 11 billion euros have been allocated to address the Ukrainian crisis.<sup>34</sup>

For the purposes of this contribution, it is important to emphasise that, although Council Decision (CFSP) 2022/338 does not explicitly mention the Responsibility to Protect, the language adopted within this act underscores its relevance. More specifically, according to Article 1(2) of the Decision, the primary aim of the assistance measure is to protect the civilian population from the ongoing Russian military aggression.<sup>35</sup> International core crimes, perpetrated as a result of the war of aggression waged by the Russian Federation against Ukraine, are also covered within this objective. Rather than implementing R2P Pillar III, the EU weapons supply to Ukraine might provide a significant contribution to assisting Ukraine in protecting their populations from the commission of international core crimes, implementing therefore R2P Pillar II. This approach would reinforce the concept of States' primary responsibility to protect their populations from international core crimes. At the same time, due to the *erga omnes* character of the obligations stemming from the prohibition of R2P crimes, it might also

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<sup>32</sup> Council Decision (CFSP) 2021/509, art. 2(b).

<sup>33</sup> Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, OJ L 60, 28.2.2022, p. 1-4. Successive amendments to Decision (CFSP) 2022/338 have been incorporated into the original text. See Council Decision (CFSP) 2023/810 of 13 April 2023 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, OJ L 101, 14.4.2023, p. 64-66.

<sup>34</sup> See Council Decision (CFSP) 2024/890 of 18 March 2024 amending Decision (CFSP) 2021/509 establishing a European Peace Facility, OJ L, 2024/890, 19.3.2024. Council of the European Union, 'European Peace Facility' at <<https://www.consilium.europa.eu/en/policies/european-peace-facility/>> accessed 27 September 2024.

<sup>35</sup> Council Decision (CFSP) 2022/338, art. 1(2).

be regarded as relevant practice towards accomplishing international law obligations resulting from the commission of serious violations of peremptory norms of general international law. However, neither the EPF Council Decision nor Council Decision (CFSP) 2022/338 have explicitly stressed this goal.

From the international law perspective, it is worth noting that the weapons supply to Ukraine is carried out during an ongoing international armed conflict between this State and the Russian Federation. This has raised several legal issues;<sup>36</sup> specifically, doubts arose regarding the lawfulness of the weapons supply to a State that is the victim of an act of aggression, since it might contrast with other international law provisions, namely the international customary rule of neutrality.<sup>37</sup> Although there is still no unified position on the matter, member States and the EU have justified this assistance measure ‘[...] in view of Russian Federation’s military aggression against Ukraine and the escalating situation’.<sup>38</sup> Military assistance was therefore provided on the grounds of the Ukrainian right of self-defence,<sup>39</sup> as a concrete tool to assist this State in halting the commission of serious *jus cogens* violations, including war crimes, crimes against humanity,<sup>40</sup> and the prohibition of the use of force. This language might go towards the direction of confirming States’ and International Organizations’ duty to cooperate to bring an end to serious violations of peremptory norms through lawful means. As outlined in the final part of this Chapter, it is still unclear whether this choice merely reflects the EU’s policy

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<sup>36</sup> Michele Vellano, ‘La decisione dell’Unione europea di fornire alle forze armate ucraine armamenti concepiti per l’uso letale della forza e le relative implicazioni giuridiche’ (Blog DUE, 7 March 2022) at <<https://www.aisdue.eu/blogdue/>> accessed 28 September 2024; Tomas Hamilton, ‘Defending Ukraine with EU Weapons: Arms Control Law in Times of Crisis’ (2022) 1(3) European Law Open 635; Kevin Jon Heller, Lena Trabucco, ‘The Legality of Weapons Transfers to Ukraine Under International Law’ (2022) 13(2) Journal of International Humanitarian Legal Studies 251.

<sup>37</sup> For further information, see Niccolò Zugliani, ‘The Supply of Weapons to a Victim of Aggression: The Law of Neutrality in Light of the Conflict in Ukraine’ (2024) 35(2) European Journal of International Law 389.

<sup>38</sup> Council of the European Union, ‘Declaration by the High Representative on Behalf of the European Union on Russia’s War of Aggression against Ukraine’ (22 September 2022) at <[www.consilium.europa.eu/en/press/press-releases/2022/09/22/declaration-by-the-high-representative-on-behalf-of-the-european-union-on-russia-s-war-of-aggression-against-ukraine/](http://www.consilium.europa.eu/en/press/press-releases/2022/09/22/declaration-by-the-high-representative-on-behalf-of-the-european-union-on-russia-s-war-of-aggression-against-ukraine/)> accessed 28 September 2024.

<sup>39</sup> Zugliani (n 37) 405.

<sup>40</sup> As witnessed by the Independent International Commission of Inquiry on Ukraine. UNGA, ‘Report of the Independent International Commission of Inquiry on Ukraine’ (18 October 2022) UN Doc A/77/533, para 109.

goals or also the need to comply with the duty to cooperate envisaged for both States and International Organizations. On the other hand, military assistance cannot contribute to the breach of peremptory norms of international law. As recently stated by the ICJ in the case *Germany v. Nicaragua*, German military assistance to Israel should be carried out taking into account its due diligence obligations to employ all the means at its disposal to prevent the commission of *jus cogens* violations, including genocide.<sup>41</sup>

In order to ensure respect for international law, and according to the abovementioned due diligence obligations, the EU has established strict monitoring conditions, which apply even for the weapons supply to Ukraine.<sup>42</sup> As a matter of fact, the weapons supply is conditional upon the conclusion of a specific agreement between the High Representative and Ukraine to ensure compliance with the objectives envisaged in Article 56 of the Council Decision (CFSP) 2021/509, including the respect of international law, specifically international human rights law and international humanitarian law.<sup>43</sup> Moreover, the High Representative has also to provide the PSC with a report on the implementation of the assistance measure, which should encompass an assessment of its impact as well as the management and use of assets.<sup>44</sup> Finally, assistance measures can be suspended or terminated in the event of human rights violations or breaches of international humanitarian law obligations.<sup>45</sup>

## **2.4 Decision making: command and control aspects**

Military operations are established through a Council decision. As enshrined in Article 42(4) TEU, decisions instituting military operations ‘[...] shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State’.<sup>46</sup> Accordingly,

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<sup>41</sup> *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, *Provisional Measures, Order of 30 April 2024*, paras 23-24, at <<https://www.icj-cij.org/case/193>> accessed 28 September 2024.

<sup>42</sup> Vellano (n 36) 4.

<sup>43</sup> Council Decision (CFSP) 2022/338, art. 6; Council Decision (CFSP) 2021/509, art. 56, art. 62.

<sup>44</sup> *ibid* art. 7; art. 63.

<sup>45</sup> *ibid* art. 8; art. 64.

<sup>46</sup> art. 42(4) TEU.

the consent of all member States is required.<sup>47</sup> However, dissenting States might abstain.<sup>48</sup> Together with budgetary issues, the unanimity rule is arguably the main obstacle to a prompt and effective military response in third States, including in R2P scenarios.

Council decisions, *inter alia*, employ a standard formula to regulate issues linked with the control and direction of the EU's military missions. According to Article 38 TEU, the PSC exercises political control and strategic direction of the EU-led military operations, under the responsibility of the Council and the HR.<sup>49</sup> Moreover, it has inform the Council at regular intervals as well as receive reports from the chair of the European Union Military Committee (EUMC) regarding the conduct of the military operation.<sup>50</sup> The EUMC exercises military direction, being entrusted to monitor the proper execution of the military operation.<sup>51</sup>

As for the chain of command of the EU's military missions, the EU can use national operation headquarters offered by member States.<sup>52</sup> In addition, it is to be recalled that the Military Planning and Conduct Capability (MPCC) was established in 2017.<sup>53</sup>

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<sup>47</sup> art. 31(4) TEU.

<sup>48</sup> art. 31(1) TEU. See also Chapter III, para 2.1.

<sup>49</sup> art. 38 TEU, *Military Command and Control* para 7. See, *inter alia*, Council Decision (CFSP) 2021/1143 of 12 July 2021 on a European Union Military Training Mission in Mozambique (EUTM Mozambique) OJ L 247, 13.7.2021, p. 93-98, art. 5(1); Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) OJ L 101, 1.4.2020, p. 4-10, art. 8(1), art. 8(2); Council Decision (CFSP) 2024/583 of 8 February 2024 on a European Union maritime security operation to safeguard freedom of navigation in relation to the Red Sea crisis (EUNAVFOR ASPIDES) OJ L, 2024/583, 12.2.2024, art. 4(1), art. 4(2).

<sup>50</sup> Council Decision (CFSP) 2021/1143 of 12 July 2021 on a European Union Military Training Mission in Mozambique (EUTM Mozambique) OJ L 247, 13.7.2021, p. 93-98, art. 5(2), art. 3; Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) OJ L 101, 1.4.2020, p. 4-10, art. 8(5), art. 6; Council Decision (CFSP) 2024/583 of 8 February 2024 on a European Union maritime security operation to safeguard freedom of navigation in relation to the Red Sea crisis (EUNAVFOR ASPIDES) OJ L, 2024/583, 12.2.2024, art. 4(3), art. 4(5).

<sup>51</sup> *Military Command and Control* p.17. cf Council Decision (CFSP) 2021/1143, art 6(1); Council Decision (CFSP) 2020/472, art 9(1); Council Decision (CFSP) 2024/583 art. 5(1). The EUMC also receives reports from the EU Mission Commander. Council Decision (CFSP) 2021/1143, art. 6(2); Council Decision (CFSP) 2020/472 art. 9(2); Council Decision (CFSP) 2024/583 art. 5(2).

<sup>52</sup> *Military Command and Control* para 15 (a).

<sup>53</sup> Council Decision (EU) 2017/971 of 8 June 2017 determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA), OJ L 146, 9.6.2017, p. 133-138. For further information on MPCC, see Yf Reykers, Johan

Originally responsible for the operational planning and conduct of the EU's non-executive military missions, it was further granted the responsibility for the operational planning and conduct of one executive military CSDP operation limited to the EU Battlegroup size.<sup>54</sup> As stressed in the 2022 EU *Strategic Compass*,<sup>55</sup> the MPCC should be regarded as the preferred command and control structure, once it reaches full operational capability.<sup>56</sup> Military operations can also be carried out with recourse to NATO's common assets and capabilities.<sup>57</sup> Concerning EU-NATO relations,<sup>58</sup> when NATO is not involved in a concrete military operation, as pointed out in the Berlin Plus arrangements,<sup>59</sup> the EU might have access to assets and capabilities along with NATO's European command options. Operation Concordia, and Operation Althea - which is still ongoing - were undertaken with recourse to NATO's common assets and capabilities.<sup>60</sup> However, the entire chain of command remained in the EU's hands, after consultation between the EU and NATO.<sup>61</sup> Concretely, the EU Operation Commander has to report on the conduct of the operation to EU bodies. At the same time, NATO is only informed of developments in the situation by the appropriate bodies, in particular the PSC and the Chairman of the European Union Military Committee (CEUMC).<sup>62</sup> Enhancing the EU-NATO synergy would therefore allow the EU to improve the effectiveness of its military

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Adriaensen, 'The politics of understaffing international organisations: the EU Military Planning and Conduct Capability (MPCC)' (2022) 32(4) *European Security* 519.

<sup>54</sup> Council of the European Union, 'Council conclusions on Security and Defence in the context of the EU Global Strategy' (19 November 2018) 13978/18 para 5.

<sup>55</sup> Council of the European Union, 'A Strategic Compass for Security and Defence' (21 March 2022) 7371/22, at <<https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/en/pdf>> accessed 28 September 2024 (hereinafter *Strategic Compass*).

<sup>56</sup> *Strategic Compass* 28.

<sup>57</sup> *Military Command and Control* para 16.

<sup>58</sup> For further information see Council of the European Union, 'Ninth progress report on the implementation of the common set of proposals endorsed by EU and NATO Councils on 6 December 2016 and 5 December 2017' (3 June 2024) 10471/24.

<sup>59</sup> NATO, 'EU-NATO Declaration on ESDP' (16 December 2002) at <[https://www.nato.int/cps/en/natolive/official\\_texts\\_19544.htm](https://www.nato.int/cps/en/natolive/official_texts_19544.htm)> accessed 28 September 2024.

<sup>60</sup> Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia, OJ L 34, 11.2.2003, p. 26-29, art. 1(3); Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, OJ L 252, 28.7.2004, p. 10-14, art. 1(3).

<sup>61</sup> Council Joint Action 2004/570/CFSP art. 13(2). See also Council Joint Action 2003/92/CFSP, art. 10(2).

<sup>62</sup> *ibid.*

operations while maintaining the autonomy of its decision-making in addressing crisis scenarios.

### 3. CSDP military operations and the Responsibility to Protect

Looking at the practical dimension, the EU has launched and conducted more than 40 civilian missions and military operations since 2003.<sup>63</sup> Even though many of them primarily focused on capacity-building operations,<sup>64</sup> there have been instances where the EU intervened with forcible means, including in scenarios involving the commission of international core crimes. Given the absence of a direct reference to R2P, it is crucial to focus on practice examining the link between the EU military operations and the R2P's overarching goals. Special emphasis will be given to the Libyan crisis and the current developments in this policy field aiming at fostering its reactive engagement in conflict situations, including R2P scenarios.

#### 3.1 Assessment of practice

EU military operations were, *inter alia*, undertaken in Congo, where the International Criminal Court has been investigating serious crimes since 2004.<sup>65</sup> The EU's military operations in support of the UN operation in the Democratic Republic of the Congo were carried out in 2003 and 2006. The first, Operation Artemis,<sup>66</sup> was launched following the UN Security Council Resolution 1484 (2003), which authorised the deployment of an Interim Emergency Multinational Force.<sup>67</sup> Acting in close

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<sup>63</sup> EEAS, 'EU Missions and Operations' (15 March 2024) at <[https://www.eeas.europa.eu/eeas/eu-missions-and-operations\\_en](https://www.eeas.europa.eu/eeas/eu-missions-and-operations_en)> accessed 28 September 2024.

<sup>64</sup> Chiara de Franco, Christoph Meyer, Karen E Smith, 'Europe and the European Union' in Alex Bellamy, Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016) 391, 400.

<sup>65</sup> International Criminal Court, 'Situation in the Democratic Republic of the Congo' at <<https://www.icc-cpi.int/drc>> accessed 29 September 2024. For further information about human rights violations committed in the Democratic Republic of Congo see, *inter alia*, Chandra Lekha Sriram, Olga Martin-Ortega, Johanna Herman, *War, Conflict and Human Rights. Theory and Practice* (Routledge 2018) 131-152.

<sup>66</sup> Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo, OJ L 147, 14.6.2003, p. 42.

<sup>67</sup> UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484 (2003) para 1.

coordination with the UN Organization Mission in the Democratic Republic of the Congo (MONUC),<sup>68</sup> the EU-led military had to ensure, *inter alia*, the stabilization of the security conditions and improvement of the humanitarian situation in Bunia as well as contribute to the safety of the civilian population.<sup>69</sup> This operation lasted less than 3 months and comprised approximately 2000 troops.<sup>70</sup> Operation EUFOR RD Congo took place three years later, between June and November 2006, and with the involvement of less than 1000 troops.<sup>71</sup> According to the UN Security Council Resolution 1671(2006),<sup>72</sup> EUFOR RD Congo was intended to support MONUC for four months after the date of the first round of the presidential and parliamentary elections in order to, *inter alia*, contribute to the protection of civilians under imminent threat of physical violence.<sup>73</sup>

As for the crisis in Darfur, considered an R2P scenario since 2003,<sup>74</sup> the EU's military engagement was narrowed if compared to military operations conducted in Congo. Carried out to support the African Union's mission in the Darfur region of Sudan, the 2005 EU's mission in Darfur is the first joint civilian-military mission, whose military component was added in April 2007.<sup>75</sup> However, this last component was considerably

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<sup>68</sup> UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279 (1999). MONUC was subsequently renamed MONUSCO, see UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925 (2010).

<sup>69</sup> UNSC Res 1484 (n 67) para 1.

<sup>70</sup> Panos Koutrakos, *The EU Common Security and Defence Policy* (OUP 2013) 110. For further information, see Damien Helly, 'The EU Military Operation in DR Congo (Artemis)' in Giovanni Grevi, Damien Helly, Daniel Keohane (eds), *European Security and Defence Policy: The First 10 Years (1999-2009)* (EIUSS 2009) 181.

<sup>71</sup> Council Decision 2006/412/CFSP of 12 June 2006 on the launching of the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process (Operation EUFOR RD Congo), OJ L 163, 15.6.2006, p. 16. cf Koutrakos (n 70) 116.

<sup>72</sup> The UN Security Council authorised '[...] for a period ending four months after the date of the first round of the presidential and parliamentary elections, the deployment of Eufor R.D. Congo in the Democratic Republic of the Congo'. UNSC Res 1671 (25 April 2006) UN Doc S/RES/1671 (2006) para 2.

<sup>73</sup> *ibid* para 8.

<sup>74</sup> Paul D Williams, Alex J Bellamy, 'The Responsibility to Protect and the Crisis in Darfur' (2005) 36(1) Security Dialogue 27.

<sup>75</sup> Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, OJ L 188, 20.7.2005, p. 46-51, Recital 12; Council Joint Action 2007/887/CFSP of 20 December 2007 repealing Joint Action 2005/557/CFSP on the European Union civilian-military supporting action to the African Union missions in the Darfur region of Sudan and in Somalia, OJ L 346, 29.12.2007, p. 28, art. 1.

small, since it was formed by less than 50 people among police officers, military experts, and observers.<sup>76</sup>

On the other hand, the 2008 military intervention of the European Union in Chad/Central African Republic (CAR) had a greater impact. With Resolution 1778 (2007), the UN Security Council authorised the EU to conduct a military operation in eastern Chad and the north-eastern Central African Republic.<sup>77</sup> This Resolution also contains an implicit reference to the R2P discourse since, one of the goals of the military operation was that of contributing ‘[...] to protecting civilians in danger, particularly refugees and displaced persons’.<sup>78</sup> Furthermore, compared to the previously mentioned missions, it differs in duration, since it lasted more than one year,<sup>79</sup> and in the number of troops deployed, around 3700.<sup>80</sup>

In the same year, the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO) took place.<sup>81</sup> Despite being a civilian mission, it is noteworthy that, within the R2P preventive lens, the mission was established to prevent possible outbreaks of violence taking into account, *inter alia*, the responsibility to protect populations reaffirmed in UN Security Council Resolution 1674 (2006).<sup>82</sup>

While the previous EU military missions were taken according to UNSC Resolutions, which authorised the EU to deploy military missions to contribute to the protection of human rights as well as the fight against impunity,<sup>83</sup> only EULEX KOSOVO directly referred to the Responsibility to Protect.<sup>84</sup> Accordingly, this inconsistent

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<sup>76</sup> Koutrakos (n 70) 114.

<sup>77</sup> UNSC Res 1778 (25 September 2007) UN Doc S/RES/1778 (2007) para 6(a).

<sup>78</sup> *ibid* para 6(a)(i).

<sup>79</sup> It was launched on 28 January 2008 and ended on 15 March 2009. Council Decision 2008/101/CFSP of 28 January 2008 on the launching of the European Union military operation in the Republic of Chad and in the Central African Republic (Operation EUFOR Tchad/RCA), OJ L 34, 8.2.2008, p. 39.

<sup>80</sup> Koutrakos (n 70) 118.

<sup>81</sup> Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ L 42, 16.2.2008, p. 92-98. EULEX KOSOVO is the largest civilian mission under the Common Security and Defence Policy of the European Union. Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (CUP 2020) 131.

<sup>82</sup> UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 (2006) para 4.

<sup>83</sup> See, *inter alia*, UNSC Res 1778 (n 77) para 2 (e).

<sup>84</sup> Council Joint Action 2008/124/CFSP, Recital 3.

approach hinders a clear understanding of the reasons underlying the EU's engagement with the 'wider world',<sup>85</sup> including the reference to the international law provisions that it seeks to respect and promote through its military missions. Nor does it allow us to assess the value of the normative provisions that govern the CFSP, specifically Articles 3(5) and 21 TEU, which may be regarded as a pendulum swinging between rhetoric and normative effect. Subsequent practice does not seem to clarify this issue, as demonstrated by the paradigmatic case regarding its military inaction in the 2011 Libyan crisis, which appeared to have swept away the hopes to push the Union towards undertaking a greater role as a global actor in addressing R2P scenarios.

### **3.2 The Libyan crisis**

The EU has never conducted a military operation with the primary goal of stopping the commission of atrocity crimes. Such a possibility arose on the occasion of the 2011 Libyan crisis which, however, did not bring the expected results. In order to conduct a military operation in third States, the EU needs the prior authorisation of the UN Security Council or the consent of the host States. It is not unusual that both kinds of authorisations operate at the same time.<sup>86</sup> The same conditions apply whenever, under R2P Pillar III, military intervention might be required to halt the commission of mass atrocities crimes. Since most of the time such atrocities are committed by the State itself or with its approval, it is difficult to obtain its consent for a forcible intervention to protect civilians from core international crimes. Therefore, the main alternative option would be the authorisation to the use of force from the Security Council acting under Chapter VII of the UN Charter. However, as stressed in Chapter II, the simple threat or the actual exercise of the veto power by the P5 Members, can prevent the adoption of a resolution that authorises forcible intervention.<sup>87</sup> For this reason, military interventions could not take place in the past, as happened in Syria, and they cannot take place nowadays in various

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<sup>85</sup> Enzo Cannizzaro, 'The Value of the EU International Values' in Wybe T Douma, Christina Eckes, Peter van Elsuwege, Eva Kassoti, Andreas Ott, Ramses A Wessel (eds), *The Evolving Nature of EU External Relations Law* (Springer 2021) 3, 4.

<sup>86</sup> Schmidt (n 5) 135.

<sup>87</sup> Chapter II, para 5.1.

ongoing R2P scenarios, including Ukraine, Myanmar, as well as Israel and the Occupied Palestinian Territory (OPT). Even in those cases in which the UN Security Council authorises the use of force, a solid agreement among the 27 EU member States is required since the unanimity rule applies for the establishment of the EU's military operations.<sup>88</sup> Therefore, the EU and its member States have to take a common and unified position. However, their divergences on how and in which scenarios using force might ultimately result in the lack of the adoption of effective military actions, as happened in the situation in Libya.

Following the outbreak of the civil war in Libya, the UN Security Council, after recalling Libya's Responsibility to Protect its population,<sup>89</sup> authorised UN member States - acting nationally or through regional organizations or arrangements - to take 'all necessary measures' to protect civilians and civilian populated areas in Libya.<sup>90</sup> The UN Security Council also emphasised that the intervention in Libya could not turn into a foreign occupation.<sup>91</sup> This Resolution is the first case in which the UN Security Council authorised a forcible intervention within R2P Pillar III.<sup>92</sup> The European Parliament supported the possibility for forcible action in its March 2011 Resolution, asserting that: '[...] the EU and its Member States must honour their Responsibility to Protect, in order to save Libyan civilians from large-scale armed attacks'.<sup>93</sup> At the end of March 2011, the European Council also expressed its satisfaction with the adoption of the UN Security Council Resolution 1973(2011), and underlined its determination to contribute to its implementation.<sup>94</sup>

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<sup>88</sup> art. 42(4) TEU.

<sup>89</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (2011); UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011).

<sup>90</sup> UNSC Res 1973 (n 89) para 4.

<sup>91</sup> *ibid.*

<sup>92</sup> Julia Schmidt, 'The European Union and the Responsibility to Protect' (2019) 24(3) *European Foreign Affairs Review* 309, 322.

<sup>93</sup> European Parliament resolution of 10 March 2011 on the Southern Neighbourhood, and Libya in particular (15 September 2011) P7 TA(2011)0095, para 10. cf Jochem Rietveld, *Regional Approaches to the Responsibility to Protect. Lessons from Europe and West Africa* (Routledge 2023) 76.

<sup>94</sup> European Council, Council Conclusions 24/25 March (25 March 2011) EUCO 10/11 para 18.

Several EU member States took part in the NATO Operation Unified Protector.<sup>95</sup> However, within the EU framework, the unanimity requirement envisaged for CSDP decisions precluded any EU military operation. Military action is a very sensitive issue characterised by different views and which has to be assessed on a case-by-case basis. As for the debates held within the UN Security Council, France and the UK, on the one hand, strongly supported the military intervention in Libya. On the other, Germany, which was at that time a Security Council's non-permanent member, took a more cautious approach, which culminated in its abstention in the vote on UNSC Resolution 1973.<sup>96</sup>

Eventually, on 1 April 2011, the Union adopted Council Decision 2011/210/CFSP on a military operation in support to humanitarian assistance operations (EUFOR Libya).<sup>97</sup> By strongly condemning '[...] the gross and systematic violation of human rights, violence, and brutal repression perpetrated by the regime against the Libyan people',<sup>98</sup> the EUFOR Libya was established to 'contribute to the safe movement and evacuation of displaced persons', and 'support, with specific capabilities, the humanitarian agencies in their activities'.<sup>99</sup> Although R2P is not explicitly mentioned, the Council Decision fully aligned with UN Security Council Resolutions 1970 and 1973.<sup>100</sup> The EU military operation aimed to support humanitarian assistance in Libya and would eventually have taken place at the request of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA).<sup>101</sup> It was planned to be quite short - no more than 4 months - and it would have been led by an Italian commander with

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<sup>95</sup> Belgium, Bulgaria, France, Greece, Italy, the Netherlands, Spain, Romania and the United Kingdom joined the NATO Operation Unified Protector. For further information, see, *inter alia*, Karin Wester, *The Responsibility to Protect in North Africa* (CUP 2020) 213-251.

<sup>96</sup> Sergio Fabbrini, *The European Union and the Libyan crisis* (2014) 51(2) *International Politics* 177, 185. Per M Norheim-Martinsen, *The European Union and Military Force: Governance and Strategy* (CUP 2013) 182; Jan Wouters, Philip de Man, Marie Vincent, 'The Responsibility to Protect and Regional Organisations: Where Does the EU Stand?' (2011) Leuven Centre for Global Governance Studies, Policy Brief 18, 13, 24-25, at <[https://ghum.kuleuven.be/ggs/publications/policy\\_briefs/pb18.pdf](https://ghum.kuleuven.be/ggs/publications/policy_briefs/pb18.pdf)> accessed 20 October 2024.

<sup>97</sup> Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) OJ L 89, 5.4.2011, p. 17-20.

<sup>98</sup> *ibid* Recital 4.

<sup>99</sup> *ibid* art. 1(2).

<sup>100</sup> *ibid* Recital 2.

<sup>101</sup> *ibid* art. 1(1).

Operational Headquarters located in Rome.<sup>102</sup> Despite this framework, EUFOR Libya was understood more as a symbolic gesture rather than a concrete help to the UN in accomplishing its goals.<sup>103</sup> As a matter of fact, it was never launched since there was no UN call for its deployment.<sup>104</sup> Council Decision 2011/210/CFSP was finally repealed in November 2011.<sup>105</sup> Moreover, even if it had been launched, some EU battlegroups member States, in particular Sweden, would have been reluctant to act.<sup>106</sup>

The EU ultimately did not take military action in Libya mainly due to diverging interests and preferences of EU member States in conducting military operations in third States; this is a domain in which States are still the dominant actors, and there is to date no unanimous consent to forcible interventions in response to mass atrocities.<sup>107</sup> Member States' different views on the use of force in R2P scenarios convey the conclusion that the EU has not internalised the military component of the responsibility to react.<sup>108</sup> The structural issues of the CSDP's complex institutional machinery,<sup>109</sup> in conjunction with member States' discrepancies in shaping this policy, do not facilitate quick, executive, and operational decisions in practice. This means that, when seeking coordinated action in tackling international core crimes, member States generally prefer to engage in R2P forcible interventions with other organizations, notably NATO,<sup>110</sup> which is considered a more effective and flexible framework to carry out military operations.

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<sup>102</sup> *ibid* art. 2(3). cf Fabbrini (n 96) 187.

<sup>103</sup> Fabbrini (n 96) 187. Jaume Ferrer-Lloret, 'La Unión Europea ante la crisis libia: ¿Derecho internacional, democracia y derechos humanos en las relaciones euromediterráneas?' (2012) 41 *Revista de Derecho Comunitario Europeo* 13, 37.

<sup>104</sup> Geert de Baere, 'The EU and the Responsibility to Protect' in Bart Van Vooren, Steven Blockmans, Jan Wouters (eds), *The EU's Role in Global Governance* (OUP 2013) 95, 104; Schmidt (n 5) 173.

<sup>105</sup> Council Decision 2011/764/CFSP of 28 November 2011 repealing Decision 2011/210/CFSP on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) OJ L 314, 29/11/2011, p. 35.

<sup>106</sup> Fabbrini (n 96) 187; Darina Dvornichenko, Vadym Barsky, 'The EU and Responsibility to Protect: case studies on the EU's response to mass atrocities in Libya, South Sudan and Myanmar' (2020) 7(1) *Intereulaweast* 117, 125.

<sup>107</sup> Schmidt (n 92) 311, 322.

<sup>108</sup> Rietveld (n 93) 107.

<sup>109</sup> cf Chapter III, para 2(2); Chapter IV, para 2.

<sup>110</sup> Dvornichenko, Barsky (n 106) 132.

### 3.3 Ongoing developments: the Rapid Deployment Capacity

The last few years have witnessed the EU's renewed attempt to enhance its position as a regional and global security actor.<sup>111</sup> In particular, it is worth focusing on the establishment of the Rapid Deployment Capacity (RDC), envisaged within the EU *Strategic Compass*, whose effective implementation could also positively influence the EU's operationalisation of the Responsibility to Protect. The topic of the RDC is not something new. Rather, it takes inspiration from the 1999 Helsinki Headline Goal which envisaged the creation of a European Rapid Reaction Force (ERRF) - which was never declared fully operational - comprised of 60,000 troops deployable within 60 days.<sup>112</sup> In June 2004, following the success of Operation Artemis, which involved around 1800 troops coming from 12 member States,<sup>113</sup> the Council decided to establish the EU battlegroups.<sup>114</sup> Battlegroups were composed by 1500 troops which should have been deployed no more than 10 days after the EU decided to launch the operation.<sup>115</sup> Member States requested its employment on different occasions, including in R2P scenarios, namely in Chad (2008), Ivory Coast (2010), Libya (2011), Mali (2013) and the Central African Republic (2014).<sup>116</sup> Although they were declared operational in 2007, they have never been employed.<sup>117</sup> Lack of political willingness, sufficient planning, flexibility, as well as adequate funding mechanisms contributed, *inter alia*, to this *impasse*.<sup>118</sup> As

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<sup>111</sup> Elin Jakobsson, Emma Sjökvist, 'The EU's Rapid Deployment Capacity - Raised Ambitions in Military Crisis Management?' (2024) Swedish Defence Research Agency, p. 1, at <<https://www.foi.se/rest-api/report/FOI%20Memo%208434>> accessed 29 October 2024.

<sup>112</sup> European Council, 'Helsinki Conclusions' (10 and 11 December 1999) para 28, at <[https://www.europarl.europa.eu/summits/hel1\\_en.htm](https://www.europarl.europa.eu/summits/hel1_en.htm)> accessed 29 October 2024.

<sup>113</sup> Christoph O Meyer, Ton van Osch, Yf Reykers, 'From EU battlegroups to Rapid Deployment Capacity: learning the right lessons?' (2024) 100(1) *International Affairs* 181, 190; Jakobsson, Sjökvist (n 111) 2.

<sup>114</sup> Council of the European Union, 'EU Battlegroups Concept' (14 June 2004) 10501/1/04.

<sup>115</sup> Meyer, van Osch, Reykers (n 113) 181; Jakobsson, Sjökvist (n 111) 2. For further information see Niklas Granholm, Pål Jonson, 'EU Battlegroups in Context: Underlying Dynamics, Military and Political Challenges' (2006) Swedish Defence Research Agency, at <<https://www.foi.se/rest-api/report/FOI-R--1950--SE>> accessed 30 October 2024.

<sup>116</sup> For further information see Christoph O Meyer, Ton van Osch, Yf Reykers, 'The EU Rapid Deployment Capacity: This time, it's for real?' (October 2022) European Parliament, p. 6-7. Yf Reykers, 'No supply without demand: Explaining the absence of the EU Battlegroups in Libya, Mali and the CAR' (2016) 25(3) *European Security* 346.

<sup>117</sup> Meyer, van Osch, Reykers (n 113) 181.

<sup>118</sup> *ibid* (n 116) 6-9.

previously outlined, addressing these issues is crucial to overcome a rhetorical understanding of the CSDP by making it a concrete tool at the EU's disposal to promptly act in crisis scenarios, especially when international core crimes are committed.

Since the adoption of the EU *Global Strategy*, a new phase commenced, marked by the EU's attempts '[...] to be able to act rapidly and robustly whenever a crisis erupts, with partners if possible and alone when necessary'.<sup>119</sup> In March 2022 the EU issued the *Strategic Compass* as a response to the tectonic shift caused by Russia's war of aggression against Ukraine,<sup>120</sup> and the subsequent growth of a new geopolitical landscape which underlines, as witnessed by the chaotic evacuation operation in Afghanistan, how important it is a rapid and resolute engagement in order to protect civilians.<sup>121</sup> To face these threats and become a stronger and more capable actor in security and defence issues, one of the main innovations envisaged in this document refers to the EU's commitment to the creation of a Rapid Deployment Capacity. The RDC is intended to become fully operational by 2025, enabling the EU to '[...] swiftly deploy up to 5000 troops into non-permissive environments for different types of crises'.<sup>122</sup>

The *Strategic Compass* stresses that the capacity can be employed for different tasks, including 'initial entry, reinforcement, or as a reserve force to secure an exit', carried out in operational scenarios initially focusing on 'rescue and evacuation operations, as well as the initial phase of stabilisation operations'.<sup>123</sup> The tasks outlined in the *Strategic Compass* are only possible examples of the actions that the EU Rapid Deployment Capacity might undertake in order to promptly address crisis situations.<sup>124</sup> As for its composition, the capacity will include substantially modified EU Battlegroups and pre-identified member States' military forces and capabilities.<sup>125</sup> Unlike the EU Battlegroups' fixed force structure, the RDC is intended as a modular force with land, air,

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<sup>119</sup> *Strategic Compass* 11.

<sup>120</sup> cf Jan Wouters, 'Enhancing the rule of law in Europe and in the world: mission impossible?' in Luis M Hinojosa-Martínez, Carmela Pérez-Bernárdez (eds), *Enhancing the rule of law in the European Union's External Action* (Elgar 2023) 18; see also *Strategic Compass* 4.

<sup>121</sup> Meyer, van Osch, Reykers (n 113) 195.

<sup>122</sup> *Strategic Compass* 11.

<sup>123</sup> *ibid* 25.

<sup>124</sup> Meyer, van Osch, Reykers (n 116) 13.

<sup>125</sup> *Strategic Compass* 25.

and maritime components, as well as strategic enablers.<sup>126</sup> The main goal is to increase flexibility in the choice of the forces to employ, which should be assessed on a case-by-case basis and tailored to the operational requirements of a concrete crisis scenario. Flexibility is also sought in the decision-making process through the use, for instance, of Article 44 TEU. Even though the unanimity rule is still applicable to decisions undertaken under this provision, it would grant coalitions of EU member States more autonomy to plan or conduct EU operations.<sup>127</sup> As for the funding issue, which is the most significant obstacle for the operationalisation of the EU battlegroups, the *Strategic Compass* envisages an increased use of the European Peace Facility to fund common costs which might ultimately encourage more member States to actively participate in ensuring an effective and rapid response in facing worldwide conflicts and crises.<sup>128</sup> To confirm this view, the October 2023 first EU live military exercise was financed by the European Peace Facility.<sup>129</sup> Although the funding under the European Peace Facility is decided on a case-by-case basis, and according to the EU's priorities,<sup>130</sup> it is a crucial aspect for an effective implementation of the EU Rapid Deployment Capacity.

It is also worth noting that the *Strategic Compass* does not directly refer to either R2P or the willingness to act to stop the commission of serious international crimes. Moreover, RDC's quantitative and qualitative aspects suggest the possibility of carrying out small-scale rapid deployment actions, for which the EU is better equipped,<sup>131</sup> rather than large-scale and long-term interventions, which might characterise R2P scenarios.

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<sup>126</sup> Meyer, van Osch, Reykers (n 113) 196; Jakobsson, Sjökvist (n 111) 6.

<sup>127</sup> *Strategic Compass* 26; Meyer, van Osch, Reykers (n 113) 196; Meyer, van Osch, Reykers (n 116) 10-12.

<sup>128</sup> *Strategic Compass* 26; EEAS, 'European Union rapid Deployment Capacity' at <[https://www.eeas.europa.eu/sites/default/files/documents/2024/2024-03-EU-Rapid-Deployment-Capacity\\_EN.pdf](https://www.eeas.europa.eu/sites/default/files/documents/2024/2024-03-EU-Rapid-Deployment-Capacity_EN.pdf)> accessed 30 October 2024.

<sup>129</sup> Meyer, van Osch, Reykers (n 113) 196. The first live exercise (LIVEX) of the Rapid Deployment Capacity (RDC) took place in Spain from the 16 to 22 October 2023. See EEAS, 'Pioneering EU's First "Live Exercise" and Shaping Rapid Deployment Capacity in 2023' (31 August 2023) at <[https://www.eeas.europa.eu/eeas/pioneering-eus-first-live-exercise-and-shaping-rapid-deployment-capacity-2023\\_en](https://www.eeas.europa.eu/eeas/pioneering-eus-first-live-exercise-and-shaping-rapid-deployment-capacity-2023_en)> accessed 30 October 2024. The second live exercise will take place in Germany from 26 November to 10 December 2024. EEAS, 'Milex 24' at <[https://www.eeas.europa.eu/eeas/milex-24\\_en](https://www.eeas.europa.eu/eeas/milex-24_en)> accessed 30 October 2024.

<sup>130</sup> As mentioned before, the majority of funds coming from the EPF have been used to address the Ukrainian crisis.

<sup>131</sup> De Baere (n 104) 102.

Nevertheless, the EU Rapid Deployment Capacity is a step forward even within the R2P realm. It is indeed aimed at ensuring a more robust, flexible, modular military action in crisis scenarios,<sup>132</sup> and avoiding inaction due to funding issues or lack of political will, even when the commission of mass atrocities crimes is at stake, as occurred in Libya. Furthermore, in conjunction with the R2P reactive dimension, actions such as the protection of civilians during evacuation operations could significantly contribute to preventing further escalation of a crisis, which might eventually lead to atrocity scenarios. Accordingly, and similarly to the UN preventive deployment operation in the Republic of Macedonia,<sup>133</sup> the EU Rapid Deployment Capacity may serve as a crucial tool for implementing R2P preventive engagement, the main component of the Responsibility to Protect. To expedite this process, the EU RDC should become operational soon, and member States should reach a unified position regarding the employment of this instrument in R2P scenarios.

Political willingness is therefore key to preventing the EU Rapid Deployment Capacity from turning into a moot exercise, as occurred with the EU Battlegroups, allowing instead the EU to act as a credible actor ready to promptly respond to crises, especially when the commission of mass atrocity crimes is at stake. At the same time, the successful launching of the EU Rapid Deployment Capacity would represent a significant step towards the operationalisation of the Responsibility to Protect, focusing - due to its limited composition and tasks - on preventive rather than reactive engagement. When the commission of serious breaches of *jus cogens* norms is at stake, it would also allow the EU to provide additional evidence of its contribution towards enhancing international law obligations arising from these violations.<sup>134</sup>

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<sup>132</sup> *Strategic Compass* 26.

<sup>133</sup> The United Nations Preventive Deployment Force in the former Yugoslav Republic of Macedonia (UNPREDEP). UNSC Resolution 983/95 (31 March 1995) UN Doc S/RES/983 (1995). For further information, see Abiodun Williams, 'The Possibilities for Preventive Deployment: The Case of Macedonia' in Serena K Sharma, Jennifer M Welsh (eds), *The Responsibility to Prevent: Overcoming the Challenges of Atrocity Prevention* (OUP 2015) 228.

<sup>134</sup> cf para 5.

#### **4. An appraisal and recent developments of the EU sanctions regime: ensuring the cessation of international core crimes**

The EU's paralysis on the internalisation of the forcible intervention under R2P Pillar III does not apply to this Pillar as a whole, but only to its military component,<sup>135</sup> which is regarded as a measure of last resort. Accordingly, before resorting to such a remedy, other non-forcible measures should be prioritised. Amongst them, sanctions are a key tool at the EU's disposal to react to the commission of international crimes. The UN Secretary-General's 2009 Report identifies sanctions as one of the means to implement R2P Pillar III on timely and decisive response, to be considered '[...] on a case-by-case basis and in cooperation with relevant regional organizations'.<sup>136</sup>

As outlined in the introduction of this work,<sup>137</sup> the EU's restrictive measures adopted against third States and individuals are issued within a complex framework, under which the EU seeks to further confirm its role as a global actor guided by a system of values and principles that shape its external action.<sup>138</sup> Bearing in mind these nuances, this paragraph will focus on the main developments and current challenges concerning the EU's sanctions in R2P scenarios. Special emphasis will be placed on the establishment of the EU Global Human Rights Sanctions Regime (EUGHRSR) and its interplay with 'traditional' geographic sanctions. Ultimately, we will provide an analysis, albeit not exhaustive, of the EU's restrictive measures *vis-à-vis* third States and individuals tackling international core crimes which would allow us to draw some preliminary conclusions on the EU's practice and consistency in implementing the non-forcible dimension of R2P Pillar III. While this paragraph will primarily focus on the analysis of the EU's sanctions to implement R2P, the following one will address their contribution within the international legal framework to the fight against international core crimes.

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<sup>135</sup> Rietveld (n 93) 107.

<sup>136</sup> UNGA, 'Implementing the Responsibility to Protect: Report of the Secretary-General' (12 January 2009) UN Doc A/63/677, para 57. De Baere (n 104) 104.

<sup>137</sup> Introduction, para 1.2.

<sup>138</sup> Mirko Sossai, *Sanzioni delle Nazioni Unite e Organizzazioni Regionali* (RomaTre Press 2020) 145.

## 4.1 Introductory remarks

Starting from the 1980s,<sup>139</sup> the EU has progressively become a key player in sanctioning third States; it actually uses sanctions - or in the EU jargon ‘restrictive measures’ - as a form of negative conditionality<sup>140</sup> to ‘assert its interest and values on the international scene’.<sup>141</sup> As an economic superpower, the threat or the imposition of restrictive measures is understood as a strong tool at the EU’s disposal to influence the conduct undertaken by other actors in the international scene.<sup>142</sup>

EU sanctions can be broken down into three types: sanctions implementing UN Security Council Resolutions, sanctions reinforcing UN sanctions, and EU autonomous restrictive measures.<sup>143</sup> As for the first type, when the UN Security Council imposes sanctions,<sup>144</sup> the EU immediately implements these acts by transposing them into EU law

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<sup>139</sup> With, for instance, the adoption of sanctions against the Soviet Union as a response of the invasion of Afghanistan or against Argentina in the aftermath of the invasion of the Falkland Islands. See Andreas de Guttry, ‘Le contromisure adottate nei confronti dell’Argentina da parte delle Comunità europee e dei terzi Stati ed il problema della loro liceità internazionale’ in Natalino Ronzitti (ed), *La questione delle Falkland/Malvinas nel diritto internazionale* (Giuffrè 1984) 343 ff; Charlotte Beaucillon, *Les mesures restrictives de l’Union européenne* (Bruylant 2014) 14.

<sup>140</sup> Considered the most innovative and relevant instrument of the EU within the context of negative conditionality. Carmela Pérez-Bernárdez, ‘Las Sanciones de la UE como Instrumento de la Acción Exterior: una Apuesta Renovada por sus Valores Fundamentales’ in Francisco Aldecoa (ed), *El papel internacional de la Unión Europea: Propuestas para la Conferencia sobre el Futuro de Europa* (Los Libros de la Catarata 2021) 205, 215.

<sup>141</sup> Marco Gestri, ‘Sanctions Imposed by the European Union: Legal and Institutional Aspects’ in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill | Nijhoff 2016) 70, 70-71. See also Anthonius W de Vries, Clara Portela, Borja Guijarro-Usobiaga, ‘Improving the Effectiveness of Sanctions: A Checklist for the EU’ (2014) 95 Centre for European Policy Studies 1. For a general overview of EU sanctions see, *inter alia*, Leonardo Borlini, Stefano Silingardi, ‘Defining Elements and Emerging Legal Issues of EU “Sanctions”’ (2018) 27(1) The Italian Yearbook of International Law 33; Christina Eckes, ‘The law and practice of EU sanctions’ in Steven Blockmans, Panos Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Elgar 2018) 206; Charlotte Beaucillon, ‘The European Union’s Position and Practice with regard to Unilateral and Extraterritorial Sanctions’, in Charlotte Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Cheltenham, 2021) 110 ff; Sara Poli, ‘Le Misure Restrittive e la Tutela dei Diritti dei Singoli’ in Maria Eugenia Bartolini, Sara Poli (eds), *L’Azione Esterna dell’Unione Europea* (Editoriale Scientifica 2021) 263.

<sup>142</sup> Gestri (n 141) 71; Marco Gestri, ‘Sanctions, Collective Countermeasures and the EU’ (2023) 32(1) The Italian Yearbook of International Law Online 67, 68.

<sup>143</sup> See Thomas Biersteker, Clara Portela, ‘EU sanctions in context: three types’ (2015) 26 European Union for Security Studies, at <<https://www.iss.europa.eu/content/eu-sanctions-context-three-types>> accessed 30 October 2024.

<sup>144</sup> United Nations Security Council Consolidated List, at <<https://main.un.org/securitycouncil/en/content/un-sc-consolidated-list>> accessed 30 October 2024.

through regulations.<sup>145</sup> As acknowledged by the CJEU, the Union has to act in compliance with international law in the establishment and implementation of restrictive measures.<sup>146</sup> Second, the EU can also adopt restrictive measures to reinforce sanctions adopted within the UN framework, such as those issued since 2010 against Iran, the Democratic People's Republic of Korea, and Libya.<sup>147</sup> Third, alongside implementing or reinforcing UN sanctions, the EU can also impose autonomous restrictive measures. As will be seen in the following pages, this third type of sanctions is particularly relevant since through their adoption, the EU can partially compensate the UN Security Council inaction caused by the exercise of the veto power by one or more of its five permanent members, as occurred in the past, *inter alia*, in Syria, and more recently, in relation with the crisis in Ukraine, Myanmar, Israel and the Occupied Palestinian Territory.

Articles 29 TEU and 215 TFEU provide the legal basis and procedure for the adoption of restrictive measures. As a preliminary remark, it is worth stressing that while other regional organizations can impose sanctions *vis-à-vis* their members, only the European Union constitutive treaties grant the EU the competence to impose sanctions against non-member States.<sup>148</sup> Moreover, one should also note that, at first, sanctions were mainly imposed against third States; over the years, to minimise adverse consequences on the population not responsible for States' wrongdoing, the EU policy on restrictive measures has shifted towards the adoption of 'smart sanctions' targeting

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<sup>145</sup> Jeremy Farrall, 'Sanctions' in Jacob Katz Cogan, Ian Hurd, Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 603, 611.

<sup>146</sup> Joined Cases C- 402 & 415/ 05 P, *Kadi I*, ECLI:EU:C:2008:461, paras 291-299; Joined Cases C- 584/ 10 P, C- 593/ 10 P & C- 595/10 P, *Kadi II*, ECLI:EU:C:2013:518, para 104. However, as stressed in *Kadi I and Kadi II*, judicial review cannot be excluded, in particular regarding the respect of fundamental rights, even for restrictive measures adopted to implement UN Security Council Resolutions. For further information see, *inter alia*, Luis M Hinojosa-Martínez, 'Bad Law for Good Reasons: The Contradictions of the Kadi Judgment' (2008) 5 *International Organizations Law Review* 339.

<sup>147</sup> Biersteker, Portela (n 141) 1-2.

<sup>148</sup> Gestri (n 142) 68.

specific entities or individuals of a third country,<sup>149</sup> or ‘natural or legal persons and groups or non-State entities’.<sup>150</sup>

Considering that Article 215 TFEU does not mention which measures might be adopted by the EU to sanction third countries or individuals, as supported by case-law, the Council enjoys broad discretion in choosing the types of sanctions to be adopted.<sup>151</sup> Therefore, restrictive measures may, for instance, take the form of arms embargoes or investment bans.<sup>152</sup> When adopted against individuals, they take the form of asset freezes and travel bans.<sup>153</sup>

Focusing on their legal basis, the adoption of restrictive measures under Article 215 TFEU is conditional upon a CFSP decision under Article 29 TEU; under Articles 30(1) and 31(1) TEU, such decision has to be adopted unanimously by the Council.<sup>154</sup> When the EU has no competence to adopt the operative measures, such as in cases of arms embargoes and travel bans, Council decisions are directly implemented by member

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<sup>149</sup> art. 215(1) TFEU. It is worth noting the term ‘third countries’ has been interpreted broadly, allowing even for the imposition of restrictive measures against natural or legal persons who appear to have a sufficient link to the targeted country. See, *inter alia*, *Kadi I* (n 146) para 166; Case C-376/10 P, EU:C:2012:138, paras. 63-64, 66-71; Case C-330/15 P, EU:C:2016:601, para. 84.

<sup>150</sup> art. 215(2) TFEU. cf Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 1637; Eva Nanopoulos, *The Juridification of Individual Sanctions and the Politics of EU Law* (Hart 2019) 53-54.

<sup>151</sup> Judgment of 28 March 2017, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, paras 146-149.

<sup>152</sup> As regards investment bans, see, *inter alia*, Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Decision 2010/413/CFSP concerning restrictive measures against Iran, OJ L 274, 18.10.2015, p. 174-197; Council Regulation (EU) 2015/1861 of 18 October 2015 amending Regulation (EU) No 267/2012 concerning restrictive measures against Iran, OJ L 274, 18.10.2015, p. 1-160. Concerning arms embargoes, see, *inter alia*, Council Decision 2014/933/CFSP of 18 December 2014 amending Decision 2014/386/CFSP concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol, OJ L 365, 19.12.2014, p. 152-155; Council Regulation (EU) No 1351/2014 of 18 December 2014 amending Regulation (EU) No 692/2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol, OJ L 365, 19.12.2014, p. 46-59. cf Kellerbauer, Klamert, Tomkin (n 150) 1636.

<sup>153</sup> Which are the two most common types of sanctions imposed by the EU. Francesco Giumelli, Fabian Hoffmann, Anna Książczaková, ‘The when, what, where and why of European Union sanctions’ (2021) 30(1) *European Security* 1, 10-11. For the Consolidated List of persons subject, under EU sanctions, to travel restrictions, see <<https://www.sanctionsmap.eu/#/main/travel/ban>> accessed 5 November 2024. As for the Consolidated list of persons, groups and entities subject to EU financial sanctions, see European Union, Consolidated list of persons, groups and entities subject to EU financial sanctions, at <<https://data.europa.eu/data/datasets/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions?locale=en>> accessed 5 November 2024.

<sup>154</sup> art. 30(1), art. 31(1) TEU.

States.<sup>155</sup> In all other cases, further EU legislation is needed in the form of non-CFSP Regulations issued under Article 215 TFEU, which requires a qualified majority voting. Combining Article 29 TEU with Article 215 TFEU, a systematic interpretation of both provisions may indicate a framework in which the CFSP decision is limited to establishing the overall policy whereas the details of the restrictions are determined by the non-CFSP act based on Article 215 TFEU.<sup>156</sup> However, practice follows a different path since frequently both decisions are adopted on the same day, having a nearly identical content, including the listing of persons and goods.<sup>157</sup>

#### 4.2 Early practice: the cases of Libya, Syria and Myanmar

From the very beginning of the affirmation of the Responsibility to Protect within the UN framework, the EU has used, *inter alia*, sanctions as a tool to face the commission of atrocity crimes in R2P scenarios, including in Libya, Syria, and Myanmar.

As regards the situation in Libya,<sup>158</sup> following UN Security Council Resolution 1970 (2011),<sup>159</sup> on 28 February 2011 the EU adopted Council Decision 2011/137/CFSP imposing an arms embargo against Libya as well as the freezing of assets and travel bans on persons and entities listed in Annex I of Resolution 1970 (2011).<sup>160</sup> In order to implement the measures provided in the Decision falling under the competence of the Union, the Council subsequently adopted Regulation (EU) 204/2011.<sup>161</sup> On 10 and 21

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<sup>155</sup> Gestri (n 142) 69. As envisaged in Article 29 TEU, once a decision is adopted by the Council, member States are bound to ‘ensure that their national policies conform to the Union positions’, under art. 29 TEU.

<sup>156</sup> For further information see Council of the European Union, ‘How the EU adopts and reviews sanctions’ at <https://www.consilium.europa.eu/en/policies/sanctions-adoption-review-procedure/#decision> accessed 5 November 2024. cf Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin (n 150) 1635.

<sup>157</sup> ‘The Council decision and the Council regulation are usually adopted together and enter into force on the day of its adoption. This allows for both legal acts to produce their effects at the same time’. Council of the European Union, ‘How the EU adopts and reviews sanctions’ (n 156). See also Case C-72/15, *Rosneft*, paras 86-93.

<sup>158</sup> For further information on the EU actions in relation to the 2011 Libyan crisis, see Rietveld (n 93) 76-81; Fabbrini (n 96) 177.

<sup>159</sup> UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 (2011).

<sup>160</sup> Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya, OJ L 58, 3.3.2011, p. 53-62.

<sup>161</sup> Council Regulation (EU) No 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya, OJ L 58, 3.3.2011, p. 1-13.

March 2011, the EU extended these restrictive measures to 11 Libyan officials and key Libyan financial entities.<sup>162</sup> Following UN Security Council Resolution 1973 (2011),<sup>163</sup> Council Decision 2011/137/CFSP was later amended by Council Decision 2011/178/CFSP,<sup>164</sup> which, *inter alia*, implemented the no-fly zone envisaged in the updated UN Security Council Resolution.<sup>165</sup> Only when the Transitional National Council (TNC) was formed, and according to UN Security Council Resolution 2009 (2011),<sup>166</sup> the EU decided to unfreeze Libyan assets and delisted twenty-nine entities previously covered by its autonomous restrictive measures.<sup>167</sup> Although these documents do not make explicit reference to ‘mass atrocities crimes’, the restrictive measures were tailored towards achieving the R2P goals,<sup>168</sup> since they were adopted in the light of ‘serious human rights abuses’ targeting those responsible for the violent crackdown on the civilian population.<sup>169</sup> Sanctions such as arms embargoes and the freezing of assets were considered as strong enough to have a direct impact on the Libyan authorities’ capacities to inflict atrocity crimes upon the civilian population.<sup>170</sup> Therefore, the implicit reference to the Responsibility to Protect, together with the adoption of UN-based,<sup>171</sup> as well as autonomous restrictive measures, might be seen as relevant evidence for the internalisation of the non-forcible component of R2P Pillar III.

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<sup>162</sup> Council Implementing Decision 2011/156/CFSP of 10 March 2011 implementing Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya, OJ L 64, 11.3.2011, p. 29-30; Council Implementing Decision 2011/175/CFSP of 21 March 2011 implementing Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya, OJ L 76, 22/03/2011, p. 95-98. cf Fabbrini (n 96) 188.

<sup>163</sup> UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011).

<sup>164</sup> Council Decision 2011/178/CFSP of 23 March 2011 amending Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya, OJ L 78, 24/03/2011, p. 24-36.

<sup>165</sup> *ibid* art. 1(1).

<sup>166</sup> UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009 (2011).

<sup>167</sup> Council of the European Union, 3117th Foreign Affairs Council Meeting, ‘Council Conclusions on Libya’ (10 October 2011) para 7. The EU had also previously transposed the provisions of UNSCR 2009 on the delisting of entities active in the oil and gas sector. UNSC Res 2009 (n 166) paras 13-16.

<sup>168</sup> Rietveld (n 93) 79.

<sup>169</sup> Council Decision 2011/137/CFSP, Recital (3). See also Council of the European Union, ‘Libya: EU imposes arms embargo and targeted sanctions’ (28 February 2011) 7081/11, Presse 41.

<sup>170</sup> Rietveld (n 93) 80.

<sup>171</sup> In May 2011, the Foreign Affairs Council expressed its commitment to fully implement Security Council Resolutions 1970 and 1973, and to protect Libyan civilian population. Council of the European Union, 3091st Council meeting (23 and 24 May 2011) 10440/11, Presse 143, 2.

The 2011 Syrian crisis represents a further example of the EU issuing restrictive measures in a mass atrocities context.<sup>172</sup> On 9 May 2011, in response to the violent repression against the civilian population in Syria, the EU adopted Council Decision 2011/273/CFSP imposing arm and oil embargoes, asset freezes, and travel bans against Syria and those responsible or involved in the commission of these acts.<sup>173</sup> It is worth noting that, unlike the previous scenario, the veto power exercised by Russia and China prevented the adoption of any resolution addressing the Syrian crisis.<sup>174</sup> As the crisis unfolded and intensified, the EU expanded its sanctions regime to additional persons and entities.<sup>175</sup> This line of action aligns with the sanctioning component of the Responsibility to React under which a stronger response is required as the situation escalates, leaving forcible intervention as a last resort mechanism.<sup>176</sup>

As for the situation in Myanmar,<sup>177</sup> it is worth recalling that the initial restrictive measures, mainly comprising arms embargo and travel restrictions, were already issued

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<sup>172</sup> For further information on the EU actions in relation with the 2011 Syrian crisis, see Rietveld (n 93) 81-85.

<sup>173</sup> Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria, OJ L 121, 10.5.2011, p. 11-14.

<sup>174</sup> Chapter II, para 1.

<sup>175</sup> See, *inter alia*, Council Decision 2011/522/CFSP of 2 September 2011 amending Decision 2011/273/CFSP concerning restrictive measures against Syria, OJ L 228, 3.9.2011, p. 16-18; Council Regulation (EU) No 878/2011 of 2 September 2011 amending Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria, OJ L 228, 3.9.2011, p. 1-5. Council Decision 2011/628/CFSP of 23 September 2011 amending Decision 2011/273/CFSP concerning restrictive measures against Syria, OJ L 247, 24.9.2011, p. 17-21; Council Regulation (EU) No 950/2011 of 23 September 2011 amending Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria, OJ L 247, 24/09/2011, p. 3-7. Council Decision 2011/684/CFSP of 13 October 2011 amending Decision 2011/273/CFSP concerning restrictive measures against Syria, OJ L 269, 14.10.2011, p. 33-35; Council Regulation (EU) No 1011/2011 of 13 October 2011 amending Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria, OJ L 269, 14/10/2011, p. 18-20. Council Decision 2011/735/CFSP of 14 November 2011 amending Decision 2011/273/CFSP concerning restrictive measures against Syria, OJ L 296, 15.11.2011, p. 53-54; Council Regulation (EU) No 1150/2011 of 14 November 2011 amending Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria, OJ L 296, 15/11/2011, p. 1-2. Council Decision 2011/782/CFSP of 1 December 2011 concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP, OJ L 319, 2.12.2011, p. 56-57; Council Implementing Regulation (EU) No 1244/2011 of 1 December 2011 implementing Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria, OJ L 319, 2.12.2011, p. 8-10.

<sup>176</sup> Rietveld (n 93) 84-85.

<sup>177</sup> For further information on the EU actions concerning the crisis in Myanmar, see Rietveld (n 93) 89-94.

in response to human violations committed in this country.<sup>178</sup> Nevertheless, in 2013, in order to encourage Myanmar's transition towards democracy, the EU lifted all the restrictive measures previously issued against Myanmar, with the sole exception of the arms and equipment embargoes.<sup>179</sup> The lifting of sanctions lasted only for a few years. Following the 2018 EU's Foreign Affairs Council conclusions, which condemned the '[...] ongoing widespread, systematic grave human rights violations' committed by Myanmar's military and security forces,<sup>180</sup> and Federica Mogherini's declarations regarding the EU's willingness to impose sanctions against Myanmar,<sup>181</sup> the Council adopted Decision (CFSP) 2018/655.<sup>182</sup> This Decision extended the existing arms embargo and further prohibited the export of dual-use goods and equipment for monitoring communications that might be employed for internal repression,<sup>183</sup> as well as the provision of military training to and military cooperation with Myanmar Armed Forces (Tatmadaw).<sup>184</sup> The Council also imposed travel bans and the freezing of funds for natural persons from the Tatmadaw and the Border Guard Police responsible, *inter alia*, for serious human rights violations in Myanmar.<sup>185</sup> In June 2018, a few days after the European Parliament Resolution underlying the 'serious human rights violations' in Myanmar, the Council imposed sanctions on 7 senior military, border guard, and police officials responsible for or associated with atrocities and serious human rights violations committed against the Rohingya population.<sup>186</sup>

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<sup>178</sup> Council of the European Union, 'EU sanctions against Myanmar' at <<https://www.consilium.europa.eu/en/policies/sanctions-against-myanmar/>> accessed 5 November 2024.

<sup>179</sup> For a critical analysis of the risks linked with Myanmar's democratic transition process, see, *inter alia*, Alex J Bellamy, 'Protecting the Rohingya: Delivering on a Shared Responsibility' (12 June 2015) at <<https://theglobalobservatory.org/2015/06/rohingya-myanmar-asean-r2p/>> accessed 5 November 2024.

<sup>180</sup> Council of the European Union, 'Myanmar/Burma - Council conclusions' (26 February 2018) 6418/18.

<sup>181</sup> EEAS, 'Remarks by HR/VP Mogherini at the press conference following the Foreign Affairs Council' at <[https://www.eeas.europa.eu/node/47303\\_en](https://www.eeas.europa.eu/node/47303_en)> accessed 5 November 2024.

<sup>182</sup> Council Decision (CFSP) 2018/655 of 26 April 2018 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma, OJ L 108, 27.4.2018, p. 29-35.

<sup>183</sup> *ibid* arts. 1-3.

<sup>184</sup> *ibid* art. 4.

<sup>185</sup> *ibid* arts. 5-6.

<sup>186</sup> Council Decision (CFSP) 2018/900 of 25 June 2018 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma, OJ L 160I, 25.6.2018, p. 9-11; Council Implementing Regulation (EU) 2018/898 of 25 June 2018 implementing Regulation (EU) No 401/2013 concerning restrictive measures in respect of Myanmar/Burma, OJ L 160I, 25.6.2018, p. 1-4.

The sanctions imposed in 2018 have faced criticisms despite their reintroduction. The Union's reaction in Myanmar has therefore been labelled as late and too weak as the sanctions imposed were allegedly not proportionate in comparison with '[...] the scale and seriousness of violations of international law taking place'.<sup>187</sup> Moreover, human rights concerns and the corresponding sanctions had to be related to their possible impact on trade preferences. The fact that in 2019 the EU became Myanmar's third largest trading partner, after China and Thailand, was seen as an additional obstacle undermining the effectiveness of the sanctions.<sup>188</sup>

The abovementioned cases show that, although the R2P language is not explicitly present, the sanctions issued by the EU in the various R2P scenarios, as a direct response to the commission of mass atrocities, indicate the EU's strong commitment to the sanctions component of the Responsibility to React.<sup>189</sup>

The necessity of issuing restrictive measures as a tool to fight the commission of international core crimes - and thus implementing the non-forcible component R2P Pillar III - has also been repeatedly stressed by the European Parliament. For instance, it welcomed the restrictive measures adopted by the European Council against Syria,<sup>190</sup> and requested the UN Security Council to issue an arms embargo on Myanmar, along with asset freezes and travel bans on those responsible for gross human rights violations.<sup>191</sup> A further strength of the EU's restrictive measures is the capacity to implement sanctions independently, in addition to those established under the UN framework, as demonstrated in the cases of Syria and Myanmar. This approach circumvents the *impasse* within the UN Security Council and enhances the process of internalisation of the sanctioning component of R2P Pillar III. However, the imposition of sanctions on third States and

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<sup>187</sup> Burma Campaign UK, 'EU Burma Response: Too Little Too Late' (26 February 2018) at <<https://archive.burmacampaign.org.uk/eu-burma-response-too-little-too-late/>> accessed 5 November 2024.

<sup>188</sup> Arlo Poletti, Daniela Sicurelli, 'The Political Economy of the EU Approach to the Rohingya Crisis in Myanmar' (2022) 10(1) Politics and Governance 47, 52-53.

<sup>189</sup> Rietveld (n 93) 100.

<sup>190</sup> European Parliament resolution of 7 July 2011 on the situation in Syria, Yemen and Bahrain in the context of the situation in the Arab world and North Africa P7 TA(2011)0333.

<sup>191</sup> European Parliament resolution of 13 September 2018 on Myanmar, notably the case of journalists Wa Lone and Kyaw Soe Oo (2018/2841(RSP)) P8 TA(2018)0345.

individuals without prior UN Security Council authorisation continues to pose challenges regarding the EU's compliance with international law, which has to ensure and respect.<sup>192</sup> On this aspect, scholars argued that, unless these measures are justified under general international law, they require authorisation from the UN Security Council.<sup>193</sup> In order to ensure the legitimacy of such actions, as paragraph 5 of this Chapter will further assess, the link between the EU's restrictive measures and the violations of peremptory norms of general international law is crucial.

### 4.3 The EU Global Human Rights Sanctions Regime

Practice showing the EU's increased commitment to issue restrictive measures in R2P scenarios has been followed by further legislative developments, notably the adoption of new types of restrictive measures *vis-à-vis* those deemed responsible for or involved in the commission of R2P crimes. On 7 December 2020, the Council adopted Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998 which established the new EU Global Human Rights Sanctions Regime (EUGHRSR).<sup>194</sup> Already envisaged in 2010, and later in 2019, by the European Parliament,<sup>195</sup> the EUGHRSR is one of the four Union's fully autonomous horizontal sanctions regimes.<sup>196</sup>

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<sup>192</sup> Sossai (n 138) 38. China and Russia, *inter alia*, have consistently opposed States' and International Organizations' unilateral sanctions. UN Doc S/PV.7323 (25 November 2014); UN Doc S/PV.7620 (11 February 2016).

<sup>193</sup> Sossai (n 138) 179.

<sup>194</sup> Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 13-19; Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410I, 7.12.2020, p. 1-12.

<sup>195</sup> European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)) P7 TA(2010)0489, para 145; European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)) P8 TA(2019)0215.

<sup>196</sup> The other three are the terrorism (2016), chemical weapons (2018), and cyberattacks (2019) sanctions regimes. As for terrorism, Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, OJ L 255, 21.9.2016, p. 25-32; Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them, OJ L 255, 21.9.2016, p. 1-11. Regarding chemical weapons: Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, OJ L 259, 16.10.2018, p. 25-30; Council Regulation (EU) 2018/1542 of 15 October 2018

It is inspired by other national legislation, in particular the 2016 US Global Magnitsky Act,<sup>197</sup> which enables the US government to impose travel bans and asset freezes on foreign individuals suspected of gross human rights violations or acts of significant corruption.<sup>198</sup> The EUGHRSR is aimed at consolidating and supporting democracy, the rule of law, human rights, and the principles of international law as enshrined in Article 21(2)(b) TEU.<sup>199</sup> It should be seen as further evidence of the EU's commitment outlined in the EU Action Plan on Human Rights and Democracy 2020-2024 to develop a new horizontal EU global human rights sanctions regime to address serious human rights violations and abuses globally.<sup>200</sup>

As for its content, the EUGHRSR can be closely linked with the R2P framework since, apart from applying to 'serious human rights violations or abuses',<sup>201</sup> and 'other human rights violations or abuses',<sup>202</sup> it specifically targets those responsible for, involved in, or associated with the commission of genocide and crimes against humanity,

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concerning restrictive measures against the proliferation and use of chemical weapons, OJ L 259, 16.10.2018, p. 12.21. In relation to cyber-attacks, Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ L 129I, 17.5.2019, p. 13-19; Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ L 129I, 17.5.2019, p. 1-12. For further information on its origins and content, see Pérez-Bernárdez (n 140) 212 ff.

<sup>197</sup> US Congress, *Global Magnitsky Human Rights Accountability Act*, Public Law 114-328, 130 Stat, 2533. For further information on the *Global Magnitsky Human Rights Accountability Act* and other national legislation, Clara Portela, 'The EU human rights sanctions regime: unfinished business?' (2021) 54 *Revista General de Derecho Europeo* 19, 20 ff; Christina Eckes, 'EU global human rights sanctions regime: is the genie out of the bottle?' (2022) 30(2) *Journal of Contemporary European Studies* 255, 262; Charlotte Beaucillon, 'Long-arm Collective Sovereignty Through the EU: The EU Global Human Rights Sanctions Regime Transcending the Limits of the Fight Against Impunity' (2023) 8(3) *European Papers* 1679, 1682; Carmela Pérez-Bernárdez, 'The human rights sanctions regime and the rule of law: towards a stronger European Union?' in Luis M Hinojosa-Martínez, Carmela Pérez-Bernárdez (eds), *Enhancing the Rule of Law in the European Union's External Action* (Elgar 2023) 132, 135.

<sup>198</sup> Unlike the 2016 US Global Magnitsky Act, the EUGHRSR does not apply to corruption. For a critical analysis of its exclusion, see Pérez-Bernárdez (n 197) 154.

<sup>199</sup> art. 21(1)(b) TEU. See also Council Decision (CFSP) 2020/1999, Recital 5.

<sup>200</sup> European Commission, Joint Communication to the European Parliament and the Council, 'EU Action Plan on Human Rights and Democracy 2020-2024' (25 March 2020) JOIN(2020) 5 final.

<sup>201</sup> Such as torture, slavery, extrajudicial killings, arbitrary arrests or detentions. art. 1(1)(c) Council Decision (CFSP) 2020/1999. It is worth recalling that the EUGHRSR has been associated with the Navalny case in both its adoption and its initial implementation. For further information, Pérez-Bernárdez (n 140) 222.

<sup>202</sup> Once provided they are widespread, systematic, or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU. art. 1(1)(d) Council Decision (CFSP) 2020/1999.

which are ranked at the highest of the three levels introduced by this new sanctions regime.<sup>203</sup> Moreover, the EUGHRSR aims to target not only individuals, through restrictive measures such as travel bans and asset freezes, but also entities and bodies - including State and non-State actors - to which only the freezing of funds might be applicable.<sup>204</sup> As for the procedure, the Council, acting by unanimity, adopts a Decision that identifies those targeted by restrictive measures, followed by a Regulation, adopted by qualified majority, which gives effect to the previous Decision. Council Decision also contains an Annex listing the individuals and entities sanctioned, which is then copied into the EU Regulation. It is worth stressing that whereas the freezing of assets is stipulated both in the Council Decision and Regulation, travel bans are only included in the Council Decision, compelling member States to implement these measures.<sup>205</sup>

The EUGHRSR is a sanctioning mechanism in addition to, and not in substitution for, other thematic or geographic sanctions.<sup>206</sup> Practice indicates that different sanctions regimes might apply to the same subject, as they can complement each other.<sup>207</sup> This would allow, *inter alia*, the continuation of the restrictions imposed to individuals or legal entities by the EU's sanctioning machinery even if one of the sanctions regimes were to cease. However, unlike geographic regimes, the EUGHRSR presents a few advantages. Due to its horizontal nature, it provides greater speed and flexibility in addressing, *inter alia*, serious human rights threats, including R2P crimes, and irrespectively of where they emerge in the world.<sup>208</sup> Moreover, their use could maximise the impact on those whose

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<sup>203</sup> Eecks (n 197) 257.

<sup>204</sup> Pérez-Bernárdez (n 197) 142.

<sup>205</sup> Eecks (n 197) 257, Pérez-Bernárdez (n 197) 133-134.

<sup>206</sup> *ibid* 260; 145.

<sup>207</sup> For instance, Viktor Vasilievich Zolotov has been sanctioned by both the geographic and human rights sanctions regimes. Council Implementing Regulation (EU) 2022/2476 of 16 December 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 322I, 16.12.2022, p. 318-465; Council Implementing Regulation (EU) 2021/2151 of 6 December 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 436, 7.12.2021, p. 1-6.

<sup>208</sup> Eecks (n 197) 260-261; Tom Ruys, 'The European Union Global Human Rights Sanctions Regime (EUGHRSR)' (2012) 60(2) *International Legal Materials* 298, 299. However, speed and flexibility 'should not come at the expense of human rights protection'. Eecks (n 197) 261. Gestri (n 142) 83.

behaviour the EU want to influence by minimising any collateral harm to the civilian population.<sup>209</sup>

Although certain aspects remain unclear,<sup>210</sup> at the time of writing the EUGHRSR has targeted 118 individuals and 33 entities,<sup>211</sup> some of which, as the next subparagraph will further assess, were considered responsible or involved in the commission of serious human rights violations that may amount to R2P crimes, in particular war crimes and crimes against humanity. The EUGHRSR should therefore be regarded as a significant enhancement to the EU's existing sanctions toolbox,<sup>212</sup> which fits well within the R2P framework. The R2P language can be found, for instance, in Council Decision (CFSP) 2020/1999, which highlights States' '[...] primary responsibility to respect, protect and fulfil human rights'.<sup>213</sup> Taking into account the seriousness of the crimes for which this new specific regime might be triggered, including R2P crimes, the EU may, *inter alia*, use it to contribute to halting serious human rights violations and further strengthening the universality and indivisibility of human rights in the wider world.<sup>214</sup> Hence, considering the *erga omnes* character or even the *jus cogens* status of international norms prohibiting mass atrocity crimes, such as genocide, war crimes, and crimes against humanity, by imposing sanctions for gross human rights violations one might argue that the EU is not only acting under its mandate but also according international law,<sup>215</sup> which, as outlined in its founding treaties - specifically Articles 3(5) and 21(1) and (2) TEU - it

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<sup>209</sup> Council of the European Union, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' (7 June 2004) 10198/1/04 para 6 (hereinafter *EU Basic Principles*). cf Ruys (n 208) 299; Sossai (n 138) 36-37.

<sup>210</sup> Including the coordination between EU member States and the EU institutions, the presence of sufficient human rights safeguards, including the presumption of innocence, straightforward listing (and delisting) criteria, as well as evidentiary thresholds. cf Pérez-Bernárdez (n 197) 150-155; Eecks (n 197) 264-265.

<sup>211</sup> Council Decision (CFSP) 2024/2009 of 22 July 2024 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/2009, 22.7.2024. For a practical assessment of those sanctioned for acts linked with R2P crimes, see para 4(4).

<sup>212</sup> Ruys (n 208) 299.

<sup>213</sup> Council Decision (CFSP) 2020/1999, Recital 2.

<sup>214</sup> art. 21(1) TEU.

<sup>215</sup> Pérez-Bernárdez (n 197) 139.

has to consolidate and promote.<sup>216</sup> This approach would therefore favour an alignment of the Union's values with international law, specifically regarding the obligations arising from serious breaches of *jus cogens* norms. Given the rhetorical dimension linked with these EU treaty provisions,<sup>217</sup> the following sections will scrutinise the consistency of the EU's actions in this domain and whether they reflect a binding commitment to act in conformity with international law.

Within the R2P interpretative lens, bearing in mind that the responsibility to prevent and react against gross human rights violations represent key pillars of the Responsibility to Protect, as long as R2P and the EUGHRSR material scopes coincide, this new sanctions regime might also go towards implementing the Responsibility to Protect.<sup>218</sup>

#### 4.4 EU Sanctions in ongoing R2P scenarios

The EU's emphasis on human rights sanctions has been proven by recent practice fostering the EU's commitment to sanctioning those accused of having committed serious human rights violations. For instance, regarding the situation in Iran, the EUGHRSR applies along with new packages of geographic sanctions.<sup>219</sup> Accordingly, on 7 March 2023, the Qarchak Prison was included under this new sanctions regime for being allegedly responsible for serious human rights violations in Iran, including torture and other cruel, inhuman or degrading treatment as well as systematic sexual and gender-based violence.<sup>220</sup>

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<sup>216</sup> cf Enzo Cannizzaro, 'I valori internazionalisti dell'Unione Europea e il loro effetto giuridico' in Alessandra Annoni, Serena Forlati, Pietro Franzina (eds), *Il Diritto Internazionale come Sistema di Valori. Scritti in Onore di Francesco Salerno* (Jovene editore 2021) 459.

<sup>217</sup> *ibid* 461; see also Cannizzaro (n 85) 7.

<sup>218</sup> Carmelo Danisi, 'The European Union's Global Human Rights Sanctions Regime and the "Role Responsibility" of International Organisations' in Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak, Gerd Oberleitner (eds), *European Yearbook on Human Rights* (Intersentia 2021) 475, 489-490.

<sup>219</sup> Under this regime, the EU has sanctioned 237 individuals and 43 entities. Council Decision (CFSP) 2024/1795 of 24 June 2024 amending Decision 2011/235/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Iran, OJ L, 2024/1795, 25.6.2024; Council Regulation (EU) 2024/1796 of 24 June 2024 amending Regulation (EU) No 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran, OJ L, 2024/1796, 25.6.2024. For further information see, Pérez-Bernárdez (n 197) 145-146.

<sup>220</sup> Council Decision (CFSP) 2023/501 of 7 March 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 11-20; Council Implementing Regulation (EU) 2023/500 of 7 March 2023 implementing Regulation (EU)

The Union's sanctioning action also includes current R2P scenarios,<sup>221</sup> where the Union is employing the various sanctioning instruments at its disposal - in particular, but not only, the EUGHRS - to target individuals and entities allegedly responsible, *inter alia*, for mass atrocity crimes. While the first part of this section will mostly focus on individuals, the second part will introduce relevant practice in sanctioning legal persons. The following sections will instead zoom in on the EU's sanctions against Russia and Israel, whose analysis and comparison would allow us to shed light on the EU's consistency in imposing sanctions in R2P contexts.

As for the R2P scenarios, the interoperability and enhanced efficacy of different sanctions regimes can be first found in the previously studied R2P frameworks, specifically regarding the situations in Syria and Myanmar. As regards Syria, where the situation remains unstable due to additional evidence underlying the commission of gross human rights violations, including war crimes and crimes against humanity,<sup>222</sup> the EU issued further restrictive measures under both the traditional and human rights sanctions regimes. In particular, in April 2023, within the Syrian sanctions regime, the Council imposed, *inter alia*, restrictive measures against 4 individuals deemed responsible for participating in the killing of at least 41 civilians in the town of Tadamon.<sup>223</sup> Furthermore, in light of the ongoing human rights abuses,<sup>224</sup> and despite the 2023 ICJ provisional measures order urging the Syrian government to halt and prevent acts of torture and other

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2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 1-10.

<sup>221</sup> For an overview of current R2P scenarios, see Global Centre for the Responsibility to Protect, 'Populations at risk', at <<https://www.globalr2p.org/populations-at-risk/>> accessed 5 November 2024.

<sup>222</sup> HRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (9 February 2024) UN Doc A/HRC/55/64.

<sup>223</sup> Council Implementing Decision (CFSP) 2023/847 of 24 April 2023 implementing Decision 2013/255/CFSP concerning restrictive measures in view of the situation in Syria, OJ L 109I, 24/04/2023, p. 26-37. For further information concerning the 'Tadamon massacre', see Uğur Ümit Üngör, 'The Tadamon Massacre: Archiving Violence through the Perpetrators' Gaze', (2024) 37(1) Visual Anthropology 56; Yassin al-Haj Saleh, 'Anatomy of Tadamon Massacre, Damascus, 2013' (2022) 26(2) Journal of Genocide Research 210.

<sup>224</sup> Council Implementing Decision (CFSP) 2023/847 of 24 April 2023, Recital (4).

cruel, inhuman or degrading treatment or punishment,<sup>225</sup> the Council has recently imposed further sanctions under the EUGHRSR. In particular, restrictive measures were issued against the Minister of Defence and Deputy Commander-in-Chief of the Army as well as the Chief of staff of the Syrian Army for the actions of the armed forces under their command, including torture and systematic and widespread sexual and gender-based violence, which may amount to war crimes and crimes against humanity.<sup>226</sup>

Regarding the situation in Myanmar, following the February 2021 *coup d'état*,<sup>227</sup> and the subsequent military and police repression against peaceful demonstrators, the EU has drastically increased restrictive measures against this country. The Council has so far adopted eight packages of sanctions including the freezing of the assets, prohibition from making funds available, and travel bans for 103 individuals and 21 entities.<sup>228</sup> The list also covers high-ranking members of the Myanmar navy, armed forces, and air force deemed responsible for serious human rights violations and abuses, including Min Aung Hlaing,<sup>229</sup> Commander in Chief of the Myanmar armed forces, one of the main responsible for the commission of mass atrocity crimes, most of which constitute war crimes and crimes against humanity.<sup>230</sup> Apart from individuals, sanctions were also adopted against legal persons. In March 2023, under the EUGHRSR, restrictive measures

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<sup>225</sup> *Application of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (Canada and The Netherlands v. Syrian Arab Republic)* Order of 16 November 2023, paras 79, 83, at <<https://www.icj-cij.org/case/188>> accessed 7 November 2024.

<sup>226</sup> Council Decision (CFSP) 2024/2009 of 22 July 2024 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/2009, 22.7.2024; Council Implementing Regulation (EU) 2024/2008 of 22 July 2024 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/2008, 22.7.2024.

<sup>227</sup> Chapter II, para 1.

<sup>228</sup> Council Decision (CFSP) 2023/2788 of 11 December 2023 amending Decision 2013/184/CFSP concerning restrictive measures in view of the situation in Myanmar/Burma, OJ L, 2023/2788, 11.12.2023; Council Implementing Regulation (EU) 2023/2789 of 11 December 2023 implementing Regulation (EU) No 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma, OJ L, 2023/2789, 11.12.2023.

<sup>229</sup> Council Decision (CFSP) 2022/669 of 21 April 2022 amending Decision 2013/184/CFSP concerning restrictive measures in view of the situation in Myanmar/Burma, OJ L 121, 22/04/2022, p. 45-52; Council Implementing Regulation (EU) 2022/662 of 21 April 2022 implementing Regulation (EU) No 401/2013 concerning restrictive measures in view of the situation in Myanmar/Burma, OJ L 121, 22.4.2022, p. 1-8.

<sup>230</sup> HRC, 'Report of the Independent Investigative Mechanism for Myanmar' (12 July 2022) UN Doc A/HRC/51/4, para 10.

were issued *vis-à-vis* the Office of the Chief of Military Security Affairs (OCMSA) for being responsible for serious human rights violations in Myanmar, including arbitrary detentions and torture, as well as for systematic and widespread sexual and gender-based violence.<sup>231</sup>

Beyond these examples, which confirm an increasing use of the EUGHRSR alongside traditional geographic sanctions, the EU has recently adopted restrictive measures in other R2P scenarios. Without claiming to be exhaustive,<sup>232</sup> we will now focus on a few instances underpinning the interplay between the EU sanctions and the Responsibility to Protect.

For instance, on 26 July 2024, considering the current geopolitical situation in the Democratic Republic of the Congo,<sup>233</sup> the EU adopted further restrictive measures targeting members of non-State armed groups active in the Eastern and North Eastern parts of the country allegedly responsible or involved in the commission of serious human rights violations, which may amount to international core crimes.<sup>234</sup>

As regards the situation in Sudan and South Sudan, the new human rights sanctions regime also stands alongside restrictive measures adopted under other frameworks. On 24 June 2024, the EU issued further restrictive measures to address the current Sudanese

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<sup>231</sup> Council Decision (CFSP) 2023/501 of 7 March 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 11-20; Council Implementing Regulation (EU) 2023/500 of 7 March 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 1-10.

<sup>232</sup> Restrictive measures under the EUGHRSR were also issued, *inter alia*, against Chinese and North Korean individuals and legal entities deemed responsible for serious human rights violations. cf Pérez-Bernárdez (n 197) 147.

<sup>233</sup> In which many of the human rights violations committed could amount to atrocity crimes. See, *inter alia*, United Nations Human Rights, Office of the High Commissioner, ‘In DRC, insecurity is at alarming levels, Türk reports’ (2 April 2024) at <<https://www.ohchr.org/en/statements-and-speeches/2024/04/drc-insecurity-alarming-levels-turk-reports>> accessed 7 November 2024. For further information on the current crisis in the Democratic Republic of the Congo, see Global Centre for the Responsibility to Protect, ‘Democratic Republic of the Congo’ (31 May 2024) at <<https://www.globalr2p.org/countries/democratic-republic-of-the-congo/>> accessed 7 November 2024.

<sup>234</sup> Council Implementing Decision (CFSP) 2024/2064 of 26 July 2024 implementing Decision 2010/788/CFSP concerning restrictive measures in view of the situation in the Democratic Republic of the Congo; Council Implementing Regulation (EU) 2024/2065 of 26 July 2024 implementing Regulation (EC) No 1183/2005 concerning restrictive measures in view of the situation in the Democratic Republic of the Congo.

crisis,<sup>235</sup> where, given the continuous fighting between the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF) and their respective affiliated militia, it has been reported the commission of gross human rights violations, some of which may constitute war crimes and possibly other serious crimes under international law.<sup>236</sup> Within the R2P lens, it is worth focusing on restrictive measures issued against the Commander of the Sudanese Air Force and the RSF Major General and Commander of West Darfur.<sup>237</sup> The former was sanctioned, among other reasons, for the indiscriminate aerial bombing carried out by the SAF Air Force under his command in densely populated residential areas, notably in Khartoum, Omdurman, and Nyala (South Darfur)<sup>238</sup> which, as ‘disproportionate and indiscriminate attacks on civilians’, constitute war crimes.<sup>239</sup> The latter was targeted, *inter alia*, for being responsible for planning, directing, or committing acts in West Darfur. As a matter of fact, it is reported that once advanced in West Darfur, RSF and allied militias committed blatant human rights violations - in particular against the Masalit community - including rape, and other forms of sexual violence against women and girls, some of which may amount to war crimes and crimes against humanity.<sup>240</sup> Restrictive measures imposed under the EUGHRSR complement this framework through which the EU, on several occasions, sanctioned high-ranking South Sudanese military members responsible for serious human rights violations in South Sudan.<sup>241</sup>

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<sup>235</sup> Council Decision (CFSP) 2024/1784 of 24 June 2024 amending Decision (CFSP) 2023/2135 concerning restrictive measures in view of activities undermining the stability and political transition of Sudan, OJ L, 2024/1784, 24.6.2024; Council Implementing Regulation (EU) 2024/1783 of 24 June 2024 implementing Regulation (EU) 2023/2147 concerning restrictive measures in view of activities undermining the stability and political transition of Sudan, OJ L, 2024/1783, 24.6.2024.

<sup>236</sup> HRC, ‘Situation of human rights in the Sudan’ (4 March 2024) UN Doc A/HRC/55/29, para 100.

<sup>237</sup> *ibid.*

<sup>238</sup> Report of the Secretary-General, ‘Situation in the Sudan and the activities of the United Nations Integrated Transition Assistance Mission in the Sudan’ (13 November 2023) UN Doc S/2023/861, paras 16, 17, 30. It is also reported that ‘While the total number of civilian casualties remains difficult to calculate, a conservative estimate is that 4,000 to 5,000 civilians have been killed since the start of the conflict’. UN Doc S/2023/861 para 17. See also paras 37, 57.

<sup>239</sup> art. 8(2)(b)(i) Rome Statute; art. 8(2)(e)(i) Rome Statute.

<sup>240</sup> HRC, ‘Situation of human rights in the Sudan’ (n 236) para 46; UN Doc S/2023/861, p. 2.

<sup>241</sup> Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 99I, 22.3.2021, p. 25-36; Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L

As outlined at the beginning of this section, during the last few years, together with sanctions issued against individuals, restrictive measures have also been adopted *vis-à-vis* entities, including the Wagner Group, a Russia-based unincorporated private military entity, present in several countries, including Ukraine, Libya, the Central African Republic (CAR), Mali and Sudan, allegedly responsible for the commission of gross human rights violations worldwide.<sup>242</sup> Restrictive measures imposed against its members further underscore the complementary character of geographic and thematic sanctions. It is worth recalling that the interplay between geographic and thematic sanctions enhances the effectiveness and flexibility of the EU's sanctions machinery while also mitigating adverse consequences on the civilian population. In fact, on 25 February 2023, the Council decided to list eight individuals and seven entities under the EUGHRSR deemed responsible for or involved in gross human rights violations in the Central African Republic and Sudan.<sup>243</sup> It is important to stress that members of the Wagner Group have been accused of having committed blatant human rights violations, including torture and other cruel, inhuman or degrading treatment or punishment, and extrajudicial, summary or arbitrary executions and killings.<sup>244</sup> Wagner Group's actions may also amount to mass atrocity crimes, undermining therefore not only common foreign and security policy goals

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99I, 22.3.2021, p. 1-12; Council Decision (CFSP) 2023/501 of 7 March 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 11-20; Council Implementing Regulation (EU) 2023/500 of 7 March 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 1-10; Council Decision (CFSP) 2023/1500 of 20 July 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 183I, 20.7.2023, p. 35-46; Council Implementing Regulation (EU) 2023/1499 of 20 July 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 183I, 20.7.2023, p. 30-34. For further information on human rights violations in Sudan and South Sudan see, *inter alia*, Sriram, Martin-Ortega, Herman (n 65) 153-176.

<sup>242</sup> For further information, see Marek Górká, 'The Wagner Group as a Tool of Russian Hybrid Warfare' (2023) 52(2) Polish Political Science Yearbook 83; Michel Klen, 'Wagner Group Penetration into Africa' (2023) 860(5) Revue Défense Nationale 53.

<sup>243</sup> Council Decision (CFSP) 2023/433 of 25 February 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 59I, 25.2.2023, p. 583-592; Council Implementing Regulation (EU) 2023/430 of 25 February 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 59I, 25/02/2023, p. 423-433.

<sup>244</sup> Council Decision (CFSP) 2023/433, Recital (4). Council Decision (CFSP) 2023/433 of 25 February 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 59I, 25.2.2023, p. 583-592.

enshrined in Article 21 TEU but also basic principles of international law, having an *erga omnes* or even peremptory character. As additional proof of the complementarity between geographic and thematic sanctions, on the same day, under the Malian sanctions regime, the Council also sanctioned Ivan Aleksandrovitch Maslov, Head of the Wagner Group in Mali.<sup>245</sup> It is noteworthy that, among other crimes, Wagner mercenaries operating in Mali under Maslov's command have been involved in serious human rights abuses, including extrajudicial killings, such as the 'Moura massacre' at the end of March 2022. The 2023 UN Human Rights Office Report on the situation in Mali indicated that, as a consequence of the five-day military operation in the Moura region that occurred in March 2022, more than 500 people were killed by Malian troops and foreign military personnel, including those belonging to the Wagner Group.<sup>246</sup> It also reported that, amongst the various crimes perpetrated in that region, summary executions, rape, and torture committed during the armed conflict amounted to war crimes.<sup>247</sup> If committed as part of a widespread or systematic attack against any civilian population, these crimes could also be qualified as crimes against humanity.<sup>248</sup>

On 25 February 2023, on the occasion of the 10<sup>th</sup> package of the geographic sanctions against Russia, two additional members of the Wagner Group were sanctioned

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<sup>245</sup> Council Decision (CFSP) 2023/431 of 25 February 2023 amending Council Decision (CFSP) 2017/1775 concerning restrictive measures in view of the situation in Mali, OJ L 59I, 25.2.2023, p. 434-436; Council Implementing Regulation (EU) 2023/428 of 25 February 2023 implementing Article 12(2) of Regulation (EU) 2017/1770 concerning restrictive measures in view of the situation in Mali, OJ L 59I, 25/02/2023, p. 275-277.

<sup>246</sup> United Nations Human Rights, Office of the High Commissioner, '*Rapport sur les événements de Moura du 27 au 31 mars 2022*' (May 2023) para 21, at <<https://www.ohchr.org/sites/default/files/documents/countries/mali/20230512-Moura-Report.pdf>> accessed 7 November 2024. See also United Nations Human Rights, Office of the High Commissioner, 'Malian troops, foreign military personnel killed over 500 people during military operation in Moura in March 2022 - UN human rights report' (12 May 2023) at <<https://www.ohchr.org/en/press-releases/2023/05/malian-troops-foreign-military-personnel-killed-over-500-people-during>> accessed 7 November 2024; EEAS, '*Mali: Déclaration du Haut Représentant/Vice-Président Josep Borrell suite à la publication du rapport sur les événements de Moura du 27 au 31 mars 2022*' (16 May 2023) at <[https://www.eeas.europa.eu/eeas/mali-d%C3%A9claration-du-haut-repr%C3%A9sentantvice-pr%C3%A9sident-josep-borrell-suite-%C3%A0-la-publication-du-rapport\\_fr](https://www.eeas.europa.eu/eeas/mali-d%C3%A9claration-du-haut-repr%C3%A9sentantvice-pr%C3%A9sident-josep-borrell-suite-%C3%A0-la-publication-du-rapport_fr)> accessed 7 November 2024.

<sup>247</sup> United Nations Human Rights, Office of the High Commissioner, '*Rapport sur les événements de Moura du 27 au 31 mars 2022*' (n 246). In particular, see for summary executions, para 67; rape, para 71; torture, para 73.

<sup>248</sup> *ibid* para 77.

for the actions undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine.<sup>249</sup>

#### 4.4.1 EU Sanctions against Russia

In response to the unprovoked and unjustified war of aggression waged by the Russian Federation against Ukraine, and as further evidence of the awareness of its geopolitical role played within the international framework,<sup>250</sup> the EU has adopted massive and unprecedented sanctions against Russia. Since the start of Russia's full-scale invasion of Ukraine on 24 February 2022, acting under the sanctions regime established in 2014 following the annexation of Crimea and the lack of implementation of the Minsk agreements,<sup>251</sup> the EU has so far adopted 14 packages of sanctions, including targeted restrictive measures, economic sanctions, diplomatic measures, and visa measures.<sup>252</sup> The EU has also issued restrictive measures against Belarus, Iran, and the Democratic People's Republic of Korea (DPRK), in light of their support to Russia in the military aggression against Ukraine.<sup>253</sup> Moreover, at the time of writing, more than 2300

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<sup>249</sup> Council Decision (CFSP) 2023/432 of 25 February 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 59I, 25.2.2023, p. 437-582; Council Regulation (EU) 2023/426 of 25 February 2023 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 59I, 25/02/2023, p. 1-5.

<sup>250</sup> cf Alessandro Mario Amoroso, 'Il contributo delle misure restrittive UE contro la Russia allo sviluppo del diritto internazionale delle sanzioni' (21 May 2022) at <<https://www.diritticomparati.it/il-contributo-delle-misure-restrittive-ue-contro-la-russia-allo-sviluppo-del-diritto-internazionale-delle-sanzioni/>> accessed 7 November 2024.

<sup>251</sup> Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17.3.2014, p. 16-21; Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17.3.2014, p. 6-15.

<sup>252</sup> EU Council, 'EU Restrictive Measures against Russia over Ukraine (since 2014)' at <<https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/>> accessed 7 November 2024. For an evaluation of their impact, see, *inter alia*, European Parliamentary Research Service, *EU sanctions on Russia: Overview, impact, challenges* (March 2023); Clara Portela, Janis Kluge, *Slow-Acting Tools: Evaluating EU sanctions against Russia after the invasion of Ukraine* (EUISS 2022).

<sup>253</sup> EU Council, 'EU sanctions against Russia' at <<https://www.consilium.europa.eu/en/policies/sanctions-against-russia/>> accessed 7 November 2024. For further information on sanctions issued *vis-à-vis* States supporting the Russian war of aggression in Ukraine, see, *inter alia*, Claire Mills, *Sanctions against countries supporting Russia's invasion of Ukraine*

individuals and entities have been included in the EU's Russian sanctions list. It is worth highlighting that the list also includes individuals and entities responsible for or involved in the commission of the atrocities perpetrated in Bucha and Mariupol as well as in the deportation and forced adoption of Ukrainian children, which constitute international core crimes.

As for the situation in Bucha, there appears to be sufficient evidence of war crimes, in the form of killing, rape, and torture perpetrated by the Russian army against Ukrainian.<sup>254</sup> The bombardments in Mariupol,<sup>255</sup> including the shelling of a maternity hospital and a theatre,<sup>256</sup> are also considered war crimes and possible crimes against humanity.<sup>257</sup> To face this situation, on 3 June 2022, on the occasion of the 6<sup>th</sup> package of sanctions against Russia, the Council included in the sanctions list high-ranking military officers and other individuals who committed war crimes in Bucha and who are deemed responsible for the brutal siege of the city of Mariupol.<sup>258</sup> In particular, restrictive measures were issued against Azatbek Asanbekovich Omurbekov, commander of the 64th Separate Motorised Rifle Brigade of the 35th Combined Arms Army of the Russian Federation, also known as the 'Butcher of Bucha', for being directly responsible for the killings, rapes and torture of civilians in Bucha.<sup>259</sup> Similarly, as regards the siege of Mariupol, a travel ban and freezing of funds were adopted against Mikhail Evgenievich Mizintsev, Head of the National Defense Control Center of the Russian Federation,

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(17 July 2024) at <<https://commonslibrary.parliament.uk/research-briefings/cbp-10048/>> accessed 7 November 2024.

<sup>254</sup> UNGA, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 October 2022) UN Doc A/77/533, para 109; HRC, 'Report of the Independent International Commission of Inquiry on Ukraine' (25 September 2023) UN Doc A/HRC/52/62 para 109.

<sup>255</sup> HRC, 'Report of the Independent International Commission of Inquiry on Ukraine' (25 September 2023) UN Doc A/HRC/52/62, paras 31-35; HRC, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 March 2024) UN Doc A/HRC/55/66, paras 13-24.

<sup>256</sup> UN Doc A/HRC/52/62, para 31; UN Doc A/HRC/55/66, paras 18, 24.

<sup>257</sup> *ibid* paras 34-35; para 24.

<sup>258</sup> Council Decision (CFSP) 2022/883 of 3 June 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 153, 3.6.2022, p. 92-127; Council Implementing Regulation (EU) 2022/878 of 3 June 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 153, 3.6.2022, p. 15-52.

<sup>259</sup> *ibid*.

nicknamed the ‘Butcher of Mariupol’, for being directly responsible in ‘[...] orchestrating the bombardments of the city of Mariupol, including the shelling of a Mariupol maternity hospital and a theatre as well as killing thousands of civilians, children included’.<sup>260</sup> In March 2023, Nikolay Kuznetsov, commander of a unit of Russian special forces deployed in Ukraine, was added to the EU’s sanctions list under the EUGHRSR, thus further proving of the interoperability of the various sanctions regimes at the EU’s disposal; Kuznetsov is allegedly responsible for encouraging or ordering the commission of acts of sexual violence perpetrated by the members of his division in Ukraine in March and April 2022.<sup>261</sup>

Since July 2022, starting with Council Decision (CFSP) 2022/1271 and subsequent Regulation (EU) 2022/1270,<sup>262</sup> the EU has also repeatedly sanctioned individuals who are deemed involved in the deportation and forced adoption of Ukrainian children.<sup>263</sup> Amongst them, it is worth focusing on Ms. Lvova-Belova, Commissioner for Children’s Rights in the Office of the President of the Russian Federation, is considered to be heavily involved in the illegal transportation of Ukrainian children to Russia and their adoption by Russian families. On 17 March 2023, the ICC Pre-Trial Chamber II issued arrest warrants against her, together with the president of the Russian Federation, Vladimir Putin, for being purportedly responsible for the war crime of unlawful deportation and transfer of children from occupied areas of Ukraine to the Russian Federation.<sup>264</sup>

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<sup>260</sup> *ibid.*

<sup>261</sup> Council Decision (CFSP) 2023/501 of 7 March 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 11-20; Council Implementing Regulation (EU) 2023/500 of 7 March 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 69I, 7.3.2023, p. 1-10.

<sup>262</sup> Council Decision (CFSP) 2022/1271 of 21 July 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, OJ L 193, 21.7.2022, p. 196-218; Council Implementing Regulation (EU) 2022/1270 of 21 July 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 193, 21.7.2022, p. 133-195.

<sup>263</sup> Directorate General for External Policies of the Union, *Forcible transfer and deportation of Ukrainian children: Responses and accountability measures* (January 2024).

<sup>264</sup> ICC, ‘Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (17 March 2023) at <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>> accessed 5 September 2024.

Unlawful deportation and transfer of population, including children, carried out by the Occupying Power from occupied areas are qualified as war crimes.<sup>265</sup> The arrest warrants issued by the ICC state that there are reasonable grounds to hold Vladimir Putin and Maria Lvova-Belova criminally responsible for the abovementioned crimes, having committed these acts as individuals, jointly with another, or through another person, whether criminally responsible or not, as enshrined in Article 25(3)(a) of the Rome Statute.<sup>266</sup> It is noteworthy that these arrest warrants are directly binding on the 124 countries that have ratified the Rome Statute,<sup>267</sup> as well as on Ukraine, which has expressly agreed to cooperate with the ICC in accordance with Section IX of the Rome Statute through its two unilateral declarations.<sup>268</sup> Therefore, as envisaged in Article 89 of the Statute, these States are required to proceed with the arrest of persons included in an arrest warrant issued by the ICC. Nevertheless, practice has shown a high level of non-compliance with this obligation;<sup>269</sup> this is well illustrated by the arrest warrants issued against former Sudanese President Al-Bashir,<sup>270</sup> which have not been respected by many African States party to the Rome Statute.<sup>271</sup> A similar situation seems to be currently unfolding regarding

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<sup>265</sup> art. 8(2)(a)(vii) Rome Statute, art. 8(2)(b)(viii) Rome Statute.

<sup>266</sup> art. 25(3)(a) Rome Statute.

<sup>267</sup> On 1 February 2024, Armenia became the 124<sup>th</sup> State party of the Rome Statute. ICC, 'Armenia joins the ICC Rome Statute' (17 November 2023) at <<https://www.icc-cpi.int/news/armenia-joins-icc-rome-statute>> accessed 8 November 2024.

<sup>268</sup> With the first declaration, issued on 9 April 2014, Ukraine accepted ICC jurisdiction concerning alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014. On 8 September 2015, the Government of Ukraine lodged a second unilateral declaration extending this time-period from 20 February 2014 onwards, with no end date. For further information, see ICC, 'Situation in Ukraine' at <<https://www.icc-cpi.int/situations/ukraine>> accessed 8 November 2024.

<sup>269</sup> Concepción Escobar-Hernández, 'Ucrania y la Corte Penal Internacional: una oportunidad para la Corte y para la lucha contra la impunidad' (2022) 74(2) *Revista Española de Derecho Internacional* 57, 72.

<sup>270</sup> Pre-Trial Chamber I, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (4 March 2009) ICC-02/05-01/09-3; Pre-Trial Chamber I, *Second Warrant of Arrest for Omar Hassan Ahmed Al Bashir* (12 July 2010) ICC-02/05-01/09-95.

<sup>271</sup> See, *inter alia*, Pre-Trial Chamber I, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure of the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (12 December 2011) ICC-02/05-01/09-139. See also, Pre-Trial Chamber I, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (13 December 2011) ICC-02/05-01/09-140; Pre-Trial Chamber II, *Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir* (26 March 2013) ICC-02/05-01/09-151; Pre-Trial Chamber II, *Decision on the Cooperation of the Democratic*

the implementation of the arrest warrant issued against the Russian President Vladimir Putin.<sup>272</sup>

Apart from Ms. Lvova, on 25 February 2023, on the occasion of the 10<sup>th</sup> geographic sanctions package, the EU sanctioned further individuals allegedly responsible for the deportation and forced adoption of Ukrainian children, based on the supplementary evidence supporting the commission of these crimes.<sup>273</sup> Almost one year later, under the 13<sup>th</sup> package of geographic sanctions against Russia, the EU issued restrictive measures on additional 15 individuals and two entities, the non-governmental organisation ‘Delfini’ and the Alexey Talay Foundation,<sup>274</sup> involved in the forced transfer, deportation, and military indoctrination of Ukrainian children, including in Belarus.<sup>275</sup>

Given the abovementioned examples regarding restrictive measures adopted as a response to the commission of blatant human rights violations committed in Ukraine, it is safe to state that, if employed in accordance with the EU and international legal framework, the sanctioning tools at the EU’s disposal, including the recent EUGHRSR,

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*Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court* (9 April 2014) ICC-02/05-01/09-195; Pre-Trial Chamber II, *Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of Sudan*, (9 March 2015) ICC-02/05-01/09-227; Pre-Trial Chamber II, *Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute* (11 July 2016) ICC-02/05-01/09; Pre-Trial Chamber II, *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir* (11 December 2017) ICC-02/05-01/09. For further information see, ICC, ‘Non-cooperation’ available at <<https://asp.icc-cpi.int/non-cooperation>> accessed 8 November 2024.

<sup>272</sup> Amnesty International, ‘Mongolia: Putin must be arrested and surrendered to the International Criminal Court’ (2 September 2024) at <<https://www.amnesty.org/en/latest/news/2024/09/mongolia-putin-must-be-arrested-and-surrendered-to-the-international-criminal-court/>> accessed 8 November 2024.

<sup>273</sup> Council Decision (CFSP) 2023/432 of 25 February 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 59I, 25.2.2023, p. 437-582; Council Implementing Regulation (EU) 2023/429 of 25 February 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 59I, 25.2.2023, p. 278-422.

<sup>274</sup> For further detail, see <<https://t.me/s/delfini2022>>, <<https://alexeytalai.by/>> accessed 8 November 2024.

<sup>275</sup> Council Decision (CFSP) 2024/747 of 23 February 2024 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L, 2024/747, 23.2.2024; Council Implementing Regulation (EU) 2024/753 of 23 February 2024 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L, 2024/753, 23.2.2024.

could serve as a significant resource for the Union to fight against the commission of international crimes, thereby facilitating the implementation of the Responsibility to Protect.

#### 4.4.2 EU Sanctions against Israel

The EU has shown strong activism in condemning and sanctioning Russia for its war of aggression against Ukraine; differently, it has taken a more cautious position in other similar scenarios, specifically regarding the situation in Israel and the Occupied Palestinian Territory (OPT) that has arisen in this context since 7 October 2023.<sup>276</sup> The analysis of this framework is crucial to ensure the consistency of the EU's sanctions machinery to uphold universal values in accordance with international law and avoid accusations of double standards that could compromise its credibility in the international arena.<sup>277</sup>

Although war crimes have been committed by both sides, for the time being, the EU's sanctioning action has mainly focused on condemning and targeting individuals and entities linked with Hamas and the Palestinian Islamic Jihad (PIJ).<sup>278</sup>

Restrictive measures issued against Hamas and the PIJ should be seen as significant evidence of the complementarity of the various sanctions regimes having as a common goal to sanction, *inter alia*, those allegedly responsible for the commission of war crimes and crimes against humanity. On 7 December 2023, under the terrorist sanctions framework,<sup>279</sup> in response to Hamas' brutal and indiscriminate terrorist attacks, the Council included to the terrorist list two high-ranking members of the military wing of

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<sup>276</sup> see Chapter II, para 1.

<sup>277</sup> cf Pérez-Bernárdez (n 197) 143, 155.

<sup>278</sup> EU Council, 'Statement by the High Representative on behalf of the European Union on the attacks against Israel' (7 October 2023) at <<https://www.consilium.europa.eu/en/press/press-releases/2023/10/07/statement-by-the-high-representative-on-behalf-of-the-european-union-on-the-attacks-against-israel/>> accessed 8 November 2024.

<sup>279</sup> Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001.

Hamas.<sup>280</sup> On 16 January 2024, Yahia Sinouar, the political leader of Hamas, was added to the abovementioned list.<sup>281</sup>

Given the gravity of the events that occurred on 7 October 2023, and intending to halt and prevent such violent actions, on 19 January 2024, the Council adopted a new sanctions regime through Decision (CFSP) 2024/385 and subsequent Regulation (EU) 2024/386, that allows the EU to hold accountable any individual or entity supporting, facilitating or enabling violent actions by Hamas and the PIJ.<sup>282</sup> This new sanctions regime also targets those involved in the commission of serious violations of international humanitarian law or human rights law which may amount to mass atrocity crimes.<sup>283</sup> It is also worth highlighting that, as further acknowledged by the six individuals sanctioned under this new regime, the EU, for the first time, is also entitled to sanction natural and legal persons providing support to those facilitating or enabling violent action by Hamas and the PIJ. Restrictive measures have been further complemented by the listing of three military entities of Hamas and Palestinian Islamic Jihad under the EUGHRSR, deemed

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<sup>280</sup> The persons listed were Mohammed Deif, Commander General of the military wing of Hamas ‘Brigades Ezzedin al-Qassam’, and Marwan Issa, the deputy Commander of the military wing of Hamas. Council Decision (CFSP) 2023/2764 of 7 December 2023 amending the list of persons, groups and entities subject to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ L, 2023/2764, 7.12.2023; Council Implementing Regulation (EU) 2023/2765 of 7 December 2023 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L, 2023/2765, 7.12.2023.

<sup>281</sup> Council Decision (CFSP) 2024/332 of 16 January 2024 updating the list of persons, groups and entities covered by Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2023/1514, OJ L, 2024/332, 16.1.2024; Council Implementing Regulation (EU) 2024/329 of 16 January 2024 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation (EU) 2023/1505, OJ L, 2024/329, 16.1.2024. These acts have been recently amended by Council Decision (CFSP) 2024/2056 of 26 July 2024 updating the list of persons, groups and entities covered by Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2024/332, OJ L, 2024/2056, 26.7.2024; Council Implementing Regulation (EU) 2024/2055 of 26 July 2024 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation (EU) 2024/329, OJ L, 2024/2055, 26.7.2024.

<sup>282</sup> Council Decision (CFSP) 2024/385 of 19 January 2024 establishing restrictive measures against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad, OJ L, 2024/385, 19.1.2024; Council Regulation (EU) 2024/386 of 19 January 2024 establishing restrictive measures against those who support, facilitate or enable violent actions by Hamas and the Palestinian Islamic Jihad, OJ L, 2024/386, 19.1.2024.

<sup>283</sup> *ibid.*

responsible for having perpetrated widespread sexual and gender-based violence systematically, including the sexual abuse of minors, rape and subsequent murder of female minors, genital mutilations and the targeted abduction of women and girls.<sup>284</sup> It is worth recalling that widespread sexual and gender-based violence, including rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization may amount to war crimes.<sup>285</sup> If committed as part of a widespread or systematic attack directed against any civilian population, they can also constitute crimes against humanity.<sup>286</sup>

If, on the one hand, the EU has shown a greater commitment to sanctioning individuals and legal entities of Hamas and PIJ for the events that have taken place since 7 October 2023 in Israel and OPT, on the other, at least initially, it has demonstrated a more cautious approach towards Israel, which is also held responsible for the commission of serious international crimes, including war crimes and crimes against humanity. However, the EU has recently adopted a more proactive stance towards this country. This shifting is due to, *inter alia*, further evidence of international core crimes committed by both sides.<sup>287</sup> Moreover, the recent provisional measures orders delivered by the ICJ in the *South Africa v. Israel* case, urged Israel, *inter alia*, to ‘immediately halt its military offensive’.<sup>288</sup> The July 2024 ICJ Advisory Opinion further posited that Israel’s continued

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<sup>284</sup> Council Decision (CFSP) 2024/1074 of 12 April 2024 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/1074, 12.4.2024; Council Implementing Regulation (EU) 2024/1073 of 12 April 2024 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/1073, 12.4.2024.

<sup>285</sup> Which are sanctioned for both international and non-international armed conflicts (IACs and NIACs). See arts. 8(2)(b)(xxii) and 8(2)(e)(vi) Rome Statute.

<sup>286</sup> art. 7(1)(g) Rome Statute.

<sup>287</sup> As a matter of fact, it has been reported that Israel has committed war crimes. HRC, Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, ‘Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023’ (10 June 2024) UN Doc A/HRC/56/CRP.4, paras 419-456. The Independent International Commission of Inquiry has also acknowledged that, apart from constituting war crimes, acts of murder, forcible transfer, and inhuman and cruel treatment also amount to crimes against humanity. It has further stressed that Israel has committed other crimes against humanity, such as extermination and gender persecution. UN Doc A/HRC/56/CRP.4, paras 457-474.

<sup>288</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* Order of 24 May 2024, para 250. As for the first and second provisional measure 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; *Application of the Convention on the*

presence in the Occupied Palestinian Territory is unlawful.<sup>289</sup> In June 2024, on the occasion of the European Council conclusions, the EU firmly condemned the ongoing extremist settler violence in the West Bank, including East Jerusalem, as well as the Israeli government's decisions to continue to expand illegal settlements across the occupied West Bank.<sup>290</sup> The flexibility and speed provided by the adoption of horizontal sanctions have facilitated an initial action against Israel by issuing restrictive measures under the EUGHRSR targeting extremist Israeli settlers deemed responsible for significant human rights violations against Palestinians. On 19 April 2024, the Council adopted Decision (CFSP) 2024/1175 and Regulation (EU) 2024/1172 *vis-à-vis* four individuals and two entities allegedly responsible, *inter alia*, of acts of torture and other cruel, inhuman or degrading treatment or punishment committed during the October attacks.<sup>291</sup> In July 2024, the Council issued further restrictive measures under the EUGHRSR which targeted extremist Israeli settlers in the occupied West Bank and East Jerusalem, as well as violent activists, blocking humanitarian aid to Gaza.<sup>292</sup> Within the

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*Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* Order of 28 March 2024. See <<https://www.icj-cij.org/case/192>> accessed on 8 November 2024.

<sup>289</sup> *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para 259, at <<https://www.icj-cij.org/case/186>> accessed 5 September 2024. For further information, see, *inter alia*, Marko Milanovic, 'ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories' (EJIL:Talk, 20 July 2024) at <<https://www.ejiltalk.org/icj-delivers-advisory-opinion-on-the-legality-of-israels-occupation-of-palestinian-territories/>> accessed 8 November 2024. It is also worth recalling that in the 2004 *Wall* Advisory Opinion, the ICJ acknowledged: 'The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law'. *Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, p. 201, para 163, subparagraph (3)(A). For a critical analysis of the EU position concerning the *Wall* Advisory Opinion see, *inter alia*, Carmela Pérez-Bernárdez, 'Some Comments Concerning the Advisory Opinion of the International Court of Justice on the Construction of a Wall in the Occupied Palestinian Territory: The Performance of the European Union' (1 February 2005) UC Berkeley, Institute of European Studies, at <<https://escholarship.org/uc/item/6923r455>> accessed 8 November 2024.

<sup>290</sup> European Council, European Council Conclusions (27 June 2024) EUCO 15/24, para 21.

<sup>291</sup> In particular, restrictive measures were adopted against Neria Ben Pazi for having participated in October 2023 in a violent attack in Wadi Seeq, where Palestinians were severely beaten, handcuffed, and photographed in their underwear. See Council Decision (CFSP) 2024/1175 of 19 April 2024 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/1175, 19.4.2024; Council Implementing Regulation (EU) 2024/1172 of 19 April 2024 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/1172, 19.4.2024.

<sup>292</sup> Council Decision (CFSP) 2024/1967 of 15 July 2024 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/1967,

R2P lens, it is important to note that, amongst the five persons and three entities sanctioned, the Council decided to sanction a member of the extremist right political party ‘Otzma Yehudit’ for openly calling for an ethnic cleansing of the Palestinians.<sup>293</sup>

Even though, the EU has not yet adopted geographic sanctions or thematic restrictive measures against Israel and its leaders, the use of the EUGHRSR to target Israeli settlers strengthens the EU’s position in uniformly employing its sanctioning tools against those responsible for the commission of blatant human rights violations, including mass atrocity crimes. As proof of this trend, the High Representative has recently proposed to sanction Israeli ministers for hate speech and incitement to war crimes against Palestinians.<sup>294</sup> It is also worth mentioning that, at the time of writing, the ICC Pre-Trial Chamber I issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant for being allegedly responsible for the war crime of starvation as a method of warfare and the crimes against humanity of murder, persecution, and other inhumane acts.<sup>295</sup> Although it is too early to assess the implications of the arrest warrants within the EU, it would be interesting to appraise whether the Union could use this occasion to provide a resolute answer to double standards accusations and lack of consistency of its sanctions in response to gross human rights violations committed in third States.

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15.7.2024; Council Implementing Regulation (EU) 2024/1960 of 15 July 2024 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L, 2024/1960, 15.7.2024.

<sup>293</sup> *ibid.*

<sup>294</sup> EEAS, ‘Informal meeting of EU Foreign Ministers: Press remarks by High Representative upon arrival’ (29 September 2024) at <[https://www.eeas.europa.eu/eeas/informal-meeting-eu-foreign-ministers-press-remarks-high-representative-upon-arrival\\_en](https://www.eeas.europa.eu/eeas/informal-meeting-eu-foreign-ministers-press-remarks-high-representative-upon-arrival_en)> accessed 8 November 2024.

<sup>295</sup> ICC, ‘Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel’s challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant’ (21 November 2024) at <<https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges>> accessed 21 November 2024. For an overview of the situation of Palestine before the ICC, see, *inter alia*, Seada Hussein Adem, *Palestine and the International Criminal Court* (Springer 2019); Triestino Mariniello, Chantal Meloni, ‘Litigating Palestine before the International Criminal Court’ (2020) 18(4) *Journal of International Criminal Justice* 881.

## 5. The implications of the European Union's response in international law

Looking at the role played by the Union within the international legal framework, we shall now focus on whether the European Union, in its attempt to implement the Responsibility to Protect, can also positively contribute to the strict observance and development of international law, including International Organizations' duty to cooperate to put an end, through lawful means, to any serious *jus cogens* violation, as outlined in Article 42(1) ARIO.<sup>296</sup> Within this framework, special emphasis will be given to the EU sanctions and their legitimacy under the international legal framework when adopted to address serious *jus cogens* violations.

### 5.1 The duty to cooperate

The European Union, as a subject of international law,<sup>297</sup> falling within the notion of International Organization envisaged in Article 2(a) ARIO, is called to play a significant role in this domain. The Lisbon Treaty established ambitious goals for the Union, including '[...] the strict observance and the development of international law'.<sup>298</sup> Therefore, notwithstanding its functional personality, the Union has to, *inter alia*, actively contribute to halting the commission of serious *jus cogens* violations. Given the International Organizations' prominent role within the international legal framework,<sup>299</sup> their actions might be crucial in fostering the positive development of international law, including International Organizations' duty to cooperate, which applies even when a State commits a breach.<sup>300</sup> As a matter of fact, it has recently been stated that:

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<sup>296</sup> ILC, 'Draft Articles on the Responsibility of International Organizations' (hereinafter ARIO). 'Report of the International Law Commission of its Sixty-third session' (26 April–3 June and 4 July–12 August 2011), UN Doc A/66/10, reproduced in *Yearbook of the International Law Commission*, 2011, vol. II, part two, pp. 40-46.

<sup>297</sup> art. 47 TUE.

<sup>298</sup> art. 3(5) TEU. cf Introduction, para 1.2.

<sup>299</sup> '[...] playing a subsidiary, and yet important role'. UN Doc A/CN.4/748, p. 39.

<sup>300</sup> ARIO (n 296) 135.

‘[...] where an international organization has the discretion to act, the obligation to cooperate imposes a duty on the members of that international organization to act with a view to the organization exercising that discretion in a manner to bring to an end the breach of a peremptory norm of general international law (*jus cogens*).’<sup>301</sup>

It is under this framework that the Union, by employing the means that are reasonably available to it,<sup>302</sup> in line with its due diligence obligations,<sup>303</sup> can substantially contribute towards shedding light on its legal nature<sup>304</sup> by enhancing the legal dimension of the duty to cooperate to halt the commission of serious *jus cogens* violations.

Recent practice seems to consolidate this view. For instance, it is worth noting that the main aim of the EU’s weapons supply to Ukraine lies in protecting the civilian population from the ongoing Russian military aggression.<sup>305</sup> Besides providing a strong reference to the R2P realm, the supply of military equipment designed to deliver lethal force to a State in which serious violations of peremptory norms of general international law have been committed, including the prohibition of the use force, war crimes and crimes against humanity,<sup>306</sup> can also be interpreted as strengthening current practice regarding States’ and International Organizations’ duty to cooperate to bring an end to serious violations of peremptory norms through lawful means. Moreover, a prompt and effective implementation of the Rapid Deployment Capacity outlined in the *Strategic*

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<sup>301</sup> ILC, ‘Report of the International Law Commission on the work of its seventy-third session’ (18 April–3 June and 4 July–5 August 2022) UN Doc A/77/10, 75-76.

<sup>302</sup> *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.

<sup>303</sup> Which also applies to International Organizations. cf Serena Forlati, ‘Due Diligence’ in Christina Binder, Manfred Nowak, Jane A Hofbauer, Philipp Janig (eds), *Elgar Encyclopedia of Human Rights* (Elgar 2022) 531, 535.

<sup>304</sup> A few States still question whether the duty to cooperate currently reflects customary international law or rather a progressive development of international law. cf Chapter II, para 4.

<sup>305</sup> Council Decision (CFSP) 2022/338, art. 1(2).

<sup>306</sup> As witnessed by the Independent International Commission of Inquiry on Ukraine. UNGA, ‘Report of the Independent International Commission of Inquiry on Ukraine’ (18 October 2022) UN Doc A/77/533, para 109.

*Compass* could also serve as additional evidence of the EU's efforts to consolidate this perspective.

While practice appears to indicate an increasing recognition of International Organizations' duty to cooperate, *opinio iuris* does not seem to accommodate this view. Remarkably, none of the aforementioned acts directly addresses the duty to cooperate. It would be appropriate for the European Union to clarify the legal basis of such actions, recognising that initiatives such as supplying weapons to a third country in which serious international crimes are being committed, do not merely reflect a policy goal, but also a concrete willingness to contribute to the strict observance and development of international law, including the obligation to cooperate to halt serious *jus cogens* violations.

## **5.2 Sanctions and collective countermeasures**

Alongside the tools discussed above, sanctions deserve a separate analysis. As seen before, the EU has increasingly employed this instrument to target States and individuals responsible for, involved in, or associated with, *inter alia*, the commission of *jus cogens* violations. In response to the war of aggression waged by the Russian Federation against Ukraine, the Union has adopted an unprecedented number and types of sanctions, targeting also those deemed responsible for the commission of war crimes and crimes against humanity perpetrated in the Ukrainian territory. Other geographic sanctions, including the Syria, Myanmar, Congo, and Sudan sanctions regimes also address serious violations of international law. The EUGHRSR further enhances this framework since it has been increasingly employed to target those deemed responsible for the commission of gross human rights violations. Accordingly, EU sanctions are crucial for confirming the crystallization of the duty to cooperate.

The EU's sanctions in addressing serious human rights violations should be regarded as a unified stance of a group of 27 member States aimed at safeguarding universal values that intersect with those that the Union commits to uphold and promote

in its external relations. However, the existence of the unanimity rule<sup>307</sup> significantly hinders the need for a prompt, effective, and consistent response of the Union in this domain since member States seeking to condition a specific policy could obstruct the EU's initiatives on the matter.<sup>308</sup> To address this issue, proposals have been put forward to switch to qualified majority voting in adopting restrictive measures in the context of serious human rights violations.<sup>309</sup>

The EU restrictive measures might also be regarded as an attempt to compensate, albeit not replace, UN Security Council's inaction caused by the threat or use of the veto power, which leads to the impossibility of adopting measures according to Chapter VII of the UN Charter.<sup>310</sup>

The EU's sanctions could also have a positive impact in the geopolitical arena. Concerning the EUGHRSR, it is worth mentioning that other third countries, including the United States, Canada, the United Kingdom, Australia and Japan, have adopted similar mechanisms internally.<sup>311</sup> Similarly, a joint geographical sanctioning effort has been taken concerning the situation in Ukraine.<sup>312</sup> Although it is not the focus of this work, it is noteworthy that coordination and cooperation between the EU and third States might increase the effectiveness of sanctions addressing, *inter alia*, gross human rights violations; it also provides greater legitimacy of the EU acting as a global actor in the fight against serious violations that affect the international community as a whole.

The EU's increasing commitment to impose sanctions as a response to the commission of gross human rights violations might also encourage third countries to undertake similar actions, particularly candidate States seeking to join the Union, as their

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<sup>307</sup> Council Decision (CFSP) 2020/1999, art. 5; cf art. 29 TEU.

<sup>308</sup> cf Pérez-Bernárdez (n 197) 151-152.

<sup>309</sup> European Commission, 'State of the Union Address by President von der Leyen at the European Parliament Plenary' at <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655)> accessed 8 November 2024; European Parliament recommendation of 17 February 2022 to the Council and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy concerning corruption and human rights (2021/2066(INI)) P9\_TA(2022)0042 1(al).

<sup>310</sup> cf Danisi (n 218) 491-492. However, autonomous sanctions have to comply with international law. See (n 193).

<sup>311</sup> Pérez-Bernárdez (n 197) 148.

<sup>312</sup> *ibid* 149. Gestri (n 142) 90.

foreign policy decisions often align with the positions taken by the European Union.<sup>313</sup> To enlist the support of the widest possible range of partners,<sup>314</sup> the EU has recently appointed an International Special Envoy for the Implementation of EU Sanctions; one of his main tasks is precisely working for a wider alignment of third countries with the sanctions imposed on Russia.<sup>315</sup> In particular, candidate countries are generally expected to conform to EU Sanctions.<sup>316</sup> Regarding the Russian war of aggression against Ukraine, almost all the candidate States,<sup>317</sup> with the exceptions of Serbia and Turkey,<sup>318</sup> have fully aligned with the EU sanctions against Russia. Concerning North Macedonia, which did not converge with the sanctions imposed against Russia after Crimea's annexation, it has recently decided to fully align with the EU restrictive measures issued against Russia after the invasion of Ukraine.<sup>319</sup> Georgia has only partially implemented these sanctions.<sup>320</sup> Amongst the reasons provided to support the EU sanctions against the Russian Federation, Albania's stance before the UN Security Council is noteworthy; it stressed that serious human rights violations, acts of genocide, and crimes against humanity must

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<sup>313</sup> Gestri (n 142) 77.

<sup>314</sup> *EU Basic Principles* para 5.

<sup>315</sup> European Commission, 'Special advisers to the European Commission' <[https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/special-advisers\\_en](https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/special-advisers_en)> accessed 8 November 2024.

<sup>316</sup> Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' (15 June 2012) 11205/12, Annex I, para 22.

<sup>317</sup> Albania, Montenegro, Bosnia and Herzegovina, Moldova, Kosovo, and Ukraine. European Commission, Albania 2023 Report (8 November 2023) SWD(2023) 690 final p 133; European Commission, Montenegro 2023 Report (8 November 2023) SWD(2023) 694 final p 132; European Commission, Bosnia and Herzegovina 2023 Report (8 November 2023) SWD(2023) 691 final p 130; European Commission, Moldova 2023 Report (8 November 2023) SWD(2023) 698 final p 115; European Commission, Kosovo 2023 Report (8 November 2023) SWD(2023) 692 final p 3; European Commission, Ukraine 2023 Report (8 November 2023) SWD(2023) 699 final, pp. 139-140.

<sup>318</sup> Think Tank European Parliament, 'Serbia at a glance' <[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_ATA\(2024\)760418](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2024)760418)> accessed 8 November 2024; European Commission, Türkiye 2022 Report, SWD(2022) 333 final, 12 October 2022, p. 124 ff.

<sup>319</sup> European Commission, North Macedonia Report 2023 (8 November 2023) SWD(2023) 693 final p 117.

<sup>320</sup> European Commission, Analytical Report on Georgia's Alignment with the EU *acquis* (2 February 2023) SWD(2023) 31, pp. 54-55.

be addressed by the international community, even on those cases in which the Security Council is unable to act.<sup>321</sup>

However, in order to contribute to the consolidation of the duty to cooperate as enshrined in Article 42(1) ARIO, sanctions have to be lawful. According to Article 3(5) TEU, EU external actions, including sanctions, must comply with international law.<sup>322</sup> This was also previously stressed in the 2004 ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’.<sup>323</sup> Focusing on the CFSP dimension, another relevant document is the ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU CFSP’, which has been constantly updated since 2003.<sup>324</sup> The latest version underlines that ‘[...] the introduction and implementation of restrictive measures must always be in accordance with international law’.<sup>325</sup>

The abovementioned documents underscore the importance of adopting sanctions as a mechanism to maintain and restore international peace and security following the principles enshrined within the UN Charter.<sup>326</sup> Alongside recalling the EU’s obligation to implement UN Security Council Resolutions imposing sanctions under Chapter VII of the UN Charter,<sup>327</sup> when their adoption is not possible, the European Union should impose and encourage wider support for its autonomous measures aiming, *inter alia*, to ‘[...] uphold respect for human rights, democracy, the rule of law and good governance’.<sup>328</sup> The great majority of the EU sanctions have been precisely imposed to support these goals.<sup>329</sup>

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<sup>321</sup> UN Doc S/PV.8962, p. 20.

<sup>322</sup> art. 3(5) TEU.

<sup>323</sup> *EU Basic Principles* para 3.

<sup>324</sup> Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (3 December 2003) 15579/03. For its updated version see, Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (4 May 2018) 5664/18 (hereinafter *EU Guidelines* 2018).

<sup>325</sup> *EU Guidelines* 2018 para 9.

<sup>326</sup> *EU Basic Principles* para 1; *EU Guidelines* 2018 para 38.

<sup>327</sup> *ibid* para 2; paras 3, 38.

<sup>328</sup> *ibid* para 3.

<sup>329</sup> European Parliament, ‘Resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)) P8\_TA(2019)0215, para C.

The EU sanctions adopted *motu proprio* have to comply with international law. This requirement is crucial to consider them as lawful means and effectively implement the duty to cooperate. This issue does not arise for actions qualified as retorsions. As pointed out by the ILC, retorsion is understood as unfriendly conduct which, however, does not contravene any international obligation even though it might be employed as a response to an internationally wrongful act.<sup>330</sup> For instance, the restriction or cessation of standard diplomatic relations or other interactions, certain types of embargoes, or the withdrawal of voluntary aid programs, might fall under this category.<sup>331</sup> In the perspective of the EU lens, some of the sanctions adopted in recent years, including travel bans, could be regarded as retorsions. Albeit unfriendly, they do not constitute an internationally wrongful act since each State can determine the entry into its territory of foreign nationals, provided there is no international agreement governing the movement of individuals between the concerned States.<sup>332</sup> As seen before, travel bans are typically adopted under the EUGHRS to target also those deemed responsible for the commission of gross human rights violations.

Nevertheless, EU measures are not confined to mere retorsions.<sup>333</sup> To avoid their unlawfulness, sanctions imposed to address the commission of *erga omnes* violations might be regarded as collective countermeasures. Despite this topic will not be examined extensively, it is worth noting that collective countermeasures are designed to allow States and International Organizations, even if not directly affected by the wrongdoing, to take countermeasures in the presence of *erga omnes* violations.<sup>334</sup> However, the

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<sup>330</sup> ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (hereinafter ARSIWA). 'Report of the International Law Commission on the work of its fifty-third session' (23 April - 1 June and 2 July - 10 August 2001) UN Doc A/56/10 p. 128, reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, part two. Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework' in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Elgar 2016) 19.

<sup>331</sup> *ibid.*

<sup>332</sup> Gestri (n 142) 70.

<sup>333</sup> *ibid.* 88.

<sup>334</sup> art. 54 ARSIWA; art. 57 ARIO. For a general overview, see also Jochen A Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law' (1994) 248 *Collected Courses of The Hague Academy of International Law* 345; Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010) 1137.

legality of collective countermeasures issued by States and International Organizations is still controversial and unsettled.<sup>335</sup> As envisaged in both ARSIWA and ARIO Commentaries, practice is limited and not very indicative.<sup>336</sup> On the other hand, a few scholars assert that practice has changed and doctrine has further strengthened towards consolidating the doctrine of collective countermeasures.<sup>337</sup> To support this view, it is worth recalling that in the 2005 Krakow session, the *Institut de Droit International* emphasised the possibility to restore to collective non-forcible countermeasures in case of commission of widely acknowledged grave breach of *erga omnes* obligations.<sup>338</sup>

The EU has provided a unique contribution in this area.<sup>339</sup> Although the ARSIWA's Commentary of Article 54 defined practice on this subject as limited and rather embryonic,<sup>340</sup> the EU's and its member States' practice is frequently mentioned as possible evidence of countermeasures adopted in the general interest of the international community.<sup>341</sup> The EU's approach to addressing third States' commission of *erga omnes* violations is precisely acknowledged in the ARIO Commentaries, which stressed that the EU has provided the 'most significant practice' in this domain.<sup>342</sup> Accordingly, the EU has been defined as a trailblazer in supporting collective countermeasures as a response to *erga omnes* violations.<sup>343</sup>

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<sup>335</sup> Gestri (n 142) 89; Alexandra Hofer, 'The EU's "Massive and Targeted" Sanctions in Response to Russian Aggression, a Contradiction in Terms' (2023) *Cambridge Yearbook of European Legal Studies* 19, 26.

<sup>336</sup> ARSIWA (n 330) 137, 139; ARIO (n 296) 147.

<sup>337</sup> For those in favour of the admissibility of collective countermeasures in response to the violation of *erga omnes* obligations, see, *inter alia*, Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2010); Paolo Picone, *Comunità internazionale e obblighi erga omnes* (Jovene 2013).

<sup>338</sup> *Institut de Droit International*, 'Obligations Erga Omnes in International Law' (27 August 2005) art. 5, at <[https://www.idi-iil.org/app/uploads/2017/06/2005\\_kra\\_01\\_en.pdf](https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf)> accessed 8 November 2024.

<sup>339</sup> Gestri (n 142) 91. See also Frank Hoffmeister, 'The Contribution of EU Practice to International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008) 37, 94-95; Frank Hoffmeister, Annika Bruckert, 'The High Representative Revisited in 2023: An Ever More Powerful Institutional Actor in the EU's Common Foreign and Security Policy' in Philipp B Donath, Alexander Heger, Moritz Malkmus, Orhan Bayrak (eds), *Der Schutz des Individuums durch das Recht. Festschrift für Rainer Hofmann zum 70. Geburtstag* (Springer 2023) 157, 164.

<sup>340</sup> art. 54 ARSIWA.

<sup>341</sup> ARSIWA (n 330) 137-139.

<sup>342</sup> ARIO (n 296) 147.

<sup>343</sup> Gestri (n 141) 99.

As seen in the previous pages, further practice appears to confirm this trend.<sup>344</sup> In particular, with the adoption of the EUGHRSR, the EU has enhanced the sanctioning mechanisms at its disposal to sanction those deemed responsible for the commission, *inter alia*, of *erga omnes* violations, which may also amount to breaches of peremptory norms of general international law. Given the indivisibility and interdependence of human rights, applying to everyone and everywhere,<sup>345</sup> the EU would be entitled to use its instruments, including sanctions, to target third States and individuals responsible or involved in the commission of *erga omnes* violations, contributing therefore to the consolidation of collective countermeasures within the international legal framework.

In order to ensure its crystallization into customary law, general practice needs to be accompanied by consistent *opinio iuris*. Current practice seems to push for further consolidation of the customary status of collective countermeasures; however, *opinio iuris* is slowing down this process, since ‘sanctioners’ omit to mention that restrictive measures are adopted as a response to the violation of obligations which are owed to the international community as a whole.<sup>346</sup>

Nevertheless, recent case-law of the Court of Justice of the European Union appears to reverse this trend. Specifically, it is worth focusing on *RT France*, in which the Court concluded that RT France’s temporary ban represented a legitimate restriction on the exercise of its right to freedom of expression.<sup>347</sup> This recent judgment has explicitly addressed the link between EU sanctions and the reaction to *erga omnes* violations.<sup>348</sup>

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<sup>344</sup> cf Sossai (n 138) 166.

<sup>345</sup> Council Decision (CFSP) 2020/1999, Recital 2. UN Doc S/PV.9268, p. 2

<sup>346</sup> Ruys (n 330) 24; Alexandra Hofer, ‘Unilateral sanctions as a challenge to the law of state responsibility’ in Charlotte Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Elgar 2021) 186, 195.

<sup>347</sup> CJEU, judgment of 7 July 2022, *RT France v Council*, T-125/22, ECLI:EU:T:2022:483. For further information see Luis M Hinojosa-Martínez, ‘Desinformación y libertad de expresión en tiempos de guerra: el asunto RT France’ in Juan Manuel de Faramiñan Gilbert, Javier Roldan Barbero, Alejandro del Valle Gálvez, Manuel López Escudero, Inmaculada Marrero Rocha, Pablo Martín Rodríguez (eds), *Unión Europea, principios democráticos y orden internacional: Liber discipulorum en homenaje al profesor Diego J. Liñan Noguera* (Tirant lo Blanch 2024) 353.

<sup>348</sup> Gestri (n 142) 82.

This departs from previous jurisprudence,<sup>349</sup> which, while recognising the possibility for the EU to adopt autonomous sanctions, did not assess whether EU ‘independent measures’ were taken according to the international legal framework, to which the EU must conform.<sup>350</sup> The Court justified this restriction by asserting that this decision has to be regarded within the framework of a broader response provided by the Union, as a subject of international law, to address the commission of the Russian Federation’s crime of aggression, committed in breach of Article 2(4) UN Charter, and representing, therefore, a violation of the *erga omnes* obligations imposed by international law.<sup>351</sup> The Court also acknowledged that the EU promptly reacted to a violation of an *erga omnes* obligation enshrined within the international legal framework, by employing all the means at its disposal, including sanctions.<sup>352</sup> Since this case comprises the breach of a peremptory norm of general international law - the prohibition of the use of force - the EU’s actions might also be understood as further evidence underscoring its compliance with the EU’s due diligence obligations to respect and ensure respect of the *jus cogens*.

This judgment is therefore crucial in enhancing the EU’s position as an international actor possessing legal personality and entitled to invoke third States’ responsibility in case of violations of *erga omnes* obligations.<sup>353</sup> Accordingly, recent developments on the EU sanctions, including restrictive measures against Russia,<sup>354</sup> might be regarded as a renewed course of action undertaken by the EU to contribute to ensuring, alongside the ‘strict observance’, also the development of international law, acting therefore in compliance of a mandate deriving from the founding treaties.<sup>355</sup> When sanctions are issued in response to serious *jus cogens* violations, they might also contribute to the

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<sup>349</sup> See, *inter alia*, CJEU, judgment 28 November 2013, *Council v. Manufacturing Support & Procurement Kala-Naft*, C-348/12P, ECLI:EU:C:2013:776; judgment of 20 September 2016, *Alsharghawi v. Council*, T-485/15, ECLI:EU:T:2016:520.

<sup>350</sup> For further information see, *inter alia*, Federico Casolari, *L’incorporazione del diritto internazionale nell’ordinamento dell’Unione Europea* (Giuffrè 2008).

<sup>351</sup> *RT France v Council* (n 347) para 164.

<sup>352</sup> *ibid* para 86.

<sup>353</sup> *Gestri* (n 142) 83.

<sup>354</sup> Para 5.2.1.

<sup>355</sup> art. 3(5) TEU; cf *Danisi* (n 218) 490.

crystallization of the duty to cooperate to stop the commission of serious breaches of peremptory norms of general international law.

However, despite current practice appearing to go in this direction, consistent *opinio iuris* is still lacking. Starting from *RT France*, and even though *opinio iuris* might also be formed implicitly, the EU should invoke collective countermeasures as a legal basis for its sanctions in response to *erga omnes* violations. Such precise reference is still missing when it adopts this specific kind of restrictive measures. Otherwise, one may claim that the EU's acts, including sanctions in response to *erga omnes* violations, may only serve as policy purposes rather than comply with and further consolidate international law obligations.<sup>356</sup>

## 6. Concluding remarks

According to R2P Pillar III, when no other options are available, States and International Organizations should be ready for a forcible intervention to protect populations from the commission of international core crimes. Despite some promising operations, the EU's inaction in the 2011 Libyan crisis underscores the EU member States' diverging interests and preferences regarding military operations in third countries, including in R2P scenarios. Lack of political willingness, along with the unanimity requirement and the issue of the costs linked with the CSDP military operations undermine the EU's capacity to provide a rapid and effective military response. Recent developments seem, however, to partially solve these problems as well as ensure a closer link between the EU military operations and R2P goals. For instance, the EU weapons supply to Ukraine under the European Peace Facility (EPF) significantly contributes to assisting Ukraine in protecting its populations from the commission of international core crimes implementing, therefore, R2P Pillar II, rather than R2P Pillar III. The effective launch of the Rapid Deployment Capacity (RDC) might also represent a step forward in the EU's operationalisation of the Responsibility to Protect. By preventing, *inter alia*, further

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<sup>356</sup> Nathanael Tilahun, 'The EU Global Human Rights Sanctions Regime: between Self Help and Global Governance' (2021) 25(1) International Community Law Review 3, 4.

escalation of the crisis, the EU's RDC might serve as a crucial tool for implementing R2P preventive engagement, the main component of the Responsibility to Protect.

Considering forcible intervention as a measure of last resort, it has to be employed taking into account the comprehensive crisis management framework in which other non-forcible instruments should be prioritised. Special emphasis should be given to sanctions, considered as a means to implement R2P Pillar III in a timely and decisive manner. Since the last few years, the EU has adopted an increasing number of restrictive measures aiming to target States, individuals, and entities responsible or involved, *inter alia*, in the commission of serious human rights violations. Third States' alignment with the EU's restrictive measures might further enhance the efficacy and the legitimacy of the EU's sanctions machinery. Furthermore, the interplay between thematic and geographic regimes ensures greater flexibility in the choice of the instrument that best suits the case at stake while also taking into account the need to mitigate adverse consequences on the civilian population.

The adoption of the EU Global Human Rights Sanctions Regime (EUGHRSR) has further consolidated this trend. In conjunction with other thematic or geographic sanctions regimes, the EUGHRSR has been employed to address current R2P scenarios, including Syria, Myanmar, and Ukraine. As for this latter situation, the EU has been issuing an unprecedented number of sanctions against Russia and those supporting its unlawful war of aggression against Ukraine targeting even individuals and entities responsible for or involved in the commission of international core crimes, including the mass atrocities perpetrated in Bucha and Mariupol. Restrictive measures were also issued in relation with the war crimes and crimes against humanity committed in Israel and the Occupied Palestinian Territory (OPT) since 7 October 2023. While, at first, sanctions were mainly adopted against Hamas and Palestinian Islamic Jihad (PIJ), Israeli settlers deemed responsible for significant human rights violations against Palestinians have been also recently sanctioned under the EUGHRSR. The July 2024 ICJ Advisory Opinion on the situation in Israel and OPT might push the EU for a greater engagement in sanctioning Israel for its wrongful acts amounting to R2P crimes. This approach would allow the EU

to dismiss accusations of double standards by providing further evidence of the consistency of its sanctioning actions.

Alongside implementing the Responsibility to Protect, the Union can also actively contribute to the strict observance and positive development of international law. By employing all the means that are reasonably available to it, the Union can therefore actively engage in the process of confirmation of States' and International Organizations' duty to cooperate to put an end to the commission of serious *jus cogens* violations. While practice suggests an increasing recognition of International Organizations' duty to cooperate, *opinio iuris* does not seem to accommodate this view. This applies specifically to the EU's autonomous restrictive measures. Since most of these cannot be qualified as retorsions, in order to be lawful - and therefore integrate the duty to cooperate when issued in response to serious *jus cogens* violations - they should be regarded as collective countermeasures. Despite doubts concerning its legal nature, the EU, which has provided the 'most significant practice' in this domain, might play a relevant role in its process of consolidation within the international legal framework. Whereas *RT France* might provide further impulse towards this goal, it would be appropriate for the EU to elucidate the legal basis for such actions under the international legal framework, thereby clarifying the issue of consistency of its foreign policies with the strict observance and development of international law, in particular *jus cogens* norms.

## CONCLUSIONS

The United Nations' and its member States' endorsement of the Responsibility to Protect (R2P) reflects the paradigm shift, which took place in the early 2000s, whereby sovereignty is no longer understood as control but rather as a concept tightly intertwined with the notion of both external and internal responsibility. The R2P thus provides a stronger response to Kofi Annan's question aiming at finding the proper balance between State sovereignty and the urgent need to intervene to stop gross human rights violations.<sup>1</sup> Unlike humanitarian intervention, it also addresses the issue of forcible intervention confining its use to the prior authorisation of the UN Security Council, as outlined in R2P Pillar III. While R2P Pillars I and II push this doctrine towards a normative realm, the uncertainties on its third Pillar hinder its complete endorsement within the international legal framework. The framing of the Responsibility to Protect in the *World Summit Outcome*, coupled with the lack of consistent practice and corrective mechanisms tackling the issue of the veto power in this domain prevent the R2P from being separated from the political and moral rationales following this concept since its inception. Nor do they allow for a thorough understanding of its legal dimension. For the time being, the Responsibility to Protect should be regarded as an emerging norm of international law.<sup>2</sup>

As outlined in Chapter II, we maintain R2P as a multifaceted concept, which is grounded in international law. Therefore, it is crucial to scrutinise it in conjunction with the international legal framework. The Responsibility to Protect is closely linked with the prohibition of genocide, crimes against humanity, and basic rules of international humanitarian law, which are regarded as peremptory norms of general international law recognised by the international community as a whole. Accordingly, as laid out in Articles 41(1) and 42(1) of the Draft Articles of the Responsibility of States and International Organizations for Internationally Wrongful Acts (ARSIWA and ARIO), both States and International Organizations, including the European Union, have a positive duty to

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<sup>1</sup> Introduction, para 1.1.

<sup>2</sup> Chapter II, para 1.

cooperate to end serious *jus cogens* breaches.<sup>3</sup> This obligation has to be read along with due diligence obligations stemming from the prohibition of R2P crimes whose role is crucial to further consolidating the obligation to cooperate within the international legal framework.<sup>4</sup> Since *jus cogens* norms rank at the highest level of the sources of international law, it is expected that the due diligence required to accomplish the duty to cooperate to end serious breaches of obligations arising under this category of norms be of the highest order.

Against this background, Chapters III and IV indicate that the EU plays a key role in shedding light on the legal nature of the Responsibility to Protect as well as in upholding international law obligations associated with serious breaches of *jus cogens* provisions that the R2P seeks to safeguard. The EU has strongly supported the Responsibility to Protect since its inception, both internally and in other international fora, most notably the United Nations.<sup>5</sup> The focus on the EU's Common Foreign and Security Policy (CFSP) allows us to clarify the link between the EU's political commitment to R2P and the assessment of its legal nature. Although with the entry into force of the Lisbon treaty the CFSP became a 'part and parcel of the EU legal order', this sector features a strong intergovernmental dimension, which might end up undermining the normative value of the Responsibility to Protect.

As outlined in Chapter III, the in-depth analysis of the Court of Justice of the European Union's case-law confirms the importance of distinguishing the CFSP from other EU's external policies; it may even serve as a single legal basis for the adoption of CFSP acts aiming, *inter alia*, at implementing the Responsibility to Protect.<sup>6</sup> A closer look at the EU treaties also shows that, even though the CFSP is not intended to affect member States' responsibilities and powers concerning the formulation and conduct of their foreign policy, they are nevertheless required to support the EU's CFSP in a spirit of loyalty and mutual solidarity, and to comply with the Union's action in this domain.<sup>7</sup>

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<sup>3</sup> Chapter II, paras 3, 4.

<sup>4</sup> Chapter II, para 2.

<sup>5</sup> Chapter I, para 6; Chapter III, para 4.

<sup>6</sup> Chapter III, para 3.2.

<sup>7</sup> Chapter III, para 3.1.

This means that CFSP acts contribute in shaping member States' conduct in the international arena thereby precluding them from undertaking actions or positions which are in contrast with those agreed within the EU framework.

The Union's approach in appraising the R2P's legal status underscores the multifaceted character of the Responsibility to Protect and emphasises a different legal understanding of its preventive and reactive facets. As for the former, the EU, as a regional organization, possesses significant potential to fully operationalise the Responsibility to Prevent. Considered as the R2P's main goal, political statements have been followed by concrete acts undertaken to foster this sector, as outlined in the EU conflict Early Warning System and in the Atrocity Prevention Toolkit, which should be seen as further evidence of the EU's internalisation of the Responsibility to Prevent.<sup>8</sup> The recent developments in the Common Security and Defence Policy (CSDP) field seem to confirm this view. In particular, the quantitative and qualitative aspects of the CSDP military operations suggest the possibility of carrying out small-scale rapid deployment actions, emphasising preventive engagement over reactive measures.

Concerning the reactive prong, Chapter IV shows that the EU's stance on R2P Pillar III proved to be far more challenging. To shed light on the matter, we differentiate the analysis of its forcible and non-forcible components. As for the former, the CSDP's structural difficulties weaken the EU's capacity to provide an effective military response in tackling mass atrocity crimes. In particular, the absence of a unified position on this topic, coupled with the unanimity requirement, prevent the Union from undertaking a forcible intervention to halt the commission of mass atrocities crimes even in those circumstances in which it receives the prior approval from the UN Security Council, as for the situation in Libya.<sup>9</sup> Recent developments, including the implementation of the European Peace Facility, might partially solve the structural issues within the CSDP, specifically as regards the funding of the CSDP military operations. Moreover, once (and if) enacted, the EU Rapid Deployment Capacity will provide more flexibility in delivering

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<sup>8</sup> Chapter III, para 5.

<sup>9</sup> Chapter IV, para 3.

a prompt and effective response in R2P scenarios.<sup>10</sup> However, their effective operationalisation appears again to primarily benefit the preventive rather than reactive realm.

While the forcible component is deemed a measure of last resort, the EU shows a greater engagement in using non-forcible means, specifically sanctions, to implement R2P Pillar III. In the last few years, the EU has adopted an increasing number of restrictive measures aiming to target States, individuals, and entities responsible or involved, *inter alia*, in the commission of R2P crimes. The adoption of the EU Global Human Rights Sanctions Regime (EUGHRSR) has further consolidated this trend. In conjunction with other thematic or geographic sanctions regimes, practice indicates that the EUGHRSR has been employed to address current R2P scenarios, including Syria, Myanmar, and Ukraine.<sup>11</sup>

In light of the previous considerations, we maintain that the EU has partially recognised the R2P legal status under its Common Foreign and Security Policy. Despite the EU's integration of the R2P's preventive and non-coercive elements, uncertainties arising from the realm of forcible measures hinder a complete recognition of the legal nature of R2P Pillar III.

The analysis of the Union's stance on R2P within its Common Foreign and Security Policy reveals that the Responsibility to Protect is deeply rooted inside the EU's actions undertaken in this domain. Even if not labelled as such, the Union's efforts to safeguard and promote fundamental human rights in conjunction with international humanitarian law align the Treaty on European Union's objectives with R2P principles, which fit within a broader framework encompassing the values the EU aims to uphold in its external relations. Considering the mutually reinforcing effects of R2P and international law obligations stemming from peremptory norms of general international law, we consider the Common Foreign and Security Policy as a suitable framework for appraising the EU's contribution to the observance and development of international law, as envisaged in Articles 3(5) and 21 TEU, while implementing the Responsibility to Protect. Chapter IV

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<sup>10</sup> Chapter IV, para 3.3.

<sup>11</sup> Chapter IV, paras 4.3, 4.4.

indicates that by employing all the means reasonably available to it, the EU can play a pivotal role in the confirmation of States' and International Organizations' duty to cooperate in halting the commission of serious *jus cogens* violations.<sup>12</sup> The EU's recent practice seems to support this view. For instance, unlike the previous funding mechanisms, the European Peace Facility enables the EU to supply military equipment designed to deliver lethal force to third States, even when the commission of serious breaches of peremptory norms is at hand, as it is the case for the EU weapons supply to Ukraine.

Amongst other tools, we maintain that EU sanctions provide a significant contribution towards the confirmation of the duty to cooperate. Nevertheless, in order to reach this goal, they need to be lawful. The imposition of sanctions - which are not qualified as retorsions - on third States and individuals without prior UN Security Council authorisation continues to pose challenges regarding the EU's compliance with international law. Their link with *jus cogens* violations is therefore crucial. Accordingly, the interplay between the EU independent sanctions and the obligation to tackle serious breaches of peremptory norms of general international law might enable States and International Organizations to act whenever the UN Security Council is paralysed due to the exercise of the veto power. Given that these violations affect the international community as a whole, when the entity entrusted to maintain and restore international peace and security is unable to act, States and International Organizations might partially supplement its inaction by adopting measures, including sanctions, aiming at halting *jus cogens* violations. The adoption of similar measures by non-EU countries, particularly candidate States, might strengthen this view, alongside increasing the effectiveness of sanctions addressing serious violations of peremptory norms of general international law.

By enhancing the link between EU sanctions and *erga omnes* violations, the Court of Justice of the European Union, in the *RT France* case, arguably anchors the legitimacy of EU independent sanctions to the protection of objectives of fundamental general interest for the international community, which even the EU, as a subject of international

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<sup>12</sup> Chapter IV, para 5.

law, has to uphold and promote.<sup>13</sup> When sanctions are issued in response to serious *jus cogens* violations, they might reinforce the duty to cooperate to halt the commission of serious breaches of peremptory norms of general international law.

However, as the comparative analysis of the EU sanctions against Russia and Israel illustrates,<sup>14</sup> overarching structural issues of the EU machinery, including lack of consistency and political willingness, coupled with the unanimity threshold, slow down the EU's contribution in upholding international law in its engagement with the 'wider world'. When it comes to serious *jus cogens* violations associated with R2P crimes, the EU and international values overlap; however, the pendulum that swings between rhetoric and normative value which characterises Article 3(5) and 21 TEU appears still to favour the former over the latter, given that the Union's strategic interests seem to outweigh its duty to act according to international law.

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<sup>13</sup> Chapter IV, para 5.2.

<sup>14</sup> Chapter IV, paras 4.4.1, 4.4.2.

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