

Contents

Chapter 1 The Security Council and the Responsibility to Protect in the Age of New Wars	1
1.1 New Patterns of Warfare as a Challenge to the Traditional Normative System	3
1.2 Tools for the Security Council and Its Members to Combat Atrocity Crimes	8
1.2.1 The Competence and Toolbox of the Security Council in Addressing Atrocity Crimes	9
1.2.2 The Role of Member States in Security Council Deliberations and Decision-Making	16
1.3 The “Responsibility to Protect”: A Concept of Principled Decision-Making	19
1.3.1 The Notion of a “Responsibility to Protect”: The ICISS Concept and Its Evolution	20
1.3.2 The Security Council and Its Members in the R2P Concept	25
1.3.3 R2P and International Law	29
1.4 Judicial and Scholarly Opinions on Legal Duties to Protect and the Security Council	33
1.4.1 Duties of Prevention in the Jurisprudence of the ICJ	34
1.4.1.1 The Law Suit Announced by the Government of Bosnia and Herzegovina Against the United Kingdom for Its Conduct on the Security Council	35
1.4.1.2 The Duty to Prevent Genocide in the Law Suit against Serbia and Montenegro	36
1.4.1.3 The Duty to Ensure Compliance with the Fourth Geneva Convention in the Israeli Wall Opinion	40
1.4.2 Scholarly Debate on Legal Duties of Protection	41
1.5 Outlook: Two Pillars and a Common Foundation for Duties of Security Council Members to Prevent or Halt Atrocity Crimes	46

Chapter 2 Legal Theory and Methodology	49
2.1 The Processes of Legal Analysis and the Impact of Legal Theory	54
2.2 The Convergence of Inductive and Deductive Approaches in Theory and Practice	60
2.3 Sources and Canons of Interpretation	67
2.3.1 Treaty Interpretation	67
2.3.1.1 The Elements of Treaty Interpretation and Their Impact on the R2P Debate	69
2.3.1.2 Purposive Interpretation: Tensions Between Values, Effectiveness and Party Intentions	76
2.3.1.3 Evolutive Interpretation: Changing Understandings of a Treaty Provision	82
2.3.1.4 The Analysis of Subsequent Agreements and Practice	92
2.3.1.5 Conclusions on Treaty Interpretation	100
2.3.2 Customary International Law Analysis	102
2.3.2.1 The Concept of Customary Law and Its Application in the R2P Discourse	103
2.3.2.2 The Requirement of State Practice and Inductive or Deductive Reasoning	105
2.3.2.3 Conceptual Issues of Customary International Law Analysis	110
2.3.3 General Principles of Law	114
2.3.4 Jurisprudence and Doctrine	119
2.4 General Methodological Guidelines for the Discussion of R2P Duties	124
Chapter 3 The Security Council and International Law	129
3.1 The Security Council, Its Members, and the Rule of Law in Doctrine and Jurisprudence	129
3.1.1 The Idea of a Council “Legibus Solutus” and Its Legacy in the Scholarly Debate	131
3.1.2 The Member States’ Acts on the Council: From Legally Neutral to Discretionary	138
3.2 Practical or Pragmatic Arguments	144
3.2.1 The Security Council as a “Political Organ”	145
3.2.2 Absence of Review Mechanisms in Practice	147
3.2.3 Conclusion: The Need for a Normative Foundation for Exempting the Security Council’s Decision-Making Process from Legal Scrutiny	154
3.3 The Principle of State Sovereignty	154
3.4 Distinct Legal Personality and Responsibility of the United Nations	155
3.4.1 The ILC’s Approach to State Responsibility in connection with the Conduct of an International Organization	158

3.4.2	Judicial and Scholarly Support for State Responsibility in connection with Conduct within the Organs of an International Organization	162
3.4.3	State Responsibility in connection with the Conduct of International Organizations as a Matter of Interpretation and Conflicts of Law.	163
3.5	The Constitutional Framework of the UN Charter	165
3.5.1	Priority of the UN Charter (Article 103 UN Charter)	165
3.5.2	The Procedural Framework for Security Council Decision-Making	169
3.5.3	The Presumed Fiduciary Relationship Between the Security Council Members and the UN Membership at Large	176
3.5.4	The Security Council's Primary Responsibility for the Maintenance of International Peace and Security (Art. 24(1) and Chapter VII UN Charter).	179
3.5.5	Conclusions on the Compatibility of Substantive Duties for Security Council Members with the UN Charter	184
3.6	The Positive Dimension of Duties of Prevention and the Limits of Attribution in the Law of State Responsibility	184
3.7	Conclusion: Legally Constrained Discretion of the Security Council Members.	186
Chapter 4	The International Law of Atrocity Crime Prevention	189
4.1	Genocide Convention.	190
4.1.1	Judicial and Scholarly Opinion on a Duty to Prevent Genocide.	191
4.1.1.1	The Jurisprudence of the International Court of Justice in the Bosnian Genocide Case.	193
4.1.1.2	Scholarly Debate on the Conventional Duty to Prevent Genocide.	197
4.1.1.3	The Interpretative Weight of the Judicial and Scholarly Pronouncements	202
4.1.2	Article VIII of the Genocide Convention	207
4.1.2.1	Judicial and Scholarly Opinion on Article VIII of the Genocide Convention	208
4.1.2.2	The Meaning of Article VIII in Light of the General Rule of Interpretation in Article 31(1) VCLT	210
4.1.2.3	The Drafting History of the Genocide Convention as a Supplementary Means of Interpretation	211
4.1.2.3.1	An Outline of the Drafting Process of the Genocide Convention	211
4.1.2.3.2	The Drafting History of Article VIII Genocide Convention.	217

4.1.2.3.3	Outlook: Limited Potential to Evolve into a Norm Prescribing Preventive Action	225
4.1.2.4	Cold War Practice on Article VIII of the Genocide Convention.	226
4.1.2.5	Interim Conclusion: Article VIII as a Largely Meaningless Norm on Allocation of Powers.	227
4.1.3	Article I of the Genocide Convention.	227
4.1.3.1	Judicial and Scholarly Opinions on Article I of the Genocide Convention.	228
4.1.3.2	Grammatical Interpretation: The Tandem of Punishment and Prevention	230
4.1.3.3	Contextual Interpretation: Preventive Elements in the System of the Genocide Convention	232
4.1.3.4	The Purpose of the Genocide Convention: Liberating Mankind from the Scourge of Genocide	235
4.1.3.5	Preventive Mechanisms in the Drafting History of the Genocide Convention	237
4.1.3.5.1	Legal Implications of the Term “Undertake” in Light of the Travaux Préparatoires	238
4.1.3.5.2	The Evolving Nature of the Undertaking to Prevent and Punish: From Preambular to Operative.	239
4.1.3.5.3	The Concept of Prevention Under the Convention: Prevention Through Punishment	244
4.1.3.5.3.1	The Deterrent Effect of Prosecuting Genocide as the Key Preventive Element	245
4.1.3.5.3.2	The Criminalization of Preparatory Acts as an Additional Means of Prevention	249
4.1.3.5.3.3	Opposition and Indifference to Broader Approaches to Prevention	252
4.1.3.5.3.4	The Territoriality Principle as a Limit to the Application of the Genocide Convention	258
4.1.3.5.4	Outlook: Article I of the Genocide Convention as a Gateway for Subsequent Developments	259
4.1.3.6	Cold War Practice on Article I of the Genocide Convention.	261
4.1.3.6.1	East Pakistan (1971)	262

- 4.1.3.6.2 Uganda (1971–1979) 265
 - 4.1.3.6.3 Cambodia (1975–1979) 266
 - 4.1.3.6.4 Conclusions on the Application of Article I
during the Cold War Period 268
 - 4.1.4 Interim Conclusions: The Genocide Convention by the End
of the Cold War. 269
 - 4.2 International Humanitarian Law: The 1949 Geneva Conventions. . . . 269
 - 4.2.1 Article 1 of the 1949 Geneva Conventions. 271
 - 4.2.1.1 Judicial and Scholarly Opinions on the Undertaking
“to ensure respect” for the Geneva Conventions 272
 - 4.2.1.1.1 Scholarly Opinion: Prevalence of a Broad
“state-compliance”-View 272
 - 4.2.1.1.2 Dicta of the International Court of Justice
on the Undertaking “to ensure respect” 275
 - 4.2.1.1.3 The Interpretative Weight of the Judicial
and Scholarly Pronouncements 277
 - 4.2.1.2 Grammatical Interpretation 282
 - 4.2.1.3 Contextual Interpretation 282
 - 4.2.1.3.1 The Internal Context of Article 1 of the
Geneva Conventions 282
 - 4.2.1.3.2 The “Undertaking to Ensure Respect”
in the Overall System of the Geneva
Conventions 284
 - 4.2.1.3.3 Teleological Interpretation 288
 - 4.2.1.3.4 Historical Interpretation 289
 - 4.2.1.3.4.1 The Genealogy of Article 1 and the
Undertakings to Respect and Ensure Respect
in All Circumstances 290
 - 4.2.1.3.4.2 The Drafting History of Article 1 and the
Function of the Undertaking to Ensure
Respect 295
 - 4.2.1.3.4.3 Interim Conclusion: Original Understandings
of the Undertaking to Ensure Respect 301
 - 4.2.1.6 Subsequent Agreements and Practice 302
 - 4.2.1.6.1 Cold War Practice and Multilateral
Debates on Article 1 of the 1949 Geneva
Conventions 302
 - 4.2.1.6.2 Interim Conclusions: Subsequent
Understandings of the Undertaking to
Ensure Respect 313
 - 4.2.2 Article 89 of Protocol I of 1977 314
 - 4.2.3 Interim Conclusions on the Duty to Ensure Respect for the
Provisions of the 1949 Geneva Conventions 316
 - 4.3 The Charter of the United Nations. 316

4.3.1	Judicial and Scholarly Opinions on UN Charter Obligations of the Security Council Members.	317
4.3.2	Duties of the Security Council Members Under Article 24 UN Charter?	319
4.3.3	The Good Faith Principle in Article 2(2) of the UN Charter	322
4.3.4	Interim Conclusions: UN Charter Obligations for Security Council Members in the Face of Atrocity Crimes	330
4.4	Duties to Prevent Atrocity Crimes under Customary International Law	330
4.4.1	Scholarly Opinion on Customary Duties to Prevent R2P Crimes	331
4.4.2	Customary Duty to Prevent Genocide	333
4.4.3	Customary Duty to Ensure Compliance with International Humanitarian Law	334
4.4.4	Customary Duty to Cooperate Under the Law of State Responsibility	338
4.4.5	Interim Conclusions: Customary Duties for the Prevention of R2P Crimes	340
4.5	Interim Conclusions and Outlook: The Need and Seeds for a Further Evolution of Duties to Prevent Atrocity Crimes in International Law Prior to the Emergence of R2P	340

Chapter 5	Multilateral Debates on R2P and the Protection of Civilians, and Their Impact on General and Treaty Law	343
5.1	Thematic Debates of the Security Council and the General Assembly concerning the Protection of Civilians in Armed Conflict (POC) and the Responsibility to Protect (R2P)	343
5.2	Emergence of the Responsibility to Protect as a Norm of General International Law?	349
5.2.1	The UN World Summit 2005: Agreement on the Responsibility to Protect Concept	350
5.2.1.1	Wording, Context and Drafting History of Paragraph 139 of the World Summit Outcome Document	351
5.2.1.2	The Lack of a Guiding Framework for Decisions of the Security Council	356
5.2.1.3	Conclusions on the Legal Quality of the Collective R2P After the 2005 World Summit	358
5.2.2	POC Debates and R2P Dialogues: Views on the Legal Nature of the R2P Concept.	359
5.2.2.1	Consolidation of the R2P Framework as Agreed at the 2005 World Summit.	360
5.2.2.2	State Opinion Regarding the Nature of R2P: Political, Moral or Legal Framework	367
5.2.3	Interim Conclusions on the Status of R2P Under General International Law	370

5.3	Evolutionary Interpretation of the Conventional Duty to Prevent Genocide?	371
5.4	Evolutionary Interpretation of the Undertaking to Ensure Respect for the Geneva Conventions?	375
5.5	Evolutionary Interpretation of the UN Charter Framework for the Prevention of Mass Atrocities?	381
5.5.1	The UN Charter as a Legal Framework for the Prevention of Mass Atrocity Crimes.	382
5.5.2	The Principles and Purposes of the United Nations: Between Imperatives and Limits	384
5.5.3	The Responsibility of the Security Council for International Peace and Security	386
5.5.4	Interim Conclusions on the Legal Framework of the UN Charter for the Prevention of Atrocity Crimes	388
5.6	General Observations on the Interplay Between Law and Politics in the Work of the Security Council for the Prevention of Atrocity Crimes	388
5.6.1	Moral and Political Guidance Rather than Legal Duties for Security Council Members	390
5.6.2	Criteria and Guidelines: Limits Rather than Imperative for Action	391
5.6.3	Institutional Reforms: The Security Council's Composition and Possible Guidance from the General Assembly	392
5.6.4	Veto Right: Appeals for Voluntary Abstention rather than Legal Boundaries	395
5.7	Conclusions: The Legal Dimension of the Discourse on Atrocity Crime Prevention	400

Chapter 6 Security Council Practice on Atrocity Crime Prevention

	Since the End of the Cold War.	403
6.1	A Short Period of Security Council Activism Following the End of the Cold War (1991–1993)	405
6.1.1	Northern Iraq (1991)	405
6.1.2	Somalia (1991–1995)	407
6.1.3	Bosnia and Herzegovina (1991–1995)	411
6.1.3.1	Arms Embargo and Sanctions Regime	414
6.1.3.2	Expansion of the UN Protection Force Mandate in Bosnia and Herzegovina	415
6.1.3.3	Creation of the International Criminal Tribunal for the Former Yugoslavia	416
6.1.3.4	Declaration of “Safe Areas” and Enforcement Mandate for UNPROFOR	417
6.1.4	Assessment: Trends, Patterns and Legal Concepts.	421
6.1.4.1	Trends and Patterns: Growing Attention to the Protection of Civilian Populations.	421

6.1.4.2	UN Charter: Massive Human Rights Violations as a Threat to Peace and Security	422
6.1.4.3	Genocide Convention and Geneva Conventions: Limited Impact and Traditional Readings	424
6.1.4.3.1	Genocide Convention	425
6.1.4.3.2	Geneva Conventions	426
6.1.4.4	Limits to the International Commitment to Prevent Atrocity Crimes	427
6.2	Security Council Failure in the Face of Genocides, Crimes Against Humanity, War Crimes and Ethnic Cleansing (1993–1999)	429
6.2.1	Somalia (1995–2000)	430
6.2.2	Burundi (1993–2000)	431
6.2.3	Rwanda (1994)	434
6.2.4	Kosovo (1998–1999)	439
6.2.5	Assessment: Trends, Patterns and Legal Concepts	442
6.2.5.1	Trends and Patterns: Limits to the International Commitment to Prevent Mass Atrocities	442
6.2.5.2	Impact on the Interpretation of Legal Concepts	443
6.2.5.2.1	Genocide Convention: Between Criminal Law and a Broader Duty to Prevent	443
6.2.5.2.2	Geneva Conventions and UN Charter	450
6.2.5.3	Turning Point: Debates on Lessons to be Learned from Rwanda, Srebrenica and Kosovo	451
6.3	Increasing and Intensified Security Council Commitment to the Prevention of Mass Atrocities (Since 1999)	451
6.3.1	East Timor (1999)	452
6.3.2	Burundi (2000–2006)	454
6.3.3	Somalia (Since 2000)	455
6.3.3.1	Strengthening of the Arms Embargo	458
6.3.3.2	Protection and Military Support for Transitional Federal Institutions	458
6.3.3.3	Targeted Sanctions and Arms Embargo	459
6.3.3.4	Developments following the End of the Transitional Period in September 2012	460
6.3.4	Eastern DRC	461
6.3.4.1	Robust Military Intervention, Including for the Protection of Civilians	463
6.3.4.2	Arms Embargo and Targeted Sanctions Regime	466
6.3.4.3	Recent Trends in Security Council Action on the DRC	467
6.3.5	Sudan (Southern Sudan)	467
6.3.6	Sudan (Darfur)	471
6.3.6.1	Measures Short of the Deployment of UN Forces	473
6.3.6.2	Authorization of a Joint AU/UN Peacekeeping Force	475

6.3.6.3	Peace Negotiations and Continued Violence Following the Deployment of UNAMID.....	477
6.3.7	Côte d'Ivoire (2010–2011).....	478
6.3.8	Libyan Arab Jamahiriya (2011).....	482
6.3.9	Syrian Arab Republic (Since 2011).....	485
6.3.9.1	First Phase: Inactivity and Largely Failed Consultations of the Security Council.....	486
6.3.9.2	Second Phase: Increasing Divisions Amongst the Security Council Members and Between the Security Council and the General Assembly.....	489
6.3.9.3	Third Phase: Security Council Involvement Through a UN Supervision Mission.....	491
6.3.9.4	Fourth Phase: Return of the Security Council to the Role of an Observer.....	493
6.3.9.5	Fifth Phase: Diplomatic Activities and Security Council Resolution on Chemical Weapons.....	494
6.3.9.6	Sixth Phase: Geneva II Negotiations and Humanitarian Access.....	496
6.3.10	Assessment: Trends, Patterns and Legal Concepts.....	496
6.3.10.1	Trends: The Evolving Practice on the Prevention of Mass Atrocity Crimes and Its Limits.....	497
6.3.10.1.1	Patterns of Security Council Involvement: Growing Attention and Action.....	497
6.3.10.1.2	Persisting Limits to Security Council Involvement Through Forceful Intervention.....	498
6.3.10.1.3	Negative Practice on Darfur and Syria?...	500
6.3.10.2	Existing Legal Regimes: The Prevalence of Traditional Readings.....	503
6.3.10.2.1	Genocide Convention: A Fading Call for Preventive Action.....	503
6.3.10.2.2	International Humanitarian Law and the Geneva Conventions.....	510
6.3.10.2.3	UN Charter: Limits and Responsibilities for the Prevention of Mass Atrocities....	513
6.3.10.3	The Emergence of New Frameworks: Protection of Civilians and R2P.....	515
6.3.10.3.1	The Protection of Civilians (POC).....	515
6.3.10.3.2	The Responsibility to Protect (R2P)....	517
6.4	Conclusion: Prevention of R2P Crimes as an Increasingly Central Matter of Politics.....	520
Chapter 7	Conclusions.....	525
Bibliography	531