

The “Responsibility to Prevent”:

An International Crimes Approach to the Prevention of Mass Atrocities

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Abstract

Paragraphs 138 to 140 of the Outcome Document of the 2005 UN World Summit not only elevated the element of prevention to a prominent place within the principle of “responsibility to protect” (R2P), but also restricted the scope of R2P to four specific crimes under international law: genocide, war crimes, ethnic cleansing, and crimes against humanity. This thesis explores the conceptual and practical consequences of linking R2P to the concept of international crimes, with a particular focus on the preventive dimension of R2P, the so-called “responsibility to prevent”.

To date, much of what has been written about the “responsibility to prevent” borrows primarily from conflict prevention theory and practice. Such conflict prevention inspired accounts of the “responsibility to prevent” tend to depict the principle as a long-term agenda that seeks to build societies resilient to atrocity crimes; that rests primarily on pillars one (state responsibility) and two (international assistance and capacity-building); that is supportive rather than undermining of state sovereignty; and that can largely adhere to the traditional conflict prevention principles of impartiality, consent, and minimal coercion should more direct prevention efforts become necessary.

Drawing on literature from criminology, this thesis develops an international crimes framework for operationalizing the preventive dimension of R2P. The framework, combined with three case studies of international crime prevention (Bosnia 1991-1995; Kenya 2007-08; and Libya 2011), challenges key assumptions of the conflict prevention accounts, arguing that linking R2P to the concept of international crimes turns the “responsibility to prevent” into a principle that is more focused on the short-term, rather than on so-called root causes of atrocity crimes; more focused on individuals, rather than on state structures and capacity; more partial regarding perpetrators and victims; and more coercive, intrusive, and controversial than is commonly acknowledged in academic writing and policy debates on the subject. More broadly, the thesis concludes that taking R2P’s focus on the prevention of international crimes seriously requires re-thinking the “responsibility to prevent” in important respects.

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List of Abbreviations

AI	Amnesty International
APRM	African Peer Review Mechanism
AU	African Union
AU Committee	Ad Hoc High-level Committee of the AU for Libya
AU Panel	African Union Panel of Eminent African Personalities
BiH	Bosnia and Herzegovina
BRICS	Brazil, Russia, India, China, and South Africa
CCP	Concerned Citizens for Peace - Kenya
CHR	United Nations Commission on Human Rights
C.I.A.	Central Intelligence Agency
CIPEV	Commission of Inquiry on Post-Election Violence
COI	Commission of Inquiry
CSCE	Conference on Security and Cooperation in Europe
EC	European Community
ECMM	European Community Monitoring Mission
EU	European Union
FIDH	International Federation for Human Rights
GA	UN General Assembly
GPP	Genocide Prevention Project
HLP	High Level Panel on Threats, Challenges, and Change
HRC	Human Rights Council
HRW	Human Rights Watch
ICC	International Criminal Court
ICFY	International Conference on the Former Yugoslavia
ICG	International Crisis Group
ICISS	International Commission on Intervention and State Sovereignty
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPs	Internally Displaced Persons

IMF	International Monetary Fund
IR	International Relations
JNA	Federal Yugoslav People's Army
KJAS	Kenya Joint Assistance Strategy
KNCHR	Kenyan National Commission on Human Rights
LAS	League of Arab States
MRGI	Minority Rights Group International
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
NORDBAT	Nordic Battalion
NTC	National Transitional Council
NYT	New York Times
ODM	Orange Democratic Movement
OECD	Organisation for Economic Cooperation and Development
OIC	Organisation of the Islamic Conference
OP	Operative Paragraph in Security Council Resolution
OSAPG	UN Office of the Special Adviser on the Prevention of Genocide
OTP	International Criminal Court Office of the Prosecutor
OUP	Operation Unified Protector
PNU	Party of National Unity
PSC	African Union Peace and Security Council
R2P	Responsibility to Protect
RtoP	Responsibility to Protect
SC	United Nations Security Council
SFRY	Socialist Federative Republic of Yugoslavia
TJRC	Truth, Justice and Reconciliation Commission
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UN-DPA	United Nations Department for Political Affairs
UN-HABITAT	United Nations Human Settlements Programme
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees

UNON	United Nations Office at Nairobi
UNPROFOR	United Nations Protection Force
UNSCR	United Nations Security Council Resolution
UNSG	United Nations Secretary-General
UPR	Universal Periodic Review
US	United States of America
VOPP	Vance-Owen Peace Plan
WSOD	World Summit Outcome Document

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Ruben Reike, Oxford, 12 July 2014

The “Responsibility to Prevent”

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1. Introduction

“The responsibility to protect applies, until Member States decide otherwise, only to four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity”.

❖ Ban Ki-moon, UN Secretary-General¹

“The first goal [of the responsibility to protect], as the Outcome Document underlined, should be prevention, prevention, prevention”.

❖ Edward C. Luck, Former UN Special Adviser on the Responsibility to Protect²

This thesis is concerned with the consequences of linking the principle of “responsibility to protect” (R2P) to the concept of international crimes. More specifically, it explores the implications of this move to international crimes for the preventive dimension of R2P, the so-called “responsibility to prevent”. The central research question that guides the following chapters is: *What are the conceptual and practical consequences of approaching the “responsibility to prevent” as the prevention of international crimes?* A set of more specific questions then follow from this broader one: How does the prevention of international crimes differ from the prevention of armed conflict? What are potential tools for the prevention of international crimes? What capacities, conditions, and dispositions are required to successfully prevent international crimes? What unintended consequences and side-effects emerge from efforts to prevent international crimes?

¹ Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary-General*, A/63/667, 12/01/2009, 8.

² Edward C. Luck, Statement made at ‘Informal Interactive Dialogue on Early Warning, Assessment and the Responsibility to Protect’, 09/08/2010, <http://www.un.org/ga/president/64/thematic/responsibility/Luck.pdf>.

These research questions arise straightforwardly if one considers the evolution of R2P since its formal acceptance by states at the 2005 United Nations (UN) World Summit. In September 2005, world leaders travelled to UN Headquarters in New York to attend the largest gathering of Heads of State and Government in history, marking the 60th anniversary of the organisation. To the surprise of most observers, world leaders formally accepted a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In paragraphs 138 to 140 of the World Summit's Outcome Document, all states accepted, at least in theory, that they have the primary responsibility to protect the population on their territory from these atrocity crimes.³ UN member states further promised to assist one another in fulfilling their domestic protection responsibilities. And finally, they pledged to react collectively, in a timely and decisive manner, should particular states manifestly fail to protect their populations from the international crimes at the heart of R2P.⁴ That R2P was written into the World Summit Outcome Document (WSOD) was highly significant for the evolution of the principle. On the one hand, this step transformed R2P from an idea developed by a Canadian-sponsored international commission, the International Commission on Intervention and State Sovereignty (ICISS),⁵ to an emerging norm endorsed by the entire UN membership. On the other hand, forging consensus on R2P amongst the world's diverse governments required changes to the ICISS' original articulation of R2P.⁶ Two of those changes form the background of this thesis, and will thus be elaborated to contextualise the central research questions.

³ Throughout this thesis the umbrella term "atrocity crimes" will be used to refer to the four specific acts at the heart of R2P, namely, genocide, war crimes, ethnic cleansing, and crimes against humanity.

⁴ United Nations General Assembly, '2005 World Summit Outcome', A/60/L.1, 20/09/2005, paragraphs 138 and 139.

⁵ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

⁶ Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (London: Routledge, 2011), 25; Edward C. Luck, 'Building a Norm: The Responsibility to Protect Experience', in R. Rotberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages* (Washington D.C.: Brookings Institution Press, 2010), 111.

The first dimension in which R2P has undergone an important evolution pertains to its primary *raison d'être*. Based on the text of the WSOD, R2P has turned into an outright *principle of prevention*.⁷ Whilst a “responsibility to prevent” had always been part of the idea of R2P, the prominent place that it now occupies is noteworthy. The principle of R2P emerged in response to the 1990s controversy over the question of when, if ever, it is right to militarily intervene in the domestic jurisdiction of another state in order to halt large-scale violations of human rights.⁸ The ICISS was established to resolve the sovereignty-intervention conundrum, and did so creatively by developing the concept of R2P. Undeniably, therefore, R2P is a child of the debate on humanitarian intervention. Whilst the ICISS famously claimed that “prevention is the most important dimension of the responsibility to protect”, the bulk of its final report was still devoted to the issue of military responses to on-going atrocities.⁹ In fact, the ICISS report opened with the words: “This report is about the so-called ‘right of humanitarian intervention’”.¹⁰ And indeed, most observers agree that the discussion on humanitarian intervention was the “real meat of the report”.¹¹ The weakly developed elements of prevention and rebuilding appear to have been added to R2P in order to make military responses to on-going atrocities more palatable.¹²

⁷ Bellamy, *Global Politics and the Responsibility to Protect*, 8, 44; Jennifer M. Welsh, ‘Implementing the Responsibility to Protect’, *Policy Brief No.1/2009, Oxford Institute for Ethics, Law, and Armed Conflict*, 5; Sheri Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’, *Global Responsibility to Protect* vol. 1, no. 4 (2009), 443; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution Press, 2008), 79; Patricia O’Brien, ‘Responsibility to Protect: United Nations Torino Retreat 2008’, *International Journal of Refugee Law* vol. 20, no. 4 (2008), 711.

⁸ For background on the humanitarian intervention debate, see Jennifer M. Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004); or Robert O. Keohane and Jens Holzgrefe (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).

⁹ ICISS, *The Responsibility to Protect*, XI. The ICISS report devotes only nine pages to the “responsibility to prevent”.

¹⁰ ICISS, *The Responsibility to Protect*, VII.

¹¹ Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action* (Cambridge: Polity Press, 2007), 100. This reflects the ICISS’ original task of finding a new consensus on “how to reconcile the principles of intervention and state sovereignty”; see Jennifer M. Welsh, Caroline Thielking, and S. Neil MacFarlane, ‘The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and

The perception that R2P's most important dimension is military reaction was further reinforced by subsequent endorsements of R2P in key agenda-setting reports for the 2005 UN World Summit.¹³ The final report of the "High-Level Panel on Threats, Challenges and Change" (HLP), entitled *A More Secure World*, endorsed R2P in the section on "Collective Security and the Use of Force" and only dealt with the reactive element of the principle.¹⁴ UN Secretary-General (UNSG) Kofi Annan's programmatic report, entitled *In Larger Freedom*, embraced R2P in a section on the "Rule of Law", but did not further elaborate on R2P's content.¹⁵ Thus, when diplomats started negotiations on the WSOD, the principle of R2P was still seen as dealing with the issue of military humanitarian intervention.¹⁶

However, the three paragraphs on R2P that were eventually included in the final WSOD shifted the primary focus of R2P decisively from reaction towards prevention. Paragraphs 138 to 140 contain strong references to the prevention of genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁷ Paragraph 138 refers to states' primary responsibility to *prevent* atrocity crimes and their incitement. In paragraph 139, states further promise to help one another to build capacity to protect their populations from atrocity crimes, and to assist those states "which are under stress before crises and conflicts break out". Paragraph 140 expresses support for the "mission of the Special Adviser of the Secretary-General on the Prevention of Genocide". Moreover, the three pillar implementation

State Sovereignty', in R. Thakur, A. Cooper, and J. English (eds.), *International Commissions and the Power of Ideas* (Tokyo: United Nations University Press, 2005), 199.

¹² Weiss, *Humanitarian Intervention*, 100, 104; Bellamy, *Global Politics and the Responsibility to Protect*, 19.

¹³ See, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change (HLP), *A More Secure World: Our Shared Responsibility* (New York: United Nations Department of Public Information, 2004). 66; Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights For All*, A/59/2005, 21/03/2005, 47-49.

¹⁴ HLP, *A More Secure World*, 65-67. The HLP report's section on the prevention of civil war, genocide and other large-scale atrocities was not linked to R2P.

¹⁵ Annan, *In Larger Freedom*, 49.

¹⁶ Alex J. Bellamy, 'Conflict Prevention and the Responsibility to Protect', *Global Governance* vol. 14, no. 2 (2008), 135.

¹⁷ Welsh, 'Implementing the Responsibility to Protect', 5; Bellamy, 'Conflict Prevention and the Responsibility to Protect', 135; and Evans, *The Responsibility to Protect*, 79.

strategy for R2P that UNSG Ban Ki-moon put forward in 2009 (first pillar: state responsibility; second pillar: international assistance and capacity-building; third pillar: timely and decisive response) stresses that “prevention, building on pillars one and two, is the key ingredient for a successful strategy for the responsibility to protect”.¹⁸ The four additional reports on R2P that UNSG Ban has since released reinforce the view that R2P is a principle that deals primarily with prevention.¹⁹ Moreover, during the six interactive dialogues on R2P in the UN General Assembly (GA), states have repeatedly and unambiguously reaffirmed that they regard the prevention of atrocity crimes as the key constitutive element of R2P.²⁰ Even states that are known for their more critical position on R2P, such as Pakistan or Venezuela, have paid lip-service to the importance of prevention.²¹ According to Thomas Weiss, there is now an “increasing and, at times, virtually exclusive emphasis on prevention in the interpretation of RtoP”.²²

The second change that provides crucial background for the research questions addressed in this thesis relates to the scope of R2P. The ICISS had initially been rather ambiguous in defining from what exactly populations should be protected under R2P, referring alternatively to “human security threatening situations”, “large-scale loss of life”, “large-scale ethnic cleansing”, or “man-made crises putting populations at risk”.²³ The final

¹⁸ Ban, *Implementing the Responsibility to Protect*, 9. On the importance of prevention see also, Ban Ki-moon, ‘Address to Stanley Foundation Conference: The Responsibility to Protect: The Next Decade’, New York, 18/01/2012. Ban declared 2012 the “year of prevention”.

¹⁹ In chronological order the reports are, Ban Ki-moon, *Early Warning, Assessment and the Responsibility to Protect: Report of the Secretary-General*, A/64/864, 14/07/2010; Ban Ki-moon, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General*, A/65/877–S/2011/393, 27/06/2011; Ban Ki-moon, *The Responsibility to Protect: Timely and Decisive Response*, A/66/874–S/2012/578, 25/07/2012; Ban Ki-moon, *Responsibility to Protect: State Responsibility and Prevention: Report of the Secretary-General*, A/67/929–S/2013/399, 09/07/2013.

²⁰ Most statements that states made during the various interactive dialogues in the GA are available on the website of the Global Centre for the Responsibility to Protect: http://www.globalr2p.org/about_r2p.

²¹ Global Centre for the Responsibility to Protect, ‘Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment’, New York, August 2009, 6.

²² Thomas G. Weiss, ‘RtoP Alive and Well after Libya’, *Ethics & International Affairs* vol. 25, no. 3 (2011), 1.

²³ ICISS, *The Responsibility to Protect*, XI, XII, 18, 19.

report of the HLP made a first step towards greater precision, defining R2P's scope as "genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law".²⁴ Rather similarly, Annan defined the scope of R2P as "genocide or massive human rights abuses".²⁵ However, in order for states to reach consensus on R2P at the 2005 World Summit, the scope of R2P needed to be defined even more precisely, mostly to counter the concerns of weaker states that feared that an ambiguous definition of R2P's scope might facilitate unwarranted interventionism from the more powerful.²⁶ The WSOD, therefore, contains a legalistic definition of the scope of R2P, restricting it to four specific crimes under international law, namely, genocide, war crimes, ethnic cleansing, and crimes against humanity.²⁷ These crimes are commonly referred to as "atrocities crimes".²⁸

Since the 2005 UN World Summit, therefore, the principle of R2P is firmly linked to the "core" crimes under international law,²⁹ which are specifically defined in international conventions and customary international law.³⁰ First, Article II of the 1948 Genocide

²⁴ HLP, *A More Secure World*, 66.

²⁵ Annan, *In Larger Freedom*, 35.

²⁶ Luck, 'Building a Norm', 113-114; Edward C. Luck, 'Sovereignty, Choice, and the Responsibility to Protect', *Global Responsibility to Protect* vol. 1, no.1 (2009), 13; Lawrence Woocher, 'The Responsibility to Prevent: Toward a Strategy', in A. Knight and F. Egerton (eds.), *Routledge Handbook of the Responsibility to Protect* (Abingdon: Routledge, 2012), 27; and Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity, 2009), 66-97, 105.

²⁷ Jennifer M. Welsh, 'Turning Words into Deeds? The Implementation of the Responsibility to Protect', *Global Responsibility to Protect* vol. 2, no. 2 (2010), 4; Jutta Brunnee and Stephen Toope, 'The Responsibility to Protect and Use of Force: Building Legality?', *Global Responsibility to Protect* vol. 2, no. 3 (2010), 197. Paragraphs 138 and 139 of the WSOD mention these four international crimes five times. Note that ethnic cleansing is not technically a separate crime under international law, but constitutes a sub-category of genocide, war crimes, or crimes against humanity.

²⁸ David Scheffer, 'Atrocity Crimes Framing the Responsibility to Protect', *Case Western Research Journal of International Law* vol. 40, no. 1 (2008), 111-135. As already mentioned, for the remainder of this thesis the term "atrocities crimes" will be used to refer to genocide, war crimes, ethnic cleansing, and crimes against humanity.

²⁹ There are currently only four "core" international crimes, namely, genocide, war crimes, crimes against humanity, and aggression. R2P covers all of them with the notable exception of the crime of aggression.

³⁰ It is a distinct element of international crimes that they constitute violations of international customary law. This is one factor that distinguishes international crimes from transnational crimes, such as counterfeiting, money laundering, illegal drug trafficking, or human trafficking. Such transnational crimes are based on international treaties that oblige states to domestically criminalize such acts. International law does not

Convention defines genocide as “any of the following acts [e.g. killing members of a group; causing serious bodily or mental harm to members of a group; or deliberately inflicting on a group conditions of life calculated to bring about its physical destruction] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. The distinctive feature of the crime of genocide is that acts need to be committed with the specific intent to destroy one of the protected groups as such.³¹ Genocide can be committed in times of war and peace.³² Second, crimes against humanity are defined by Article 7 of the 1998 Rome Statute of the International Criminal Court (ICC) as “any of the following acts [e.g. murder, extermination, forcible transfer of population, sexual violence, or persecution] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Thus, crimes against humanity need to be widespread (directed against more than one person) and systematic (part of a policy of government or other de facto authority). They can be committed against any civilian population, combatants hors de combat, and even enemy combatants. And they do not require a nexus with an armed conflict.³³ Third, war crimes are defined as “serious violations of customary or treaty rules belonging to the corpus of the international humanitarian law of armed conflict”.³⁴ They involve grave breaches of the 1949 Geneva Conventions, its two 1977 Additional Protocols, or violations of customary international humanitarian law. Unlike genocide and crimes against humanity, war crimes do require a nexus to an armed conflict.³⁵ Moreover, while isolated violations of the laws of war also constitute war crimes, the war

directly criminalise these transnational crimes. See, Antonio Cassese, *International Criminal Law*, 2nd edn (Oxford: Oxford University Press, 2008), 11.

³¹ Cassese, *International Criminal Law*, 137. The protected groups mentioned in the Genocide Convention are “national, ethnical, religious and racial groups”. Cultural and political extermination campaigns are not covered by the law on genocide.

³² Cassese, *International Criminal Law*, 130.

³³ Cassese, *International Criminal Law*, 98-99.

³⁴ Cassese, *International Criminal Law*, 81.

³⁵ Cassese, *International Criminal Law*, 82.

crimes relevant to R2P have to be systematic and widespread.³⁶ This view follows the “substantiality test” that the ICC has introduced for war crimes, limiting its jurisdiction to acts that are committed as part of a policy or as part of a large-scale commission of such crimes.³⁷ Finally, ethnic cleansing refers to the forcible removal of an identifiable group from specific territory.³⁸ It is not itself a crime under international law, but constitutes a sub-category of genocide, war crimes, or crimes against humanity.³⁹

In all of his reports on R2P, UNSG Ban has strongly emphasised that R2P remains tied to these four international crimes until UN member states decide otherwise – which to date they have not.⁴⁰ On the contrary, Ban’s former Special Adviser on R2P, Edward Luck, notes that he had to repeatedly assure states during consultations that R2P would not go “an inch beyond the four specified crimes”.⁴¹ This view has also received overwhelming support from UN member states during the GA’s annual interactive dialogues on R2P. According to David Scheffer, former US Ambassador-at-Large for War Crimes Issues, “there is no ambiguity about what, in the collective view of the UN and its member-state governments, is the trigger for R2P: atrocity crimes”.⁴² Since 2005, therefore, R2P is married to the concept of international crimes.

Taken together, these two developments suggest that R2P should be conceptualised and operationalized as international crime prevention.⁴³ This insight forms the background and starting point for this thesis. Unlike other research on the “responsibility to prevent” that has emerged in recent years, and which typically treats the principle as an offspring of the

³⁶ See, Don Hubert and Ariela Blätter, ‘The Responsibility to Protect as International Crimes Prevention’, *Global Responsibility to Protect* vol. 4, no. 1 (2012), 28; Scheffer, ‘Atrocity Crimes Framing the Responsibility to Protect’, 132.

³⁷ Scheffer, ‘Atrocity Crimes Framing the Responsibility to Protect’, 132.

³⁸ Scheffer, ‘Atrocity Crimes Framing the Responsibility to Protect’, 129.

³⁹ Hubert and Blätter, ‘The Responsibility to Protect as International Crimes Prevention’, 19; Scheffer, ‘Atrocity Crimes Framing the Responsibility to Protect’, 128.

⁴⁰ Ban, *Implementing the Responsibility to Protect*, 8.

⁴¹ Luck, ‘Building a Norm’, 114.

⁴² Scheffer, ‘Atrocity Crimes Framing the Responsibility to Protect’, 78.

⁴³ Hubert and Blätter, ‘The Responsibility to Protect as International Crimes Prevention’.

well-established conflict prevention agenda, the subsequent chapters take R2P's narrow focus on international crimes seriously and explore the implications of this move to international crimes for the "responsibility to prevent".⁴⁴

1.1. Central Arguments

Having set out and contextualised the principle research questions that this thesis addresses, this section explains the main arguments that are gradually developed throughout the following chapters. The overall argument of this thesis is that if one wants to take R2P's narrow focus on international crimes seriously, this would require a significant re-thinking of the "responsibility to prevent", which is conventionally approached as a form of conflict prevention. More specifically, it will be argued that *linking R2P to the concept of international crimes turns the "responsibility to prevent" into a principle that is more focused on the short-term, rather than on so-called root causes of atrocity crimes; more focused on individuals (their choices, capacities, and protection needs), rather than on state structures and capacity; more partial regarding perpetrators and victims; and more coercive, intrusive, and controversial than is commonly acknowledged in academic writing and policy debates on the subject.* This central argument can be broken down into four more specific arguments that will be elaborated in turn.

First, this thesis argues that the very nature of the concept of international crimes will make it difficult for actors seeking to prevent such universally outlawed behaviour to adhere to the traditional conflict prevention principles of consent, impartiality, and minimal coercion. This argument can best be explained in comparison to the concept of conflict, which is typically defined as a serious, potentially violent, disagreement of opinions,

⁴⁴ Note that this thesis is not an unbridled advocacy of an international crimes approach. The thesis seeks to spell out the implications of R2P's move to international crimes, whilst also considering potential negative implications and side-effects.

interests, or demands between two or more actors.⁴⁵ Conflict is not necessarily seen as morally wrong and unjustifiable.⁴⁶ Thus, the prevention and resolution of conflict is traditionally approached as a voluntary exercise, where third parties act with the consent of the parties concerned and try to facilitate a non-violent solution to the dispute.⁴⁷ In stark contrast to this, the concept of crime, at its core, seeks to protect the shared moral values of a society. The concept of *international crime* morally stigmatises certain forms of human conduct as evil and inherently wrong within international society. It draws a clear line between acceptable and unacceptable behaviour of individuals. Individuals that violate the behavioural code of international society are transformed into global outlaws (enemies of mankind) that deserve punishment.⁴⁸ The sharp distinction that is drawn between offenders and victims reflects an inherent posture of partiality. Moreover, the protection of the international behavioural code is predicated on coercive measures.⁴⁹ International criminal law even imposes an obligation on states to prosecute and punish international criminal conduct.⁵⁰ Thus, this thesis argues that the principles of impartiality, consent, and minimal

⁴⁵ See, I. William Zartman and Mark Anstey, 'The Problem: Preventing Identity Conflicts and Genocide', in W. Zartman, M. Anstey, P. Meerts (eds.), *The Slippery Slope to Genocide: Reducing Identity Conflicts and Preventing Mass Murder* (Oxford: Oxford University Press, 2012), 5, 16; Jacob Bercovitch and Richard Jackson, *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches* (Michigan: The University of Michigan Press, 2012), 20.

⁴⁶ Zartman and Anstey, 'The Problem', 16.

⁴⁷ See, Michael S. Lund, 'Conflict Prevention: Theory in Pursuit of Policy and Practice', in J. Bercovitch, V. Kremenyuk, and W. Zartman (eds.), *SAGE Handbook of Conflict Resolution* (London: SAGE, 2009), 289. Note that this traditional approach to conflict prevention is increasingly challenged from within the conflict prevention community, especially in instances where conflict resolution is conducted in the context of atrocity crimes. The 2000 Brahimi report is only one example for this evolved thinking.

⁴⁸ See, Ruti Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011), 199-201; Kirsten Ainley, 'Individual Agency and Responsibility for Atrocity', in R. Jeffery (ed.), *Confronting Evil in International Relations* (Basingstoke: Palgrave Macmillan, 2008), 2-4; Roloef Haveman and Alette Smeulders, 'Criminology in a State of Denial – Towards a Criminology of International Crimes', in A. Smeulders and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 16.

⁴⁹ Paul Roberts and Nesam McMillan, 'For Criminology in International Criminal Justice', *Journal of International Criminal Justice* vol. 1, no. 2 (2003), 329-330.

⁵⁰ Cassese, *International Criminal Law*, 3.

coercion, which have traditionally guided conflict prevention efforts, do not apply in the same way to the “responsibility to prevent”.

Second, the research findings of this thesis support the argument that an international crimes approach to the prevention of mass atrocities would prioritise short-term and proximate prevention strategies (so-called situational crime prevention), which seek to reduce crime opportunities, manipulate the decision-making of individuals, and protect potential victims, over long-term and root cause focused ones (so-called social crime prevention), which seek to reduce the number of potential offenders by eliminating structural and dispositional factors associated with the development of criminality.⁵¹ As will be shown below, criminological research into the prevention of crime provides very little evidence for the effectiveness of long-term prevention strategies, but suggests that targeted interventions into the immediate crime context are an effective way of reducing crime choices of individuals.⁵² Whilst both social and situational crime prevention can form part of one integrated and comprehensive international crime prevention strategy, the predominantly negative interactions between these two forms of crime prevention give added weight to the argument that situational crime prevention strategies should be prioritized in policy making.⁵³ This thesis, therefore, defends the argument that international crime prevention is best approached as a strategic game. International actors can try to avert escalations of systematic violence by altering the strategic cost-benefit calculations of potential perpetrators (e.g. with sticks, carrots, or incapacitation), reducing the vulnerability of potential victims (e.g. by strengthening capacity to cope with harm or reducing risk of victimisation), and limiting the

⁵¹ Rossella Selmini, ‘The European Experience of Crime Prevention’, in S. Shoma, P. Knepper, and M. Kett (eds.), *International Handbook of Criminology* (London CRC Press, 2010), 528-535; Mangai Natarajan, ‘Introduction’, in M. Natarajan (ed.), *Crime Opportunity Theories: Routine Activity, Rational Choice and their Variants* (Farnham: Ashgate, 2011), xv.

⁵² Lawrence Sherman et al., ‘Preventing Crime’, in L. Sherman et al. (eds.), *Evidence-based Crime Prevention* (London: Routledge, 2002), 4; Marcus Felson and Ronald Clarke, *Opportunity Makes the Thief: Practical Theory of Crime Prevention* (London: Home Office, Policy Research Series Paper 98, 1998), 3.

⁵³ Selmini, ‘The European Experience of Crime Prevention’, 528-535; Natarajan, ‘Introduction’, xv.

permissiveness of crime situations (e.g. by reducing means, eliminating excuses, or increasing risk). Thus, an international crimes approach to mass atrocity prevention reverses the argument advanced in large segments of literature on the “responsibility to prevent”, which depicts the principle as a long-term and structurally focused agenda that seeks to build societies resilient to atrocity crimes by promoting, for example, economic development, democratization, education, or good governance.⁵⁴

Third, this thesis argues that efforts to prevent international crimes need to encompass all three pillars of R2P, a strategy which sometimes blurs the line between prevention and response. The tools that seem to be most relevant for the prevention of international crimes belong to the “third pillar” of R2P, which is not usually associated with preventive action. Conventional wisdom on the “responsibility to prevent” holds that it rests on the first two pillars of R2P (“state responsibility” and “international assistance and capacity building”). Pillar three (“timely and decisive response”), by contrast, is conceptualised as the response pillar of R2P that becomes relevant once prevention has failed. This conceptualisation pushes R2P towards a focus on root cause prevention. Contrary to this view, this thesis shows that as a consequence of linking R2P to international crimes, the third pillar of R2P needs to be considered a crucial and integral part of the “responsibility to prevent”. Whilst pillar three contains more than just military tools, it is true that the non-military tools are also coercive in nature, such as, for example, targeted sanctions or international criminal prosecutions. The prevention of international crimes, it will therefore be argued, is not necessarily the “soft spot” of R2P. Depicting it as such might help to build and strengthen political consensus on

⁵⁴ See, Ban, *Responsibility to Protect: State Responsibility and Prevention*, 2; Bellamy, *Global Politics and the Responsibility to Protect*, 119; Woocher, ‘The Responsibility to Prevent’, 31-32; ICISS, *The Responsibility to Protect*, 22; Evans, *The Responsibility to Protect*, 91-97; Deborah Mayersen, ‘Current and Potential Capacity for the Prevention of Genocide and Mass Atrocities Within the UN System’, *Global Responsibility to Protect* vol. 3, no. 2 (2011), 221; Asia-Pacific Centre for the Responsibility to Protect, *Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation* (Brisbane: University of Queensland, 8 June 2009), 20-34.

R2P, but does not necessarily reflect the full conceptual and operational reality of international crime prevention.

Finally, this thesis argues that international crime prevention poses a distinct set of challenges and dilemmas for global politics, which are likely to turn it into a highly controversial endeavour. This is somewhat counterintuitive because making R2P primarily about prevention, rather than military response, was partly a strategic choice of the advocates of R2P, intended to *reduce* controversy around R2P and generate greater political consensus.⁵⁵ However, this thesis argues that the turn to prevention does not necessarily solve the controversy problem. The “responsibility to prevent” is not, as is often suggested, an apolitical and non-coercive principle that avoids much of the controversy that is usually associated with military humanitarian interventions.⁵⁶ The research findings of this thesis reveal a series of the potential dilemmas that can arise from international crime prevention: first, the prevention of atrocity crimes requires international actors to reconfigure their capacities and dispositions towards affecting the behaviour of individuals; second, the victim/perpetrator frame that guides international crime prevention is susceptible to manipulations; third, taking sides in civil war situations can empower potential “victims” to turn into potential “perpetrators”; fourth, military prevention measures are likely to entail (civilian) casualties and injuries; fifth, preventing escalations of systematic violence cannot completely forestall tragic loss of life; and finally, international crime prevention efforts might be a facilitating factor for regime change and regional instability. These and other implications challenge the compatibility of international crime prevention with other international policy agendas of significance, such as the prevention of armed conflict, the

⁵⁵ See, Francis M. Deng, ‘JISB Interview: The Responsibility to Protect’, *Journal of Intervention and Statebuilding* vol. 4, no. 1 (2010), 85; Jennifer M. Welsh, ‘A Normative Case for Pluralism: Reassessing Vincent’s Views on Humanitarian Intervention’, *International Affairs* vol. 87, no. 5 (2011), 1201.

⁵⁶ See also, Chris Brown, ‘The Antipolitical Theory of Responsibility to Protect’, *Global Responsibility to Protect* vol. 5, no. 4 (2013).

promotion of democratization, the delivery of humanitarian assistance to needy populations, or the provision of development aid. In sum, preventing international crimes often requires international policy-makers to prioritise certain agendas and interests over others.

1.2. Contribution to the Literature

As this section will discuss in detail, the research presented in this thesis contributes to at least two areas of International Relations (IR) scholarship. On the one hand, the articulation of an international crimes approach to the prevention of mass atrocities contributes to the literature on R2P, particularly the emerging literature on its preventive dimension. On the other hand, by explicitly drawing on criminological research, this thesis also contributes to the relatively understudied nexus between international relations scholarship and the field of criminology. Both contributions will be discussed in turn.

1.2.1. The Debate on the “Responsibility to Prevent”

Until very recently, the “responsibility to prevent” has been neglected in scholarship on R2P.⁵⁷ Despite widespread lip-service to the claim that prevention is the most important dimension of R2P, academic research and policy thinking on R2P’s preventive component was long absent.⁵⁸ Whilst there is still a gap in scholarship on the “responsibility to prevent”, an embryonic debate on the prevention of atrocity crimes has emerged in recent years. Too often, however, the “responsibility to prevent” is perceived through a conflict prevention

⁵⁷ See, Bellamy, ‘Conflict Prevention and the Responsibility to Protect’, 135. Bellamy argues that there are two reasons for this. First, in the aftermath of 9/11, Western powers were preoccupied with preventing terrorism and WMD proliferation, rather than atrocity crimes. At the same time, the Bush doctrine of pre-emptive warfare in combination with the US’ humanitarian justifications for the invasion of Iraq led to resistance to legitimising further preventive doctrines. Second, there was genuine confusion over how comprehensive the “responsibility to prevent” should be. The broad approach proposed by the ICISS made it difficult to distinguish the “responsibility to prevent” from measures dealing with development and security more broadly.

⁵⁸ See, Woocher, ‘The Responsibility to Prevent’, 22-23; also Ruben Reike, Serena Sharma, and Jennifer Welsh, ‘The Responsibility to Prevent: A Strategic Framework for Atrocity Prevention’, in J. Welsh and S. Sharma (eds.), *The Responsibility to Prevent: Overcoming the Challenges of Mass Atrocity Prevention* (Oxford: Oxford University Press, forthcoming), chapter one.

framework. What is lacking from the emerging debate, this thesis argues, is conscious and systematic reflection on what exactly follows from R2P's narrow focus on the prevention of international crimes. An analysis of these implications is the contribution that this thesis makes to scholarship on the preventive dimension of R2P, arguing that an international crimes approach to the prevention of mass atrocities challenges conventional wisdom on the "responsibility to prevent".

Much of what has been said and written about the "responsibility to prevent" borrows heavily from the conflict prevention agenda, which has attracted substantial interest over the past decades.⁵⁹ Early accounts of the "responsibility to prevent" have approached the subject as being more or less synonymous with the prevention of armed conflict, and essentially amount to calls for more commitment to conflict prevention, without offering any real conceptual innovation. Oftentimes, this conflict prevention approach to mass atrocity prevention is based on the observation that atrocity crimes frequently occur in the context of armed conflict.⁶⁰ The best examples can be found in the 2001 report of the ICISS, former UNSG Kofi Annan's 2004 "Action Plan to Prevent Genocide", Gareth Evans' 2008 book on R2P, and William Zartman's 2012 book on the prevention of identity conflicts and genocide.⁶¹ "In context of the responsibility to protect," the ICISS report argues, "improving

⁵⁹ On conflict prevention see: Boutros Boutros-Ghali, *An Agenda for Peace. Preventive Diplomacy, Peacemaking, and Peacekeeping: Report of the Secretary-General*, A/47/277 – S/24111, 17/06/1992; Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report* (Washington, D.C.: Carnegie Commission on Preventing Deadly Conflict, 1997); Kofi Annan, *Prevention of Armed Conflict: Report of the Secretary-General* (New York: Department of Public Information, 2002); Fen Osler Hampson and David Malone (eds.), *From Reaction to Conflict Prevention: Opportunities for the UN System* (London: Lynne Rienner Publishers, 2002); Barnett Rubin and Bruce Jones, 'Prevention of Violent Conflict: Tasks and Challenges for the United Nations', *Global Governance* vol. 13, no. 3 (2007), 6; Hugo Slim, *A Guide to Mediation: Enabling Peace Processes in Violent Conflict* (Geneva: Centre for Humanitarian Dialogue, 2007).

⁶⁰ See, Kofi Annan, 'Action Plan to Prevent Genocide', Press Release, SG/SM/9197 AFR/893 HR/CN/1077, 7 April 2004; Evans, *The Responsibility to Protect*, 81.

⁶¹ See, ICISS, *The Responsibility to Protect*, 19-27; Evans, *The Responsibility to Protect*, 79-104; Annan, 'Action Plan to Prevent Genocide'; and William Zartman et al., *Slippery Slope to Genocide: Reducing Identity Conflicts and Preventing Mass Murder* (Oxford: Oxford University Press, 2012).

conflict prevention at every level is urgent and essential”.⁶² The term “conflict prevention” is mentioned twenty-three times on the nine pages that the report devoted to the “responsibility to prevent”, and the supplementary research volume also equates atrocity prevention with conflict prevention.⁶³ Similarly, R2P advocate Evans suggests that, “as a result of the much more systematic focus on conflict prevention since the early 1990s, we now have a much better understanding not only of the causes of deadly conflict and mass atrocities but of the preventive and reactive measures available to deal with these problems”.⁶⁴ Evans’ account is full of phrases such as: “effective conflict prevention, and by extension the prevention of mass atrocity crimes”.⁶⁵ Former UNSG Annan simply argues that “peace offers the ultimate prevention of genocide”.⁶⁶

Unsurprisingly, these conflict prevention approaches take conflict prevention theory as the main guide to operationalising the “responsibility to prevent”, i.e. they simply map well-established conflict prevention frameworks onto the principle. As a result, conflict prevention and the “responsibility to prevent” become indistinguishable. Like conflict prevention theory, these approaches distinguish between structural prevention, which seeks to avoid crises and disputes altogether by dampening the dynamics that might give rise to them (poverty, inequality, poor governance, etc.),⁶⁷ and direct prevention, which tries to prevent

⁶² ICISS, *The Responsibility to Protect*, 20.

⁶³ Thomas Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001)

⁶⁴ Evans, *The Responsibility to Protect*, 86.

⁶⁵ Evans, *The Responsibility to Protect*, 81.

⁶⁶ Kofi Annan, ‘Report of the Secretary-General on the Implementation of the Five Point Action Plan and the Activities of the Special Adviser on the Prevention of Genocide’, *Commission on Human Rights*, E/CN.4/2006/84, 09/03/2006, 10.

⁶⁷ See, Carnegie Commission, *Preventing Deadly Conflict*, 69-105; Michael S. Lund, ‘Conflict Prevention: Theory in Pursuit of Policy and Practice’, in J. Bercovitch, V. Kremenyuk and W. Zartman (eds.), *SAGE Handbook of Conflict Resolution* (London: SAGE, 2009), 289; and Edward C. Luck, ‘Prevention: Theory and Practice’, in F. O. Hampson and D. Malone (eds.), *From Reaction to Conflict Prevention: Opportunities for the UN System* (London: Lynne Rienner Publishers, 2002), 253.

imminent crises from escalating into full-scale conflict.⁶⁸ Moreover, structural prevention aimed at re-building societies is often depicted as preferable to direct prevention, not least because it seems less intrusive.⁶⁹ Should direct prevention efforts become necessary, however, conflict prevention approaches to the “responsibility to prevent” follow rather traditional conflict prevention theory in arguing that preventive action should largely adhere to the principles of impartiality, consent, and minimal coercion; and operate with maximum respect for the sovereignty and territorial integrity of the country concerned.⁷⁰ Whilst unconditional adherence to these traditional principles is increasingly challenged within the conflict prevention community, especially in the context of systematic violence against civilians and atrocity crimes, they are still widely seen as the bedrock principles of conflict prevention.⁷¹ In particular, direct prevention efforts are seen as depending heavily on the consent and cooperation of the conflicting parties. “If the Government concerned refuses to admit that it has a problem that could lead to violent conflict and rejects offers for

⁶⁸ Alice Ackerman, ‘The Idea and Practice of Conflict Prevention’, *Journal of Peace Research* vol. 40, no. 3 (2003), 341.

⁶⁹ See, ICISS, *The Responsibility to Protect*, 19, 22-23; Evans, *The Responsibility to Protect*, 86; Annan’s genocide prevention plan stresses the importance of implementing his earlier recommendations for the prevention of armed conflict, which are heavily root cause focused, see Kofi Annan, *Prevention of Armed Conflict: Report of the Secretary-General* (New York: Department of Public Information, 2002), 3-4; also Bercovitch and Jackson, *Conflict Resolution in the Twenty-First Century*, 8-10.

⁷⁰ See, Evans, *The Responsibility to Protect*, 86; ICISS, *The Responsibility to Protect*, 25. The importance of these traditional conflict prevention principles is not challenged by the conflict prevention approaches to the “responsibility to prevent”. They operate with a traditional approach to conflict prevention.

⁷¹ Since the end of the Cold War there has been an evolution in UN peace operations. The inability of UN peacekeepers to prevent the 1994 Rwandan genocide and the 1995 Srebrenica massacre led to the development of the concept of so-called “robust peace operations”. In 2000, the report of the Panel on UN Peace Operations, the “Brahimi Report”, argued that the traditional UN peacekeeping principles were still valid, but required adaptation to the more complex conditions of internal conflict. Whilst consent of the local parties is still seen as crucial, the Brahimi report argued that impartiality could lead to complicity with evil if interpreted as equidistant neutrality. The Brahimi report also advocated establishing peace operations under Chapter VII of the UN Charter so that they could use force beyond self-defence and create a credible deterrent threat. The Brahimi recommendations have been partially implemented in peace operations that were confronted with imminent or on-going atrocities, such as the ones in Sierra Leone, the DRC, Liberia, Haiti, or East Timor. See, Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, 21/08/2000; also William Durch, Viktoria Holt, Caroline Earle, Moira Shanahan, *The Brahimi Report and the Future of UN Peace Operations* (Washington D.C. The Henry L. Stimson Center, 2003); and Alex J. Bellamy, Paul D. Williams, Stuart Griffin, *Understanding Peacekeeping* (Cambridge: Polity Press, 2004), 95-96.

assistance,” Kofi Annan explains, “there is very little outside actors, including the United Nations, can do. The United Nations must have the consent and cooperation of the Government concerned”.⁷²

In recent years, some more nuanced approaches to the “responsibility to prevent” have emerged, which try to unpack the relationship of R2P and conflict prevention in a more systematic manner, relying on empirical, often quantitative, research. Notable work in this regard has been produced by Alex Bellamy, Lawrence Woocher, and the US-based Genocide Prevention Task Force.⁷³ These approaches start by acknowledging that atrocity crimes can occur outside the context of armed conflict. Research conducted by Bellamy shows that from 103 cases where atrocity crimes have occurred since 1945, 69 cases have occurred in the context of an armed conflict, whereas 34 cases have occurred in peacetime.⁷⁴ From this finding it is concluded that conflict prevention and atrocity crime prevention do not necessarily overlap and that the “responsibility to prevent” needs to contain strategies for the prevention of wartime atrocities and strategies for the prevention of peacetime atrocities.

However, whilst acknowledging that the prevention of the crimes associated with R2P might sometimes have to diverge from conflict prevention wisdom, these approaches ultimately come back to the importance of structural conflict prevention for the “responsibility to prevent”. They argue that empirical research suggests that the root causes of atrocity crimes are rather similar to those identified for armed conflict. Addressing these root causes and building resilience within states is seen as the primary objective of the R2P

⁷² Annan, *Prevention of Armed Conflict*, 87.

⁷³ See, Bellamy, *Global Politics and the Responsibility to Protect*, 93-122; Alex J. Bellamy, ‘Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent’, *Policy Analysis Brief: The Stanley Foundation*, January 2011; Madeleine Albright and William Cohen (eds.), *Preventing Genocide: A Blueprint for U.S. Policymakers* (Washington D.C.: United States Holocaust Museum, American Academy of Diplomacy, United States Institute of Peace, 2008); Woocher, ‘The Responsibility to Prevent’.

⁷⁴ Bellamy, ‘Mass Atrocities and Armed Conflict’, 7. Lawrence Woocher and the Genocide Prevention Task Force make similar arguments.

prevention agenda. This essentially amounts to a call for the strengthening structural conflict prevention. The Genocide Prevention Task Force, for example, stresses that “early prevention is the preferred course of action in strategic, resource, and moral terms”, and that “building sustainable peace in fragile societies requires serious long-term investment”.⁷⁵ Lawrence Woocher proposes a three-pronged approach to the “responsibility to prevent”, but ultimately concludes: “empirical patterns and the logic of prevention suggests that the greatest potential may lie in structural prevention focused on preventing violent conflict. Thus, a strong commitment to prevent mass atrocities -as represented by the global commitment to R2P- might add little to the *shape* of the conflict prevention agenda, but should add to the *importance and robustness* of these efforts”.⁷⁶ Alex Bellamy argues that the “responsibility to prevent” needs to be guided by an “atrocities lens”, but that “there is no need to radically rethink the core components of prevention for R2P purposes”.⁷⁷ He further suggests that “there can be no meaningful and effective agenda for the prevention of genocide and mass atrocities that does not incorporate the prevention of armed conflict”.⁷⁸ Based on statistical research, Bellamy advises policy-makers to particularly focus on structural prevention and to include “economic development and democratization as core components of the preventive aspect of RtoP”. “Continuing to leave economic development and democratization in the cold”, he claims, “restricts RtoP’s contribution to the prevention of mass atrocities and risks making the principle a ‘fire-fighting’ tool”.⁷⁹ In sum, these nuanced approaches have advanced the debate on the “responsibility to prevent” in important respects, but they ultimately come full circle and advocate strengthening structural conflict prevention. Most

⁷⁵ Albright and Cohen (eds.), *Preventing Genocide*, 35.

⁷⁶ Woocher, ‘The Responsibility to Prevent’, 31-32.

⁷⁷ Bellamy, ‘Mass Atrocities and Armed Conflict’, 7.

⁷⁸ Bellamy, ‘Mass Atrocities and Armed Conflict’, 1.

⁷⁹ Bellamy, *Global Politics and the Responsibility to Protect*, 119.

importantly, though, they also do not systematically reflect on the implications of the element of “international crime” in the “responsibility to prevent”.⁸⁰

This thesis contributes to this emerging body of literature on the “responsibility to prevent” by offering systematic examination of the consequences of linking the principle of R2P to the concept of international crimes. In contrast to the conflict prevention inspired approaches examined above, it develops an international crimes approach to conceptualizing and operationalizing the “responsibility to prevent”. It is argued that such an approach differs from the existing accounts of the “responsibility to prevent” in the following key respects. An international crimes approach to the prevention of atrocities would prioritise proximate/direct forms of prevention over structural prevention (or what will be called “situational crime prevention” over “social crime prevention”). The “responsibility to prevent” would come to resemble a strategic game, rather than a long-term agenda for social change. It would focus on individuals as perpetrators and victims of international crimes, rather than on state structures. And it would be more partial, coercive, and intrusive than is typically acknowledged.

1.2.2. Contribution to the IR/ Criminology Nexus

In addition to filling a gap in the literature on the “responsibility to prevent”, this thesis contributes to interdisciplinary scholarship at the intersection of IR and criminology. It seeks to explore the criminology/IR nexus in a focused way rather than simply gesturing towards closer exchange. So far, the nexus between IR and criminology has been remarkably understudied.⁸¹ The notion of crime has traditionally been confined to the domestic realm and IR scholars have not considered crime-related issues to be a significant field of inquiry. However, the notion of crime, both transnational crime (involving, for example, drug

⁸⁰ Bellamy’s “atrocities lens” comes closest in this regard.

⁸¹ See, Peter Andreas and Ethan Nadelman, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford: Oxford University Press, 2006), viii.

trafficking or money laundering) and international crime (involving, for example, genocide, war crimes, and crimes against humanity), plays an increasingly prominent role in the actual practice of international relations. Whilst the line between the subject-matters of international relations and criminology seems thus increasingly blurred,⁸² there are still very few attempts to cross the disciplinary divide. This thesis constitutes such an attempt, and one that explicitly focuses on the “core” international crimes of genocide, war crimes, and crimes against humanity.

The few other works on the IR/criminology nexus that have emerged in recent years focus on transnational, or treaty-based, crimes. Peter Andreas and Ethan Nadelman discuss crime control in international relations, focusing on transnational crimes - such as piracy, slavery, prostitution, and illegal drug trafficking.⁸³ Claudia Aradau and Rens von Munster examine the value of criminological theory for understanding the logic behind counter-terrorism measures.⁸⁴ Sarah Percy and Ian Loader discuss the erosion of the organisational lines of ‘inside’ and ‘outside’, ‘war’ and ‘crime’, and ‘public’ and ‘private’ in their work on the overlaps between criminology and IR.⁸⁵ And finally, James Sheptycki’s work focuses on the transnational policing of, for example, money laundering and illegal drug trafficking.⁸⁶ To this intellectual exchange between IR and criminology, this thesis adds a criminologically-inspired approach to the preventive dimension of R2P. This approach focuses specifically on the prevention of the “core” international crimes.

⁸² See, Ian Loader and Sarah Percy, ‘Bringing the ‘Outside’ In and the ‘Inside’ Out: Crossing the Criminology/IR Divide’, *Global Crime* vol. 13, no. 4 (2012), 213.

⁸³ Andreas and Nadelman, *Policing the Globe*.

⁸⁴ Claudia Aradau and Rens van Munster, ‘Exceptionalism and the War on Terror: Criminology Meets IR’, *British Journal of Criminology* vol. 49, no. 5 (2009).

⁸⁵ Loader and Percy, ‘Bringing the ‘Outside’ In and the ‘Inside’ Out’, 214.

⁸⁶ James Sheptycki (ed.), *Issues in Transnational Policing* (Abingdon: Routledge, 2000); James Sheptycki, ‘Criminology and the Transnational Condition: A Contribution to Political Sociology’, *International Political Sociology* vol. 1, no. 3 (2007), 391-405.

1.3. Research Design

This section discusses the general research design of this thesis, leaving more detailed discussion on specific research methods, such as case selection, data collection, and sources in Part Two, which is the case study part of this thesis. The overall research objective of this thesis, as already alluded to, is to take R2P's narrow focus on international crimes seriously and to spell out the implications of this move to international crimes for the "responsibility to prevent". For this, the research design of this thesis combines deductive and inductive reasoning.

The first part of this thesis adopts a deductive approach and derives a preliminary framework for the prevention of international crimes from the relevant literature in the field of criminology. It is assumed that a certain amount of deductive knowledge about international crime prevention is valuable in structuring the subsequent research. The decision to turn to criminological literature to deduce an international crime prevention framework distinguishes this thesis from other research on the "responsibility to prevent", which tends to draw on literature from the field of conflict prevention. For the purposes of this thesis, "criminology" comprises the fields of domestic criminology, supranational criminology, and international criminal law. These literatures deal with the nature and causes of crime/international crime, public policy responses to crime/international crime, and potential strategies for the prevention of crime/international crime. Thus, this thesis views "criminology" as the natural place to begin the development of an international crimes approach to the prevention of mass atrocities.

There are two key challenges associated with the deductive research conducted in the first part of this thesis. First, the majority of criminological literature in general, but particularly the literature on the prevention of crime, relates to domestic crimes. With regards to this literature, reasoning by analogy is an important method for translating criminological

insights from the domestic level to the international level and to international crimes. Whilst this translation process is not without challenges and pitfalls, as the next chapter will elaborate in more detail, the literature from the field of domestic criminology still provides important insights into the nature of crime and ways of thinking about the prevention of crime. Second, like the discipline of International Relations, criminology is a rather diverse field of inquiry that contains different theoretical approaches. As a result, it has become necessary to prioritize certain theoretical assumptions over others. This thesis contends that the study of international crime prevention lends itself to rational choice inspired approaches – often associated with “situational crime prevention”. Whilst some of the rationality assumptions that underpin these approaches are contested, particularly by critical criminologists⁸⁷, there are several factors that justify this choice. First, the vast amount of criminological crime prevention research operates with a rational actor framework.⁸⁸ Rational choice assumptions also underpin a large segment of literature in international criminal law, and there is a growing body of literature in IR that emphasises the rationality behind the commission of atrocities.⁸⁹ Second, criminologists have produced significant empirical evidence for the effectiveness of rational choice based situational crime prevention.⁹⁰ Third, situational crime prevention, which is largely derived from a rational choice framework,

⁸⁷ See, for example, Gordon Hughes, *Understanding Crime Prevention: Social Control, Risk and Late Modernity* (Maidenhead: Open University Press, 1998).

⁸⁸ Adam Crawford and Karen Evans, ‘Crime Prevention and Community Safety’, in M. Maguire, R. Morgan, and R. Reiner, *The Oxford Handbook of Criminology*, 5th edn (Oxford: Oxford University Press, 2012), 772.

⁸⁹ On international criminal law see: Cassese, *International Criminal Law*, 33; Ainley, ‘Individual Agency and Responsibility for Atrocity’, 10-14. For the rational and strategic underpinnings of mass atrocities see: Benjamin Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century* (Ithaca, N.Y.: Cornell University Press, 2004); Manus I. Midlarsky, *The Killing Trap: Genocide in the Twentieth Century* (Cambridge: Cambridge University Press, 2005), especially chapter 5; Matthew Krain, ‘State-Sponsored Mass Murder: The Onset and Severity of Genocides and Politicides’, *Journal of Conflict Resolution* vol. 41, no. 3 (1997); Rene Lemarchand, ‘Rwanda: The Rationality of Genocide’, *Issue: A Journal of Opinion* vol. 23, no. 2 (1995); and Scott Straus, ‘Political Science and Genocide’, in D. Bloxham and R. Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), 175.

⁹⁰ See, Rick Linden, ‘Situational Crime Prevention: Its Role in Comprehensive Prevention Initiatives’, *ICP Review* vol. 1 (2007), 149.

dominates the actual crime prevention practice of governments in most parts of the world.⁹¹ In short, rational choice approaches enjoy unrivalled popularity amongst criminologists and crime prevention practitioners. Thus, the international crime prevention framework that will be deduced in the first part of this thesis draws heavily on such approaches and the assumptions that come with them.

The second part of this thesis adopts an inductive approach and empirically studies three cases of international crime prevention. The aim of this empirical analysis is to refine, complement, and problematize the framework deduced in the first part of the thesis. The case studies are primarily intended to serve a heuristic or exploratory function.⁹² Their purpose is to generate hypotheses, rather than to test theories or hypotheses. The case studies shall demonstrate how international crime prevention, especially the situational prevention of international crimes, works in practice, clarify how certain prevention mechanisms work, and facilitate an in-depth study of policy-making in the midst of crisis. More specifically, the purpose of the case studies is to identify potential tools for international crime prevention; analyse how these tools are used; generate hypotheses about the conditions under which certain tools succeed or fail; infer capacities and dispositions required to operationalize international crime prevention; study the interactions between international crime prevention and the prevention of armed conflict; and highlight unintended consequences and side-effects that international crime prevention efforts might entail.

For this exploratory purpose, a qualitative small-*n* research design with thick and rich case studies is most appropriate. Such in-depth case studies allow for a detailed delineation of background and context, which in turn helps to generate meaningful insights into the practice

⁹¹ See, Rossella Selmini, 'The European Experience of Crime Prevention', in S. Shoham, P. Knepper, and M. Kett (eds.), *International Handbook of Criminology* (London: CRC Press, 2010), 230.

⁹² On heuristic case studies see, Harry Eckstein, *Regarding Politics: Essays on Political Theory, Stability, and Change* (Los Angeles: University of California Press, 1992), 143-147. See also, Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge: Belfer Centre for Science and International Affairs, 2005).

and politics of international crime prevention, as well as its relationship to the prevention of armed conflict. This cannot be achieved with a large-*N* statistical research design, which tends to focus on estimating the average effects of causes (“effects-of-causes” approach).⁹³ It is not the purpose of the case studies in this thesis to assess exactly how much variable a or b contributed to the prevention of atrocity crimes. Moreover, whilst the commission of atrocity crimes is already a rare phenomenon, cases in which international actors consciously attempt to prevent atrocity crimes are even rarer.⁹⁴ Put differently, the population of potential cases of international crime prevention is very small. The study of these relatively rare but high-impact events also necessitates a qualitative small-*n* research design.⁹⁵ As a consequence of such a research design, the generalizability of the case study findings is limited. The various hypotheses generated through the case studies require further testing. Nevertheless, the case studies provide an important complement and corrective to the deductive framework presented in this thesis.

The three cases that will be studied in this thesis are: 1) the international community’s failed efforts to prevent atrocity crimes in Bosnia and Herzegovina (1991-1995); 2) the international community’s relatively successful efforts to prevent atrocity crimes in the context of the post-election violence in Kenya (2007-08); and 3) the international community’s successful but controversial efforts to prevent atrocity crimes during the Libya crisis (2011). These three cases are studied in chronological order. The details of the case selection process will be elaborated in the case study part of the thesis. At this point, it suffices to briefly explain why these three cases are suitable for the specific research

⁹³ Gary Goertz and James Mahoney, ‘A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research’, *Political Analysis* vol. 14, no. 3 (2006), 230.

⁹⁴ See, Scott Straus, ‘Second-Generation Comparative Research on Genocide’, *World Politics* vol. 59, no. 3 (2007), 479, 494; also, Scott Straus and Daniel Knudsen, ‘The Costs of Escalation: Theorizing Constraint and Negative Cases in the Study of Mass Violence’ (*unpublished, in possession of the author*).

⁹⁵ George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 3-35. A statistical large-*N* study would require the availability of a large number of cases.

objectives mentioned above. First, and most importantly, the three cases are clear instances of international crime prevention, which this thesis defines as cases in which international actors recognized the risk of atrocity crimes and made conscious efforts to prevent them. As instances of international crime prevention, the three cases provide specific insights into the politics, practices, and challenges of international crime prevention. It should be stressed, however, that the cases primarily illuminate the situational prevention of international crimes; they allow only a few limited observations about social crime prevention, which is significantly more difficult to grasp and study. Second, the three cases provide a mix of positive and negative cases of international crime prevention. In the Bosnia case, international crime prevention efforts largely failed. In the Kenya and Libya cases, however, the international crime prevention efforts were relatively successful in preventing the escalation of systematic violence into atrocity crimes. Third, the three cases allow the study of international crime prevention efforts in different situational environments: in the context of an armed conflict (Bosnia), in a peacetime context (Kenya), and in the context of a transition from peacetime to armed conflict (Libya).

The third part of this thesis, finally, synthesizes the research findings of the deductive and inductive sections. The aim of this synthesis is to refine and revise the preliminary framework for the prevention of international crimes in light of the case study findings. More specifically, the approach of mixing deductive and inductive research findings has the purpose to (1) clarify the relationship between social and situational crime prevention; (2) populate the framework with policy tools that international actors consider appropriate for operationalizing the situational prevention of international crimes; (3) shed light on the conditions and capacities that need to be in place for the prevention of atrocity crimes; and (4) elucidate the relationship between the prevention of atrocity crimes and the prevention of armed conflict. Thus, the revised framework identifies the key characteristics of an

international crimes approach to the prevention of mass atrocities, and could be used in future research with other cases.

1.4. Plan of the Thesis

This Introduction concludes by outlining the road ahead and explaining how the different parts and chapters of this thesis hang together.

The rest of the thesis is divided into three parts and six chapters. The first part of this thesis, entitled “The Framework” (Chapter 2), draws on literature from the field of criminology in order to deduce insights into the nature of international crimes, as well as the dominant frameworks for the prevention of crime. Based on this excursion into the world of criminology, Chapter 2 puts forward a preliminary framework for the prevention of international crimes.

The second part of this thesis, entitled “The Cases”, consists of three chapters, which examine cases of international crime prevention. Chapter 3 studies the international community’s efforts to prevent international crimes in context of the armed conflict in Bosnia and Herzegovina. Bosnia serves as a negative case study insofar as the efforts to prevent and/or mitigate atrocity crimes largely failed. Chapter 4 studies the international crime prevention efforts in the context of the 2007-08 post-election crisis in Kenya. Kenya represents a positive case of international crime prevention, as the international engagement averted an escalation of systematic violence into atrocity crimes. Chapter 5 analyses the international crime prevention efforts in the 2011 Libya crisis. Libya is another positive case study of international crime prevention, though one that triggered significant controversy.

The third part of this thesis, entitled “The Synthesis” (Chapter 6), combines the deductive and inductive research findings of the previous chapters to propose a revised framework for an international crimes approach to the “responsibility to prevent”. Drawing on conceptual assumptions and empirical observations about the prevention of atrocity

crimes, Chapter 6 clarifies the relationship between social and situational crime prevention, identifies generic tools and capacities for the operationalization of situational crime prevention, and elucidates the role of armed conflict in international crime prevention.

The Conclusion, finally, discusses the implications of an international crimes approach to the prevention of mass atrocities for the discourse on the “responsibility to prevent”, as well as for global politics more generally. A particular focus will be on the challenges and dilemmas associated with the prevention of international crimes.

Part One

The Framework

The first part of this thesis follows deductive logic and draws on the discipline of criminology to derive key assumptions about the nature and prevention of “international crimes”. Based on these insights from the field of criminology, the following chapter puts forward a preliminary framework for the prevention of international crimes. This framework will then be refined, complemented, and problematized through the case studies of international crime prevention in the second part of the thesis.

In many respects, the discipline of criminology is the natural place to begin the development of an international crimes approach to the preventive dimension of R2P. Criminology is the “expert discipline” on crime problems, and deals with questions such as: What is crime? What are the key features and dimensions of crime? What are the causes of crime? What are potential public policy responses to crime? And how can crime be prevented? Often, moreover, criminological research explicitly seeks to inform public policy debates.¹ The discipline of criminology is well placed, therefore, to inform the development of an international crime prevention framework.

The chapter that follows draws on three literatures that broadly fall within the purview of criminology: 1) literature on domestic criminology; 2) literature on supranational criminology; and 3) literature on international criminal law. The use of these three bodies of literature will be briefly discussed in turn.

¹ Paul Roberts and Nesam McMillan, ‘For Criminology in International Criminal Justice’, *Journal of International Criminal Justice* vol. 1, no. 3 (2003), 319.

First, the literature on domestic criminology is vast and diverse. It contains philosophical discussions on the very nature of the category “crime”, as well as an impressive amount of conceptual and empirical research on the prevention of crime.² However, much of this research deals with crime in a domestic context, and often with more mundane types of crime, such as shop-lifting, burglary, or car theft. Thus, ideas and assumptions about crime prevention from the field of domestic criminology need to be adjusted to the international context and to international crimes. It is noteworthy, however, that the main crime prevention approaches in domestic criminology are increasingly also applied to and tested in the context of terrorism, corruption, and organised crime.³ Whilst these are transnational crimes (rather than international crimes), they have more in common with international crimes, not least the international context. In short, whilst the transplantation of ideas from the domestic to the international context involves challenges and pitfalls,⁴ the literature on domestic criminology can still contribute important raw-material to the development of an international crimes approach to the prevention of mass atrocities.⁵

² See, Nick Tilley, *Crime Prevention* (Cullompton: Willan, 2009); Nick Tilley (ed.), *Handbook of Crime Prevention and Community Safety* (Cullompton: Willan, 2005); Melissa Smith and Nick Tilley (eds.), *Crime Science: New Approaches to Preventing and Detecting Crime* (Devon: Willan Publishing, 2005); Lawrence Sherman et al. (eds.), *Evidence-based Crime Prevention* (London: Routledge, 2002); Marcus Felson and Ronald Clarke, *Opportunity Makes the Thief: Practical Theory of Crime Prevention* (London: Home Office, Policy Research Series Paper 98, 1998); Ken Pease, ‘Crime Reduction’, in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology*, 3rd edn. (Oxford: Oxford University Press, 2002); Adam Crawford, ‘Crime Prevention and Community Safety’, in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology*, 4th edn. (Oxford: Oxford University Press, 2007).

³ See, Ronald Clarke, ‘Crime Prevention in an International Context’, in M. Natarajan (ed.), *International Crime and Justice* (Cambridge: Cambridge University Press, 2011); Ronald Clarke and Graeme Newman, *Outsmarting the Terrorist* (Westport: Praeger Security International, 2006); or Karen Bullock, Ronald Clarke, and Nick Tilley, *Situational Prevention of Organised Crime* (Cullompton: Willan, 2010).

⁴ On the challenges of applying domestic criminology to the international level see, Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007).

⁵ On the promises of applying domestic criminology to the international level see, Roberts and McMillan, ‘For Criminology in International Criminal Justice’, 331-332. As Roberts and McMillan argue, “The international criminal justice project might have striking domestic analogies; implying that international criminal justice is less exceptional, and its project more viable, than casual acquaintance might at first lead one to suppose ... Good analogies between domestic and international fora are interesting; the dangers of such comparisons, which are not insurmountable, may be offset by the rewards”.

Second, in recent years a handful of criminologists have started to develop a distinct criminology of international crimes, called “supranational criminology”.⁶ These supranational criminologists argue that the study of atrocity crimes should be of natural concern for the field of criminology – though criminologists have long shied away from considering the study of mass atrocities as an integral part of their discipline. Supranational criminologists have therefore designed specific research projects that seek to investigate the nature of international crimes and to develop strategies for their prevention.⁷ Although the insights provided by the research of the emerging field of “supranational criminology” are directly applicable to the subject-matter of this thesis, it needs to be acknowledged that this criminological sub-field is still in its formative phase and not yet robust enough to provide the sole foundation for the development of an international crimes approach to the prevention of mass atrocities.

Finally, literature from the field of international criminal law constitutes an important resource. It illuminates the specific nature and the underlying assumptions of the concept of international crimes, and also provides concrete insights into judicial ways of preventing international crimes. Indeed, the prevention of international crimes is one of the self-proclaimed goals of international criminal law.

⁶ On supranational criminology see, Alette Smeulers and Roelof Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008); Alette Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (Antwerp: Intersentia, 2010); Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2012); Mark Drumbl, ‘Toward a Criminology of International Crime’, *Ohio State Journal of Dispute Resolution* vol. 19, no. 1 (2003), 263-282; Daniel Maier-Katkin, Daniel Mears, and Thomas Bernard, ‘Towards a Criminology of Crimes Against Humanity’, *Theoretical Criminology* vol. 13, no. 2 (2009), 227-255.

⁷ Roloef Haveman and Alette Smeulers, ‘Criminology in a State of Denial – Towards a Criminology of International Crimes’, in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 4.

2. Criminology and the Prevention of International Crimes

“Criminology is crucially positioned to contribute understanding and direction to what the United Nations has mandated as the ‘Responsibility to Protect’ groups that are threatened with mass atrocities.”

❖ John Hagan & Wenona Rymond-Richmond, *Criminologists*¹

Given R2P’s narrow focus on the prevention of four specific crimes under international law, the field of criminology provides an important, but to date neglected and underutilised, analytical perspective on its subject-matter. As the prominent criminologists John Hagan and Wenona Rymond-Richmond suggest, drawing on criminological research is a promising way for developing more focused knowledge on the prevention of international crimes – an element that is still absent from the emerging debate on the “responsibility to prevent”. It is the objective of this chapter to bring criminological research insights into International Relations debates on the prevention of atrocity crimes. The chapter deduces key assumptions about the prevention of international crimes from the literature in the field of criminology, and puts forward a preliminary framework for the prevention of international crimes. This constitutes the first step in developing an international crimes approach to the “responsibility to prevent”.

In this chapter, it will be argued that criminological research provides new perspectives on some key debates surrounding the “responsibility to prevent”. First, criminological research suggests that the concept of “crime” differs from the concept of

¹ John Hagan and Wenona Rymond-Richmond, ‘Criminology Confronts Genocide: Whose Side Are You On?’, *Theoretical Criminology* vol. 13, no. 4 (2009), 504; also John Hagan and Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge: Cambridge University Press, 2009), 219-222.

“conflict” in important respects. Criminal law sets normative boundaries for societies and stigmatises certain forms of human behaviour, backed with threats of coercive punishment. International criminal law serves this function within international society. The notion of “international crime” strongly emphasises individual agency and responsibility, and places individuals that violate the international behavioural code outside the bounds of the world community. By drawing a clear distinction between perpetrators and victims - threatening punishment for the former and promising protection for the latter -, criminal law leans towards partial and coercive action.

Second, there are two main criminological approaches to the prevention of crime. Situational crime prevention is a more proximate prevention strategy that focuses on reducing crime opportunities and manipulating factors of immediate crime events. Social crime prevention focuses on eliminating the alleged “root causes” of criminality. Whilst the two approaches are not mutually exclusive, situational crime prevention is prioritised in crime prevention theory and practice. The prevention of international crimes, it will therefore be argued, is best approached as a strategic game that seeks to prevent the escalation of systematic violence into atrocity crimes. The privileging of proximate prevention (situational crime prevention) over structural prevention (social crime prevention) reverses the logic of much contemporary thinking on the “responsibility to prevent”.²

Finally, criminological research identifies four dimensions that characterize all crime events and that, by extension, frame the strategies for crime prevention: perpetrators, victims,

² For accounts of the “responsibility to prevent” that stress the importance of long-term, structural prevention, see Ban Ki-moon, *Responsibility to Protect: State Responsibility and Prevention: Report of the Secretary-General*, A/67/929-S/2013/399, 09/07/2013; Alex Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (London: Routledge, 2011), 119; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington D.C.: Brookings Institution Press, 2008), 91-97; Asia-Pacific Centre for the Responsibility to Protect, *Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation* (Brisbane: University of Queensland, 8 June 2009), 20-34; International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 22.

situations, and third parties. Third party actors are seen as the “crime preventers”, who are responsible for altering the strategic cost-benefit calculations of potential perpetrators (e.g. with sticks, carrots, or incapacitation), reducing the vulnerability of potential victims (e.g. by strengthening capacity to cope with harm or reducing risk of victimisation), and limiting the opportunities and permissiveness of crime situations (e.g. by reducing means, eliminating excuses, or increasing general risk). For this, it is imperative to build specific third party capacities and dispositions, rather than engage in a general strengthening of social structures in at-risk states.

This chapter proceeds in five steps. The first section examines the nature and underlying assumptions of the category “international crime”. The second part then discusses the dominant criminological prevention approaches: social and situational crime prevention. After this, the third section identifies the key dimensions of crime, namely perpetrators, victims, crime situations, and third parties. The fourth section then deduces preventive strategies that third party actors can employ across the other three crime dimensions. Finally, the conclusion brings these criminological insights together and proposes a preliminary framework for international crime prevention.

2.1. The Nature of “International Crimes”

The discussion that follows shows that the concept of “international crime” differs from the notion of “conflict” in important respects. The concept of crime establishes normative boundaries for a society. It expresses and seeks to protect shared community values. Whilst collectives play a role in defining what counts as a crime, the concept of crime strongly emphasises individual agency and responsibility, and largely ignores the role of collectives or social grievances. Individuals that violate the agreed standards of appropriate behaviour put themselves outside the bounds of society and risk punishment. A sharp distinction is drawn between offenders and victims, reflecting a posture of partiality. These assumptions set crime

prevention apart from conflict resolution, which tends to avoid value judgements, partiality, and coercion, and often tries to address structural issues that underpin a crisis.

Legal scholars and criminologists usually define “crime” as intentional human behaviour that is criminalised by the legislator and that entails punishment.³ As the criminologist Per-Olof Wickström puts it: “Crime may be defined as an act of breaking a moral rule defined in criminal law”.⁴ It can be argued, therefore, that crime is the product of criminal law.⁵ The function of criminal law is to establish substantive norms of behaviour within societies. It reflects what a society considers to be acceptable and unacceptable behaviour.⁶ In short, criminal law sets normative boundaries for a society. It defines acts that put the agent outside of that society and provides for the punishment of the offender.⁷ The notion of crime, therefore, is best seen as a strong expression of social disapproval for certain types of behaviour, backed by the threat of punitive measures and sanctions.⁸

It is widely acknowledged among criminologists that crime is not an objective category, but a social construct. Crime is behaviour that societies decide to label as such, i.e. acts deemed as socially unacceptable.⁹ “It is not what people do,” the criminologist John Muncie argues, “but how they are perceived and evaluated by others, that constitutes

³ Jean-Paul Brodeur and Genevieve Ouellet, ‘What is a Crime? A Secular Answer’, in Law Commission of Canada (ed.), *What Is a Crime? Defining Criminal Conduct in Contemporary Society* (Vancouver: UBC Press, 2004); also Roloef Haveman and Alette Smeulders, ‘Criminology in a State of Denial – Towards a Criminology of International Crimes’, in A. Smeulders and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 6

⁴ Per-Olof Wickström, ‘Individuals, Settings, and Acts of Crime: Situational Mechanisms and the Explanation of Crime’, in P-O. Wickström and R. Sampson (eds.), *The Explanation of Crime: Context, Mechanism, and Development* (Cambridge: Cambridge University Press, 2006), 63; also John Muncie and Eugene McLaughlin, ‘Introduction: Reading the Problem of Crime’, in J. Muncie and E. McLaughlin (eds.), *The Problem of Crime* (London: SAGE Publications, 2001), 1.

⁵ See the classical piece by Paul Tappan, ‘Who is the Criminal?’, *American Sociological Review* vol. 12, no. 1 (1947), 100; and John Muncie, ‘Editor’s Introduction’, in J. Muncie (ed.), *Criminology: The Meaning of Crime*, vol. 1 (London: SAGE, 2006), xvi.

⁶ Nathalie Des Rosiers and Steven Bittle, ‘Introduction’, in Law Commission of Canada (ed.), *What Is a Crime? Defining Criminal Conduct in Contemporary Society* (Vancouver: UBC Press, 2004).

⁷ Ruti Teitel, *Humanity’s Law* (Oxford: Oxford University Press, 2011), 199-201.

⁸ Muncie, ‘Editor’s Introduction (*The Meaning of Crime*)’, xxiv; Tappan, ‘Who is the Criminal?’, 101.

⁹ Muncie, ‘Editor’s Introduction (*The Meaning of Crime*)’, xxiv.

crime”.¹⁰ Thus, the label crime is essentially a reflection of a collective value judgement. On the domestic level, it is assumed that this value judgement is made by the centralized legislator that passes the criminal laws. Legal scholars further distinguish two rationales for why legislators criminalize certain forms of human behaviour. On the one hand, there is behaviour that is labelled as criminal for regulatory purposes (so-called *malum prohibitum* crimes). *Malum prohibitum* crimes are not criminalized because the behaviour in question is considered to be inherently evil or morally wrong, but because the law-makers wishes to minimize such behaviour for practical purposes; examples would be copyright infringements or alcohol consumption in public. *Malum prohibitum* crimes do not carry a powerful moral stigma. On the other hand, there is human behaviour that is criminalized because it is seen as violating fundamental moral values and thus as inherently evil and wrong (so-called *malum in se* crimes).¹¹ Crimes that are *mala in se* are outlawed because they are judged to be intrinsically bad, evil, and wrong; examples would be murder or rape.¹² Crime in this domain is a strongly value-loaded category that delineates civilized and uncivilized behaviour.¹³ Here, society tries to prevent and punish acts that “shock the common or collective morality, producing intense moral outrage among people”.¹⁴ Thus, crimes that are *malum in se* carry with them a powerful stigma.

In international society, it is sovereign states that establish international criminal laws as one instrument to define the normative boundaries of that particular community.¹⁵ According to the prominent international criminal lawyer Antonio Cassese, international

¹⁰ Muncie, ‘Editor’s Introduction (*The Meaning of Crime*)’, xxiii.

¹¹ Muncie, ‘Editor’s Introduction (*The Meaning of Crime*)’, xxvi.

¹² Muncie, ‘Editor’s Introduction (*The Meaning of Crime*)’, xviii.

¹³ William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012); William Schabas, ‘International Crimes’, in D. Armstrong (ed.), *Routledge Handbook of International Law* (New York: Routledge, 2009), 268.

¹⁴ Stuart Henry, ‘Crime’, in E. McLaughlin and J. Muncie (eds.), *The Sage Dictionary of Criminology* (London: SAGE Publications, 2006), 78; Tappan, ‘Who is the Criminal?’, 101.

¹⁵ Teitel, *Humanity’s Law*, 199-201.

criminal law rules “are intended to protect values considered important by the whole international community”.¹⁶ The “core” international crimes - usually defined as genocide, war crimes, crimes against humanity, and aggression¹⁷ - are considered to be crimes *mala in se*, carrying a strong social stigma.¹⁸ They are criminalised for their exceptionally horrible, cruel, and barbarous nature, which threatens “the very foundations of modern civilization and the values it embodies”.¹⁹ According to the International Criminal Tribunal for the former Yugoslavia, atrocity crimes, such as those at the heart of R2P, violate important values of humanity as such.²⁰ Similarly, the Preamble of the Rome Statute of the International Criminal Court (ICC) recalls that “this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. The Statute further notes that the ICC’s subject-matter jurisdiction concerns “the most serious crimes of concern to the international community as a whole”.²¹ “To turn into an international crime,” the Appeals Chamber of the Special Tribunal for Lebanon explains, “a domestic offence needs to be regarded by the world community as an attack on universal values or on values held to be of paramount importance in that community”.²²

The normative boundaries that international criminal law establishes for international society are not pre-given, of course, but the product of the interactions of states. Rather than representatives of centralized authority, it is the society of states that establishes international criminal rules - either through the development of international customary rules or through

¹⁶ Antonio Cassese, *International Criminal Law*, 2nd edn (Oxford: Oxford University Press, 2008), 11; also Teitel, *Humanity’s Law*, 199-201.

¹⁷ Note that R2P does not cover the crime of aggression.

¹⁸ Schabas, ‘International Crimes’, 269. An aspect of moralisation seems to be intrinsic to the core international crimes, and might be a spur to preventive action in the international context.

¹⁹ Schabas, ‘International Crimes’, 271.

²⁰ Schabas, ‘International Crimes’, 272.

²¹ Preamble of the Rome Statute of the International Criminal Court.

²² Schabas, ‘International Crimes’, 272.

international conventions, or both.²³ Whilst international criminal law is made by states, however, it focuses on regulating and punishing the behaviour of individuals, rather than collectives.²⁴ Similarly, even though atrocity crimes are often described as collective crimes, international criminal law rejects the notion of collective responsibility.²⁵ It largely ignores the influence of social and structural factors on individual actors.²⁶ Instead, international criminal law is fundamentally based on the principle of individual criminal responsibility.²⁷ “The principle of individual autonomy whereby the individual is normally endowed with free will and the independent capacity to choose his conduct,” Cassese argues, “is firmly rooted in modern criminal law, including ICL”.²⁸ Kirsten Ainley also stresses that the “doctrines of free will and individual responsibility are the foundations of contemporary Western criminal law”.²⁹ In the words of Telford Taylor, the public prosecutor at the Nuremberg Trials, “crimes are committed by individuals and not by abstract entities”.³⁰

Individuals that violate international criminal law put themselves outside the bounds of international society.³¹ Ruti Teitel argues that international criminal law reconstitutes the friend/enemy distinction in legalistic terms as law/outlaw.³² Individuals that commit international crimes become global outlaws, “enemies of humanity” (*hostes humani*

²³ Haveman and Smeulers, ‘Criminology in a State of Denial’, 6. It is often assumed that for a crime to be an international crime, the behaviour in question needs to be criminalised by customary international law, see Cassese, *International Criminal Law*, 11.

²⁴ Cassese, *International Criminal Law*, 8; Alette Smeulers, ‘Perpetrators of International Crimes: Towards a Typology’, in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 265.

²⁵ Cassese, *International Criminal Law*, 33.

²⁶ Kirsten Ainley, ‘Individual Agency and Responsibility for Atrocity’, in R. Jeffery (ed.), *Confronting Evil in International Relations* (Basingstoke: Palgrave Macmillan, 2008), 2, 27.

²⁷ The primacy of the individual is deeply embedded in both domestic and international criminal law. See, Ainley, ‘Individual Agency and Responsibility for Atrocity’, 10.

²⁸ Cassese, *International Criminal Law*, 33.

²⁹ Ainley, ‘Individual Agency and Responsibility for Atrocity’, 10.

³⁰ Telford Taylor, ‘Judgment of the Tribunal’, *American Journal of International Law* vol. 41 (1947), 172.

³¹ Teitel, *Humanity’s Law*, 199-201; Haveman and Smeulers, ‘Criminology in a State of Denial’, 16.

³² Teitel, *Humanity’s Law*, 199-201.

generis).³³ In other words, international criminal law does not remain neutral between the various actors involved in atrocity crimes, but draws a distinction between the perpetrators, who are threatened with punishment, and the victims, who are promised protection.³⁴ Moreover, the protection and enforcement of the international behavioural code, which is established by international criminal law, is predicated on coercive measures.³⁵ International criminal law even imposes an obligation on states to prosecute and punish international criminal conduct.³⁶ In sum, as John Muncie notes: “Criminal law is coercive and partial, its political neutrality a myth”.³⁷ The supranational criminologist Fred Grünfeld draws on this reasoning in his “Guidelines” for the prevention of international crimes. Grünfeld suggests that, “any preventive strategy on international crimes cannot be neutral or impartial” (Rule no. 9). He further stresses that, “confronted with international crimes, genocide and in general gross human rights violations, preventive strategies should not be focused on a peaceful settlement but should be adopted under Chapter VII with the possibility to use threats with enforcement powers” (Rule no. 10).³⁸

This discussion of the particular features of the very category of “international crimes” reveals some important differences to the notion of conflict, which underpins much of the thinking on the “responsibility to prevent”. Conflict is typically defined as a serious disagreement of opinions or incompatibility of interests and demands between two or more actors.³⁹ This is not necessarily seen as morally wrong and inherently unjustifiable.⁴⁰ In fact,

³³ Haveman and Smeulers, ‘Criminology in a State of Denial’, 16.

³⁴ Teitel, *Humanity’s Law*, 200-201. See also, Ainley, ‘Individual Agency and Responsibility for Atrocity’, 2.

³⁵ Paul Roberts and Nesam McMillan, ‘For Criminology in International Criminal Justice’, *Journal of International Criminal Justice* vol. 1, no. 2 (2003), 329-330.

³⁶ Cassese, *International Criminal Law*, 3.

³⁷ Muncie, ‘Editor’s Introduction (*The Meaning of Crime*)’, xviii.

³⁸ Fred Grünfeld, ‘The Role of Bystanders in Rwanda and Srebrenica: Lessons Learned’, in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 485.

³⁹ See, Jacob Bercovitch and Richard Jackson, *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches* (Michigan: The University of Michigan Press, 2012), 20; Joyce Hocker and William Wilmot, *Interpersonal Conflict*, 8th edn. (London: McGraw-Hill, 2011).

some forms of conflict are sometimes even perceived as positive phenomena that can promote social progress. Thus, conflict is merely regulated, rather than universally outlawed.⁴¹ The notion of conflict does not contain intrinsic value judgements or elements of partiality. “Finger pointing” is not traditionally considered to be part of conflict resolution. Despite more recent evolutions, the bedrock principles of conflict prevention and resolution are still impartiality, consent, and minimal coercion.⁴² Increasingly, moreover, the prevention of conflict focuses on structural issues and collective grievances that could give rise to a crisis.⁴³

The concept of “international crime”, by contrast, reflects collective value judgements regarding acceptable and unacceptable behaviour of individuals. It is inherently predicated on partiality, in that it morally stigmatises certain forms of human conduct and turns individuals that commit international crimes into global outlaws. In particular, atrocity crimes carry with them a strong social stigma and a clearly communicated threat of punishment for potential violators. Thus, it can be argued that by linking the principle of R2P to the concept of international crimes, it is made more difficult for actors seeking to operationalise the “responsibility to prevent” to adhere to the traditional conflict prevention and resolution principles of impartiality, consent, and minimal coercion. Moreover, the conduct of individuals gains a more prominent place in the “responsibility to prevent”.

⁴⁰ I. William Zartman and Mark Anstey, ‘The Problem: Preventing Identity Conflicts and Genocide’, in W. Zartman, M. Anstey, P. Meerts (eds.), *The Slippery Slope to Genocide: Reducing Identity Conflicts and Preventing Mass Murder* (Oxford: Oxford University Press, 2012), 16.

⁴¹ See, Lawrence Woocher, ‘The Responsibility to Prevent: Toward a Strategy’, in A. Knight and F. Egerton (eds.), *Routledge Handbook of the Responsibility to Protect* (Abingdon: Routledge, 2012), 27-28. Note that some violent conflict has been outlawed as the crime of aggression. Even though the ICC does not yet have jurisdiction over the crime of aggression, the 2010 Review Conference of the Rome Statute in Kampala, Uganda, has seen states parties to the ICC agree on a substantive definition and jurisdictional pre-requisites of the crime of aggression. At the earliest, this could become operational in 2017.

⁴² Bercovitch and Jackson, *Conflict Resolution in the Twenty-First Century*, 7-8. Note that Bercovitch and Jackson also sketch evolutions in conflict prevention thinking, such as the 2000 Brahimi Report.

⁴³ Bercovitch and Jackson, *Conflict Resolution in the Twenty-First Century*, 8-10.

2.2. Criminological Approaches to Crime Prevention

Having examined the particular nature of the category “international crime”, this section identifies and analyses the main criminological approaches to the prevention of crime. The discussion shows that there are two main crime prevention approaches. On the one hand, there is social crime prevention, which focuses on eliminating structural and dispositional risk factors associated with the development of criminality. On the other hand, there is situational crime prevention, which focuses on reducing crime opportunities and manipulating individual decision-making in more proximate crime situations. In criminological theory and crime prevention practice, the situational crime prevention approach is dominant and widely seen as the most promising strategy for preventing crime. This prioritisation of proximate over structural prevention approaches reverses the logic behind much contemporary thinking on the “responsibility to prevent”.

In the field of criminology, three accounts of the causes of crime are usually distinguished: a dispositional account, a sociological account, and a rational choice account. The dispositional account assumes that criminality is determined by various biological and psychological factors (genetic and personality related). Dispositional risk factors linked to criminal behaviour include, for example, hormone imbalances or the failure to develop self-control mechanisms.⁴⁴ The sociological account stresses the role of socio-economic structures in the production of criminality, such as poverty, unemployment, or class relations. It argues that individual behaviour is largely determined by these external forces.⁴⁵ Both the dispositional and the sociological account focus on factors that lead to the development of

⁴⁴ John Muncie, ‘Editor’s Introduction’, in J. Muncie (ed.), *Criminology: The Causes of Crime*, vol. 2 (London: SAGE, 2006), vii-xix.

⁴⁵ Muncie, ‘Editor’s Introduction (*The Causes of Crime*)’, vii-xix.

criminality, which is why they are called “theories of criminality”.⁴⁶ Their focus is on why certain individuals are more likely to be involved in crime. It is assumed that individuals are pushed into crime by either their dispositional characteristics or socio-economic structures.⁴⁷

The rational choice account, by contrast, argues that crime is the product of individual choices that are mainly influenced by immediate situational factors, including opportunities. It is assumed that there is always a crucial *choice* element in crime. Criminal offenders are conceptualized as “normal” and non-pathological individuals that choose to commit crime because it benefits them in some way. Criminal behaviour is seen as goal-oriented and purposive - the most effective means to achieve desired ends.⁴⁸ In fact, it is argued that everyone might choose to commit crime under the right circumstances and with powerful situational incentives.⁴⁹ Rationality, however, is usually understood in a limited sense - not encompassing the view taken by the economic “expected utility” model. It is not assumed, for example, that actors are fully informed, possess accurate information, or engage in extensive cost-benefit calculations.⁵⁰ It is fully expected that potential perpetrators will use rule-of-thumb reasoning and might settle for anticipated outcomes that simply promise enough gain to satisfy or “get the job done”.⁵¹ As crime is seen as the result of choices made

⁴⁶ Mangai Natarajan, ‘Introduction’, in M. Natarajan (ed.), *Crime Opportunity Theories: Routine Activity, Rational Choice and their Variants* (Farnham: Ashgate, 2011), xiv. Note that “theories of criminality” are distinct from “theories of crime”.

⁴⁷ Natarajan, ‘Introduction’, xxv-xxx.

⁴⁸ Natarajan, ‘Introduction’, xxiii. See also, James McGuire, *Understanding Psychology and Crime: Perspectives on Theory and Action* (Maidenhead: Open University Press, 2004), 35; Adam Crawford, ‘Crime Prevention and Community Safety’, in M. Maguire, R. Morgan, and R. Reiner (eds.), *The Oxford Handbook of Criminology*, 4th edn (Oxford: Oxford University Press, 2007), 872-882; and the various chapters in A. Piquero and S. Tibbetts (eds.), *Rational Choice and Criminal Behaviour: Recent Research and Future Challenges* (London: Routledge, 2002).

⁴⁹ Criminological research on organized crime, white-collar crime, and state crime also suggests that crime is not necessarily related to dispositional factors or socio-economic structures.

⁵⁰ Natarajan, ‘Introduction’, xxiii.

⁵¹ Natarajan, ‘Introduction’, xxiii. This approach of “bounded” rational choice avoids much of the criticism that is often directed at rational choice approaches. Importantly, moreover, these assumptions have been tested in the empirical study of hard cases, such as intoxicated crime or predatory sex offences.

in the present, the rational choice account largely ignores the background of offenders.⁵² The focus is on individual decision-making in present situational settings. Thus, the rational choice account constitutes a “theory of crime” that seeks to explain the occurrence of crime rather than the roots of criminal propensity.⁵³

These different crime causation theories inform the two main crime prevention approaches in the field of criminology. Amongst criminologists, the first approach is usually referred to as “social crime prevention”, based on the dispositional and sociological crime causation models. The second approach is so-called “situational crime prevention”, based on the rational choice account. These are the two crime prevention approaches identified in the UN Guidelines on Crime Prevention, as well as in the main criminological textbooks on the issue, such as the Oxford Handbook of Criminology, the Oxford Handbook of Crime Prevention, and the International Handbook of Criminology.⁵⁴ Both approaches will be discussed in turn.

First, social crime prevention assumes that the best way to prevent crime is to tackle the root causes of criminality and thereby reduce the number of potential offenders.⁵⁵ Thus, social crime prevention focuses on interventions aimed at the socio-structural root causes and the dispositions of individuals. The UN Guidelines on Crime Prevention explain that social crime prevention seeks to “promote the well-being of people and encourage pro-social behaviour through social, economic, health and educational measures, with a particular emphasis on children and youth, and focus on the risk and protective factors associated with

⁵² Natarajan, ‘Introduction’, xix-xxvii.

⁵³ Natarajan, ‘Introduction’, xiv.

⁵⁴ See, United Nations Economic and Social Council (UN ECOSOC), ‘United Nations Guidelines for the Prevention of Crime’, Economic and Social Council Resolution 2002/13, available at http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/resolution_2002-13.pdf; Mike Maguire, Rod Morgan, and Robert Reiner (eds.), *The Oxford Handbook of Criminology*, 5th edn. (Oxford: Oxford University Press, 2012); Brandon Welsh and David Farrington (eds.), *The Oxford Handbook of Crime Prevention* (Oxford: Oxford University Press, 2012); and Shlomo G. Shoham, Paul Knepper, and Martin Kett (eds.), *International Handbook of Criminology* (Boca Raton: CRC Press, 2010).

⁵⁵ Rick Linden, ‘Situational Crime Prevention: Its Role in Comprehensive Prevention Initiatives’, *ICP Review* vol. 1 (March 2007), 150.

crime and victimization”.⁵⁶ More proximate factors are ignored. Social crime preventive measures include reducing poverty, fighting unemployment, improving education, strengthening institutions of socialization, changing child-rearing practices, or building stronger communities.⁵⁷ The pursuit of these fairly broad social policies is not always explicitly referred to as crime prevention, but often implemented under different labels and as part of other social agendas.

In contrast to this approach, situational crime prevention is based on the rational choice theory of crime. Situational crime prevention is sceptical about arguments that crime prevention needs to address the “root causes” of criminality, which it sees as an overly ambitious and unfocused task. Advocates of situational crime prevention note that the variables that contribute to the development of criminality are wide and varied, and there is very little that can be done to directly address them. Thus, whilst situational crime prevention acknowledges that socio-structural and dispositional factors can influence the development of criminality, it treats them merely as background variables. It is assumed that there will always be motivated offenders that are willing to commit crime. The most effective means to prevent crime, therefore, is to control and manipulate factors in immediate crime situations that affect the choices of potential criminals.⁵⁸ In particular, situational crime prevention emphasises the central role of opportunities in causing crime. Opportunities are treated as a key “root cause” of crime.⁵⁹ Situational crime prevention thus tries to alter the decision-making process of potential perpetrators by manipulating proximate variables of the crime

⁵⁶ UN ECOSOC, ‘United Nations Guidelines for the Prevention of Crime’.

⁵⁷ Adam Crawford and Karen Evans, ‘Crime Prevention and Community Safety’, in M. Maguire, R. Morgan, and R. Reiner, *The Oxford Handbook of Criminology*, 5th edn (Oxford: Oxford University Press, 2012), 781.

⁵⁸ See, Ronald Clarke, ‘Situational Crime Prevention: Theory and Practice’, *British Journal of Criminology* vol. 20, no. 2 (1980), 139-143; and Daniel R. Lee, ‘Understanding and Applying Situational Crime Prevention Strategies’, *Criminal Justice Policy Review* vol. 21, no. 3 (2010), 264.

⁵⁹ Natarajan, ‘Introduction’, xxvii.

event – for example, by making crime more risky, more difficult, or less rewarding.⁶⁰ Thereby, situational crime prevention is willing to treat the potential offender as “the enemy”.⁶¹ According to the UN Guidelines on Crime Prevention, situational crime prevention tries to “prevent the occurrence of crimes by reducing opportunities, increasing risks of being apprehended and minimizing benefits, including through environmental design, and by providing assistance and information to potential and actual victims”.⁶² The assumption of actor rationality is central to situational crime prevention. Criminals are viewed as “reasoning criminals”, capable of adjusting and responding to adverse consequences, anticipated or experienced.⁶³

Whilst situational and social crime prevention are by no means incompatible strategies, and a comprehensive crime prevention approach could combine both, it is the former that is usually prioritized by crime prevention practitioners and theorists.⁶⁴ As the criminologist Rossella Selmini explains, “most crime prevention policies in Europe are nowadays a mix of situational and social measures, where the situational approach is dominant”.⁶⁵ Mangai Natarajan also stresses that while both prevention approaches help to explain crime, situational crime prevention is significantly more important for preventing and

⁶⁰ Gloria Laycock, ‘Defining Crime Science’, in M. Smith and N. Tilley (eds.), *Crime Science: New Approaches to Preventing and Detecting Crime* (Devon: Willan Publishing, 2005), 14; Ken Pease, ‘A Review of Street Lighting Evaluations: Crime Reduction Effects’, in K. Painter and N. Tilley (eds.), *Surveillance of Public Space: CCTV, Street Lighting and Crime Prevention* (Monsey, New York: Criminal Justice Press, 1999), 58.

⁶¹ Natarajan, ‘Introduction’, xxx.

⁶² United Nations, ‘United Nations Guidelines for the Prevention of Crime’.

⁶³ See, Clarke, ‘Situational Crime Prevention’, 145; and Paul Ekblom, ‘How to Police the Future: Scanning for Scientific and Technological Innovations which Generate Potential Threats and Opportunities in Crime, Policing, and Crime Reduction’, in M. Smith and N. Tilley (eds.), *Crime Science: New Approaches to Preventing and Detecting Crime* (Devon: Willan Publishing, 2005), 28; Stephen Tibbets and Chris Gibson, ‘Individual Propensities and Rational Decision-Making: Recent Findings and Promising Approaches’, in A. Piquero and S. Tibbets (eds.), *Rational Choice and Criminal Behaviour: Recent Research and Future Challenges* (London: Routledge, 2002), 6.

⁶⁴ Rossella Selmini, ‘The European Experience of Crime Prevention’, in S. Shoham, P. Knepper, and M. Kett (eds.), *International Handbook of Criminology* (London: CRC Press, 2010), 528-535; Natarajan, ‘Introduction’, xv.

⁶⁵ Selmini, ‘The European Experience of Crime Prevention’, 530; also Natarajan, ‘Introduction’, xv.

controlling crime.⁶⁶ Criminological research has produced a wealth of empirical evidence for the effectiveness of situational crime prevention in very different contexts, including sex crimes, corruption, organised crime, or terrorism.⁶⁷ This has injected renewed optimism into academic debates on crime prevention and informed crime prevention policy across the world.⁶⁸ As a result, situational crime prevention is now the fastest growing form of crime prevention.⁶⁹ It is seen as a practicable prevention approach that produces tangible results.⁷⁰

In sum, the most prominent and proliferating criminological crime prevention approach focuses on manipulating immediate situational factors, rather than on long-term efforts to eliminate risk factors associated with the development of criminality.⁷¹ As this is an important point for the remainder of this thesis, the various reasons for prioritizing situational crime prevention will be discussed in more detail.

First, the impact of social crime prevention strategies is very difficult to prove empirically.⁷² Establishing a direct causal link between distant social conditions and the actual commission of crime is almost impossible.⁷³ Ronald Clarke, the key thinker on situational crime prevention, argues that focusing on alleged root causes is unpromising as “there are too many intermediary links between distant causes and crime to be sure that action directed at these causes will be effective”.⁷⁴ Similarly, the prominent criminologist Ken Pease argues that, “the routes whereby societal structure may impact upon crime are so

⁶⁶ Natarajan, ‘Introduction’, xv.

⁶⁷ See, for example, Ronald Clarke and Graeme Newman, *Outsmarting the Terrorists* (Westport: Praeger Security International, 2006); Angela Gorta, ‘Minimising Corruption: Applying Lessons from the Crime Prevention Literature’, *Crime, Law & Social Change* vol. 30 (1998), 67-87; Karen Bullock, Ronald Clarke, and Nick Tilley, *Situational Prevention of Organised Crime* (Cullompton: Willan, 2010).

⁶⁸ Selmini, ‘The European Experience of Crime Prevention’, 532.

⁶⁹ Ronald Clarke, ‘Crime Prevention in an International Context’, in M. Natarajan (ed.), *International Crime and Justice* (Cambridge: Cambridge University Press, 2011).

⁷⁰ Pease, ‘Crime Reduction’, 949.

⁷¹ Crawford and Evans, ‘Crime Prevention and Community Safety’, 772.

⁷² Crawford and Evans, ‘Crime Prevention and Community Safety’, 772.

⁷³ Clarke, ‘Crime Prevention in an International Context’.

⁷⁴ Ronald Clarke, ‘Seven Misconceptions of Situational Crime Prevention’, in N. Tilley (ed.), *Handbook of Crime Prevention and Community Safety* (Cullompton: Willan, 2005), 56.

various as to defy simple classification”.⁷⁵ Lawrence Sherman and his colleagues, pioneering evidence-based crime prevention, emphasise that there is no empirical evidence for the effectiveness of tackling structural causes of criminality.⁷⁶ Their empirical research suggests that, “while some might say that no program can work until the ‘root causes’ of crime are cured, we find no scientific basis for that conclusion - and substantial evidence against it”.⁷⁷ On the other hand, criminological research has produced a vast amount of evidence for the effectiveness of situational crime prevention strategies. According to Rick Linden: “There have been hundreds of studies showing the effectiveness of situational prevention programmes”.⁷⁸ “There is now a great deal of evidence,” the crime scientist Gloria Laycock notes, “that changing aspects of the immediate situation leads to measurable and in most cases permanent reductions in offending”.⁷⁹ Thus, in their famous paper *Opportunity Makes the Thief*, Marcus Felson and Ronald Clarke argue that while some erroneously assume that the earliest and most remote causes are most significant, “the more immediate causes are often more powerful in generating crime”.⁸⁰

Second, social crime prevention faces temporal difficulties, given that dispositional and structural changes take a long time to reduce criminality.⁸¹ Thus, social crime prevention strategies could only contribute to the reduction of crime in the distant future; it has almost nothing to say about the prevention of more imminent crime.⁸² Targeted interventions into immediate crime situations, on the other hand, can be done relatively quickly and crime

⁷⁵ Pease, ‘Crime Reduction’, 953.

⁷⁶ Lawrence Sherman et al., ‘Preventing Crime’, in L. Sherman et al. (eds.), *Evidence-based Crime Prevention* (London: Routledge, 2002), 4.

⁷⁷ Sherman et al., ‘Preventing Crime’, 4.

⁷⁸ Linden, ‘Situational Crime Prevention’, 149.

⁷⁹ Laycock, ‘Defining Crime Science’, 14.

⁸⁰ Marcus Felson and Ronald Clarke, *Opportunity Makes the Thief: Practical Theory of Crime Prevention* (London: Home Office, Policy Research Series Paper 98, 1998), 3.

⁸¹ Clarke, ‘Seven Misconceptions of Situational Crime Prevention’, 56; and Pease, ‘Crime Reduction’, 949.

⁸² Clarke, ‘Seven Misconceptions of Situational Crime Prevention’, 56; and Pease, ‘Crime Reduction’, 949.

reduction results will often show immediately.⁸³ This is not necessarily an argument against the pursuit of social crime prevention as such, as there is no harm in pursuing long-term social changes in the background, hoping that they might contribute to a reduction in criminality in the longer-term.⁸⁴ It suggests, however, that designing effective situational strategies for preventing more imminent crime is indispensable for dealing with crime problems in the foreseeable future.

Third, most states already run social programmes that address the concerns that social crime prevention focuses on. Besides the difficulties of distinguishing these efforts from social crime prevention, only marginal additional impact can be achieved by re-organizing these programmes under the label of crime prevention. On the other hand, situational prevention strategies that are tailored to the requirements of concrete crime situations have been shown to have a significant additional impact on crime rates. On the international level, by analogy, it seems that international actors are often already engaged in social crime prevention, for instance by promoting democratization, economic development, or human rights. Strengthening these efforts under the label “international crime prevention” could only make a marginal additional impact.

Finally, social crime prevention strategies are notoriously difficult to implement and sustain, due to limited capacity and resources.⁸⁵ Many crime prevention scholars argue that research on the prevention of crimes should have a clear link to practice and “be tied more closely to achievable public policy goals”.⁸⁶ Thus, some criminologists argue that crime

⁸³ Clarke, ‘Seven Misconceptions of Situational Crime Prevention’, 56; and Pease, ‘Crime Reduction’, 949. For a similar argument from the R2P debate see, Eli Stamnes, ‘Speaking R2P and the Prevention of Mass Atrocities’, *Global Responsibility to Protect* vol. 1, no. 1 (2009), 76.

⁸⁴ In IR, there is a body of literature that suggests that social prevention strategies can enhance criminality in the short-term. An example would be the tendency of democratic transition processes to be accompanied by violence and ethnic cleansing. See, Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press, 2004); or Edward Mansfield and Jack Snyder, ‘Democratization and the Danger of War’, *International Security* vol. 20, no. 1 (1995).

⁸⁵ Crawford and Evans, ‘Crime Prevention and Community Safety’, 772.

⁸⁶ Crawford and Evans, ‘Crime Prevention and Community Safety’, 772.

prevention should focus on what can realistically be changed and manipulated, i.e. situational variables. Situational crime prevention is seen as the more practically oriented crime prevention approach: a “framework for some practical and common-sense thinking about how to deal with crime”.⁸⁷ This image contributes to its popularity among crime prevention practitioners and academics.⁸⁸

The insight that much of the criminological crime prevention thinking prioritizes situational crime prevention over social crime prevention is relevant with regards to debates on the “responsibility to prevent”. Approaches to the preventive dimension of R2P tend to prioritise more long-term and social prevention strategies, which seek to build societies resilient to atrocity crimes, e.g. by promoting democracy, fighting corruption, improving governance performance, or fostering economic development.⁸⁹ UNSG Ban, for example, has consciously focused his plan for the implementation of R2P on these broader social aspects – in other words on the first two pillars of R2P.⁹⁰ Focusing on these social prevention strategies also attracts significant support from countries in the Global South, as it meets their interest in development and capacity-building. However, this thesis argues that as a consequence of linking R2P to international crimes, the “responsibility to prevent” needs to assign primary importance to more immediate and situational crime prevention strategies that seek to manipulate the decision-making of individuals and alter the crime opportunity structure of proximate situations. Criminological research into the prevention of crime suggests that whilst there is no direct harm in pursuing social crime prevention strategies, international

⁸⁷ Crawford and Evans, ‘Crime Prevention and Community Safety’, 773.

⁸⁸ See, Clarke, ‘Situational Crime Prevention: Theory and Practice’, 136; Crawford, ‘Crime Prevention and Community Safety’, 872-882.

⁸⁹ See, Ban, *State Responsibility and Prevention*; Bellamy, *Global Politics and the Responsibility to Protect*, 119; or Deborah Mayersen, ‘Current and Potential Capacity for the Prevention of Genocide and Mass Atrocities within the United Nations System’, *Global Responsibility to Protect* vol. 3, no. 2 (2011), 221.

⁹⁰ See, Francis Deng, ‘JISB Interview: The Responsibility to Protect’, *Journal of Intervention and State Building* vol. 4, no. 1 (2010), 85; Jennifer M. Welsh, ‘A Normative Case for Pluralism: Reassessing Vincent’s Views on Humanitarian Intervention’, *International Affairs* vol. 87, no. 5 (2011), 1201.

crime prevention is best seen as a strategic game that seeks to prevent the escalation of systematic violence, rather than as an agenda for long-term social reform.

2.3. The Key Dimensions of Crime

This section identifies and discusses the key dimensions of crime. The discussion highlights that criminological thinking about crime and its prevention is usually structured around four dimensions: perpetrators, victims, situations, and third parties.⁹¹ Third party actors are seen as the “crime preventers” that design preventive interventions with reference to the other three dimensions. As a consequence, building specific third party capacities becomes a key requirement for the prevention of international crimes.

A good starting point for identifying the key dimensions of crime is routine activity theory, which is one of the theoretical foundations of situational crime prevention and one of the most highly-cited theories in criminology.⁹² Routine activity theory seeks to provide a practical guide for crime prevention and purports that “crime occurs when a *likely offender* and *suitable target* come together in *time and place*, without a *capable guardian* present”.⁹³ From this theoretical assumption, four relevant dimensions of crime can be deduced, namely perpetrators (likely offender), victims (suitable target), situation (time and place), and third parties (capable guardian). With regards to the prevention of crime, routine activity theory argues that manipulating any of these four crime elements can reduce the likelihood that crime occurs.

The assumptions of routine activity theory are reflected in the so-called “crime triangle” – a helpful way of thinking about crime and its prevention. The “crime triangle”

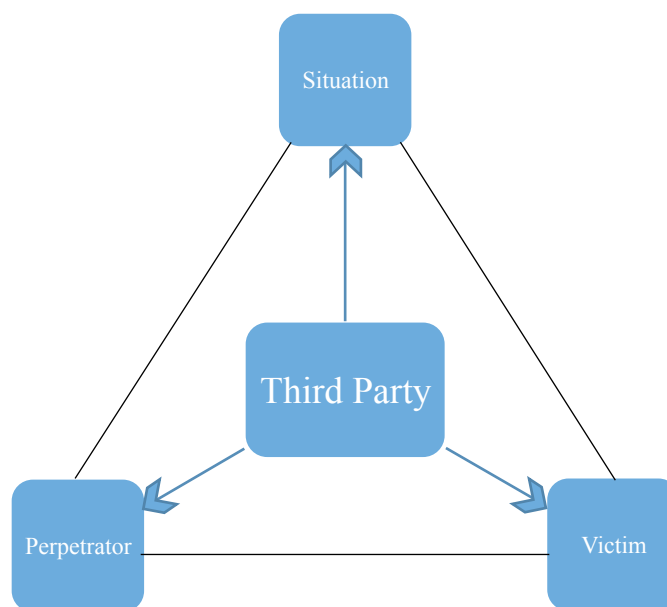
⁹¹ Pease, ‘Crime Reduction’, 949-950. For more information on the problem analysis triangle see the website of the Centre for Problem-Oriented Policing: <http://www.popcenter.org/about/?p=triangle>.

⁹² Natarajan, ‘Introduction’, xxviii.

⁹³ See, Crawford, ‘Crime Prevention and Community Safety’, 877; Centre for Problem-Oriented Policing, ‘Use the Problem Analysis Triangle’, available at: <http://www.popcenter.org/learning/60steps/index.cfm?stepnum=8>.

combines perpetrators, victims, and the crime situation, arguing that these are the primary dimensions present in any crime event.⁹⁴ In order to prevent crime, so-called “controllers” are then assigned to each of the three crime dimensions - a “handler” for the perpetrators, a “guardian” for the victims, and a “manager” for the situation.⁹⁵ These “controllers” are third parties that have the job to affect preventive changes within any of the other three crime dimensions.⁹⁶ Figure 2.1. captures the central ideas of the crime triangle.

Figure 2.1.: The Crime Triangle



According to this “crime triangle”, third party actors are at the centre of crime prevention efforts. “The supply of capable guardians,” the criminologist Adam Crawford argues, “is crucial to prevention efforts”.⁹⁷ At the international level, potential actors that could serve as capable guardians are international organizations, regional organizations,

⁹⁴ Pease, ‘Crime Reduction’, 949.

⁹⁵ Centre for Problem-Oriented Policing, ‘Use the Problem Analysis Triangle’.

⁹⁶ Pease, ‘Crime Reduction’, 950.

⁹⁷ Crawford, ‘Crime Prevention and Community Safety’, 877.

national governments, or even non-governmental organizations. These third party actors could try to manipulate the decision-making of potential perpetrators by changing their cost-benefit analysis or reducing their ability to commit crime;⁹⁸ they could focus on reducing the vulnerability of potential victims by providing them with protection; or they could try to reduce the permissiveness of the crime situation.⁹⁹ Moreover, criminological literature on so-called “third-party policing” suggests that these primary third parties could also persuade or coerce other non-offending third parties, such as local business communities or local civil society, to take some responsibility for preventing and controlling crime. In other words, international actors can use non-offending “proximate targets” to impact on the behaviour of the potential perpetrators, the “ultimate targets”.¹⁰⁰ Criminologists stress that preventive third party interventions need to be continuously reviewed and tailored to the specific crime context. They also need to be based on sound knowledge of the specific situation.

Supranational criminologists identify the same four crime dimensions as being crucial in the specific context of international crimes. In their pioneering study, the supranational criminologists Alette Smeulers and Roelof Haveman argue that strategies for the prevention of international crimes need to be structured around a victim dimension, a perpetrator dimension, a situational dimension, and a third party dimension. They note that:

If we know the groups that are most vulnerable to becoming victims of large scale violence like genocide and the reasons for this vulnerability, it may become possible to develop strategies to strengthen their ability to fight against this [**victim dimension**]. If we know why bystanders, both individuals and states, stay inactive upon seeing atrocities happening, we possibly may develop strategies to intervene in an effective manner [**third party dimension**]. If we know more about the offenders and why they commit their crimes, we may develop mechanisms to prevent them from becoming war criminals and the like [**perpetrator dimension**]. If we know what exactly turns a specific situation into an ‘atrocities producing

⁹⁸ On the rationality of criminal offending see, Graeme Newman, Ronald Clarke and Giora Shoham (eds.), *Rational Choice and Situational Crime Prevention: Theoretical Foundations* (Aldershot: Ashgate, 1997); Derek Cornish and Ronald Clarke (eds.), *The Reasoning Criminal: Rational Choice Perspectives on Offending* (New York: Springer-Verlag, 1986); and Alex Piquero and Stephen Tibbetts (eds.), *Rational Choice and Criminal Behaviour: Recent Research and Future Challenges* (London: Routledge, 2002).

⁹⁹ John Eck, ‘Preventing Crime at Places’, in L. Sherman et al. (eds.), *Evidence-based Crime Prevention* (London: Routledge, 2002), 242.

¹⁰⁰ On third-party policing see, Lorraine Mazerolle and Janet Ransley, *Third Party Policing* (Cambridge: Cambridge University Press, 2006); Julie Ayling et al., *Lengthening the Arms of the Law: Enhancing Police Resources in the Twenty-First Century* (Cambridge: Cambridge University Press, 2009).

situation' we may be able to prevent those situations from developing in the future [**situational dimension**].¹⁰¹

Moreover, the supranational criminologist Fred Grünfeld has proposed an “atrocities prevention triangle” that focuses on perpetrators, victims, and third parties.¹⁰² For Grünfeld, third parties are the crucial actors for the prevention of international crimes. His research focuses on how third parties can influence perpetrators and victims. “Third parties at state and international level,” Grünfeld notes, “are the focal points for the prevention of gross human rights violations, because the perpetrators are unwilling to prevent or stop the atrocities and the victims are unable to do so”.¹⁰³ In particular, if atrocities are imminent or have already begun, third parties are responsible for initiating preventive interventions with regards to the perpetrators (incentives), victims (vulnerability), and crime situation (permissiveness).¹⁰⁴

Hence, criminological research suggests that the situational prevention of international crimes can be structured around four dimensions that characterise all crime events, whether domestic or international. These four dimensions are perpetrators, victims, situations, and third parties. Third party actors play a crucial role as they are responsible for initiating preventive changes in the other three crime dimensions. For this, in addition to mustering the political will to act as the “crime preventer”,¹⁰⁵ third parties require specific capacities to effectively fill this role. This suggests that identifying and building specific capacities for third party actors is an important requirement of international crime prevention.¹⁰⁶ This could be called “external capacity building”. This focus is distinct from the one commonly adopted in debates on the “responsibility to prevent”, which stresses the

¹⁰¹ Haveman and Smeulers, ‘Criminology in a State of Denial’, 14-15; see also Smeulers and Grünfeld, *International Crimes and Other Gross Human Rights Violations*.

¹⁰² Grünfeld, ‘The Role of Bystanders in Rwanda and Srebrenica’, 458.

¹⁰³ Grünfeld, ‘The Role of Bystanders in Rwanda and Srebrenica’, 458.

¹⁰⁴ Grünfeld, ‘The Role of Bystanders in Rwanda and Srebrenica’, 459.

¹⁰⁵ The issue of political will is an important prerequisite for preventive action. Besides acknowledging the importance of political will, this thesis largely refrains from detailed discussion on the subject.

¹⁰⁶ Haveman and Smeulers, ‘Criminology in a State of Denial’, 14-15.

primary importance of building state capacity in at-risk states to mitigate atrocity risk.¹⁰⁷ This could be called “internal capacity building”.

2.4. Preventive Strategies Across the Crime Dimensions

Building on the criminological insights deduced in the previous three sections, this section draws on criminological literature to derive some more specific prevention strategies that third party actors can employ across the other three crime dimensions. In what follows, third party prevention strategies in the perpetrator, victim, and situational dimensions will be discussed in turn.

2.4.1. Potential Perpetrators

According to the “crime triangle”, one way in which third party actors can prevent crime is by “handling” potential perpetrators. With regards to international crimes, however, it needs to be acknowledged that “perpetrators” cannot be treated as one uniform category, which is something that third parties need to take into consideration when designing preventive strategies. As will be shown in this section, preventive strategies in the perpetrator category promise to be most effective if they focus on manipulating the strategic calculations of criminal masterminds, who can be approached as rational actors.

Supranational criminologists usually distinguish three broad categories of perpetrators, namely, 1) criminal masterminds, 2) middle-ranking perpetrators, and 3) low-ranking perpetrators.¹⁰⁸ First, “criminal masterminds” are the architects of international

¹⁰⁷ See, for example, Bellamy, *Global Politics and the Responsibility to Protect*, 119; Ban, *State Responsibility and Prevention*; ICISS, *The Responsibility to Protect*, 22; Evans, *The Responsibility to Protect*, 91-97; Asia-Pacific Centre, *Preventing Genocide and Mass Atrocities*, 20-34.

¹⁰⁸ Kai Ambos, ‘Criminologically Explained Reality of Genocide, Structure of the Offence and the Intent to Destroy Requirement’, in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (Antwerp: Intersentia, Ambos 2010), 163; Smeulers, ‘Perpetrators of International Crimes’; Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), 25; Sara Liwerant, ‘Mass Murder: Discussing Criminological Perspectives’, *Journal of International Criminal Justice* vol. 5, no. 4 (2007), 927. For a similar categorisation with regards to the Rwandan genocide see,

crimes. They are rational actors that plan, incite, and command international crimes. For them, atrocity crimes are a goal-oriented policy – a means to achieve certain political, economic, or military ends.¹⁰⁹ If the commission of atrocity crimes does not risk unacceptable costs, they can appear as a “rational” course of action.¹¹⁰ Whilst criminal masterminds design the atrocity policies, they do not physically execute them. Criminal masterminds possess a high level of agency and autonomy.¹¹¹ Their actions are not externally determined by the social context. On the contrary, they are the ones that create the social context in which the commission of atrocity crimes might become acceptable for other actors. “Without criminal masterminds in powerful positions,” Smeulers and Hola argue, “there would be no state sanctioned international crimes”.¹¹² Criminal masterminds are the actors that bear most responsibility for international crimes. They are the “true hostes humanis generis”.¹¹³

The second group of perpetrators that supranational criminologists identify are the so-called “middle-ranking perpetrators”. These “intermediaries” receive orders from the criminal masterminds, whilst also exercising authority over the low-ranking perpetrators: they are

Scott Straus, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca & London: Cornell University Press, 2006), 113; and Rene Lemarchand, ‘Rwanda: The Rationality of Genocide’, *Issue: A Journal of Opinion* vol. 23, no. 2 (1995), 8-11.

¹⁰⁹ For scholarship that stresses the strategic nature of atrocity crimes see, Benjamin Valentino, ‘Final Solution: The Causes of Mass Killing and Genocide’, *Security Studies* vol. 9, no. 3 (2000), 3; Benjamin Valentino, Paul Huth and Dylan Balch-Lindsay, ‘Draining the Sea: Mass Killing and Guerrilla Warfare’, *International Organization* vol. 58, no. 2 (2004), 375-407; Manus I. Midlarsky, *The Killing Trap: Genocide in the Twentieth Century* (Cambridge: Cambridge University Press, 2005), especially chapter 5; Lemarchand, ‘Rwanda’, 8-11; Matthew Krain, ‘State-Sponsored Mass Murder: The Onset and Severity of Genocides and Politicides’, *Journal of Conflict Resolution* vol. 41, no. 3 (1997), 331-360; see also Anthony Doob and Cheryl Webster, ‘Offenders’ Thought Process’, in A. von Hirsch, A. Ashworth, and J. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, 3rd edn (Oxford: Hart Publishing, 2009), 73.

¹¹⁰ See, Scott Straus, ‘Political Science and Genocide’, in D. Bloxham and R. Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), 174; Alette Smeulers and Roelof Haveman, ‘International Crimes and Criminology: An Agenda for Future Research’, in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 494; and Lemarchand, ‘Rwanda’, 8-11.

¹¹¹ Alette Smeulers and Barbora Hola, ‘ICTY and the Culpability of Different Types of Perpetrators’, in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (Antwerp: Intersentia, 2010).

¹¹² Smeulers and Hola, ‘ICTY and the Culpability of Different Types of Perpetrators’, 180-181; also Valentino, ‘Final Solution’; Straus, *The Order of Genocide*, 114.

¹¹³ Smeulers and Hola, ‘ICTY and the Culpability of Different Types of Perpetrators’, 180-181.

“ordered into ordering others”.¹¹⁴ They do not design atrocity policies, but are instrumental in supervising and executing them. They are a critical capacity for the criminal masterminds.¹¹⁵ Middle-ranking perpetrators can be criminals, bureaucrats, devoted warriors, or profiteers. Some of them follow orders or the chain of command, while others pursue career advancement and material gain.¹¹⁶ Middle-ranking perpetrators possess less agency and autonomy than the criminal masterminds. They calculate costs and benefits to a certain degree, but their behaviour depends heavily on the situational context that is created by the criminal masterminds.¹¹⁷

Finally, there are so-called “low-ranking perpetrators”. These perpetrators are not involved in designing or supervising atrocity crimes, but they are “used” for doing the hands-on killing. They are the henchmen. They can be law-abiding individuals, without criminal record or history in violence.¹¹⁸ Supranational criminologists highlight the impact of situational factors, such as reversed social norms, structures of authority, or outright coercion in causing otherwise law-abiding individuals to participate in atrocity crimes.¹¹⁹ Experimental research in social psychology provides evidence for the claim that ordinary people are capable of committing extreme violence when caught in particular situational settings -

¹¹⁴ Drumbl, *Atrocity, Punishment and International Law*, 25.

¹¹⁵ I am grateful to Taylor Seybold for this observation.

¹¹⁶ See, Smeulers, ‘Perpetrators of International Crimes’, 247; also Straus, *The Order of Genocide*, 114.

¹¹⁷ Smeulers, ‘Perpetrators of International Crimes’, 247; Drumbl, *Atrocity, Punishment and International Law*, 26.

¹¹⁸ See, Paul Roth, ‘Social Psychology and Genocide’, in D. Bloxham and R. Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010). For evidence from empirical studies see, Straus, *The Order of Genocide*, 108; and Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: Harper Perennial, 1992).

¹¹⁹ See, Roth, ‘Social Psychology and Genocide’, 199; Stanley Milgram, *Obedience to Authority* (New York: Harper & Row, 1974); Philip Zimbardo, ‘A Situationist Perspective on the Psychology of Evil: Understanding How Good People Are Transformed Into Perpetrators’, in A. Miller (ed.), *The Social Psychology of Good and Evil* (New York: Guilford Press, 2004); Ravi Bhavnani, ‘Ethnic Norms and Interethnic Violence: Accounting for Mass Participation in the Rwandan Genocide’, *Journal of Peace Research* vol. 43, no. 6 (2006), 651-669.

behaviour they would otherwise consider inappropriate.¹²⁰ As the social psychologist Stanley Milgram observes: “Often, it is not so much the kind of person a man is as the kind of situation in which he finds himself that determines how he will act”.¹²¹ According to Philip Zimbardo, sometimes the “evil situation triumphs over the good people”.¹²² Thus, it is the social situation – deliberately created by the criminal masterminds - that causes low-ranking perpetrators to participate in atrocity crimes. Low-ranking perpetrators commit crimes of obedience. They are “non-calculators” that do not think about possible consequences.¹²³ Their agency is significantly constrained by the social environment, though it is never fully relinquished.¹²⁴

This differentiation of perpetrators has implications for the prevention strategies that third parties could use to “handle” potential perpetrators. It suggests that whilst the “criminal masterminds” are usually not the only actors involved in the commission of atrocity crimes, they are the *sine qua non* for the occurrence of such international crimes. Criminal masterminds not only design and command atrocity crimes, but are also instrumental for creating the social context that might cause other actors to get involved. In short, without criminal masterminds there will be no atrocity crimes.¹²⁵ As the other actors are not necessary in the same way, a strong argument can be made to focus preventive strategies in the perpetrator dimension predominately on the criminal masterminds.¹²⁶ “The most effective way to prevent mass killing,” the genocide scholar Benjamin Valentino argues, “is to deal with the specific motivations and conditions which prompt leaders to consider it”.¹²⁷ Criminal

¹²⁰ Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2012), 239; Milgram, *Obedience to Authority*; Zimbardo, ‘A Situationist Perspective on the Psychology of Evil’.

¹²¹ Milgram *Obedience to Authority*, 205.

¹²² Zimbardo, ‘A Situationist Perspective on the Psychology of Evil’, 40.

¹²³ Doob and Webster, ‘Offenders’ Thought Processes’, 73.

¹²⁴ Smeulers and Grünfeld, *International Crimes and Other Gross Human Rights Violations*, 232.

¹²⁵ Ambos, ‘Criminologically Explained Reality of Genocide’, 166.

¹²⁶ Targeting the “intermediaries” would help to reduce the means available to the criminal masterminds.

¹²⁷ Valentino, ‘Final Solution’, 56.

masterminds can be treated as strategic actors, who possess agency and calculate costs and benefits.¹²⁸ In consequence, supranational criminologists suggest that the most promising prevention strategies in the perpetrator dimension focus on manipulating the strategic cost-benefit calculations of criminal masterminds (through “sticks” and “carrots”), or on physically hindering them from designing and inciting atrocity crimes (through “incapacitation”).¹²⁹ These three strategies will be discussed in a little bit more detail.

First, preventive strategies in the category of “sticks” usually revolve around the concept of deterrence.¹³⁰ Deterrence is based on the intuitive assumption that harm is generally something that actors try to avoid, whereas gain is generally something they seek.¹³¹ This means that awareness of possible punishment changes the strategic cost-benefit calculations of individuals – potentially to an extent that prevents them from pursuing a certain course of action.¹³² As the criminologist David Kennedy notes: “Offenders and potential offenders, like other people, seek reward and seek to avoid loss. If particular acts

¹²⁸ Whilst some scholars seem to generally reject the assumption that the perpetrators of atrocity crimes can be understood as rational actors, much of the recent scholarship on mass atrocities stresses that the key leaders usually act rationally to a certain extent. See, Straus, ‘Political Science and Genocide’, 175; and Benjamin Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century* (Ithaca, N.Y.: Cornell University Press, 2004); and Lemarchand, ‘Rwanda’; Bellamy, *Global Politics and the Responsibility to Protect*, 96; Madeleine Albright and William Cohen (co-chairs), *Preventing Genocide: A Blueprint for U.S. Policymakers* (The Report of the Genocide Prevention Task Force, 2008), xv-xvi.

¹²⁹ Doris Layton MacKenzie, ‘Reducing the Criminal Activities of Known Offenders and Delinquents: Crime Prevention in the Courts and Corrections’, in L. Sherman et al. (eds.), *Evidence-based Crime Prevention* (London: Routledge, 2002), 334.

¹³⁰ See, David M. Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (New York: Routledge, 2009), 13-15; Straus, ‘Political Science and Genocide’, 175.

¹³¹ Kennedy, *Deterrence and Crime Prevention*, 15; Marie Tillyer and David M. Kennedy, ‘Locating Focused Deterrence Approaches within a Situational Crime Prevention Framework’, *Crime Prevention & Community Safety* vol. 10, no. 2 (2008). For sceptical views on the effectiveness of deterrence on the international level see, Donald Bloxham and Devin Pendas, ‘Punishment as Prevention? The Politics of Punishing Genocidares’, in D. Bloxham and R. Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), 633; Sheri Rosenberg, ‘Responsibility to Protect: A Framework for Prevention’, *Global Responsibility to Protect* vol. 1, no. 4 (2009), 442-477; and Drumbl, *Atrocity, Punishment and International Law*, 169-173.

¹³² Andrew Ashworth and Julian Roberts, ‘Deterrence’, in A. von Hirsch, A. Ashworth, and J. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, 3rd edn (Oxford: Hart Publishing, 2009), 39.

carry penalties, then those acts will become less attractive”.¹³³ Deterrence is a psychological mechanism that depends on the subjective risk assessments of the potential perpetrators.¹³⁴ “Deterrence must work through the mind of the actor,” Andrew Ashworth and Julian Roberts argue, “and so the reasoning should always be in terms of what potential offenders believe”.¹³⁵ Kennedy calls this the “radical subjectivity” of deterrence.¹³⁶ Thus, it is the criminal masterminds’ subjective perception of risks, costs, and sanctions that matters. Criminal masterminds can only be deterred if they are aware of potential punishments and believe that punishment will actually be imposed.¹³⁷ The communication of punishment threats is therefore an important part of deterrence strategies.¹³⁸

Deterrence can either target specific individuals (“specific deterrence”) or criminal behaviour at large (“general deterrence”). Specific deterrence requires detailed information about the character, circumstances, and previous record of the particular offender, so that punishment threats can be tailored to influence the specific offender.¹³⁹ There are generally three components to deterrence: certainty, severity, and celerity. Criminological research has shown that severity of punishment does not matter greatly, whereas certainty of punishment is a key factor.¹⁴⁰ Enhancing the certainty of punishment, or at least the potential perpetrators’ perceptions about the certainty of punishment, is thus a key issue for crime prevention.¹⁴¹ In

¹³³ Kennedy, *Deterrence and Crime Prevention*, 1.

¹³⁴ Kennedy, *Deterrence and Crime Prevention*, 29; Ashworth and Roberts, ‘Deterrence’, 40.

¹³⁵ Ashworth and Roberts, ‘Deterrence’, 44.

¹³⁶ Kennedy, *Deterrence and Crime Prevention*, 23.

¹³⁷ Ashworth and Roberts, ‘Deterrence’, 45; Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney, and Per-Olof Wikström, ‘Deterrent Sentencing as a Crime Prevention Strategy’, in A. von Hirsch, A. Ashworth, and J. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, 3rd edn. (Oxford: Hart Publishing, 2009), 58-59.

¹³⁸ Kennedy, *Deterrence and Crime Prevention*, 24. As Kennedy argues, “fundamental to an effective deterrence regime is that offenders and potential offenders know what they face: that they are aware of prospective consequences. A sanction, or a risk of sanction, that is unknown cannot, by definition, deter”.

¹³⁹ Ashworth and Roberts, ‘Deterrence’, 41.

¹⁴⁰ There are consistent and significant negative correlations between certainty of punishment and crime rates. See, Ashworth and Roberts, ‘Deterrence’, 40; Von Hirsch, Bottoms, Burney, and Wikström, ‘Deterrent Sentencing as a Crime Prevention Strategy’, 60.

¹⁴¹ Von Hirsch, Bottoms, Burney, and Wikström, ‘Deterrent Sentencing as a Crime Prevention Strategy’, 60

context of atrocity crimes, deterrence is usually associated with threats of individual criminal accountability, targeted sanctions, threats of military intervention, or threats of incapacitation.¹⁴²

A second, though less common, strategy for altering the behaviour of potential perpetrators of crime is to offer “carrots”. The logic is similar to deterrence strategies. However, “carrots” strategies try to achieve behavioural changes by increasing the rewards of pursuing non-atrocity policies.¹⁴³ By analogy, on the international level this could involve linking development aid to specific policy changes, providing economic inducements, or offering military assistance.¹⁴⁴

Finally, third parties could employ incapacitation strategies that aim to physically hinder criminal masterminds from plotting international crimes.¹⁴⁵ Incapacitation strategies do not seek to prevent crime decisions but to interpose obstacles that impede potential perpetrators from carrying out whatever criminal inclinations they may have.¹⁴⁶ The underlying logic is simply that “those who are incarcerated, transported, executed or otherwise physically treated in ways that disable crime, cannot commit it, in some cases indefinitely and in others for a given period”.¹⁴⁷ On the international level, preventive incapacitation strategies could be the removal specific leaders from positions of power or

¹⁴² See, Cherif Bassiouni, ‘Advancing the Responsibility to Protect Through International Criminal Prosecution’, in R. Cooper and J. Voinov Kohler (eds.), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (New York: Palgrave Macmillan, 2009), 33; Robert Rotberg, ‘Deterring Mass Atrocity Crimes: The Cause of Our Era’, in R. Rotberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages* (Washington D.C.: Brookings Institution Press, 2010); Ban, *Implementing the Responsibility to Protect*, 12, 16.

¹⁴³ Asia-Pacific Centre for the Responsibility to Protect, *The Responsibility to Prevent: Opportunities, Challenges and Strategies for Operationalisation* (Brisbane: The University of Queensland, 2010), 32.

¹⁴⁴ Asia-Pacific Centre for the Responsibility to Protect, *The Responsibility to Prevent*, 32.

¹⁴⁵ MacKenzie, ‘Reducing the Criminal Activities of Known Offenders and Delinquents’, 330.

¹⁴⁶ Andrew von Hirsch, ‘Incapacitation’, in A. von Hirsch, A. Ashworth, and J. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, 3rd edn. (Oxford: Hart Publishing, 2009), 75.

¹⁴⁷ MacKenzie, ‘Reducing the Criminal Activities of Known Offenders and Delinquents’, 333.

even targeted killings – both strategies that are likely to give rise to serious legal problems and political controversy.¹⁴⁸

2.4.2. Potential Victims

A second way for third parties to prevent international crimes is by acting as “guardians” for the potential victims. In the specific context of atrocity crimes, victims are usually not targeted on individual grounds, but because of their membership in a particular group.¹⁴⁹ Acting as guardian for potential victims requires third parties to reduce the vulnerability of these groups. According to the criminologist Simon Green, the concept of “vulnerability” has two dimensions: risk and harm.¹⁵⁰ On the one hand, vulnerability refers to the level of *risk* of victimisation that particular groups face. On the other hand, it also refers to the level of *harm* that potential victim groups are likely to suffer in case of victimisation.¹⁵¹ “Individuals least likely to be victimised and most capable to cope with victimisation are the least vulnerable,” Simon Green notes, “whereas those most at risk and least capable to cope with harm caused would be the most vulnerable”.¹⁵² From this, two strategies for reducing the vulnerability of potential victims can be deduced: (1) reducing the level of risk of victimisation; and (2) strengthening victim capacity to cope with harm. These two strategies will be considered in turn.

With regards to the first strategy, criminologists suggest several ways in which third party actors could reduce the level of risk that certain individuals get victimised. One strategy would be to prevent potential victims from being depicted as legitimate targets. Situational

¹⁴⁸ Valentino, ‘Final Solutions’, 56.

¹⁴⁹ Drumbl, *Atrocity, Punishment and International Law*, 41-42.

¹⁵⁰ Simon Green, ‘Crime, Victimisation and Vulnerability’, in S. Walklate (ed.), *Handbook of Victims and Victimology* (Cullompton: Willan Publishing, 2007), 92.

¹⁵¹ Green, ‘Crime, Victimisation and Vulnerability’, 92.

¹⁵² Green, ‘Crime, Victimisation and Vulnerability’, 92.

crime prevention theorists call this strategy “target concealment”.¹⁵³ Supranational criminologists purport that incitement and hate propaganda, which quite commonly precede atrocity crimes, increase the risk that certain groups are seen as legitimate targets for atrocity campaigns.¹⁵⁴ Hate propaganda de-humanizes certain groups and falsely portrays situations as being of a “kill or be killed” nature. It is not difficult to see that this increases the level of risk of victimisation for certain groups.¹⁵⁵ Thus, international actors could prevent international crimes by challenging hate propaganda and incitement to atrocities by designing “communication interventions” such as, for example, radio jamming or the spreading of diverse views. Another strategy for reducing the level of victimisation risk is to enable potential victims to flee from crime scenes. Situational crime prevention theorists refer to this strategy as “target removal”.¹⁵⁶ By analogy, third party actors on the international level could provide potential victims with escape routes by opening borders to neighbouring countries.¹⁵⁷ Refugee experts have long advocated this strategy as a promising way of protecting vulnerable populations from atrocity crimes.¹⁵⁸ “The ability of potential victims of mass killing to flee across borders,” Valentino notes, “often has been a critical factor in limiting or

¹⁵³ See, Derek Cornish and Ronald Clarke, ‘Opportunities, Precipitators and Criminal Decisions: A Reply to Wortley’s Critique of Situational Crime Prevention’, in M. Smith and D. Cornish, *Theory for Practice in Situational Crime Prevention* (New York: Criminal Justice Press, 2003); Ronald Clarke and Graeme Newman, *Outsmarting the Terrorists* (Westport: Praeger Security International, 2006), 190-193.

¹⁵⁴ See, Drumbl, *Atrocity, Punishment and International Law*, 41; William Schabas, ‘Hate Speech in Rwanda: The Road to Genocide’, *McGill Law Journal* vol. 141, no. 46 (2000); Frank Chalk, ‘Monitoring African Governments’ Domestic Media to Predict and Prevent Mass Atrocities: Opportunities and Obstacles’, in R. Rothberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages* (Washington D.C.: Brookings Institution Press, 2010), 220.

¹⁵⁵ Chalk, ‘Monitoring African Governments’ Domestic Media to Predict and Prevent Mass Atrocities’, 226.

¹⁵⁶ Cornish and Clarke, ‘Opportunities, Precipitators and Criminal Decisions’; Clarke and Newman, *Outsmarting the Terrorists*, 190-193.

¹⁵⁷ Valentino, ‘Final Solutions’, 57; Valentino, *Final Solutions*, 249; Asia-Pacific Centre, *The Responsibility to Prevent*, 42.

¹⁵⁸ Brian Barbour and Brian Gorlick, ‘Embracing the Responsibility to Protect: A Repertoire of Measures Including Asylum for Potential Victims’, *International Journal of Refugee Law* vol. 20, no. 4 (2008), 562, 565. However, as Valentino points out, the strategy of providing victims with flight opportunities raises serious questions regarding regional security and might facilitate ethnic cleansing. As Valentino stresses, “assisting refugee flows or collaborating in the partition of war-torn states might only encourage violence elsewhere by lending international sanction to ethnic cleansing”. See, Valentino, ‘Final Solutions’, 58.

averting mass killing”.¹⁵⁹ Yet another strategy would be to provide potential victims with physical protection from physical attacks. Among criminologists, this strategy of “building walls and barriers” is usually referred to as “target hardening”.¹⁶⁰ On the international level, by analogy, third party actors could contribute to target hardening through measures such as, for example, preventive deployments of UN peacekeepers, the creation of safe areas, or the imposition of no-fly zones.

The second broad strategy for reducing the vulnerability of potential victims focuses on strengthening the capacity of potential victims to cope with harm. One way for third parties to assist potential victims to cope with harm is to increase their self-defensive capabilities. This could mean supplying arms and military equipment to potential victims, or providing them with intelligence and military training.¹⁶¹ Moreover, tutoring potential victim groups in self-protection measures could be another way to reduce their vulnerability.¹⁶²

2.4.3. Crime Situation

Finally, the “crime triangle” suggests that third party actors can prevent international crimes by “managing” the situational context in which crime takes place. Criminological literature commonly identifies three situational elements that, if present, increase the likelihood that individuals will decide to commit crime. These three elements are the ready availability of means, a low risk setting, and the availability of excuses.¹⁶³ The presence of these elements increases crime opportunities and produces a permissive environment for the commission of

¹⁵⁹ Valentino, *Final Solutions*, 249-250; Asia-Pacific Centre, *The Responsibility to Prevent*, 42.

¹⁶⁰ Clarke and Newman, *Outsmarting the Terrorists*, 190-193.

¹⁶¹ Valentino, ‘Final Solutions’, 57.

¹⁶² Alex J. Bellamy and Paul D. Williams, ‘Protecting Civilians in Uncivil Wars’, in L. Glanville and S. Davies (eds.), *Protecting the Displaced: Deepening the Responsibility to Protect* (Leiden: Martinus Nijhoff Publishers, 2010), 143-146.

¹⁶³ Clarke, ‘Seven Misconceptions of Situational Crime Prevention’; Pease, ‘Crime Reduction’, 953.

crime.¹⁶⁴ The supranational criminologists Smeulers and Haveman suggest that there are some specific situational settings that usually combine these three criminogenic elements, such as war zones, prisons, or refugee camps.¹⁶⁵ They regard these situational settings as atrocity producing.¹⁶⁶ Based on this insight into the criminogenic power of certain situations, criminological research has identified three strategies for reducing the permissiveness of crime situations: 1) limiting the availability of means; 2) increasing the risk of detection; and 3) reducing the persuasiveness of excuses. These prevention strategies do not target specific perpetrators or victims, but focus on the structure of the situation at large. They will be discussed in turn.

First, criminologists argue that limiting the availability of the means to commit crime reduces the criminogenic power of situations. This argument is based on the assumption that the ready availability of the means to commit certain crimes can incentivise individuals to engage in criminal activity that they would otherwise not have engaged in. With regards to burglary or car theft, for example, it is argued that these crimes will suddenly appear more feasible and tempting to certain individuals if specific tools are within reach. With regards to the international level, by analogy, it can be argued that atrocity crimes become more likely if the situational context provides potential offenders with ready access to weapons or an army of willing killers.¹⁶⁷ Reducing the availability of these means to commit atrocity crimes is thus a promising prevention strategy for third party actors.¹⁶⁸

¹⁶⁴ See, Clarke, 'Seven Misconceptions of Situational Crime Prevention'; Felson and Clarke, *Opportunity Makes the Thief*; Pat Mayhew et al., *Crime as Opportunity* (London: Home Office Research Study No 34, 1976).

¹⁶⁵ Smeulers and Grünfeld, *International Crimes and Other Gross Human Rights Violations*, 240; also Roberts and McMillan, 'For Criminology in International Criminal Justice', 324. War zones are particularly relevant with regards to atrocity crimes. 67% of all atrocity crimes have occurred in the context of armed conflict. See, Alex Bellamy, 'Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent', *Policy Analysis Brief: The Stanley Foundation*, January 2011.

¹⁶⁶ Haveman and Smeulers, 'Criminology in a State of Denial', 15.

¹⁶⁷ Dan Kuwali, 'Old Crimes, New Paradigms: Preventing Mass Atrocity Crimes', in R. Rotberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages* (Washington D.C.: Brookings Institution Press, 2010), 33.

¹⁶⁸ Pease, 'Crime Reduction', 953.

Second, criminologists point out that situational settings differ in the degree of risk that they pose for potential perpetrators. Situations that are characterised by very low risk of getting caught, e.g. because there are no natural or formal surveillance mechanisms, can fuel crime decisions.¹⁶⁹ For example, dark and deserted alleys are more conducive to crime than busy and well-lit streets with CCTV surveillance. Even though surveillance technology, street lighting, or high-visibility police patrols do not constitute physical barriers to the commission of crime, criminological research has shown that increasing the risk of detection leads to fewer crime choices.¹⁷⁰ On the international level, by analogy, this suggests that strengthening public scrutiny or enhancing satellite surveillance programmes could help to prevent crime.¹⁷¹ Moreover, the perception that international crimes can often be committed with impunity has a criminogenic effect. Fighting impunity by strengthening international criminal justice mechanisms could therefore be another promising prevention strategy; and one very much aligned with the idea of general deterrence.

Finally, criminologists note that certain situations are criminogenic because they allow potential perpetrators to hide behind a range of excuses. Criminological research shows that removing access to such excuses reduces the likelihood of crime. The criminologist Adam Crawford explains that removing excuses means eliminating “the possibility of someone responding that they did not know they were committing an offence or that they had

¹⁶⁹ See the different contributions in Kate Painter and Nick Tilley (eds.), *Surveillance of Public Space: CCTV, Street Lighting and Crime Prevention* (Monsey, New York: Criminal Justice Press, 1999); or Lawrence Sherman and John Eck, ‘Policing for Crime Prevention’, in L. Sherman et al. (eds.), *Evidence-based Crime Prevention* (London: Routledge, 2002).

¹⁷⁰ See, Kate Painter and Nick Tilley, ‘Seeing and Being Seen to Prevent Crime’, in K. Painter and N. Tilley (eds.), *Surveillance of Public Space: CCTV, Street Lighting and Crime Prevention* (Monsey, New York: Criminal Justice Press, 1999), 4; Ken Pease, ‘A Review of Street Lighting Evaluations: Crime Reduction Effects’, in K. Painter and N. Tilley (eds.), *Surveillance of Public Space: CCTV, Street Lighting and Crime Prevention* (Monsey, New York: Criminal Justice Press, 1999), 59-60; Pease, ‘Crime Reduction’, 953; and Nick Tilley, ‘Driving Down Crime at Motorway Service Areas’, in M. Smith and N. Tilley (eds.), *Crime Science: New Approaches to Preventing and Detecting Crime* (Devon: Willan Publishing, 2005), 115-116.

¹⁷¹ See, Sarah Kreps, ‘Social Networks and Technology in the Prevention of Crimes Against Humanity’, in R. Rotberg (ed.), *Mass Atrocity Crimes: Preventing Future Outrages* (Washington D.C.: Brookings Institution Press, 2010), 178-182.

no alternative but to do so”.¹⁷² From this insight, two crime prevention strategies can be deduced: 1) countering the “I did not know” excuse; and 2) opposing the “I had no alternative” excuse. Access to the “I did not know” excuse could be removed by regularly reminding people of the relevant rules that apply in a given situation, as well as the penalties for breaking these rules.¹⁷³ More generally, this excuse can be countered by making international criminal laws as clear and unambiguous as possible. This could involve drafting international conventions in clear language, raising public awareness about what kinds of behaviour constitute an international crime, or offering training seminars on the subject matter.¹⁷⁴ Access to the “I had no alternative” excuse could be limited by challenging false narratives or providing de-escalating information. At its core, the “I had no alternative” excuse rests on a necessity argument.¹⁷⁵ In the context of atrocity crimes, hate propaganda and incitement to violence often have the purpose of creating the false impression that certain groups or individuals present a threat to another group, which is then supposed to frame the situation as one of “kill or be killed”.¹⁷⁶ Removing access to this excuse could involve challenging such false narratives, spreading alternative views, or simply suppressing this kind of hate propaganda.¹⁷⁷

2.5. Conclusions

As this chapter has shown, drawing on criminological research into the prevention of crime/international crime provides new perspectives on the “responsibility to prevent” and calls into question some of the conventional wisdom on the subject-matter, which tends to borrow primarily from conflict prevention theory and practice. This concluding section takes

¹⁷² Crawford, ‘Crimes Prevention and Community Safety’, 873.

¹⁷³ Crawford, ‘Crimes Prevention and Community Safety’, 873.

¹⁷⁴ Pease, ‘Crime Reduction’, 953

¹⁷⁵ Crawford, ‘Crimes Prevention and Community Safety’, 873.

¹⁷⁶ Chalk, ‘Monitoring African Governments’ Domestic Media to Predict and Prevent Mass Atrocities’, 226.

¹⁷⁷ See Ban, *Implementing the Responsibility to Protect*.

the main findings from the excursion into the world of criminology and assembles them into a preliminary framework for international crime prevention. To recapitulate very briefly:

The preceding analysis has demonstrated that the very nature of the category of “international crime” differs from the notion of “conflict” in fundamental respects. Unlike conflict, international crimes protect core values of international society as a whole. The notion of international crime draws a sharp line between perpetrators and victims. The former are branded as outlaws and threatened with punishment, whereas the latter are promised protection. International criminal law is intrinsically tied to partiality and coercion. International crime prevention does not revolve around the principles of impartiality, consent, and minimal coercion, which have traditionally guided conflict prevention efforts.

Moreover, the prevention of crime is not primarily seen as a long-term agenda for social reform, which seeks to build state structures that make societies resilient to atrocities. The vast majority of the criminological literature on crime prevention stresses that it is almost impossible to establish a direct causal link between distant socio-economic conditions and the commission of crime. Social crime prevention, moreover, is usually already pursued as part of other agendas. It is not clear that additional crime prevention effects can be achieved by re-labelling these activities as crime prevention strategies. Instead, the most promising and popular criminological prevention approaches focus on reducing crime opportunity structures and manipulating individual decision-making in proximate situations.¹⁷⁸ Whilst social crime prevention strategies can be pursued in parallel, situational crime prevention strategies are seen as more important for the prevention of crime. This reverses the logic advanced in large

¹⁷⁸ See, Clarke, ‘Seven Misconceptions of Situational Crime Prevention’, 56; Sherman et al., ‘Preventing Crime’, 4; Laycock, ‘Defining Crime Science’, 12-13; or Pease, ‘Crime Reduction’, 953.

segments of literature on the “responsibility to prevent”, which prioritises social crime prevention strategies.¹⁷⁹

Finally, criminological research identifies four dimensions of crime that also frame the strategies for prevention: perpetrators, victims, situations, and third parties.¹⁸⁰ Third party actors are understood to be the central “crime preventers” that are responsible for initiating preventive changes in relation to the other three crime dimensions. Criminologists suggest that third party actors can prevent crime by changing the strategic cost-benefit calculations of potential perpetrators through sticks, carrots, and incapacitation; reducing the vulnerability of potential victims by strengthening victim capacity to cope with harm or reducing their risk of victimisation; and limiting the permissiveness of crime situations by eliminating excuses, increasing risk, or reducing the availability of means. Table 2.1. assembles these insights from criminology into a preliminary framework for the prevention of international crimes.

Table 2.1.: Initial Framework of International Crime Prevention

	Perpetrators (Incentives)	Victims (Vulnerability)	Situation (Permissiveness)
Situational Crime Prevention	<ul style="list-style-type: none"> - <i>Incapacitation</i> - <i>Sticks/Deterrence</i> - <i>Carrots/Inducement</i> 	<ul style="list-style-type: none"> - <i>Strengthen Victim Capacity to Cope with Harm</i> - <i>Reduce Risk of Victimisation</i> 	<ul style="list-style-type: none"> - <i>Eliminate Excuses</i> - <i>Increase Risk</i> - <i>Reduce Means</i>
Social Crime Prevention	<p><i>Eliminate Structural & Dispositional Risk Factors Associated with the Development of International Criminality</i></p>		

¹⁷⁹ See, Ban, *State Responsibility and Prevention*; Bellamy, *Global Politics and the Responsibility to Protect*, 119; Deborah Mayersen, ‘Current and Potential Capacity for the Prevention of Genocide and Mass Atrocities Within the UN System’, *Global Responsibility to Protect* vol. 3, no. 2 (2011), 221; Asia-Pacific Centre, *Preventing Genocide and Mass Atrocities*, 20-34; ICISS, *The Responsibility to Protect*, 22; or Evans, *The Responsibility to Protect*, 91-97. For evidence that this focus is in accordance with conflict prevention thinking, see Annan, *Prevention of Armed Conflict*, 90; Ackermann, ‘The Idea and Practice of Conflict Prevention’, 344; Lund, ‘Conflict Prevention’, 289; Luck, ‘Prevention: Theory and Practice’, 253.

¹⁸⁰ See, for example, Pease, ‘Crime Reduction’, 949-950; and Centre for Problem-Oriented Policing, ‘Use the Problem Analysis Triangle’.

In the next part of this thesis, this deductively derived framework will be refined, complemented, and problematised through inductive research. The subsequent chapters provide three case studies of instances of international crime prevention in order to illuminate the following questions: What tools do international actors consider useable/acceptable for operationalizing international crime prevention? How do these tools work and under what conditions do they succeed or fail? What capacities and dispositions do third parties require to successfully prevent atrocity crimes? How does international crime prevention relate to the prevention of armed conflict? What unintended consequences and side-effects emerge from efforts to prevent international crimes?

Part Two

The Cases

The second part of this thesis adopts an inductive approach and studies three cases of international crime prevention in great empirical detail. The aim of this empirical analysis is to refine, complement, and problematize the international crime prevention framework deduced in the preceding chapter. Whilst the preliminary international crime prevention framework does provide a lens for looking at the cases, it is not directly imposed on the cases.

The three case studies are primarily intended to serve a heuristic or exploratory function.¹ Their purpose is to generate hypotheses, rather than to test theories or hypotheses. In other words, the case studies are not supposed to be tests of the preliminary framework, but an additional research method for illuminating the practical side of international crime prevention. They shall demonstrate how international crime prevention, especially the situational prevention of international crimes, works in practice, clarify how certain mechanisms work, and facilitate an in-depth study of policy-making in the midst of crisis. More specifically, the case studies have the purpose to enhance knowledge about international crime prevention in six ways: (1) assessing the international capacity to anticipate atrocity crimes; (2) identifying potential tools for the operationalization of international crime prevention; (3) generating hypotheses about the conditions under which

¹ On heuristic case studies see, Harry Eckstein, *Regarding Politics: Essays on Political Theory, Stability, and Change* (Los Angeles: University of California Press, 1992), 143-147; also Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: Belfer Centre for Science and International Affairs, 2005).

international crime prevention tools are likely to succeed (or fail); (4) inferring capacities and dispositions required for the prevention of international crimes; (5) discovering side-effects and unintended consequences of international crime prevention; and (6) clarifying the relationship and interactions between international crime prevention and the prevention of armed conflict. As this thesis only studies three cases of international crime prevention (small-*n* study), which all have important idiosyncratic elements, the case study findings cannot easily be generalized, but require further testing.²

The case selection process also requires more detailed elaboration, given the importance of this aspect for a case study research design. This thesis selects the three cases on the basis of four main criteria in order to ensure that the case studies can serve the research purposes just outlined. The first and most important case selection criterion is that cases are clear instances of international crime prevention. This thesis defines instances of international crime prevention as cases in which international actors recognized the risk of atrocity crimes and made conscious efforts to prevent them. This means that there needs to be evidence that international actors consciously aimed at preventing the commission of international crimes and not just armed conflict. Instances of conflict prevention are more frequent, but do not necessarily provide insights into the prevention of international crimes. Thus, this first case selection criterion reduces the population of potential cases significantly. References to international crimes in statements of senior policy-makers, governments, or international organizations, as well as the text of resolutions or equivalent documents, are treated as evidence for the intent of international actors to prevent international crimes. Moreover, the involvement of international criminal justice mechanisms, as well as explicit references to

² The limitations of dealing with a small universe of cases are acknowledged in the field of genocide studies. See, Scott Straus, 'Second-Generation Comparative Research on Genocide', *World Politics* vol. 59, no. 3 (2007), 479.

R2P, are seen as indicators that international actors aimed at the prevention of atrocity crimes.

The second case selection criterion that this thesis follows is that cases need to show signs that the occurrence of atrocity crimes constituted a distinct “possibility”, even if such crimes did not occur. It is one of the challenges of studying preventive action that positive cases are generally characterized by the non-occurrence of specific events. For this thesis, for example, a positive case would be characterized by the non-occurrence of atrocity crimes. Given that atrocity crimes are rare events, the non-occurrence of atrocity crimes is the norm rather than the exception in world politics. This raises the issue of the relevance of cases. Treating any instance of mass atrocity non-occurrence as a positive case of international crime prevention would significantly over-inflate the population of relevant cases. Thus, this thesis follows the logic of the so-called “possibility principle” and argues that relevant cases of international crime prevention need to display signs indicating that the occurrence of atrocity crimes was a distinct “possibility”.³ Put differently, whilst it is impossible to determine with certainty what may have happened in any given situation, relevant cases should display signs that indicate the possibility of atrocity crimes. Planning, mobilization, and incitement to atrocity crimes, as well as low-level acts of violence and life integrity violations, are treated as evidence for this “possibility” claim. Due to this selection criterion, the case studies primarily illuminate the situational prevention of international crimes and allow only a few limited observations about social crime prevention, which is significantly more difficult to grasp and study.

The third case selection criterion is that the case studies must allow observations about the prevention of international crimes in different situational environments. Research conducted by Alex Bellamy shows that from 103 cases where atrocity crimes have occurred

³ On the “possibility principle” see, James Mahoney and Gary Goertz, ‘The Possibility Principle: Choosing Negative Cases in Comparative Research’, *American Political Science Review* vol. 98, no. 4 (2004).

since 1945, 69 cases (67%) have occurred in the context of an armed conflict, whereas 34 cases (33%) have occurred in a peacetime context.⁴ This statistic suggests that international crime prevention efforts can take place in three different contexts: 1) in a peacetime context, 2) in the context of armed conflict, and 3) in the context of a transition from peacetime to an armed conflict. Where armed conflict provides the situational context, it seems very likely that it will be an important situational variable that also impacts on the way that international crime prevention is conducted. The three cases should therefore cover the three different contexts in which international crime prevention can take place.

The final criterion that affects the selection of cases is the need to study a mix of positive and negative cases of international crime prevention. This thesis defines a positive case of international crime prevention as one in which international actors recognized the risk of atrocity crimes, consciously designed policy strategies to prevent the commission of such crimes, and indeed succeeded in averting the commission of international crimes. The definition of a negative case of international crime prevention requires clarification as well. In theory, any of the cases included in Alex Bellamy's list of mass atrocity campaigns since 1945 could be conceptualized as a case of failed prevention.⁵ However, in almost all of these cases, international actors did not make conscious efforts to prevent atrocity crimes (or only acted after mass killing had already been committed). Such cases illustrate issues related to political will, which is a necessary condition for successful prevention, but they do not help to generate more specific findings and hypotheses about the practice of international crime prevention. Thus, this thesis defines negative cases of international crime prevention as cases in which international actors recognized the risk of atrocity crimes, consciously designed

⁴ Alex J. Bellamy, 'Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent', *Policy Analysis Brief: The Stanley Foundation*, January 2011, 2.

⁵ Appendix I to Bellamy's Stanley Foundation brief on mass atrocities and armed conflict can be accessed at: <http://www.stanleyfoundation.org/publications/pab/BellmayAppendices22011.pdf>.

policy strategies to prevent such crimes, but ultimately failed to avert the commission of international crimes.

The three cases that in combination best fit these four case selection criteria are, in chronological order, the international community's efforts to prevent atrocity crimes in Bosnia-Herzegovina (1991-1995), Kenya (2007/08), and Libya (2011). First, the Bosnia case serves as a negative case study of international crime prevention. Whilst the Bosnia case predates the first articulation of R2P by a decade, international actors still engaged in conscious efforts to prevent international crimes - though the international community's preventive engagement failed to avert the worst atrocities on European soil since the Holocaust. Moreover, the Bosnia crisis allows insights into the prevention of international crimes in the context of an armed conflict. Second, the Kenya case serves as a positive case study of international crime prevention; one which is often seen as an R2P "success story". Moreover, studying the international preventive engagement during Kenya's post-election crisis allows observations about international crime prevention in a peacetime context. Third, the Libya case serves as another positive case study of international crime prevention – though one that triggered heated international controversy. The Libya case is an ideal addition to the Bosnia and Kenya cases, as the international crime prevention efforts in Libya took place in the context of a transition from peacetime to an armed conflict.⁶

Finally, the process of data gathering for these three case studies will be explained. The case data was gathered through a variety of sources. An important data gathering method is the analysis of official documents, such as resolutions/ decisions/ communiqués, adopted by, for example, the UN Security Council, the UN Human Rights Council, the AU Peace and Security Council, the League of Arab States, the Organization for the Islamic Conference, the EU Parliament, the Council of the EU, or individual governments. These official documents

⁶ Other potential positive cases that could have been studied are the international crime prevention efforts in Burundi (1995-2005), Guinea-Conakry (2009), Kyrgyzstan (2010), or Cote d'Ivoire (2010/2011).

help to identify the purpose and motivation behind an international preventive engagement and clarify the rationale behind the adoption of specific policy instruments. Moreover, records of official meetings that took place in the context of the adoption of resolutions are often publicly available, such as the Provisional Verbatim Records of the UN Security Council. These meeting records provide additional insights into international crime prevention efforts.⁷ Furthermore, leaked diplomatic cables, such as the ones from the US Embassy in Kenya, and leaked reports of national intelligence agencies, such as the US Central Intelligence Agency's assessments of the situation in the former Yugoslavia, provide important insights into internal debates in the US government. These leaked documents provide reliable data, as the documents were not prepared for public consumption.

Furthermore, elite interviews with policy-makers that were actively involved in the three cases of international crime prevention are a key source of information. The elite interviews provide unique insights into non-public deliberation processes. This is important as meetings, discussions, and negotiations often take place behind closed doors or during informal consultations. Elite interviews are also useful for drawing on personal recollection, expertise, and insights more generally.⁸ In total, 51 elite interviews have been conducted for the three case studies.⁹ The interviewees were selected for their privileged access to information and came from a range of governments, international organizations, and NGOs, including: the UN Joint Office of the Special Advisers for the Prevention of Genocide and the Responsibility to Protect, the UN Department for Political Affairs, the UN Secretary-General's Office, and the UN High Commissioner for Human Rights; the Permanent

⁷ Examples are statements or explanations of vote of states during debates in the UN Security Council.

⁸ On elite interviewing see, Teresa Odendahl and Aileen Shaw, 'Interviewing Elites', in J. Gubrium and J. Holstein (eds.), *Handbook of Interview Research* (Thousand Oaks, CA: SAGE Publications, 2002); and Herbert Rubin and Irene Rubin, *Qualitative Interviewing: The Art of Hearing Data*, 2nd edn. (Thousand Oaks, CA: SAGE Publications, 2005).

⁹ A full list of the interviews with detailed information on the position and role of the interviewees, as well as the date and place of the interviews, is enclosed at the end of the bibliography.

Missions to the UN of the US, the UK, France, Brazil, South Africa, Portugal, Lebanon, India, Switzerland, Hungary, and the Netherlands; the Liaison Office of the ICC to the UN; different departments of NATO; the European Commission's Directorate General for Development and Cooperation; former ambassadors, diplomats, and government ministers; as well as influential civil society organizations, such as the International Crisis Group, the Global Centre for the Responsibility to Protect, the International Centre for Transitional Justice, the Centre for Humanitarian Dialogue, and Security Council Report. A potential limitation of the interview data is the possibility that interviewees remember events incorrectly (faulty memory). This limitation is particularly relevant for the cases that date back further, such as the Bosnia case. Moreover, there is always the risk that interviewees provide self-serving accounts of events that present them in a better light. To account for these potential problems, this thesis allows for triangulation by interviewing a range of different individuals on the same subject and double checking the interview data with public statements, meeting records, and other available documents.

These primary sources will be supplemented by secondary literature. For instance, the case studies also draw on academic monographs, peer-reviewed journal articles, journalistic reports, radio broadcasts, and blogs. Memoirs of key policy-makers will be used as an additional source of information where possible, particularly for the Bosnia case. Whilst memoirs can provide valuable insights into particular events, they come with certain limitations. Chief among them is the tendency of individuals to provide self-serving accounts of events. Similarly to the interview data, this will be dealt with through triangulation.

3. Bosnia and International Crime Prevention: Lessons from a Failure

“The Serb conquerors of northern Bosnia have established two concentration camps in which more than a thousand civilians have been executed or starved and thousands more are being held until they die.”

❖ Roy Gutman, Journalist and Pulitzer Prize Winner¹

“Certainly, errors of judgement were made - errors rooted in a philosophy of impartiality and non-violence wholly unsuited to the conflict in Bosnia.”

❖ Kofi Annan, former UN Secretary-General²

On 25 June 1991, the Yugoslav republics of Croatia and Slovenia declared their independence from the Socialist Federative Republic of Yugoslavia (SFRY). This step not only prompted military confrontation between the federal Yugoslav People's Army (JNA) and the territorial defence forces of the two republics, but also accelerated the break-up of the SFRY, which did not come completely unexpectedly.³ Since the mid-1980s, economic disparities and the spread of ethnic nationalism created tension between the six constitutive republics of the SFRY: Bosnia, Serbia, Croatia, Slovenia, Montenegro, and Macedonia. Serbia, on the one hand, was acting in an increasingly nationalistic and aggressive manner, trying to dominate the SFRY

¹ Roy Gutman, 'Death Camps: Survivors Tell of Captivity, Mass Slaughters in Bosnia', *Newsday*, 02/08/1992. The quote is taken from the first report about Serb concentration camps in Bosnia.

² Kofi Annan, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica*, General Assembly, 15/11/1999, A/54/549, 110.

³ The military confrontation between the Slovenian territorial defence forces and the Serb-dominated JNA was brief, as Serbia had no real interest in Slovenia. There was, however, a significant Serb minority in the Croatian Krajina, which immediately declared the Serb Autonomous Region of Krajina. The armed confrontation between Croatia and the JNA was significantly more brutal.

within the existing structures.⁴ Slovenia and Croatia, on the other hand, were trying to gain independence from the federation. Bosnia was caught between these two camps.⁵ It was an ethnically mixed republic, hosting Bosnian Muslims (43.7 percent), Bosnian Serbs (31.4 percent), and Bosnian Croats (17.3 percent).⁶ Serbia and Croatia were outspoken about their intention to annex parts of Bosnia should Yugoslavia's federal structure break down. As there were few ethnically homogenous regions in Bosnia, it was clear that this would require forced population transfers on a massive scale. Thus, Yugoslavia's disintegration posed an existential threat to Bosnia. And indeed, in April 1992, after Bosnia declared its independence, Serb/Bosnian Serb forces and paramilitary groups began to implement the "Greater Serbia" project by ethnically cleansing parts of Bosnia.

Contrary to popular opinion, however, international actors did not sit back and watch ethnic cleansing unfold, but took prevention rather seriously. In particular, there was an unprecedented level of engagement by the reinvigorated UN. Even before the outbreak of systematic violence in Bosnia, the UN imposed an arms embargo on all of Yugoslavia, whilst the EC tried to find a political solution to the crisis. From April 1992 to October 1993, then, the UN Security Council adopted 47 resolutions and issued 42 presidential statements on Yugoslavia. As Kofi Annan points out, "no issue in the history of the Security Council has engendered more resolutions and statements over a comparable period".⁷ International actors employed

⁴ Noel Malcolm, *Bosnia: A Short History* (London: Pan Books, 2002), 215. See also, Warren Zimmermann, *Origins of a Catastrophe: Yugoslavia and Its Destroyers-America's Last Ambassador Tells What Happened and Why* (New York: Times Books, 1996); Louis Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (London: Duke University Press, 2002), 5.

⁵ Geert-Hinrich Ahrens, *Diplomacy on the Edge: Containment of Ethnic Conflict and the Minorities Working Group of the Conference on Yugoslavia* (Washington D.C.: Woodrow Wilson Center Press, 2007), 202.

⁶ Steven Burg and Paul Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (New York: M.E. Sharpe, 2000), 27.

⁷ Annan, *The Fall of Srebrenica*, 16.

a number of policy instruments to prevent an escalation of ethnic cleansing in Bosnia. Some of the prevention tools adopted were rather exceptional at the time, such as the establishment of an International Criminal Tribunal for the former Yugoslavia (ICTY). Despite the international crime prevention efforts, however, the Serb campaign of ethnic cleansing continued for three and a half years, entailing the worst atrocity crimes in Europe since the Holocaust.⁸ Atrocity crimes only came to a halt after the signing of the Dayton Accords on 14 December 1995.

This chapter studies the international crime prevention efforts in the Bosnia crisis in detail. There are several reasons why the Bosnia case suits the specific research objectives of this thesis. First, even though the Bosnia case predates the first articulation of R2P by a decade, it constitutes a clear instance of international crime prevention. Much of the international preventive engagement in Bosnia aimed at preventing “serious violations of international humanitarian law”, a term used at the time to collectively refer to genocide, war crimes, ethnic cleansing, and crimes against humanity.⁹ Security Council resolutions and debates invoked the language of “genocide”, “atrocities against civilian populations”, “forcible creation of ethnically pure regions”, and “criminal practices”. Moreover, the threats of individual criminal accountability and the creation of the ICTY demonstrate that there was international concern about atrocity crimes.¹⁰ Second, the Bosnia crisis fits this thesis’ definition of a negative case of international crime prevention: international actors recognized the

⁸ Annan, *The Fall of Srebrenica*, 102; also Jan Willem Honig and Norbert Both, *Srebrenica: Record of a War Crime* (London: Penguin Book, 1996), xix.

⁹ William Schabas, ‘International Crimes’, in D. Armstrong (ed.), *Routledge Handbook of International Law* (New York: Routledge, 2009), 272.

¹⁰ Personal Interview with Ambassador Peter Galbraith, *Professional Staff Member of the US Senate Committee on Foreign Relations, 1979-1993, and First US Ambassador to Croatia, 1993-1998* (Washington D.C., 12/09/2012); Personal Interview with Leon Fuerth, *National Security Adviser to US Vice President Al Gore, 1993-2000; Coordinator of US Sanctions against Serbia and Montenegro* (Washington D.C., 10/09/2012); Personal Interview with Stuart Seldowitz, *Legal Adviser, Permanent Mission of the US to the UN, 1991-1996* (New York, 04/09/2012).

risk of atrocity crimes, consciously designed strategies to prevent such crimes, but failed to avert the Serb campaign of ethnic cleansing, as well as the atrocities committed by Croatian forces. Third, atrocity crimes in Bosnia escalated in the context of an armed conflict, which international actors tried to manage in parallel to preventing international crimes. At times, the two strategies actively merged. Thus, the Bosnia crisis illuminates the prevention of international crimes in the context of armed conflict.

In this chapter, it will be argued that the Bosnia case study allows a number of observations about international crime prevention that help to revise and complement the preliminary framework deduced in Chapter 2. First, the international response to the emerging Yugoslavia crisis until September 1991 reveals an interrelationship between social and situational crime prevention, suggesting that the pursuit of social crime prevention can be a factor in delaying or creating demand for situational crime prevention. Whilst not labelled in such terms, social crime prevention was present in the international efforts to strengthen Yugoslavia's federal institutions, promote market reforms and economic liberalisation, and assist the democratization process. Whilst the pursuit of these structural reforms was not a sufficient safeguard against the commission of international crimes, it reinforced international policy-makers' assumption that such a well-respected European country would not become the scene of atrocity crimes - despite concrete early warning about the potential for systematic inter-ethnic violence. Some observers even argue that the social crime prevention measures have triggered violence and increased the risk of atrocity crimes.¹¹

Second, the international prevention efforts that commenced in September 1991 reveal a number of tools that international actors consider appropriate for

¹¹ For example, Susan Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War* (Washington D.C.: Brookings Institution, 1995), 15.

operationalizing all three dimensions of situational crime prevention. International actors tried to deter and constrain potential perpetrators by imposing comprehensive sanctions, threatening individual criminal accountability, creating the ICTY, and authorising NATO air strikes. They tried to protect potential victims by imposing a no-fly zone, establishing safe areas, and providing self-defensive weapons. International actors further tried to reduce the permissiveness of the crime situation by imposing an arms embargo, dispatching monitoring missions, managing the armed conflict, showing scrutiny, and communicating relevant legal norms.

Third, the Bosnia case suggests that the situational prevention of international crimes faces unique challenges if it takes place in the context of armed conflict. In an armed conflict environment, the establishment of a conflict management track that seeks to alter this enabling context is a plausible international crime prevention strategy. In the Bosnia case, conflict management was pursued in a very traditional form that largely adhered to the principles of consent, impartiality, and minimal coercion. This undermined the instruments adopted to deter potential perpetrators and protect potential victims, which were more coercive, partial, and intrusive in nature – and *vice versa*.

Finally, the Bosnia case study shows that the prevention of international crimes can entail dilemmas and controversies. In Bosnia, for example, international crime prevention efforts incentivised all parties to manipulate the international perception about “victims” and “perpetrators”, which led to perverse outcomes. Several of the mediation initiatives, moreover, seem to have inadvertently triggered or ratified campaigns of ethnic cleansing.

This chapter proceeds in five steps. The first section analyses the international responses to the situation in Yugoslavia before the outbreak of internal armed conflict

in the summer of 1991. The second part provides an in-depth study of the international crime prevention efforts that commenced in September 1991, focusing particularly on the situational crime prevention tools employed. The third section seeks to infer conditions, capacities, and dispositions that are required for the situational prevention of international crimes. The fourth section turns to side-effects and unintended consequences that emerged from efforts to prevent international crimes in Bosnia. The concluding section discusses five lessons that the Bosnia case study suggests with regards to the preliminary international crime prevention framework.

3.1. Early Signs and Early Action

This chapter starts by examining the international responses to the situation in Yugoslavia before the outbreak of internal armed conflict in the summer of 1991. The analysis shows that intelligence agencies, journalists, diplomats, and NGOs anticipated that Bosnia might become subject to systematic “ethnic violence”, “massacres”, or “inter-communal violence”. However, key international policy-makers assumed that atrocity crimes were unlikely to occur in a European country with a reputation for ethnic tolerance. This false sense of security was reinforced by the on-going investment into social crime prevention, such as the strengthening of Yugoslavia’s federal structures and institutions, the promotion of market reforms and economic liberalisation, or the democratization assistance. Moreover, some observers argue these social crime prevention measures inadvertently triggered violence and increased the risk of atrocity crimes.

At the time of the Bosnia crisis, international capacity to systematically anticipate atrocity crimes was absent. The US-based Political Instability Task Force was only launched in 1994. Swisspeace’s early warning programme “FAST

International” was not operational before 1998. The International Crisis Group’s “Crisis Watch” reports were first released in 2003. The UN Office of the Special Advisor for the Prevention of Genocide was established in 2004. Minority Rights Group International’s early warning programme “Peoples Under Threat” was launched in 2005. And the Genocide Prevention Project’s “Mass Atrocity Crimes Watch List” was first generated in 2008. Moreover, the dissolution of Yugoslavia came at a time when there was no assumption that policy-makers had to look very carefully at the possibility of atrocity crimes.¹² It was the failure to prevent atrocity crimes in places such as Bosnia, Somalia, and Rwanda that put the issue on the international agenda and triggered the development of specific early warning mechanisms.

Despite the absence of systematic early warning capacity, however, a number of actors still anticipated the potential for atrocity crimes in Yugoslavia. Some of the first reports about worrying developments in the SFRY appeared in influential international newspapers. On 08 October 1988, *The Economist* reported that Milosevic’s incitement of Serb nationalism was threatening to rupture the SFRY. “The smell of powder is in the air,” *The Economist* noted. “Many people suspect Mr Milosevic not only of personal ambition but also of wanting to establish Serb hegemony over the rest of Yugoslavia. One Slovene newspaper has likened him to a latter-day Mussolini”.¹³ One week later, *The Economist* warned that neither the East nor the West were taking enough notice of the crisis in Yugoslavia.¹⁴ The *New York Times* (NYT) also warned about Milosevic’s incitement to public unrest, the spread of

¹² Personal Interview with Ambassador Jose Cutileiro, *Special Adviser to the Portuguese Foreign Minister, 1992-1994; Chair of the Bosnia Talks of the EC Conference on Yugoslavia, 1992* (Brussels, 13/12/2012); Personal Interview with Leon Fuerth.

¹³ *The Economist*, ‘Yugoslavia: Mussovic’, 08/10/1988.

¹⁴ *The Economist*, ‘Yugo Minus Slavia’, 15/10/1988.

Serb nationalism, and rising ethnic tensions.¹⁵ On 11 October 1988, the NYT analysed that Milosevic's appeal to nationalism should be the cause of great concern to all international actors: "the West, every bit as much as the East, can only be alarmed by the unleashing of ethnic hostilities in the Balkans".¹⁶

Local newspapers in Yugoslavia's republics provided additional early warning by reporting dangerous developments. In October 1989, for example, Bosnian newspapers reported that Serbia's State Security Service was illegally operating on Bosnian territory. These reports triggered a public outcry in Bosnia as it was interpreted as evidence for the deliberate mobilisation of Bosnian Serbs.¹⁷ Yugoslav newspapers also printed statements by Milosevic and Bosnian Serb leaders that revealed their plan to carve-out parts of Bosnia and Croatia to unite all ethnic Serbs in a "Greater Serbia".¹⁸ "All Serbs in one State", was a well-known slogan at the time.¹⁹ The press in Serbia, moreover, started to spread hate propaganda directed at the Bosnian Muslims, warning that an independent Bosnia could mean the annihilation of the Bosnian Serbs by genocide.²⁰ In April 1991, images of Bosnian Muslims wearing stars of David circulated in Bosnian Serb magazines; a clear reference to the persecution of Jews in Nazi Germany.²¹

¹⁵ See, *The New York Times*, 'Yugoslav Leader Issues a Warning on Nation's Crisis', 10/10/1988; and *The New York Times*, 'Yugoslavia Unglued: How Unrest Grew', 11/10/1988. See also, *Washington Post*, 'Ambitious Yugoslav Tries to Fill Void Left by Tito', 09/10/1988.

¹⁶ *The New York Times*, 'Aboil in the Balkans', 11/10/1988,

¹⁷ See, Josip Glaurdic, *The Hour of Europe: Western Powers and the Breakup of Yugoslavia* (New Haven: Yale University Press, 2011), 53.

¹⁸ James Gow, *Triumph of the Lack of Will: International Diplomacy and the Yugoslav War* (London: Hurst & Company, 1997), 19; Glaurdic, *The Hour of Europe*, 104; Malcolm, *Bosnia*, 223. Malcolm notes that, "by early 1991 Milosevic was saying publicly that if there were any attempts to replace the federal structure of Yugoslavia with some looser, confederal arrangement, he would seek to annex whole areas of Croatia and Bosnia".

¹⁹ Sell, *Slobodan Milosevic and the Destruction of Yugoslavia*, 5.

²⁰ Norman Cigar, *Genocide in Bosnia: The Policy of Ethnic Cleansing* (Texas: Texas A&M University Press, 1995), 76-78.

²¹ Gow, *Triumph of the Lack of Will*, 33.

Moreover, declassified reports and risk assessments of the US Central Intelligence Agency (C.I.A.) show that the administration of Bush senior received various warnings about dangerous developments in Yugoslavia. It is documented, moreover, that the C.I.A. shared its risk assessments on Yugoslavia with European allies.²² On 5 May 1989, the C.I.A. reported growing ethnic nationalism in Yugoslavia and warned that “several altercations between Serbs and Croats in Croatia increased concern in Bosnia about ethnic violence”.²³ When the Yugoslav League of Communist Parties fell apart in early 1990 and the six republics began to organize their first free elections, the C.I.A. warned that this could spark violence in Bosnia, due to the republic’s mixed population of Muslims, Serbs, and Croats.²⁴ In another risk assessment, the C.I.A. warned that the democratization process was creating a permissive environment for ethnic violence, communal conflict, and bloodbaths among Yugoslavia’s ethnic groups. The assessment identified Bosnia as a likely battleground:

We judge that the chances of a more explosive outcome are high. With ethnic passions rising, we see several flashpoints that could explode within the next several months ... Ethnically-mixed Bosnia has already seen minor ethnic violence in recent weeks and has much tinder for more serious trouble. Elections scheduled for November will pit Moslem, Serb, and Croat parties against each other and raise the prospect of fighting that could draw in Serbia and Croatia, as well as involving Moslems.²⁵

Only one month later, the C.I.A.’s National Intelligence Estimate warned that,

Bosnia-Herzegovina represents the greatest threat of bringing the fundamental ethnic divisions of Yugoslavia into large-scale communal violence ... The most plausible scenario for inter-republican violence is one in which Serbia, assisted by disaffected Serbian minorities in the other republics, moves to reincorporate disputed territory into a greater Serbia, with pendent and

²² Glaurdic, *The Hour of Europe*, 110.

²³ C.I.A., ‘Yugoslavia: Threats to Stability Growing’, *Special Analysis*, 05/05/1989, http://www.foia.cia.gov/docs/DOC_0000372070/DOC_0000372070.pdf.

²⁴ C.I.A., ‘Yugoslavia: More Centrifugal Elections in Store’, *Special Analysis*, 18/04/1990, http://www.foia.cia.gov/docs/DOC_0000372235/DOC_0000372235.pdf

²⁵ C.I.A., ‘Yugoslavia: End of a Nation-Building Experiment’, *Special Analysis*, 21/09/1990, http://www.foia.cia.gov/docs/DOC_0000372260/DOC_0000372260.pdf.

bloody shifts of population [i.e. ethnic cleansing]. The temptation to engage in such adventures will grow during the period of this Estimate.²⁶

And as anticipated, the first free elections in Bosnia were indeed preceded and accompanied by inter-ethnic clashes.²⁷

On 14 March 1991, the C.I.A explicitly noted that Yugoslavia has a history of atrocity campaigns and warned that Milosevic's plan to establish a "Greater Serbia" could trigger another one. As the C.I.A. put it: "warfare, accompanied by forced population transfers and communal violence and other human sufferings [is likely]".²⁸ When Slovenia and Croatia declared their independence on 25 June 1991, the C.I.A. analysed that this dramatically increased the risk of atrocity crimes in Bosnia:

We believe that even under the best circumstances, escalating communal violence in the coming weeks or months will probably produce casualties in the hundreds. If republic paramilitaries and federal Army forces are drawn in, the scale of fighting could expand dramatically ... We believe that Serbian strongman Milosevic remains committed to his goal of incorporating all Serb-occupied territory into Serbia ... Ethnically-mixed Bosnia-Herzegovina is a potential battleground. It is also the potential basis for a deal between Tudjman and Milosevic. Any deal, however, would probably require significant population moves - a Bosnian Muslim leader recently estimated that 800.000 would be affected - that almost certainly would provoke ethnic violence.²⁹

Thus, numerous C.I.A. risk assessments have warned about the potential for atrocity crimes in Yugoslavia/Bosnia and clearly identified Serbian President Slobodan Milosevic as the main instigator of systematic violence.

The national embassies in Yugoslavia were another important source of early warning. Well-informed diplomats and ambassadors repeatedly warned about the potential for ethnic violence and atrocity crimes. The US Ambassador to Yugoslavia,

²⁶ C.I.A., 'Yugoslavia Transformed', *National Intelligence Estimate*, 18/10/1990, http://www.foia.cia.gov/docs/DOC_0000254259/DOC_0000254259.pdf.

²⁷ Woodward, *Balkan Tragedy*, 192-193; Glaurdic, *The Hour of Europe*, 106. For a list of inter-ethnic clashes in Bosnia see, Neven Andjelic, *Bosnia-Herzegovina: The End of a Legacy* (London: Frank Cass, 2003), 173-178.

²⁸ C.I.A., 'Yugoslavia's Ethnic Conflict and its Regional Fallout', *Special Analysis*, 14/03/1991, http://www.foia.cia.gov/docs/DOC_0000372348/DOC_0000372348.pdf.

²⁹ C.I.A., 'Yugoslavia: Prospects for Violence', *Special Analysis*, 25/06/1991, http://www.foia.cia.gov/docs/DOC_0000372452/DOC_0000372452.pdf; C.I.A., 'Yugoslavia: Situation Report', 28/06/1991, http://www.foia.cia.gov/docs/DOC_0000372453/DOC_0000372453.pdf.

Warren Zimmermann, reveals that he got increasingly worried about developments in Yugoslavia towards the end of 1989. “The worst case we could think of was the breakup of Yugoslavia under nationalist pressure,” Zimmermann explains. “We believed, and reported to Washington, that no breakup of Yugoslavia could happen peacefully. Because of the ethnic hatred sown by Milosevic and his ilk, and because of the mixture of races in every republic except Slovenia, the shattering of Yugoslavia would surely lead to extreme violence”.³⁰ In another cable, Ambassador Zimmermann warned that “the fabric of ethnic tolerance, never very strong in Yugoslavia, has been badly torn”. Louis Sell, Political Counsellor in the US Embassy in Belgrade from 1987 to 1991, notes that, “The US embassy in Belgrade ... was warned at least a year before the conflict began that there could be no peaceful divorce in Yugoslavia”. Sell added that this was not a unique US insight: “diplomats and intelligence officials in the United States, Europe, and Russia understood that Yugoslav disintegration would almost certainly be accompanied by violence”.³¹

Other top diplomats in Yugoslavia also rang the alarm bells over developments in the SFRY. On 12 April 1990, a British diplomat warned that Milosevic had turned the Serbian press into “a shameful propaganda machine worthy of Goebbels”.³² On 23 July 1990, the Dutch Ambassador to Yugoslavia, Albert Nooij, informed his superiors in The Hague that “the continued existence of the (con)-federation as a viable state seems to be hanging from a silk thread”. Nooij further warned that, “Serbian President Milosevic has emphasised that in the case of the disintegration of Yugoslavia the borders between the republics would have to be

³⁰ Zimmermann, *Origins of a Catastrophe*, 41, 53.

³¹ Sell, *Slobodan Milosevic and the Destruction of Yugoslavia*, 6.

³² See, Richard Bassett and Dessa Trevisan, ‘Serbs Tighten Grip on Media’, *Times*, 13/04/1990.

revised – by force if need be”.³³ Moreover, against the background of Slovenian and Croatian steps towards independence, both the Dutch Ambassador Nooij and the German Ambassador to Yugoslavia, Hanjoerg Eiff, reported that Milosevic told Western diplomats in Yugoslavia that he would “create a new Serbian state on the ruins of Yugoslavia”, that “the Serb-inherited parts of Bosnia-Herzegovina and Croatia were to be included in the new state”, and that Serbia was prepared to use force if necessary.³⁴

In 1991, moreover, human rights groups started to report increasing levels of human rights abuses in Yugoslavia. In January 1991, Human Rights Watch (HRW) publicly condemned human rights violations and urged international actors to impose economic sanctions on Yugoslavia to ensure compliance with human rights standards.³⁵ Thus, there is evidence that different actors issued warnings about the potential for atrocity crimes in Yugoslavia and identified the Serb political leadership around Slobodan Milosevic as the main instigator of ethnic violence.

However, these early warnings did not immediately translate into situational crime prevention efforts, which aim directly at potential perpetrators, potential victims, and the crime situation. Until September 1991, international actors merely continued their investment into what can be interpreted as social crime prevention.³⁶ One element of this social crime prevention strategy was the provision of financial and political support for Yugoslavia’s federal structures and institutions, as well as for its territorial integrity. “That one had to try to keep Yugoslavia together for as long as possible”, the Dutch diplomat Peter van Walsum reveals, “was kind of a dogma for

³³ Norbert Both, *From Indifference to Entrapment: The Netherlands and the Yugoslav Crisis 1990-1995* (Amsterdam: Amsterdam University Press, 2000), 71-72; Glaurdic, *The Hour of Europe*, 95.

³⁴ Glaurdic, *The Hour of Europe*, 135; Both, *From Indifference to Entrapment*, 74.

³⁵ Human Rights Watch, *Human Rights Watch World Report 1990 - Yugoslavia*, 01/01/1991.

³⁶ Social crime prevention was not the label that was used at the time. It is common that social crime prevention measures are not explicitly referred to as such, but pursued under different labels.

the EC foreign ministers”.³⁷ Lord David Owen remembers that “the prevailing wisdom was ‘no fragmentation’”.³⁸ Similarly, the Slovenian Foreign Minister, Dimitrij Rupel, recalls that it seemed that “the international community would most like to close its eyes and continue to dream of a unified Yugoslav state, which it sees as a guarantee of peace in this region”.³⁹ Another element of social crime prevention can be seen in the efforts of Western states and the International Monetary Fund (IMF) to promote market reforms, economic liberalisation, and privatization in order to improve Yugoslavia’s worsening economic performance.⁴⁰ These socio-economic reforms were supposed to mitigate the root causes of crisis in Yugoslavia, and by implication reduce international criminality.

There are at least three reasons that help to explain why international actors delayed the onset of situational crime prevention until September 1991. First, it needs to be acknowledged that international actors were preoccupied with developments elsewhere.⁴¹ The early 1990s were turbulent times, and the crisis in Yugoslavia had to compete for attention with several other international events, such as the dissolution of the Soviet Union, the war against Iraq, or German reunification. It did not help that Yugoslavia had lost much of its strategic importance, due to the end of the Cold War.⁴² US Ambassador Zimmermann recounts that there was very little attention paid to Yugoslavia during meetings with other US ambassadors to European countries.⁴³

Second, international actors were under the impression that Yugoslavia was somewhat resilient to inter-ethnic violence and atrocity crimes. This sense of security

³⁷ Glaurdic, *The Hour of Europe*, 137; see also, Both, *From Indifference to Entrapment*, 80.

³⁸ David Owen, *Balkan Odyssey* (London: Victor Gollancz, 1995), 10.

³⁹ Dimitrij Rupel, cited in Glaurdic, *The Hour of Europe*, 137.

⁴⁰ Woodward, *Balkan Tragedy*, 15.

⁴¹ See, Ahrens, *Diplomacy on the Edge*, 486; Glaurdic, *The Hour of Europe*, 73.

⁴² Ahrens, *Diplomacy on the Edge*, 481; Zimmermann, *Origins of a Catastrophe*, 7.

⁴³ Zimmermann, *Origins of a Catastrophe*, 41-42.

was reinforced by the on-going investment into social crime prevention. Yugoslavia was a highly respected member of the international community. It was a founding member of the Non-Aligned Movement and very popular in the developing world. More importantly, Yugoslavia was a relatively prosperous country that was known for its landscape of multicultural pluralism.⁴⁴ Bosnia, in particular, was admired as a place of ethnic tolerance, and not viewed as a potential scene of atrocity crimes. The Bosnian capital, Sarajevo, had impressed the world as the host of the 1984 Winter Olympics and, for many, constituted a symbol of ethnic harmony.⁴⁵ It was widely believed that there was a “social compact” in Bosnia that would prevent systematic ethnic violence.⁴⁶ The German diplomat Geert-Hinrich Ahrens admits that he struggled to correctly assess the situation in Yugoslavia.⁴⁷ He explains: “So far, I had only known the ‘good’ Yugoslavia, and thought indeed that the worst would be prevented because Yugoslavs were reasonable enough to see the consequences of a total breakup”.⁴⁸ Under these circumstances, “everyone seemed to hope, against all reasonable analysis, that the worst might be avoided”.⁴⁹ Stuart Selowitz, who at the time served in the US Mission to the UN, also emphasises the optimistic interpretations that were made of the crisis on the ground. “Everybody thought that massacres and atrocities are something that happens in Africa, but not in Europe”, Seldowitz explains. “People thought that Europe, including Yugoslavia, was beyond ethnic conflict”.⁵⁰

⁴⁴ Woodward, *Balkan Tragedy*, 1.

⁴⁵ Personal Interview with Leon Fuerth; Michael Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham: Carolina Academic Press, 1997), xiv.

⁴⁶ Personal Interview with Leon Fuerth; also Ahrens, *Diplomacy on the Edge*, 563; Lenard Cohen, *Broken Bonds: The Disintegration of Yugoslavia* (Oxford: Westview Press, 1993), 215-216.

⁴⁷ Ahrens, *Diplomacy on the Edge*, 482.

⁴⁸ Ahrens, *Diplomacy on the Edge*, 44.

⁴⁹ Ahrens, *Diplomacy on the Edge*, 202.

⁵⁰ Personal Interview with Stuart Seldowitz.

Third, influential policy-makers did not initially regard Serbian President Milosevic as a potential perpetrator of atrocity crimes. At the time, the US policy towards Yugoslavia was heavily influenced by Lawrence Eagleburger, then the Deputy Secretary of State, and Brent Scowcroft, the National Security Advisor. Both had served in Yugoslavia and were knowledgeable about the country. Eagleburger had built a good relationship with Milosevic, whom he believed to be a European-style political leader.⁵¹ The US embassy in Belgrade viewed Milosevic alternatively as a “controllable grey bureaucrat” or a “Balkan Gorbachev”, a reformer who could push the whole Yugoslav federation towards democracy.⁵² According to Louis Sell, “the international community could not decide whether to treat Milosevic as the problem or the solution to the Yugoslav wars”.⁵³

With the benefit of hindsight, however, it is clear that the international investment into social crime prevention was not sufficient to avert the commission of international crimes in Yugoslavia. The socio-economic reforms that international actors tried to promote did not prevent Serb/Bosnian Serb leaders from choosing ethnic cleaning as a strategy to achieve their political goals in Bosnia.⁵⁴ Instead, the social crime prevention efforts reinforced the widely held assumption that Yugoslavia was structurally resilient to atrocity crimes. Thus, the social crime prevention efforts were one factor in delaying situational crime prevention. Moreover, some observers argue that the social crime prevention efforts inadvertently triggered violence and increased the risk of atrocity crimes. Susan Woodward claims that the Bosnia crisis was “the result of the politics of transforming a socialist society to a market economy

⁵¹ Glaurdic, *The Hour of Europe*, 11, 24.

⁵² Glaurdic, *The Hour of Europe*, 22, 24.

⁵³ Sell, *Slobodan Milosevic and the Destruction of Yugoslavia*, 4.

⁵⁴ Norman Cigar argues that international actors should have tried to prevent inflammatory propaganda and incitement. He also stresses that timely foreign pressure could have persuaded Milosevic to lower inter-ethnic tensions; see Cigar, *Genocide in Bosnia*, 148, 165.

and democracy”.⁵⁵ The C.I.A. analysed that the democratization process created a permissive environment for ethnic violence and atrocities.⁵⁶ Josip Glaurdic points out that the international support for Yugoslavia’s federal institutions directly served Serbia’s interests, as Serbia dominated the key federal institutions, including the leadership of the federal Yugoslav People’s Army (JNA).⁵⁷ Dealing with the negative externalities of the social crime prevention efforts required situational crime prevention. Thus, the initial international response to the emerging Yugoslavia crisis suggests that there can be an interrelationship between social and situational crime prevention.

3.2. The International Preventive Engagement

This section analyses how international actors operationalized the situational prevention of international crimes from September 1991 onwards. It was in the context of the escalating crisis in Croatia, which involved atrocities in the cities of Vukovar and Dubrovnik, that international actors started to engage in situational crime prevention.⁵⁸ As the following discussion shows, international actors adopted a range of tools that aimed, at least partially, at the prevention of atrocity crimes in Bosnia, such as an arms embargo, a monitoring mission, mediation initiatives, a UN peacekeeping operation, comprehensive sanctions, threats of individual criminal accountability, a no-fly zone, safe areas, an international war crimes tribunal, and the use of NATO air power. However, these situational crime prevention efforts largely failed to prevent and mitigate atrocity crimes in Bosnia.

3.2.1. UN Arms Embargo

⁵⁵ Woodward, *Balkan Tragedy*, 15.

⁵⁶ C.I.A., ‘Yugoslavia: End of a Nation-Building Experiment’.

⁵⁷ Glaurdic, *The Hour of Europe*, 172.

⁵⁸ Ahrens, *Diplomacy on the Edge*, 483-484.

In August 1991, international policy-makers realized that Bosnia was on the brink of inter-ethnic violence, when the Yugoslav Federal Prime Minister, Ante Markovic, informed the public that Serbia had been arming Bosnian Serb militias for some time.⁵⁹ According to official documents, around 52.000 firearms had already been distributed to Bosnian Serb volunteer units.⁶⁰ On 12 September, moreover, Bosnian Serb groups started to set up “Serb Autonomous Regions” in Bosnia.⁶¹ The escalating conflict in Croatia also started to spill-over into northern Bosnia, where army reservists from Serbia and Montenegro burned down Bosnian Croat villages in revenge for military defeats in Croatia.⁶² The prevailing assessment in the diplomatic community was that “the fuse is burning in BiH”.⁶³

On 25 September, in response to the escalating crisis in Yugoslavia, the UN Security Council unanimously adopted Resolution 713; the first UN resolution on the Yugoslavia crisis. UNSCR 713 was not a Bosnia specific resolution, but imposed a comprehensive arms embargo on all constituent parts of Yugoslavia.⁶⁴ The arms embargo had the objective to deprive the violence in Croatia of fuel and to prevent it from spilling into Bosnia.⁶⁵ The Austrian Foreign Minister, Alois Mock, explained that: “First of all, a halt must be put to the escalation of violence, which could now spread to Bosnia-Herzegovina”.⁶⁶ Similarly, US Secretary of State, James Baker, noted that, “We must collectively protect also, I think, against the spread of this cycle

⁵⁹ Malcolm, *Bosnia*, 225.

⁶⁰ Jovan Divjak, ‘The First Phase, 1992-1993: Struggle for Survival and Genesis of the Army of Bosnia-Herzegovina’, in B. Magas and I. Zanic (eds.), *The War in Croatia and Bosnia-Herzegovina 1991-1995* (London: Frank Cass Publishers, 2001), 154.

⁶¹ Burg and Shoup, *The War in Bosnia-Herzegovina*, 73. The same strategy had been pursued by ethnic Serbs in Croatia.

⁶² Daniel Bethlehem and Marc Weller (eds.), *The ‘Yugoslav’ Crisis in International Law: General Issues, Part I* (Cambridge: Cambridge University Press, 1997), xxx; also Woodward, *Balkan Tragedy*, 192-193; Lukic and Lynch, *Europe from the Balkans to the Urals*, 203-204.

⁶³ Ahrens, *Diplomacy on the Edge*, 201-202.

⁶⁴ UN Security Council Resolution 713 (1991), S/RES/713, 25/09/1991.

⁶⁵ See, UN Security Council, Provisional Verbatim Record, S/PV.3009, 25/09/1991.

⁶⁶ See, UN Security Council, Provisional Verbatim Record, S/PV.3009, 25/09/1991.

of violence to yet another Yugoslav republic. There can be no mistaking that the fate of Bosnia-Herzegovina also hangs in the balance”.⁶⁷

The comprehensive arms embargo was the first situational crime prevention tool that partly aimed at Bosnia. The arms embargo was imposed in an impartial manner, meaning that it applied equally to all six Yugoslav republics. The impartial nature of the arms embargo remained a source of controversy throughout the Bosnia crisis, as it hindered the Bosnian government from acquiring weapons for self-defence.⁶⁸

3.2.2. EC Monitoring Mission

On 1 October 1991, only shortly after the UN imposed the arms embargo, the European Community (EC) decided to also dispatch a monitoring mission to Bosnia.⁶⁹ The EC’s Monitoring Mission (ECMM) had originally been dispatched to Slovenia in order to monitor the ceasefire and the withdrawal of JNA troops. With regards to Bosnia, the EC was hoping that the ECMM could serve as a fact-finding body to inform and facilitate international decision-making relating to Bosnia. Moreover, the EC hoped that an international presence on the ground would calm the situation by demonstrating international scrutiny.⁷⁰ According to the ECMM director, Ambassador Hans van Houten, EC monitors also visited Bosnia’s 110 communities on a regular basis to promote dialogue between the three ethnic groups and facilitate the resolution of disputes.⁷¹

⁶⁷ See, UN Security Council, Provisional Verbatim Record, S/PV.3009, 25/09/1991.

⁶⁸ Personal Interview with Leon Fuerth.

⁶⁹ Statement by Ambassador Hans van Houten at the Hearing before the Committee on Security and Cooperation in Europe (CSCE), ‘The Yugoslav Republics: The Prospects for Peace and Human Rights’, 102nd Congress, 2nd Session, 05/02/1992; also Ahrens, *Diplomacy on the Edge*, 43, 203.

⁷⁰ Statement by Ambassador Hans van Houten, CSCE, 05/02/1992.

⁷¹ Statement by Ambassador Hans van Houten, CSCE, 05/02/1992.

It is noteworthy that the UN rejected a request from the Bosnian government for the preventive deployment of 2.000 UN peacekeepers.⁷² The UN Secretariat argued that the conditions for the deployment of peacekeeping forces to any part of Yugoslavia were not ready.⁷³ With hindsight, this can be seen as an opportunity missed.

3.2.3. EC Mediation (“Cutileiro Talks”)

The tensions between Bosnia’s three ethnic communities continued to rise in the autumn of 1991. On 15 October, during a parliamentary debate, the Bosnian Serb leader, Radovan Karadzic, openly threatened the Bosnian Muslims with annihilation. “Do not think that you will not lead Bosnia-Herzegovina to hell, and do not think that you will not perhaps lead the Muslim people into annihilation,” Karadzic warned, “because the Muslim people cannot defend themselves if there is war”.⁷⁴ Shortly afterwards, the Bosnian Serbs declared autonomy and pushed for unity with the ethnic Serbs in the Croatian Krajina.⁷⁵ The Bosnian Serbs were armed to the teeth and the JNA, which had turned into a Serb/Montenegrin army, was transporting personnel and material to Bosnia.⁷⁶ According to Peter Galbraith, who visited Bosnia in December 1991, “it was crystal clear that something horrible was about to happen in Bosnia.

⁷² Lee Bryant and Tihomir Loza, ‘UN Peacekeeping in Bosnia: Expectations & Realities’, in B. Cohen and G. Stamkoski (eds.), *With No Peace to Keep: United Nations Peacekeeping and the War in the Former Yugoslavia* (London: Gainpress, 1995), 52-53.

⁷³ See, Bethlehem and Weller, *The ‘Yugoslav’ Crisis in International Law*, xxxi; Gow, *Triumph of the Lack of Will*, 91.

⁷⁴ Radovan Karadzic cited in, Burg and Shoup, *The War in Bosnia-Herzegovina*, 77. Burg and Shoup also stress that, “In the crucial six months preceding the outbreak of fighting, Karadzic made inflammatory statements suggesting that the Muslims would be exterminated if war broke out in Bosnia. He provided the ideological justification for ethnic cleansing, insisting that Muslims and Serbs could not live together”.

⁷⁵ Bethlehem and Weller, *The ‘Yugoslav’ Crisis in International Law*, xxxi; Burg and Shoup, *The War in Bosnia and Herzegovina*, 74.

⁷⁶ Ahrens, *Diplomacy on the Edge*, 201-202.

Well-informed people thought that violence in Bosnia would be much worse than in Croatia”.⁷⁷

However, despite signs that Serbia and the Bosnian Serbs were systematically inciting and planning violence in Bosnia, the UN Secretariat continued to strongly favour a comprehensive peace settlement for Yugoslavia that would maintain the country’s existing structure. The UN Secretariat was strictly against singling out Serbia for blame or formally recognizing any of the Yugoslav republics, which was hotly debated at the time. In December 1991, UNSG Javier Perez de Cuellar sent a letter to the President of the EC Council of Ministers, warning that the premature recognition of Yugoslav republics could have devastating consequences for Bosnia.⁷⁸ UNSG de Cuellar and his Special Envoy on Yugoslavia, Cyrus Vance, argued that it was best to “remain strictly neutral among the Yugoslav parties”. “Singling out Serbia for blame and punishment,” they noted, “would be unjustified and counterproductive in terms of an overall settlement”.⁷⁹

On 6 January 1992, the chairman of the EC Conference on Yugoslavia, Lord Peter Carrington, decided to propose preventive peace negotiations specifically on the anticipated Bosnia crisis.⁸⁰ However, Carrington’s initiative was overshadowed by the debate over recognition.⁸¹ On 15 January, the EC countries decided to recognize Croatia and Slovenia as independent and sovereign states. The Bosnian President Izetbegovic immediately requested the recognition of Bosnia as well, noting that

⁷⁷ Personal Interview with Ambassador Peter Galbraith; also Human Rights Watch, *Human Rights Watch World Report 1992: Events of 1991*, December 1991, 601-607.

⁷⁸ Javier Perez de Cuellar cited in, Burg and Shoup, *The War in Bosnia-Herzegovina*, 94.

⁷⁹ Javier Perez de Cuellar, *Pilgrimage for Peace: A Secretary General’s Memoir* (Basingstoke: Macmillan Press, 1997), 484.

⁸⁰ Gow, *Triumph of the Lack of Will*, 80; Ahrens, *Diplomacy on the Edge*, 204. The EC Peace Conference on Yugoslavia had been convened on 7 September 1991. Under the chairmanship of Lord Peter Carrington it had so far worked towards a general settlement for the SFRY.

⁸¹ The debate over recognition caused Carrington to contemplate resigning as conference chair, see Ahrens, *Diplomacy on the Edge*, 204.

Bosnia would not stay in a Serb-dominated rump Yugoslavia. A referendum on Bosnian independence was scheduled for 29 February.⁸² Fearing that Bosnia's declaration of independence would escalate the situation,⁸³ Lord Carrington revived the idea of EC-sponsored negotiations on Bosnia and appointed the Portuguese diplomat Jose Cutileiro to preside over the talks.⁸⁴

On 14 February, the so-called "Cutileiro Talks" were launched in Sarajevo with the three ethnic groups represented by Bosnian Serb leader Radovan Karadzic, Bosnian President Alija Izetbegovic, and Bosnian Croat leader Mate Boban.⁸⁵ The talks sought to find a constitutional arrangement for an independent Bosnia that would be acceptable to the three main ethnic groups.⁸⁶ Ambassador Cutileiro reasoned that agreement on a constitutional arrangement would prevent the parties from fighting a nasty war and thus reduce the risk of atrocity crimes.⁸⁷ Further talks were held in Lisbon on 21 and 22 February. At the Lisbon meeting, Cutileiro put forward the outlines of his peace plan. Cutileiro stressed that Bosnia's borders were non-negotiable, that Bosnia could not be partitioned, and that a sustainable solution would need to reflect the existence of three constituent nations. The Cutileiro Plan suggested the "cantonisation" of Bosnia into several ethnic cantons that were not geographically contiguous. The exact outlines of the ethnic cantons remained unclear, however,

⁸² Holding a referendum was an EC requirement for recognition. Bethlehem and Weller, *The 'Yugoslav' Crisis in International Law*, xxxiii.

⁸³ Gow, *Triumph of the Lack of Will*, 111; see also Statement by Ambassador Hans van Houten, CSCE, 05/02/1992.

⁸⁴ Cutileiro had no prior experience with Yugoslavia. Personal Interview with Ambassador Jose Cutileiro; also Ahrens, *Diplomacy on the Edge*, 204, 205.

⁸⁵ Ahrens, *Diplomacy on the Edge*, 206; Gow, *Triumph of the Lack of Will*, 80.

⁸⁶ Gow, *Triumph of the Lack of Will*, 80.

⁸⁷ Personal Interview with Ambassador Jose Cutileiro.

which gave rise to intense debate.⁸⁸ The Bosnian Muslims, in particular, were uncomfortable with the heavy emphasis that was placed on ethnicity.⁸⁹

The Cutileiro negotiations got even more difficult as a result of the Bosnian referendum, in which 99.4% voted in favour of independence. President Izetbegovic's proclamation of Bosnian independence in early March triggered violent clashes in Sarajevo.⁹⁰ Meanwhile, Cutileiro was trying to get the three leaders to agree on the boundaries of the ethnic cantons. Cutileiro remembers that whilst the leaders of the three ethnic groups were relatively reasonable individuals, they found it extremely difficult to agree on this issue. Cutileiro, however, did not try to impose a settlement on them. "I wanted to listen to the parties," he recalls. "I did not come in to investigate a crime or deal with the parties as criminals". He also approached the talks through a lens of impartiality: "I never felt that the Serbs were more to blame than the others. The Serbs were already committing some atrocities during the talks, but we were not trying to resolve the problem of good and evil. In fact, we had more problems with the Muslims, as they lied in a shameless manner".⁹¹

On 17 March, it looked as if the three parties had finally come to an agreement on dividing Bosnia into three ethnically defined constitutive units. However, the optimism only lasted for a week, as the boundaries of the constitutive units remained contested.⁹² The three leaders submitted fundamentally different maps to the mediation team.⁹³ Whilst the Bosnian Muslim map was rather similar to the one envisioned by Cutileiro, the Bosnian Serbs claimed around 70% of the Bosnian territory. The Bosnian Croats were the first ones to reject the map that was eventually

⁸⁸ Gow, *Triumph of the Lack of Will*, 80.

⁸⁹ Burg and Shoup, *The War in Bosnia-Herzegovina*, 108-109.

⁹⁰ Bethlehem and Weller, *The 'Yugoslav' Crisis in International Law*, xxxiv.

⁹¹ Personal Interview with Ambassador Jose Cutileiro.

⁹² Burg and Shoup, *The War in Bosnia-Herzegovina*, 110-111.

⁹³ Burg and Shoup, *The War in Bosnia-Herzegovina*, 111-115.

proposed by Cutileiro, followed by the Bosnian Muslims and the Bosnian Serbs. Ambassador Cutileiro claims that the US had intervened behind the scenes to dissuade the Bosnian Muslims from accepting the agreement.⁹⁴ According to Cutileiro, the US official Ralph Johnson advised the Bosnian Muslims to reject Cutileiro's three unit plan, promising them US recognition of Bosnian sovereignty.⁹⁵ At the end of March, Cutileiro postponed further talks on Bosnia.⁹⁶

3.2.4. International Scrutiny

In April 1992, only days after the Cutileiro Talks broke down, violence started to spread through Bosnia, when JNA troops, Serb paramilitary groups, and Bosnian Serb militias started to attack Bosnian Muslim towns in Eastern Bosnia. Paramilitary groups that received orders and support from Belgrade, such as the Zeljko "Arkan" Raznjatovic's "Serbian Guard" or Vojislav Seselj's "White Eagles", committed several massacres against civilian populations and contributed to an escalation of the violence. On 6 April, Bosnian Serb forces started to shell and besiege Sarajevo.⁹⁷ By mid-April much of Bosnia was engulfed in violence. Until the end of April, at least 350 persons were killed and around 420.000 persons were internally displaced.⁹⁸ From the beginning, it was clear that the brutal displacement of Bosnian Muslim populations was intrinsic to the Serb aim of carving out ethnically homogenous territory.⁹⁹ In short, the campaign of ethnic cleansing "had necessary strategic purpose".¹⁰⁰

⁹⁴ Personal Interview with Ambassador Jose Cutileiro.

⁹⁵ Personal Interview with Ambassador Jose Cutileiro. Cutileiro has diplomatic cables to prove this.

⁹⁶ Ahrens, *Diplomacy on the Edge*, 48.

⁹⁷ Burg and Shoup, *The War in Bosnia-Herzegovina*, 129.

⁹⁸ Bethlehem and Weller, *The 'Yugoslav' Crisis in International Law*, xxxv.

⁹⁹ Dana Allin, *NATO's Balkan Interventions* (The International Institute for Strategic Studies: Adelphi Paper 347, 2002), 16.

¹⁰⁰ Gow, *The Serbian Project and Its Adversaries*, 42.

International actors responded to the onset of the Serb campaign of ethnic cleansing by publicly threatening consequences if massacres continued.¹⁰¹ On 14 April, US Secretary of State, James Baker, wrote a letter to the Serbian leaders, expressing his outrage at reports about the summary execution of civilians in the Bosnian town of Visegrad.¹⁰² One day later, the spokeswoman of the US State Department, Margaret Tutwiler, condemned “the use of force, intimidation and provocation to nationalist violence by militant nationalist Serbian, and to a lesser extent, Croatian leaders in Bosnia”.¹⁰³ On 4 May, Tutwiler reiterated that the US “strongly condemns the perpetrators of violence in Bosnia on all sides, including the Serbian side and the Yugoslav army, which clearly bear the heaviest blame and have the greatest responsibility for working to obtain a cease-fire”.¹⁰⁴ On 12 May, the new UN Secretary-General Boutros Boutros-Ghali noted that, “what is happening is a concerted effort by the Serbs of Bosnia-Herzegovina, with the acquiescence of, and at least some support from, JNA, to create ‘ethnically pure’ regions”. He reported that this has led to the displacement of around 520.000 non-Serbs.¹⁰⁵

On 15 May, the UN Security Council unanimously adopted Resolution 752, which was the first resolution specifically adopted on the situation in Bosnia. UNSCR 752 demanded that “forcible expulsions of persons from areas where they live and any attempts to change the ethnic composition of the population, anywhere in the Social Federal Republic of Yugoslavia, cease immediately”.¹⁰⁶ The resolution aimed

¹⁰¹ On 6/7 April, the EC and the US recognized Bosnia as a sovereign and independent state. The recognition of Bosnia internationalizing the armed conflict. Bethlehem and Weller, *The ‘Yugoslav’ Crisis in International Law*, xxxv.

¹⁰² Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 185.

¹⁰³ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 185.

¹⁰⁴ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 186.

¹⁰⁵ Further Report of the Secretary-General Pursuant to Security Council Resolution 749 (1992), S/23900, 12/05/1992.

¹⁰⁶ UN Security Council Resolution 752 (1992), S/RES/752, 15/05/1992.

at changing the behaviour of key Serb leaders by demonstrating international scrutiny. It should be noted, however, that some international actors still refused to blame the Serbian leadership for the systematic violence in Bosnia, pretending that everyone was more or less equally guilty.¹⁰⁷ “Everybody is to blame for what is happening in Bosnia and Hercegovina,” Lord Carrington continued to argue publicly. “As soon as we get the ceasefire, there will be no need to blame anybody”.¹⁰⁸ Similarly, the controversial UNPROFOR commander Major-General Lewis MacKenzie argued: “There is more than enough blame to go around for all sides, with some left over”.¹⁰⁹

3.2.5. Comprehensive Sanctions on Serbia and Montenegro

Despite the international warnings, systematic ethnic cleansing continued. It even escalated after General Ratko Mladic was appointed commander of the newly formed Bosnian Serb army in May 1992.¹¹⁰ It was clear that Serbia and Montenegro, who together formed the Federal Republic of Yugoslavia, were actively supporting the campaign of ethnic cleansing in Bosnia.

Aiming to stop Serbia and Montenegro from supporting ethnic cleansing in Bosnia, international actors initially imposed a range of unilateral sanctions. The EC countries recalled their ambassadors from Belgrade. The EC also imposed a partial trade embargo on Serbia and Montenegro, froze export credits, and suspended scientific and technological cooperation.¹¹¹ Serbia and Montenegro were also suspended from the Conference on Security and Cooperation in Europe (CSCE) and

¹⁰⁷ Noel Malcolm, ‘Impartiality and Ignorance’, in B. Cohen and G. Stamkoski (eds.), *With No Peace to Keep: United Nations Peacekeeping and the War in the Former Yugoslavia* (London: Gainpress, 1995), 122.

¹⁰⁸ Brendan Simms, *Unfinest Hour: Britain and the Destruction of Bosnia* (London: The Penguin Press, 2001), 20; Lord Peter Carrington cited in, *Daily Telegraph*, 24/04/1992.

¹⁰⁹ Major-General Lewis MacKenzie, cited in Malcolm, ‘Impartiality and Ignorance’, 122.

¹¹⁰ Burg and Shoup, *The War in Bosnia-Herzegovina*, 131.

¹¹¹ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 179.

the Organization for Economic Cooperation and Development (OECD).¹¹² On 20 May, the US suspended permission for Yugoslavia's national airline to land flights in the US and recalled Ambassador Zimmermann from Belgrade. On 22 May, the US adopted further diplomatic sanctions, which included withdrawing military attaches, expelling Yugoslav diplomats from the US, closing Yugoslav consulates in the US, and further reducing staff in the US embassy in Belgrade.¹¹³ The US and the EC countries also threatened to withhold diplomatic recognition of the Federal Republic of Yugoslavia as the legal successor to the SFRY until Serbian forces withdrew from Bosnia.¹¹⁴

On 24 May, US Secretary Baker called for mandatory UN sanctions against Serbia and Montenegro. However, Russia initially opposed the idea, which made it unlikely that the SC would impose multilateral sanctions. On 27 May, however, Serbian forces shelled a breadline in Sarajevo, killing scores of civilians. This triggered international outrage and helped to overcome Russian resistance to UN sanctions. Burg and Shoup note that, "President Yeltsin expressed his anger at the incident and withdrew Russian objections to imposing sanctions against Serbia".¹¹⁵ On 30 May, therefore, the SC was able to adopt Resolution 757, with abstentions from China and Zimbabwe. UNSCR 757 imposed a comprehensive sanctions package on Serbia and Montenegro. It deplored that the "call for the immediate cessation of forcible expulsions and attempts to change the ethnic composition of the population has not been heeded", and reaffirmed "the need for the effective protection of human rights and fundamental freedoms, including those of ethnic minorities". The

¹¹² Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 179; Woodward, *Balkan Tragedy*, 497.

Serbia and Montenegro were initially suspended for five months, as Russia objected to permanent exclusion. However, Serbia and Montenegro were not readmitted until November 2000.

¹¹³ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 186-187

¹¹⁴ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 179.

¹¹⁵ Burg and Shoup, *The War in Bosnia-Herzegovina*, 204-205.

comprehensive sanctions that UNSCR 757 imposed on Serbia and Montenegro included an economic and financial embargo, serious restrictions on air travel to and from Serbia and Montenegro, reductions in diplomatic staff, exclusion of Serbia and Montenegro from sporting events, and suspension of any scientific, technical, and cultural cooperation.¹¹⁶ According to Susan Woodward, “Serbia was being transformed into a pariah state”.¹¹⁷

The SC debate on UNSCR 757 shows that the rationale behind the adoption of sanctions was to deter and constrain potential perpetrators of atrocity crimes. The Indian Ambassador to the UN, Chinmaya Gharekhan, explained that the resolution was a response to international calls for deterrent action and primarily aimed at sending “an unmistakeable message” that the Council will not “permit atrocities being committed with impunity”.¹¹⁸ Similarly, the UN Ambassador of Cape Verde called on the SC to prevent bloodshed and atrocities by playing a deterrent role.¹¹⁹ The US Ambassador to the UN, Edward J. Perkins, called on Serbia to immediately stop the “campaign of terror it is conducting against the civilian populations”, and warned that the US is determined to “seek further measures, until the Serbian regime changes course”.¹²⁰ The language used by diplomats signalled a policy shift towards more coercive measures specifically directed at deterring Serb/Bosnian Serb leaders from committing atrocity crimes.

The US started to enforce the sanctions very quickly. On 1 June, the US Treasury Department announced the freezing of assets of the Yugoslav government and the republics of Serbia and Montenegro, including of the state-owned airline and

¹¹⁶ UN Security Council Resolution 757 (1992), S/RES/757, 30/05/1992.

¹¹⁷ Woodward, *Balkan Tragedy*, 288.

¹¹⁸ UN Security Council, Provisional Verbatim Record, S/PV.3082, 30/05/1992.

¹¹⁹ UN Security Council, Provisional Verbatim Record, S/PV.3082, 30/05/1992.

¹²⁰ UN Security Council, Provisional Verbatim Record, S/PV.3082, 30/05/1992.

banks.¹²¹ On 6 July, the US Treasury Department even strengthened the sanctions by extending them to all companies in Serbia and Montenegro.¹²² Moreover, warships from NATO (“Operation Maritime Monitor”) and from the Western European Union (“Operation Sharp Vigilance”) began patrolling the coast of Montenegro to monitor compliance with the sanctions.

3.2.6. UN Peacekeeping

Since June 1992, Sarajevo was virtually encircled by Bosnian Serb forces. The constant shelling and sniping from the surrounding hills put Bosnia’s capital effectively under siege, causing a humanitarian crisis in the Bosnian Muslim parts of the city.¹²³ On 8 June, the SC responded to the suffering of civilians in Sarajevo by unanimously adopting Resolution 758, which mandated the UN Protection Force (UNPROFOR), which had initially been deployed to oversee the ceasefire in Croatia, to ensure the re-opening of Sarajevo airport for humanitarian purposes.¹²⁴ UNPROFOR’s initial role in Bosnia was humanitarian, ensuring the safe delivery of humanitarian aid to needy populations in Sarajevo.¹²⁵ Over the following weeks, UNPROFOR was gradually strengthened in follow-up resolutions of the SC, such as Resolutions 761 of 29 June, 762 of 30 June, and 764 of 13 July. UNPROFOR’s lead troop contributing countries were France and the UK, which regarded the UN operation as a key part of their policy towards Bosnia and provided the bulk of the UNPROFOR troops.¹²⁶

¹²¹ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 188.

¹²² Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 190.

¹²³ Burg and Shoup, *The War in Bosnia-Herzegovina*, 133.

¹²⁴ See, UN Security Council Resolution 743 (1992), S/RES/743, 21/02/1992.

¹²⁵ Hikaru Yamashita, *Humanitarian Space and International Politics: The Creation of Safe Areas* (Aldershot: Ashgate, 2004), 93.

¹²⁶ Bryant and Loza, ‘UN Peacekeeping in Bosnia’, 61.

Initially, UNPROFOR was configured as a traditional peacekeeping mission, operating on the basis of the principles of consent, impartiality, and use of force in self-defence only.¹²⁷ The prevention of atrocity crimes or the protection of civilians were not mentioned as an objective of UNPROFOR, though its first Force Commander, Lieutenant General Satish Nambiar, claims that the presence of UNPROFOR always provided protection for the Bosnian Muslims by deterring Serb attacks.¹²⁸ Step by step, however, UNPROFOR was given the mandate to perform limited enforcement tasks under Chapter VII of the UN Charter.¹²⁹ On 13 August, the SC passed UNSCR 770, which authorized the use of “all necessary measures” to facilitate the delivery of humanitarian assistance in Sarajevo and other parts of Bosnia.¹³⁰ The SC had used the same formula to authorize the use of force against Iraqi forces in Kuwait.¹³¹ However, despite the SC authorisation to use force to achieve specific tasks, UNPROFOR never engaged in robust military enforcement action for civilian protection purposes.¹³² UNPROFOR lacked the means to “impose the international will on the Serbs”.¹³³ Successive UNPROFOR commanders consistently opposed robust enforcement action, fearing that this would put UNPROFOR personnel at risk. “It was a real mistake to call the mission the ‘protection force’,” argues Alvaro de Soto, Senior Advisor to UNSG Boutros-Ghali. “This sent the wrong message to the Yugoslav people”.¹³⁴

¹²⁷ Bryant and Loza, ‘UN Peacekeeping in Bosnia’, 51-52.

¹²⁸ Cigar, *Genocide in Bosnia*, 115.

¹²⁹ Bryant and Loza, ‘UN Peacekeeping in Bosnia’, 52; Malcolm, ‘Impartiality and Ignorance’, 118.

¹³⁰ UN Security Council Resolution 770 (1992), S/RES/770, 13/08/1992.

¹³¹ See, UN Security Council Resolution 678 (1990), S/RES/678, 29/11/1990.

¹³² Malcolm, ‘Impartiality and Ignorance’, 118-120.

¹³³ Malcolm, ‘Impartiality and Ignorance’, 119.

¹³⁴ Personal Interview with Alvaro de Soto, *Special Adviser to UNSG Javier Perez de Cuellar, 1982-1992; Senior Political Adviser to UNSG Boutros Boutros-Ghali, 1992-1994* (New York, 06/09/2012); also Adam Roberts, ‘From San Francisco to Sarajevo: The UN and the Use of Force’, *Survival: Global Politics and Strategy* vol. 37, no. 4 (1995), 18.

3.2.7. Threats of Individual Criminal Accountability

In the summer of 1992, it also became public knowledge that the Bosnian Serbs had established a number of concentration camps in Bosnia, reminiscent of the Nazi-run camps in World War II. ITN broadcasted video footage of the appalling conditions in the Omarska camp.¹³⁵ This put the international spotlight more firmly on the elements of war crimes and crimes against humanity that the Serb campaign of ethnic cleansing seemed to increasingly involve. All of a sudden, the prospect of large-scale atrocity crimes in the heart of Europe appeared very real.

The shocking pictures coming out of Bosnia prompted the SC to adopt a series of resolutions that warned the perpetrators of serious violations of international humanitarian law that they will be held individually accountable for such crimes. The first one of these resolution was Resolution 764, which was unanimously adopted on 13 July 1992. UNSCR 764 noted that “all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions”, and warned that “persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches”.¹³⁶ In Resolution 771, adopted unanimously on 13 August, the SC reiterated its threat to hold individual perpetrators of atrocity crimes criminally accountability for such acts.¹³⁷ UNSCR 771 further stressed the need to document atrocities and

¹³⁵ Scharf, *Balkan Justice*, 29-30, 37. The first article about “death camps” in Bosnia was published in early August 1992 by Roy Gutman, ‘Death Camps: Survivors Tell of Captivity, Mass Slaughters in Bosnia’, *Newsday*, 02/08/1992; see also *ITN*, ‘Bosnia and Herzegovina Death Camps for Muslims, Omarska/Trnopolje’, 06/08/1992, http://www.youtube.com/watch?v=NF-JfhMZJ_Y. There is evidence that UN officials have known about the existence of “concentration camps” since early July, see Helsinki Watch, *War Crimes in Bosnia and Hercegovina*, 63-69.

¹³⁶ UN Security Council Resolution 764 (1992), S/RES/764, 13/07/1992.

¹³⁷ UN Security Council Resolution 771 (1992), S/RES/771, 13/08/1992.

called on states and humanitarian organizations to submit “substantiated information” relating to the violations of humanitarian law.¹³⁸

During the SC debate on Resolution 771, states explained that the purpose of the threats of individual criminal accountability was to deter potential perpetrators from committing atrocity crimes. The Venezuelan Ambassador to the UN, Diego Arria, referred to ethnic cleansing as an “abominable, criminal practice”, and noted that “the perpetrators must not go unpunished”. Arria added: “We hope that the decision we have just taken will serve as sufficient warning not only to those directly involved in the conflict of Bosnia and Herzegovina but to collaborators involved in the conflict”.¹³⁹ The Moroccan Ambassador to the UN, Ahmed Snoussi, described the Serb campaign of ethnic cleansing as “cold-bloodedly planned genocide”, and noted that the threats of individual criminal accountability “will make Serbian leaders think”.¹⁴⁰ Similarly, the French Ambassador to the UN, Rochereau de la Sabliere, stressed that those committing atrocity crimes “will have to bear individual responsibility for them, in accordance with international law. We whole-heartedly hope that this message will be heard”.¹⁴¹ The Austrian Ambassador to the UN, Thomas Hajnoczi, captured the more robust posture of the SC, when he registered his regret that the resolution tried “to maintain impartiality towards all parties to the conflict”. “Can we be equally distant from the victim and the victimizer?”, Hajnoczi asked. “Policies of appeasement have never worked. Fifty years ago Europe suffered the insanity of the quest for ethnic purity and its corollary, ethnic cleansing and

¹³⁸ UN Security Council Resolution 771 (1992), S/RES/771, 13/08/1992, OP 5&6; also Scharf, *Balkan Justice*, 38.

¹³⁹ UN Security Council, Provisional Verbatim Record, S/PV.3106, 13/08/1992.

¹⁴⁰ UN Security Council, Provisional Verbatim Record, S/PV.3106, 13/08/1992.

¹⁴¹ UN Security Council, Provisional Verbatim Record, S/PV.3106, 13/08/1992.

concentration camps. We cannot be permissive; we cannot allow this to happen again”.¹⁴²

3.2.8. Special Session of the UN Commission on Human Rights

From 13 to 14 August 1992, in parallel to the SC’s threats of individual criminal accountability, the UN Commission on Human Rights (CHR) held a “special session” on the human rights situation in the territory of the former Yugoslavia. This marked the first time that the CHR held a special session since its inception in 1946.¹⁴³ On 5 August, the US had formally requested the special session “to discuss the dangerous situation in the former Yugoslavia”.

On 14 August, the CHR adopted without a vote Resolution 1992/S-1/1. The resolution condemned the practice of ethnic cleansing and echoed the SC’s threat that “persons who commit or order the commission of grave breaches of the Geneva Conventions or their Additional Protocols are individually responsible in respect of such breaches”. Moreover, the resolution requested the appointment of a “Special Rapporteur” with the mandate to investigate and gather credible information about violations of human rights and international humanitarian law in Bosnia.¹⁴⁴ In operative paragraph 16, the resolution specifically requested the Special Rapporteur “to gather and compile systematically information on possible violations of human rights in the territory of the former Yugoslavia, including those which may constitute war crimes, and to make this information available to the Secretary-General, and notes that such information could be of possible future use in prosecuting violators of international humanitarian law”.

¹⁴² UN Security Council, Provisional Verbatim Record, S/PV.3106, 13/08/1992.

¹⁴³ See, Payam Akhavan, ‘Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order’, *Human Rights Quarterly* vol. 15, no. 2 (1993), 265-268.

¹⁴⁴ UN Commission on Human Rights, Resolution 1992/S-1/1, E/CN.4/S-1/8, 14/08/1992.

The former President of Poland, Tadeusz Mazowiecki, was appointed as Special Rapporteur. Mazowiecki immediately travelled to Bosnia to start gathering information.¹⁴⁵ On 28 August, Mazowiecki presented his first report, which detailed the practice of ethnic cleansing. Mazowiecki called on the UN to issue a peremptory warning to deter potential perpetrators of atrocity crimes and to create a commission of inquiry to document such crimes and identify the perpetrators.¹⁴⁶

3.2.9. UN/EC Mediation (“ICFY”)

However, despite the attempts to deter potential perpetrators of mass atrocities, the situation in Bosnia further escalated towards the end of August 1992.¹⁴⁷ UNHCR reported that around 1.25 million persons had been internally displaced or forced into flight in Bosnia. The growing concern about the approaching winter, foreseeable food shortages, and the welfare of IDPs prompted the British Prime Minister, John Major, and UNSG Boutros-Ghali to resume efforts to find a political settlement to the Bosnia crisis.¹⁴⁸ From 26 to 28 August, therefore, they convened the so-called London Conference on the former Yugoslavia.

The main aim of the London Conference was to negotiate a political solution to the Bosnia crisis, though participants also took the opportunity to reiterate the threats of individual criminal accountability.¹⁴⁹ The German Foreign Minister, Klaus Kinkel, even called for the establishment of an international war crimes tribunal and identified the Serbian leadership as the criminal masterminds. “Undoubtedly, war

¹⁴⁵ First Report of the Special Rapporteur of the Commission for Human Rights, E/CN.4/1992/S-1/9, 28/08/1992.

¹⁴⁶ First Report of the Special Rapporteur of the Commission for Human Rights, E/CN.4/1992/S-1/9, 28/08/1992.

¹⁴⁷ Burg and Shoup, *The War in Bosnia-Herzegovina*, 213.

¹⁴⁸ Owen, *Balkan Odyssey*, 42.

¹⁴⁹ Statement delivered by John Major, British Prime Minister, The London Conference, 26/08/1992, <http://www.johnmajor.co.uk/londonconf.pdf>.

crimes and grave violations of human rights are not perpetrated by only one side,” Kinkel said. “But in political terms the crucial question is: Where does the main source of the evil lie? The answer is obvious: in Belgrade! Those responsible for all crimes and violations of human rights, both inside and outside the detention camps, must be brought to account. An international court of criminal justice has to be created”.¹⁵⁰ Moreover, the Bosnian President Izetbegovic used the platform of the London Conference to publicly call on the international community to exempt Bosnia from the UN arms embargo, arguing that “in the absence of direct military support from outside powers Bosnia should be permitted to exercise the right of self-defence”.¹⁵¹

However, the most important outcome of the London Conference was the establishment of a permanent body charged with negotiating a peace settlement, the so-called “International Conference on the Former Yugoslavia” (ICFY). The ICFY was co-chaired by former US Secretary of State, Cyrus Vance (for the UN), and the former British Foreign Secretary, Lord David Owen (for the EC). The peace talks commenced promptly and multiple rounds of consultations were held over the following months. The Finnish diplomat Martti Ahtisaari was put in charge of the Working Group on Bosnia and convened talks with representatives of the three Bosnian parties. The aim of the Bosnia specific negotiations was threefold: (1) an overall cessation of hostilities, (2) the demilitarization of Sarajevo, and (3) agreement on a constitution that was acceptable to all three constituent nations and contained strong enforcement mechanisms for human and minority rights.¹⁵²

¹⁵⁰ Statement delivered by Klaus Kinkel, Foreign Minister of Germany, The London Conference, 26/08/1992, <http://sca.lib.liv.ac.uk/collections/owen/boda/addrkink.pdf>.

¹⁵¹ Burg and Shoup, *The War in Bosnia-Herzegovina*, 212.

¹⁵² Owen, *Balkan Odyssey*, 58.

The ICFY co-chairs strongly believed that a peace settlement was a prerequisite for stopping ethnic cleansing and atrocity crimes in Bosnia.¹⁵³ Vance and Owen strategized that a peace settlement required the full cooperation of all three parties. This is why they refused to “take sides” in favour of the Bosnian Muslims, as was increasingly suggested by the US and Germany.¹⁵⁴ Lord Owen admits that he operated with the assumption that “there were no innocents among the political and military leaders in all three parties in Bosnia-Herzegovina”.¹⁵⁵ Thus, the co-chairs initiated a rather traditional mediation process based on the principles of impartiality, consent, and minimal coercion.

3.2.10. No-Fly Zone

In September 1992, reports about air attacks on Bosnian Muslim villages proliferated.¹⁵⁶ The Serb/Bosnian Serb army possessed significant numbers of multi-role aircrafts and helicopters, which they used to attack Bosnian Muslim towns and villages in what amounted to “ethnic cleansing by air”.¹⁵⁷ This triggered calls for a no-fly zone over Bosnia.¹⁵⁸ On 2 October, US President George Bush noted that, “the parties agreed to a ban on all military flights over Bosnia. Yet the bombing of defenceless population centres has actually increased ... we will take steps to see that the ban is respected”.

On 9 October, the SC adopted Resolution 781, which formally established a ban on all military flights over Bosnia, with the exception of flights in support of UN

¹⁵³ Owen, *Balkan Odyssey*, 109.

¹⁵⁴ Owen, *Balkan Odyssey*, 49.

¹⁵⁵ Owen, *Balkan Odyssey*, 45.

¹⁵⁶ Owen, *Balkan Odyssey*, 52.

¹⁵⁷ Scharf, *Balkan Justice*, 35; also, Alastair Finlan, *The Collapse of Yugoslavia 1991-1999* (Oxford: Osprey Publishing, 2004), 46; and Malcolm, *Bosnia*, 238.

¹⁵⁸ Finlan, *The Collapse of Yugoslavia*, 46.

operations.¹⁵⁹ UNSCR 781 requested UNPROFOR to monitor compliance with the no-fly zone and called on the Council to “examine without delay all the information brought to its attention concerning the implementation of the ban on military flights in Bosnia and Herzegovina and, in the case of violations, to consider urgently the further measures necessary to enforce this ban”. During the negotiations on UNSCR 781, a direct paragraph on enforcement action was omitted due to French and British pressure.¹⁶⁰ The UK and France were worried that robust enforcement of the no-fly zone would put UN personnel on the ground at risk; the majority of which was French and British.¹⁶¹ The historian Brendan Simms argues that it was British obstructionism that watered down the final resolution, which only included provisions for monitoring, but was silent on enforcement.¹⁶² However, China still abstained on the resolution, as it believed that the text might facilitate an authorization of the use of force in the future.

During the SC debate on the resolution, member states explained that the no-fly zone aimed at protecting civilian populations from air attacks, as well as at ensuring the safe delivery of humanitarian assistance. “We trust that this action will have the effect of further discouraging those who have decided to violate our rules and values,” the Moroccan Ambassador Snoussi explained, “we wish to consider it [the Resolution] only part of a whole which will ultimately force Serbia to cease all these massacres and all this nightmare”. The Austrian Ambassador to the UN added: “We also hope that the Serbian side will now realize the determination of the Council to bring about, at long last, an end to the slaughter in Bosnia and Herzegovina”. US Ambassador Perkins even threatened with tough enforcement measures in case of

¹⁵⁹ UN Security Council 781 (1992), S/RES/781, 09/10/1992.

¹⁶⁰ Scharf, *Balkan Justice*, 35.

¹⁶¹ Owen, *Balkan Odyssey*, 52-53.

¹⁶² Simms, *Unfinest Hour*, 62.

Serb non-compliance with the no-fly zone, arguing that only immediate compliance with the ban of military flights would “remove from this body the need to consider further enforcement measures resulting from non-compliance”. He added that, “If, however, the current resolution is violated, my Government will move to seek adoption by the Council of a further resolution mandating enforcement of a no-fly zone over Bosnia and Herzegovina”.¹⁶³

NATO agreed to provide the UN with the necessary capacity to monitor the Bosnian airspace. On 15 October, NATO launched “Operation Sky Monitor” to monitor the no-fly zone over Bosnia. However, the monitoring of the Bosnian airspace failed to deter the Bosnian Serbs from using air power to threaten civilian populations. Low flying helicopters, in particular, continued to violate the no-fly zone on a regular basis.¹⁶⁴

3.2.11. Commission of Experts

In October 1992, the SC also decided to bolster its threats of individual criminal accountability. On 6 October, the SC unanimously adopted resolution 780, which expressed “grave alarm at continuing reports of widespread violations of international humanitarian law ... including reports of mass killings and the continuance of the practice of ‘ethnic cleansing’”. UNSCR 780 then authorized UNSG Boutros-Ghali to establish a Commission of Experts to investigate atrocity crimes in the territory of the former Yugoslavia and analyse the information that states have submitted pursuant to UNSCR 771.¹⁶⁵ According to the international lawyer Payam Akhavan, the establishment of the Commission of Experts was an “historic measure unprecedented

¹⁶³ UN Security Council, Provisional Verbatim Record, S/PV.3122, 09/10/1992.

¹⁶⁴ Finlan, *The Collapse of Yugoslavia*, 47-48.

¹⁶⁵ UN Security Council Resolution 780 (1992), S/RES/780, 06/10/1992.

since the creation of the UN War Crimes Commission in 1942”.¹⁶⁶ In fact, the drafters of resolution 780 insisted on referring to the body as “commission” in order to draw a direct link to the investigative body that preceded the Nuremberg Trials.¹⁶⁷ Whilst the resolution did not make direct reference to the establishment of an international war crimes tribunal, it requested UNSG Boutros-Ghali to “take into account the Commission’s conclusions in any recommendation for further action”. This text was intended to open the door for the establishment of an international tribunal.¹⁶⁸

The creation of the investigative Commission was supposed to strengthen the threats of individual criminal accountability to deter potential perpetrators of atrocity crimes. During the SC debate on UNSCR 771, the Venezuelan Ambassador Arria referred to perpetrators of international crimes as enemies of mankind (“hostis humanis generis”) and stressed that the commission will “not only serve to establish responsibility and punish the guilty, but would also, we believe - and most particularly – constitute an important deterrent”. Similarly, US Ambassador Perkins noted that the establishment of the Commission was supposed to warn potential perpetrators of atrocity crimes that they will be brought to justice. “The resolution will hopefully act as a deterrent,” Perkins added. The Ambassador of Belgium explained that “the establishment of a Commission makes this signal more credible by making more operational the principle contained in the Geneva Conventions regarding the personal responsibility of war criminals”. The Russian Ambassador Vorontsov described the purpose of the Commission as adding credibility to criminal accountability threats for “any political and military leaders who allow mass breaches

¹⁶⁶ Akhavan, ‘Punishing War Crimes in the Former Yugoslavia’, 269.

¹⁶⁷ Scharf, *Balkan Justice*, 40-41.

¹⁶⁸ Scharf, *Balkan Justice*, 42.

of the norms of international humanitarian law on the territory of the former Yugoslavia”.

It is noteworthy that the UK and France both expressed concern that holding perpetrators of atrocity crimes criminally accountable might become an obstacle for the on-going ICFY peace negotiations. They had reservations about a powerful investigative body, believing that “the pursuit of war criminals might damage prospects for a peace settlement”.¹⁶⁹ On 26 October, UNSG Boutros-Ghali appointed the Commission’s members. The Commission was initially chaired by the Dutch international lawyer Fritz Kalshoven, but the international criminal lawyer Cherif Bassiouni took over soon after.¹⁷⁰

3.2.12. International War Crimes Tribunal

The Bosnian Serb campaign of ethnic cleansing continued throughout the winter of 1992 – despite the prevention measures that international actors had adopted. This not only prompted the SC to strengthen the comprehensive sanction regime that had been imposed on Serbia and Montenegro, even authorising the use of force to enforce the blockade,¹⁷¹ but also added momentum to calls for the establishment of an international criminal tribunal to deter potential perpetrators of atrocity crimes. On 17 November, UN Special Rapporteur Mazowiecki submitted his second report, which highlighted the systematic use of rape in ethnic cleansing and concluded that “the Muslim population are the principle victims and are virtually threatened with

¹⁶⁹ Scharf, *Balkan Justice*, 41.

¹⁷⁰ Alfred de Zayas, ‘The Kalshoven Commission’, *Leiden Journal of International Law* vol. 6 no. 1 (1993), 132.

¹⁷¹ On 16 November 1992, the SC adopted resolution 787, which authorised the use of all necessary measures to enforce the sanctions. On 22 November, NATO launched “Operation Maritime Guard” to strengthen the enforcement regime.

extermination”.¹⁷² On 30 November, the CHR held a second “special session” on Yugoslavia, which reiterated the threats of individual criminal accountability and attributed primary responsibility for the campaign of ethnic cleansing to the Serbian leadership.¹⁷³

At the December 1992 session of the ICFY in Geneva, moreover, US Secretary of State, Lawrence Eagleburger, not only called for the establishment of a Nuremberg-like tribunal to prosecute perpetrators of atrocity crimes, but also identified specific individuals as the key targets of potential prosecutions.¹⁷⁴ Secretary Eagleburger encouraged the international community “to think about moving beyond the London agreements and contemplate more aggressive measures”. “It is time,” he noted, “for the international community to begin identifying individuals who may have to answer for having committed crimes against humanity”. Eagleburger identified specific Serb and Bosnian Serb leaders, including Milosevic, Karadzic, and Mladic, as the individuals with primary responsibility for “the odious practice of ethnic cleansing”.¹⁷⁵

After the UN Commission of Experts also noted that the establishment of an international tribunal would be consistent with the direction of its work, the SC started

¹⁷² Second Report of the Special Rapporteur of the Commission for Human Rights, E/CN.4/S-1/10, 17/11/1992.

¹⁷³ UN Commission for Human Rights, ‘Report on the Second Special Session on the Human Rights Situation in the Former Yugoslavia’, E/CN.4/1992/S-2/6 (1992), 03/12/1992.

¹⁷⁴ Burg and Shoup, *The War in Bosnia-Herzegovina*, 232. According to State Department lawyer Jim O’Brien, Eagleburger had a change of heart on humanitarian issues after Special Rapporteur Mazowiecki personally explained to him the systematic nature of the crimes. Moreover, Eagleburger met with holocaust survivor Elie Wiesel, who warned that crimes against humanity were on-going in Bosnia and that Eagleburger had the moral responsibility to stop the crimes. Personal Interview with Jim O’Brien, *Legal Adviser’s Office, US State Department, 1989-1994* (Washington D.C., 23/04/2013).

¹⁷⁵ Statement by Lawrence S. Eagleburger, US Secretary of State, ‘The Need to Respond to War Crimes in the Former Yugoslavia’, ICFY, Geneva, Switzerland, 16/12/1992, <http://coursesa.matrix.msu.edu/~fisher/bosnia/readings/Eagleburger1.html>.

to move on the issue.¹⁷⁶ On 22 February 1993, the SC adopted Resolution 808, which outlined the framework for an International Criminal Tribunal for the former Yugoslavia (ICTY). UNSCR 808 expressed the SC's determination to end the commission of international crimes and to "take effective measures to bring to justice the persons who are responsible for them". The SC added that "in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved".¹⁷⁷

During the SC debate on the resolution states clarified that the ICTY had a preventive purpose. The establishment of the tribunal was intended to de-legitimise individuals committing atrocities and to deter the commission of further atrocity crimes.¹⁷⁸ "Prosecuting the guilty will send a clear message to those who continue to commit these crimes that they will be held responsible for their acts," the French Ambassador stated. The Moroccan Ambassador proclaimed that the "step we have taken is serious. Until yesterday the crimes continued unabated. Today the criminals know they will be pursued and punished ... it will surely deter those who are afraid only of force".¹⁷⁹ For her part, the new US Ambassador to the UN, Madeleine Albright, noted that the new US President Bill Clinton had "long supported the establishment of a war crimes tribunal at the United Nations to bring justice and deter further atrocities in the former Yugoslavia". Ambassador Albright added that:

Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes ... to those who committed these heinous crimes, we have a very clear message: war criminals will be prosecuted and justice will be rendered ... the crimes being committed, even as we meet today, are not just isolated acts of drunken militiamen, but often are the systematic and orchestrated crimes of Government officials, militia commanders, and disciplined artillery men and foot soldiers. The men and women behind these crimes are individually responsible for the crimes of those they purport to control ... Those sceptics –

¹⁷⁶ De Zayas, 'The Kalshoven Commission'.

¹⁷⁷ Security Council Resolution 808 (1993), S/RES/808, 22/02/1993.

¹⁷⁸ Personal Interview with Michael Matheson, *Acting Legal Adviser or Principle Deputy Legal Adviser, US State Department, 1990-2000; Person in Charge of Creation of the ICTY* (Washington D.C., 24/04/2013).

¹⁷⁹ UN Security Council, Provisional Verbatim Record, S/PV.3175, 22/02/1993.

including the war criminals – who deride this Tribunal as being powerless because the suspects may avoid arrest should not be so confident. The Tribunal will issue indictments whether or not suspects can be taken into custody. They will become international pariahs. While these individuals may be able to hide within the borders of Serbia or in parts of Bosnia or Croatia, they will be imprisoned for the rest of their lives within their own lands.¹⁸⁰

Albright's statement highlights powerfully that the ICTY was supposed to serve a preventive purpose by deterring specific individuals from committing atrocities.

On 25 May, the SC then adopted Resolution 827, which formally created the ICTY. The tribunal was established by the SC under its Chapter VII powers, which was done strategically to ensure that the creation of the tribunal would be quick and that all states would be legally bound by its decisions.¹⁸¹ This was important, as the ICTY's key purpose was to deter atrocity crimes in the context of *on-going violence*.¹⁸² The ICTY was not only created as a post-conflict instrument in pursuit of justice, but served an immediate political purpose.¹⁸³ The ICTY's jurisdiction was limited to prosecuting "persons responsible for serious violations of international humanitarian law [grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity] committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council".

3.2.13. The Vance-Owen Peace Talks

In parallel to the establishment of the ICTY, the co-chairs of the ICIFY put forward the outlines of a potential peace settlement for Bosnia, the so-called "Vance-Owen Peace

¹⁸⁰ UN Security Council, Provisional Verbatim Record, S/PV.3217, 25/05/1993.

¹⁸¹ Personal Interview with Michael Matheson. The alternative was to create the ICTY through a multilateral treaty. This was judged to be impractical. It would have taken a long time to negotiate, sign, ratify, and bring into force such a treaty. It was also unlikely that Serbia and Croatia would sign the treaty.

¹⁸² Personal Interview with Michael Matheson.

¹⁸³ See, Theodor Meron, 'The Case for War Crimes Trials in Yugoslavia', *Foreign Affairs* (Summer 1993), 123; Finlan, *The Collapse of Yugoslavia*, 48; Gow, *The Serbian Project and Its Adversaries*, 20; and Woodward, *Balkan Tragedy*, 323.

Plan” (VOPP). On 2 January 1993, the co-chairs had convened the first ICFY plenary session on Bosnia and introduced the main ideas of the VOPP. The VOPP was a three-part package, comprising a set of constitutional principles, a roadmap for the cessation of hostilities, and a map delineating a new ten-province structure for Bosnia. The VOPP proposed to make Bosnia a decentralized state in which significant functions would be carried out by ten relatively autonomous provinces. Though the ten provinces had no ethnic labels, it was clear that each of the three ethnic groups was to get a majority in three provinces; with Sarajevo being neutral. However, none of the three ethnic groups was supposed to get contiguous territory. The federal government would be based in Sarajevo and retain power in the areas of defence, foreign policy, and trade.¹⁸⁴

Negotiations on the details of the VOPP were difficult and dragged on until May 1993.¹⁸⁵ In early 1993, moreover, fighting broke out between Bosnian Croat and Bosnian Muslim forces – partly triggered by the Vance-Owen peace negotiations.¹⁸⁶ The Bosnian Croats, in particular, were trying to secure their territorial claims by cleansing Muslim populations from areas in Western Herzegovina and central Bosnia.¹⁸⁷ Meanwhile, the peace negotiations revolved around the details of the map, i.e. the boundaries of the different provinces and the amount of territory that each ethnic group would get. Revisions continued to be made. Whilst the Bosnian Serbs complained that the VOPP required them to give up too much of the territory that they had conquered, the Bosnian government criticised that the VOPP essentially ratified and rewarded the ethnic cleansing. The new US administration of Bill Clinton, inaugurated on 20 January, was also hesitant to fully support the VOPP, criticizing

¹⁸⁴ For details on the VOPP see, Owen, *Balkan Odyssey*.

¹⁸⁵ Owen, *Balkan Odyssey*, 88.

¹⁸⁶ Burg and Shoup, *The War in Bosnia-Herzegovina*, 134.

¹⁸⁷ Burg and Shoup, *The War in Bosnia-Herzegovina*, 134.

that the plan condoned ethnic cleansing and was too lenient with the Bosnian Serbs. The position of the Clinton administration was that not all parties in the Bosnia crisis were equally culpable (a position that was maintained by the UK, France, and the UN Secretariat). Instead, the Clinton administration advocated punishing the Bosnian Serbs and supporting the Bosnian Muslims.¹⁸⁸ It proposed “lift and strike” as a more robust and partial “strategy for international crime prevention”.¹⁸⁹ The “lift” referred to the easing of the arms embargo for the Bosnian Muslims, and the “strike” was aimed at stopping the Serb attacks.

Whilst Lord Owen has accused the Clinton administration of having deliberately derailed the VOPP by advising the Bosnian Muslims to reject the plan, this claim needs to be treated with care. It is a fact that the Bosnian Serbs were the first party to reject the VOPP. On 2 May, all parties met in Athens to sign the VOPP. The Bosnian Serb leader Karadzic hesitantly signed the VOPP with the caveat that the Bosnian Serb Assembly in Pale would get the final vote. On 6 May, Karadzic put the VOPP before the Bosnian Serb Assembly, which rejected it and called for a Bosnian Serb referendum on the plan. On 16 May, 96% of those participating in the Bosnian Serb referendum rejected the VOPP. The Bosnian Serbs were not prepared to give up territory that they had acquired through their brutal campaign of ethnic cleansing.

3.2.14. Safe Areas

In April 1993, whilst the Vance-Owen peace negotiations were on-going, Bosnian Serb forces embarked on an offensive against the remaining Bosnian Muslim enclaves in Eastern Bosnia. These enclaves were hindering the creation of contiguous Bosnian Serb territory in Eastern Bosnia. The main target of the Bosnian Serb offensive was

¹⁸⁸ Personal Interview with Stuart Seldowitz.

¹⁸⁹ Personal Interview with Stuart Seldowitz.

the town of Srebrenica. Bosnian Serb forces surrounded Srebrenica, which was packed with around 60.000 IDPs from other towns in Eastern Bosnia.¹⁹⁰ On 12 April, Bosnian Serb shelling killed at least 56 persons in the streets of Srebrenica. This triggered international outrage and prompted even cautious voices to advocate more coercive measures directed against the Bosnian Serbs.¹⁹¹

On 16 April, persistent lobbying by the UN Ambassadors of Venezuela and Pakistan persuaded the SC to unanimously adopt Resolution 819, which declared Srebrenica a safe area.¹⁹² The safe area idea had been floating around since August 1992, when ICRC President Cornelio Sommaruga suggested the creation of “protected zones” for Bosnian Muslims in northern Bosnia.¹⁹³ Special Rapporteur Mazowiecki had also proposed the creation of safe areas.¹⁹⁴ Moreover, the SC had mentioned the possible creation of humanitarian safe areas in Resolution 787 of 16 November 1992. In UNSCR 819, acting under Chapter VII, the SC demanded that Srebrenica and its surroundings be treated as a safe area “which should be free from any armed attack or any other hostile act”. The SC specifically called for the immediate withdrawal of Bosnian Serb paramilitary units from the areas surrounding Srebrenica.¹⁹⁵ UNSCR 819 was a strong chastisement of the Bosnian Serbs, but the resolution failed to specify how the safe area policy should be implemented on the ground. It merely requested an increased UNPROFOR presence in Srebrenica to monitor the humanitarian situation. Given that UNPROFOR had limited military capabilities and operated, as a matter of practice, with the consent of all parties, the

¹⁹⁰ Bryant and Loza, ‘UN Peacekeeping in Bosnia’, 56.

¹⁹¹ Burg and Shoup, *The War in Bosnia-Herzegovina*, 140-142.

¹⁹² Carol McQueen, *Humanitarian Intervention and Safety Zones: Iraq, Bosnia and Rwanda* (Basingstoke: Palgrave Macmillan, 2005), 67.

¹⁹³ McQueen, *Humanitarian Intervention and Safety Zones* 61; Yamashita, *Humanitarian Space and International Politics*, 88.

¹⁹⁴ Yamashita, *Humanitarian Space and International Politics*, 88.

¹⁹⁵ UN Security Council Resolution 819 (1993), S/RES/819, 16/04/1993.

robustness of the safe areas was questionable. UNSCR 819 did not yet mention NATO air power to deter attacks.¹⁹⁶ In UNSCR 824 of 6 May, the SC extended the safe area policy to Sarajevo, Tuzla, Zepa, Gorazde, and Bihac.¹⁹⁷

In the debate on UNSCR 824, the Venezuelan Ambassador Arria explained that the safe area policy “prevented the massacre of the people of Srebrenica, who have lived and suffered under siege for more than a year”. Arria added: “these acts constitute crimes of genocide for which, some day, those responsible will have to answer ... the Council will have to exert every possible effort to make all of the former Yugoslavia a safe area”.¹⁹⁸ Similarly, the French Ambassador to the UN explained that the safe areas aimed at reducing the vulnerability of civilian populations. “The civilian populations must no longer be made to bear the consequences of the Bosnian conflict,” he warned. “The most important thing is protection, to save the human lives seriously threatened”. Other ambassadors also stressed that the safe areas should be seen as a sanctuary for Bosnian Muslims under the threat of ethnic cleansing. Thus, the safe areas constituted a partisan instrument intended to protect the Bosnian Muslims and deter Bosnian Serb forces.¹⁹⁹ This view was reinforced by UNSCR 836, which extended UNPROFOR’s mandate to “enable it to deter attacks against the safe areas, to monitor the ceasefire, and to promote the withdrawal of military or paramilitary units other than those of the government of the Republic of Bosnia and Herzegovina”.²⁰⁰ According to Noel Malcolm, this meant that

¹⁹⁶ McQueen, *Humanitarian Intervention and Safety Zones*, 64.

¹⁹⁷ UN Security Council Resolution 824 (1993), S/RES/824, 06/05/1993.

¹⁹⁸ UN Security Council, Provisional Verbatim Record, S/PV.3208, 06/05/1993.

¹⁹⁹ See, Karin Landgren, ‘Safety Zones and International Protection: A Dark Grey Area’, *International Journal of Refugee Law* vol. 7, no. 3 (1995), 441-447.

²⁰⁰ UN Security Council Resolution 836 (1993), S/RES/836, 04/06/1993.

UNPROFOR was now being used to alter the military balance in the civil war in favour of the Bosnian government.²⁰¹

3.2.15. Air Power (“Operation Deny Flight”)

In March 1993, NATO’s “Operation Sky Monitor” revealed that Bosnian Serb forces were continuing to use the Bosnian airspace for attacks on civilian populations. It is documented that the no-fly zone was violated over 400 times between October 1992 and March 1993.²⁰² On 31 March, in direct response to these violations, the SC adopted Resolution 816, which authorised states or regional organisations to use all necessary measures to ensure compliance with the no-fly zone. In short, UNSCR 816 authorised the use of force to enforce the no-fly zone. China abstained on the resolution as it had reservations about authorising military force.

It was NATO that decided to implement the mandate. On 12 April, NATO launched “Operation Deny Flight”, which initially sought to enforce the no-fly zone and neutralize the Bosnian Serb advantage in air power. With NATO aircrafts in the air, violations of the no-fly zone stopped almost immediately. Subsequent resolutions of the SC gradually expanded the scope of “Operation Deny Flight” to serve coercive purposes beyond the enforcement of the no-fly zone. On 4 June, the SC adopted Resolution 836, which authorized “all necessary measures, through the use of air power, in and around the safe areas in Bosnia and Herzegovina”, i.e. the use of NATO air power to provide close air support for UNPROFOR in and around the safe areas.²⁰³ In Resolution 844 of 18 June, the SC even added a third element to “Operation Deny Flight”, authorising the use of coercive air power in support of UN

²⁰¹ Malcolm, ‘Impartiality and Ignorance’, 120.

²⁰² Finlan, *The Collapse of Yugoslavia*, 47-48.

²⁰³ The “dual key arrangement” turned NATO air support into an unreliable tool. The procedure meant that NATO air strikes needed to be approved both by UN and NATO Headquarters. This was problematic, not least because of the time difference between New York and Brussels.

resolutions more generally, e.g. to break the siege of Sarajevo. In theory, therefore, NATO's "Operation Deny Flight" signalled a marked increase in robustness, partiality, and coerciveness of the international crime prevention efforts in Bosnia.

The US was particularly keen to use air power more prominently. US President Clinton was a strong supporter of the policy of "lift and strike", and since the Vance-Owen Peace Plan had failed in early May 1993, he was looking for ways to put this policy into practice. Together with several Islamic countries, the US also started to violate the UN arms embargo and deliver weapons to the Bosnian Muslims to provide them with the capacity to defend themselves against Bosnian Serb attacks.²⁰⁴ Iran, Saudi Arabia, Malaysia, Brunei, and Pakistan were supplying weapons to the Bosnian government with the help of Turkey. The US supplied weapons via Croatia and covertly in food aid flights.²⁰⁵ The Clinton administration contended that it was "wrong to deprive a sovereign government under attack of the means to defend itself" and that the "international arms embargo put the entire United Nations effectively on the side of the Serbs, who had enough heavy weaponry to continue the war for years".²⁰⁶

By the summer of 1993, therefore, international actors had put in place various situational crime prevention tools to prevent and mitigate the escalation of atrocity crimes in Bosnia. Several of the prevention tools, such as the creation of the ICTY, were rather novel and exceptional at the time. Contrary to popular opinion, therefore, international actors took escalation prevention seriously. Despite this, however, ethnic cleansing continued for another two years. More than any other event, it is the fall of

²⁰⁴ Personal Interview with Ambassador Peter Galbraith.

²⁰⁵ Personal Interview with Ambassador Peter Galbraith; Burg and Shoup, *The War in Bosnia-Herzegovina*, 307-308; Finlan, *The Collapse of Yugoslavia*, 65; and Allin, *NATO's Balkan Interventions*, 25.

²⁰⁶ Allin, *NATO's Balkan Interventions*, 25.

the safe area of Srebrenica on 11 July 1995, including the genocidal massacre of 8.000 Bosnian Muslim boys and men, which stands for the international failure to prevent atrocity crimes in Bosnia. It was only after the fall of Srebrenica that NATO launched its decisive bombing campaign “Operation Deliberate Force” (30 August to 20 September). Together with the joined Bosnian Muslim/ Bosnian Croat campaign “Operation Mistral” (08 September to 12 October), the NATO bombing put the Bosnian Serb forces on the brink of defeat and paved the way for a peace settlement. On 14 December 1995, the Serbian President Milosevic, the Croatian President Tudjman, and the Bosnian President Izetbegovic signed the Dayton Accords, which finally put an end to the Bosnia crisis.

Table 3.1.: Situational Crime Prevention Tools Used in Bosnia

Start Date	Tool	Source	Objective
25/09/91	Arms Embargo	- UNSC	- Prevent violence from spreading to Bosnia - Reduce the means to commit atrocities
01/10/91	Monitoring Mission	- EC	- Calm situation by showing scrutiny - Inform international policy-making
06/02/92	Cutileiro Mediation	- EC Conference on Yugoslavia	- Prevent violence conflict by finding acceptable constitutional structure
15/04/92	International Warnings	- Key states - UNSC	- Show international scrutiny - Deter potential perpetrators
12/05/92	Sanctions on Serbia & Montenegro	- Key states - EC - UNSC	- Deter political leaders from supporting ethnic cleansing
08/06/92	UN Protection Force	- UNSC	- Ensure the delivery of humanitarian aid - Deter potential perpetrators
13/07/92	Threats of Individual Criminal Accountability	- UNSC	- Deter criminal masterminds - Communicate relevant legal norms - De-legitimize potential perpetrators
14/08/92	UN Special Rapporteur	- UN-CHR	- Fact-finding - Enhance credibility of accountability threats - Deter criminal masterminds
26/08/92	ICFY	- UN - EC	- Negotiate a peace settlement - Alter the situational context of atrocities
06/10/92	UN Commission of Experts	- UNSC	- Fact-finding - Enhance credibility of accountability threats - Deter criminal masterminds
09/10/92	No-Fly Zone	- UNSC - NATO	- Reduce the vulnerability of potential victims
02/01/93	VOPP	- UN - EC	- End the armed conflict - Alter the situational context of atrocities
22/02/93	ICTY	- UNSC	- Deter criminal masterminds - De-legitimize potential perpetrators

16/04/93	Safe Areas	- UNSC - NATO	- Reduce the vulnerability of potential victims
04/06/93	Coercive Air Power	- UNSC - NATO	- Deter and constrain potential perpetrators
1993-95	Arming Victims	- States	- Strengthen victims' self-defensive capacity

3.3. Conditions, Capacities, and Dispositions

Based on the preceding analysis of the largely unsuccessful crime prevention efforts in the Bosnia crisis, this section seeks to infer conditions, capacities, and dispositions that are required for the situational prevention of international crimes. The discussion shows that situational crime prevention tools are influenced by contextual variables, such as geographic circumstances, the level of unity and backing from key international actors, or other prevention tools employed. Furthermore, the situational prevention of international crimes hinges on the international capacity to establish credible enforcement regimes, which in turn requires military capabilities, judicial capacity to threaten individual criminal accountability, or domestic legislation to rapidly impose sanctions. Finally, situational crime prevention requires international actors to adopt a mind-set of partiality that distinguishes between victims and perpetrators, which poses challenges for an organization such as the UN.

3.3.1. Arms Embargo

The first situational crime prevention tool that international actors adopted was the comprehensive UN arms embargo, which sought to reduce the permissiveness of the crime situation by limiting the weapons available for the commission of atrocity crimes. The arms embargo was imposed in an impartial manner, meaning that it applied equally to all of the six republics of Yugoslavia. At least two lessons can be inferred from the Bosnian arms embargo.

First, the impartial nature of the arms embargo followed traditional conflict management theory,²⁰⁷ which turned out to be counter-productive in terms of preventing atrocity crimes.²⁰⁸ At the time of Yugoslavia's disintegration, Serbia, Montenegro, and the Bosnian Serbs dominated the JNA and appropriated most of the federal army's weaponry and equipment. This meant that they had a distinct advantage in terms of military capabilities vis-à-vis the Bosnian government (and also Croatia). The military imbalance was particularly significant with regards to heavy weapons of which the Bosnian government possessed almost none.²⁰⁹ Due to this context, the impartial arms embargo had the effect of hindering the Bosnian government from acquiring weapons for self-defence, whilst allowing the Serbs/Bosnian Serbs to engage in ethnic cleansing without much military resistance. Malcolm stresses that, "since Serbia, and its proxy forces in Bosnia, had the stockpiles of the fourth largest army in Europe, while the Bosnian government, on the first day of the war, had no army at all, the effects of this even-handedness were far from equivalent".²¹⁰ Peter Galbraith argues that, "imposing the arms embargo was a mistake and reminiscent of what happened in the Spanish civil war. The principle perpetrators were already armed, but the victims were not".²¹¹ The Bosnia crisis shows that if potential perpetrators are in a position of military superiority, the

²⁰⁷ Cyrus Vance defended the arms embargo as follows: "It takes credulity to suggest that lifting the arms embargo for only one party is either feasible or desirable. Such an action could only widen and deepen the war in Bosnia and Herzegovina and jeopardize the effectiveness of the United Nations peacekeeping operation. The flow of more arms would inevitably lead to more casualties. This would undermine the negotiating process which, with all its difficulties, still represents our best hope. I believe strongly that lifting the arms embargo not only would increase hostilities in Bosnia and Herzegovina, but could spread the conflict throughout the Balkan region." UN Security Council, Provisional Verbatim Record, S/PV.3134, 13/11/1992.

²⁰⁸ Malcolm, 'Impartiality and Ignorance', 123.

²⁰⁹ Gow, *Triumph of the Lack of Will*, 37, 38.

²¹⁰ Malcolm, 'Impartiality and Ignorance', 123; also Gow, *Triumph of the Lack of Will*, 37, 38.

²¹¹ Personal Interview with Ambassador Peter Galbraith; also Allin, *NATO's Balkan Interventions*, 25. Dana Allin argues that: "It is an historical rule of thumb: blanket arms embargoes usually penalise the victims of aggression, given that the aggressor – almost by definition – is adequately armed already".

imposition of an impartial arms embargo can facilitate rather than constrain atrocity crimes. Contrary to traditional conflict prevention wisdom, situational crime prevention requires international actors to distinguish between victims and perpetrators.

Second, the Bosnian arms embargo shows that geographic circumstances can matter as a contextual variable, especially when enforcement regimes are weak. Geographically, the Yugoslav republics had radically different possibilities for acquiring weapons illegally, i.e. in violation of the arms embargo. For all practical purposes, Bosnia was a land-locked state. This made it extremely difficult for the Bosnian government to acquire weapons. Moreover, Bosnia was surrounded by hostile republics that would not supply it with weapons.²¹² Thus, even in the absence of a robust enforcement regime, the arms embargo was immediately effective for Bosnia. In stark contrast, Serbia and Montenegro had few problems to illegally acquire additional weapons and military equipment via the Danube River or the Adriatic Sea. Croatia acquired weapons via the Adriatic Sea or Hungary. Given that the enforcement regime for the arms embargo was initially weak, the geographic circumstances further disadvantaged the Bosnian Muslims.

3.3.2. Political Mediation

Another key situational crime prevention tool was political mediation, which aimed at preventing, managing, and resolving the armed conflict in Bosnia. International policy-makers regarded armed conflict as an enabling context for atrocity crimes.²¹³ Thus, by preventing and managing armed conflict they also sought to reduce the likelihood of atrocity crimes. “Efforts to end the war,” Galbraith argues, “were also

²¹² Note that the US later used Croatia as a base to supply the Bosnian government with weapons.

²¹³ Personal Interview with Ambassador Jose Cutileiro.

atrocity prevention measures”.²¹⁴ The various EC and UN mediation initiatives were rather traditional in nature, revolving around the principles of consent, impartiality, and minimal coercion. The only exception was the Dayton Agreement, which has to be seen in the context of NATO’s bombing campaign “Operational Deliberate Force” and the joint Bosnian Croat/Bosnian Muslim campaign “Operation Mistral”. At least three lessons can be inferred from the mediation efforts in the Bosnia crisis.

First, the Bosnia case shows that the effectiveness of traditional mediation efforts, which are not designed to coercively impose a solution, hinges on the willingness of the parties to negotiate in good faith. Good faith, however, was largely lacking in the Bosnia crisis. The Bosnian Serbs, in particular, were not prepared to sacrifice the territorial gains that they had made during their campaign of ethnic cleansing. The Bosnian Serb rejection of the VOPP evidences this point. Successive mediators were neither prepared nor able to coerce the Bosnian Serbs to agree to a peace settlement that involved reversing the ethnic cleansing. As a consequence, Gow criticises, the Bosnian Muslims were “urged to make concessions to the bully, instead of being helped to stand up to intimidation”.²¹⁵ The Bosnian Muslims, on their part, were also reluctant to negotiate in good faith, given that all peace plans seemed to ratify ethnic cleansing. Douglas Hurd, the British Foreign minister at the time, remembers that there “was simply no good faith in any of the parties concerned”.²¹⁶ Given this context, the traditional mediation processes could achieve very little without the capacity to dictate a solution to the parties.

Second, the Bosnia case shows that a lack of unified support and backing from key international actors can undermine mediation initiatives. Both Ambassador

²¹⁴ Personal Interview with Ambassador Peter Galbraith.

²¹⁵ Gow, *Triumph of the Lack of Will*, 83.

²¹⁶ Personal Interview with Lord Douglas Hurd, *British Foreign Minister, 1989-1995* (London, 12/06/2013).

Cutileiro and Lord Owen have lamented that interventions by the US undermined their respective mediation processes at strategically important moments. Cutileiro claims that the US secretly promised the Bosnian Muslims a better deal than the one proposed in the Cutileiro plan.²¹⁷ “For mediation to be successful it is fundamental to have unity and backing, particularly the backing of a strong political power,” Ambassador Cutileiro reflects. “Without this, nothing is possible”.²¹⁸ Similarly, Lord Owen has blamed the Clinton administration for the failure of the VOPP, arguing that the US failed to pressure the Bosnian Muslims into accepting the plan. Instead, Owen explains, the US proposed a policy of “lift and strike” that favoured the Bosnian Muslims. It needs to be stressed, however, that Owen’s claim is highly controversial, given that the VOPP was rejected by the Bosnian Serbs. However, it seems that a lack of unity and support from key actors hampers the effectiveness of mediation processes.

Third, the traditional mediation initiatives clashed with the measures related to individual criminal accountability. Holding individuals criminally accountable required direct confrontation with the political leaders that were needed as interlocutors in the peace negotiations.²¹⁹ For instance, the UK complained that the US’ push for individual criminal accountability in late 1992 was an obstacle to the VOPP.²²⁰ UK officials have lamented that Secretary Eagleburger jeopardized the peace negotiations by identifying Milosevic, Karadzic, and Mladic as candidates for international criminal prosecutions.²²¹ Reportedly, moreover, Owen and Vance saw the creation of the ICTY as “complicating their peacemaking mission, since it would

²¹⁷ Personal Interview with Ambassador Jose Cutileiro; Burg and Shoup, *The War in Bosnia-Herzegovina*, 113-116.

²¹⁸ Personal Interview with Ambassador Jose Cutileiro.

²¹⁹ Akhavan, ‘Punishing War Crimes in the Former Yugoslavia’, 283.

²²⁰ Woodward, *Balkan Tragedy*, 323.

²²¹ Burg and Shoup, *The War in Bosnia-Herzegovina*, 232.

be difficult to get leaders of fighting parties to make peace if after the peace they were to be made to stand trial for war crimes”.²²² According to Stuart Seldowitz, at the time a legal adviser in the US Mission to the UN, “the chief mediators viewed the ICTY as an obstacle. If you do not give dictators a way out, you give them an incentive to go all the way”.²²³ Thus, political mediation can be undermined by parallel attempts to credibly threaten individual criminal accountability.

3.3.3. Individual Criminal Accountability

As already mentioned, threats of individual criminal accountability were another key situational crime prevention strategy.²²⁴ It is important to note that the various threats of individual criminal accountability were used as a tool to deter an escalation of atrocity crimes in the context of on-going violence, rather than as a judicial instrument to ensure post-conflict justice.²²⁵ At least three lessons can be inferred from the accountability threats in the Bosnia case.

First, the Bosnia case shows that it is difficult to maintain the credibility of accountability threats in the context of parallel efforts to negotiate a peace settlement with the criminal masterminds, such as Milosevic, Karadzic, Mladic, or Tudjman. Throughout the Bosnia crisis, the prospect that the criminal masterminds would be indicted seemed rather slim, as the logic of the parallel peace negotiations demanded keeping them at the negotiation table.²²⁶ The international lawyer Anthony D’Amato explains that the threats of individual criminal accountability were not credible, as the individuals allegedly responsible for war crimes, or at least their friends, were sitting

²²² David Forsythe, ‘Politics and the International Criminal Tribunal for the Former Yugoslavia’, *Criminal Law Forum* vol. 5, no. 2 (1994), 410.

²²³ Personal Interview with Stuart Seldowitz.

²²⁴ Akhavan, ‘Punishing War Crimes in the Former Yugoslavia’, 283.

²²⁵ Meron, ‘The Case for War Crimes Trials in Yugoslavia’, 134.

²²⁶ Meron, ‘The Case for War Crimes Trials in Yugoslavia’, 133.

at the negotiation table.²²⁷ The UK, for instance, was reluctant to “embrace any actions against the Bosnian Serbs that could potentially disrupt the peace negotiations”.²²⁸ As a result, the criminal masterminds believed that, “once a political settlement is achieved, the apparatus for punishing war crimes will be dismantled and relegated to historical and political oblivion”.²²⁹ “From my experience,” Galbraith argues, “the main targets did not think that the ICTY would ever get them. Tudjman never thought that he would be indicted”.²³⁰ Similarly, Norman Cigar notes that Karadzic did not take his potential indictment by a criminal tribunal seriously: “When asked in February 1993 whether being placed on a list of war criminals worried him, Karadzic responded self-confidently that he considered these charges as ‘all temporary’”.²³¹

Second, and closely related to the previous point, there was a lack of unified international support for the accountability track, which exacerbated its credibility problem. Certain international actors refused to provide support for the ICTY, financially or logistically, so as to not jeopardize the peace negotiations, which depended on the cooperation of suspected war criminals.²³² “British officials,” David Forsythe notes, “made known to the press that they had strong misgivings about the practicality of what they saw as a US push for criminal proceedings”.²³³ The UK wanted “to give free reign to diplomacy”.²³⁴ The British Foreign Minister, Douglas Hurd, explains his position as follows: “I was not a great enthusiast for the ICTY.

²²⁷ Anthony D’Amato, ‘Peace vs. Accountability in Bosnia’, *American Journal of International Law* vol. 88, no. 3 (1994), 501.

²²⁸ Scharf, *Balkan Justice*, 32.

²²⁹ Akhavan, ‘Punishing War Crimes in the Former Yugoslavia’, 283.

²³⁰ Personal Interview with Ambassador Peter Galbraith.

²³¹ Cigar, *Genocide in Bosnia*, 147.

²³² Forsythe, ‘Politics and the International Criminal Tribunal for the Former Yugoslavia’, 403.

²³³ Forsythe, ‘Politics and the International Criminal Tribunal for the Former Yugoslavia’, 404.

²³⁴ Forsythe, ‘Politics and the International Criminal Tribunal for the Former Yugoslavia’, 403.

Once you hand a situation over to lawyers and take it away from diplomats this can have results that are not good. The main incentive for the potential indictees then becomes to avoid prosecution. One has to be careful not to undermine diplomacy”.²³⁵ Similarly, French officials publicly argued that criminal proceedings would complicate the mediation efforts.²³⁶ The chairman of the UN Commission of Experts, Fritz Kalshoven, claims that high-ranking UN officials instructed him not to go after top Serbian leaders.²³⁷ EC negotiator Lord Owen is alleged to have instructed Cherif Bassiouni, Kalshoven’s successor, to “go easy on the Serbian leadership and to find all sides equally guilty, so that the ‘peace negotiations’ could go forward”.²³⁸

Third, the credibility of the accountability threats was further hampered by the lack of a real track record of international criminal prosecutions at the time. Moreover, international judicial capacity to prosecute individuals for atrocity crimes was absent. Such capacity had to be built from scratch, which is why it took some time before the ICTY was fully operational.

3.3.4. No-Fly Zone and Safe Areas

The no-fly zone and the safe areas were situational crime prevention measures that aimed at reducing the vulnerability of the potential victims. The no-fly zone aimed at protecting threatened populations from Bosnian Serb airpower. The safe areas sought to cast a protective cloak over populations at risk. At least two lessons can be learned from the use of these tools in the Bosnia case.

²³⁵ Personal Interview with Lord Douglas Hurd.

²³⁶ Forsythe, ‘Politics and the International Criminal Tribunal for the Former Yugoslavia’, 405.

²³⁷ Forsythe, ‘Politics and the International Criminal Tribunal for the Former Yugoslavia’, 406-407.

²³⁸ See R. C. Longworth, ‘Peace vs. Justice: DePaul Professor Fears UN Sabotaged his Inquiry into Yugoslav War Crimes’, *Chicago Tribune*, 02/09/1994. On 4 April 1995, Cherif Bassiouni publicly repeated this point in his testimony before the CSCE Helsinki Commission, arguing that UN authorities systematically sabotaged his investigations.

First, the Bosnia case shows that the effectiveness of no-fly zones and safe areas hinges on the international capacity to robustly enforce them. Initially, the no-fly zone over Bosnia was frequently violated, as it was only monitored without consequences in case of non-compliance.²³⁹ The no-fly zone got more effective once the SC authorized “all necessary measures” to ensure compliance with the no-fly zone and NATO’s “Operation Deny Flight” bolstered enforcement. “Operation Deny Flight” largely neutralized the Bosnian Serb advantage in air power; though some violations by helicopters continued. The safe areas also reveal the importance of robust enforcement regimes. The safe areas were supposed to be demilitarised and UNPROFOR was charged with deterring Bosnian Serb forces. However, UNPROFOR did not have the military capabilities to provide protection for the populations in the safe areas, and the complicated “dual key” arrangement turned NATO air strikes into an ineffective tool. “The people in the safe areas had every reason to believe that they were being offered protection”, Alvaro de Soto laments, “but the Security Council knew perfectly well that UNPROFOR could not do this”.²⁴⁰ According to the US Ambassador to NATO, Robert Hunter, “UNPROFOR was a real mistake. It had less authority than a police mission and just watched”.²⁴¹ The safe areas were amongst the most dangerous places in Bosnia, as the genocidal attack on Srebrenica demonstrates.²⁴² That robust enforcement action had the potential to be effective is suggested by NORDBAT, a predominantly Danish peacekeeping force

²³⁹ Finlan, *The Collapse of Yugoslavia*, 47-48.

²⁴⁰ Personal Interview with Alvaro de Soto.

²⁴¹ Personal Interview with Ambassador Robert Hunter, *Senior Foreign Policy Advisor to Presidential Candidate Bill Clinton, 1992; US Ambassador to NATO, 1993-1998* (Washington D.C., 12/09/2012).

²⁴² McQueen, *Humanitarian Intervention and Safety Zones*, 53; Bryant and Loza, ‘UN Peacekeeping in Bosnia’, 57.

that was deployed to the safe area of Tuzla. NORDBAT had tanks at its disposal, which it used successfully to deter Serb attacks.

Second, the Bosnia case shows that the use of air power can be undermined by the presence of UN peacekeeping forces and humanitarian personnel on the ground. UNPROFOR and humanitarian actors were crucial for delivering humanitarian assistance to needy populations. However, the presence of international personnel was counter-productive with regards to robust enforcement action. UNPROFOR's key troop contributors, France and the UK, were reluctant to sanction robust enforcement action due to concern about Bosnian Serb retaliation against their troops. This concern was not ill-founded. UNPROFOR soldiers were repeatedly taken hostage, attacked, and used as "human shields" to deter NATO airstrikes. As Paul Diehl argues: "By choosing to send peacekeeping troops, the United Nations limited its option for enforcement actions; contributing states were reluctant to support coercive actions for fear of retaliation against these troops".²⁴³ Ambassador Hunter even argues that "one reason that the UK had troops in UNPROFOR was to prevent the use of air power".²⁴⁴ In any case, the presence of ground troops, who were in no position to defend themselves against Bosnian Serb retaliation, undermined the use of air power to enforce the safe area policy and the no-fly zone.

3.4. Unintended Consequences and Side-Effects

This section turns to unintended consequences and side-effects that emerged from the efforts to prevent international crimes in Bosnia. The discussion shows that the prevention of international crimes can be a controversial endeavour. In Bosnia, international crime prevention efforts have incentivized all parties to manipulate the international perception about "victims" and "perpetrators". Moreover, political

²⁴³ Paul Diehl, *International Peacekeeping* (Baltimore: Johns Hopkins University Press, 1994), 195.

²⁴⁴ Personal Interview with Ambassador Robert Hunter.

mediation has had the unintended consequence of triggering and ratifying campaigns of ethnic cleansing.

3.4.1. Triggering and Ratifying Ethnic Cleansing

An unintended consequence that emerged from the international crime prevention efforts in Bosnia relates to the political mediation initiatives, which aimed at reducing the permissiveness of the crime situation by preventing and managing the armed conflict. Several of the different mediation processes have either triggered inter-ethnic violence or ratified and rewarded ethnic cleansing. This unintended consequence was observable in context of the Cutileiro Talks, the Vance-Owen peace process, and the Dayton Agreement.

First, Ambassador Cutileiro's preventive peace plan for Bosnia proposed the division of the republic into several ethnic cantons. The Bosnian government and other observers have argued that Cutileiro's emphasis on ethnicity inadvertently enhanced ethnic polarization in Bosnia and encouraged the Bosnian Serbs to start their campaign of ethnic cleansing. "The Serb camp may have been intent on a programme of population purification in Bosnia anyway," Gow argues, "but admitting the principle of ethnically determined territorial units was a cardinal mistake, since it bestowed approval on Serb ambition and was in effect a charter for 'ethnic cleansing'".²⁴⁵ Similarly, Helsinki Watch criticises that the Cutileiro plan proposed ethnic cantons without specifying the exact boundaries of the cantons. Helsinki Watch argues that this provided the parties with an incentive to engage in ethnic cleansing. As most parts of Bosnia were so ethnically intertwined that a simple division was not

²⁴⁵ Gow, *Triumph of the Lack of Will*, 81.

possible, ethnic cleansing presented itself as a strategy for getting a bigger piece of the pie.²⁴⁶

Second, the Vance-Owen peace process has not only encouraged Bosnian Serb ethnic cleansing, but also triggered the Muslim-Croat war in the spring of 1993.²⁴⁷ “The London Conference was a sham,” Brendan Simms argues. “Given the urgency of the situation, the decision to announce it three weeks in advance was widely interpreted as an invitation to the Serbs to maximize their gains before having them ratified by the international community”.²⁴⁸ Alastair Finlan notes that the VOPP was “merely rewarding Bosnian Serb and Serbian aggression and dealing with their leaders as legitimate parties in a dispute, rather than as criminals who had created the chaos in the first place”.²⁴⁹ Furthermore, Burg and Shoup point out that the VOPP is largely responsible for the vicious fighting that broke out between Bosnian Croats and Bosnian Muslims in early 1993, which revolved primarily around the exact boundaries of the different cantons.

Finally, whilst the Dayton Agreement was crucial for ending the Bosnia crisis, many observers point out that it also ratified and rewarded the Serb campaign of ethnic cleansing. “Although the Bosnian Serbs suffered military reversal in the end,” Allin notes, “the ‘Republika Srpska’ granted to them by Dayton was the nationally homogeneous product of three and a half years of terror, murder and mass expulsion”.²⁵⁰ In short, whilst the Dayton Accords brought atrocity crimes in Bosnia to an end, it did so by rewarding the Bosnian Serbs’ campaign of ethnic cleansing.

²⁴⁶ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, 39-40. This was also recognized by the C.I.A, see C.I.A., ‘Yugoslavia: Bosnians Opt for Cantonization’, 19/03/1992, http://www.foia.cia.gov/docs/DOC_0000258812/DOC_0000258812.pdf.

²⁴⁷ See, Bryant and Loza, ‘UN Peacekeeping in Bosnia’, 55.

²⁴⁸ Simms, *Unfinest Hour*, 21; see also *The Economist*, ‘Britania Rules the Waverers’, 15/08/1992.

²⁴⁹ Finlan, *The Collapse of Yugoslavia*, 41.

²⁵⁰ Allin, *NATO's Balkan Interventions*, 15.

3.4.2. Politicization of Victim/Perpetrator Dichotomy

Moreover, the efforts to prevent international crimes in Bosnia had the side-effect of incentivising all parties to manipulate the international assessment of who gets to be seen as “the perpetrator” and who as “the victim”, which produced perverse consequences. Both the Bosnian Muslims and the Bosnian Serbs constantly tried to manipulate the victim/perpetrator frame that guides international crime prevention and promises protection for the former and punishment for the latter. Given the far reaching implications of this distinction, it is perhaps unsurprising that all parties have tried to influence and manipulate the frame.

However, this has led to some negative consequences. Not only did all parties engage in propaganda strategies that politicized and obfuscated the situation on the ground in unhelpful ways. The Bosnian government is also charged with having imposed unnecessary suffering on its own civilian population to depict its side as “the victims” in need of robust protection. UN personnel repeatedly accused the Bosnian government of having attacked its own people to then blame the action on the Bosnian Serbs in order to attract international military intervention. Major General Lewis MacKenzie, the controversial first chief of staff of UNPROFOR, claims that the Bosnian Muslims repeatedly shelled themselves “in order to create a particular image”.²⁵¹ Similarly, Lord Owen claims that international visits to Sarajevo were usually accompanied by covert Bosnian Muslim shelling of the city, which was then attributed to the Bosnian Serbs.²⁵² In Owen’s view, “Bosnian Muslims were trying to plant the responsibility for actions on to the Bosnian Serbs, thereby portraying the Serbs as even worse than they were in the eyes of world opinion”.²⁵³ The Bosnian

²⁵¹ Helsinki Watch, *War Crimes in Bosnia and Hercegovina*, 165.

²⁵² Owen, *Balkan Odyssey*, 47.

²⁵³ Owen, *Balkan Odyssey*, 47.

Muslims had only one aim, Owen argues, namely to get the US involved on the Muslim side, and they felt entitled to use whatever means necessary to convey the simple message of “we are victims”.²⁵⁴ Burg and Shoup also argue that there is “evidence that the Muslims were not beyond deliberately inflicting casualties on their own civilian population in order to gain sympathy of the international community”.²⁵⁵ Alvaro de Soto supports this assessment, and claims that there is evidence for this strategy from UN observers.²⁵⁶ De Soto also stresses that both the Bosnian Foreign Minister and the Bosnian Ambassador to the UN “played the victimhood card to the full. They were victims to a large extent, but they were not total innocents”.²⁵⁷

3.5. Conclusions

The Bosnia case study has allowed a number of important observations about the prevention of international crimes in the context of armed conflict. This concluding section highlights five lessons that are directly relevant with regards to refining, complementing, and problematizing the preliminary framework that was deduced in Chapter 2.

First, the international response to the emerging Yugoslavia crisis until September 1991 shows that there can be an interrelationship between social and situational crime prevention. International actors pursued a range of social crime prevention strategies, even though they did not use this terminology. For example, international actors provided political and financial support for Yugoslavia’s federal structures and institutions, promoted economic reforms, and sponsored the democratization process. However, the implementation of this socio-economic reform agenda failed to prevent the Serb/Bosnian Serb leaders from choosing a strategy of

²⁵⁴ Owen, *Balkan Odyssey*, 84.

²⁵⁵ Burg and Shoup, *The War in Bosnia and Herzegovina*, 13.

²⁵⁶ Personal Interview with Alvaro de Soto.

²⁵⁷ Personal Interview with Alvaro de Soto.

ethnic cleansing to realize the “Greater Serbia” project.²⁵⁸ Moreover, combined with Yugoslavia’s reputation as a civilised and tolerant European country, the social crime prevention efforts reinforced international policy-makers’ assumption that Yugoslavia was unlikely to become the scene of atrocity crimes - despite concrete early warning about the potential for systematic inter-ethnic violence. Social crime prevention thus contributed to the delay in situational crime prevention. Some observers also argue that the social crime prevention strategies inadvertently triggered systematic violence and increased the risk of atrocity crimes, requiring situational crime prevention to deal with these negative externalities.²⁵⁹

Second, the international preventive engagement that commenced in September 1991 reveals a range of tools that international actors consider appropriate for operationalizing the situational prevention of international crimes. At the 11th hour, international actors realized that long-term socio-economic reform was not a sufficient safeguard against the imminent risk of inter-ethnic violence in Bosnia. Thus, they started to adopt situational crime prevention strategies that directly targeted the crime situation, the potential perpetrators, and the potential victims. Some of the tools adopted were novel and almost unprecedented at the time. International actors tried to reduce the permissiveness of the crime situation by imposing an arms embargo, managing the armed conflict, signalling international scrutiny, and communicating relevant international norms. At the same time, international actors tried to change the cost-benefit analysis of the potential perpetrators by imposing sanctions (though not against specific individuals), threatening individual criminal accountability for atrocity crimes, and authorising the use of air power. Finally, international actors tried to reduce the vulnerability of the potential victims by

²⁵⁸ Cigar, *Genocide in Bosnia*, 63.

²⁵⁹ Woodward, *Balkan Tragedy*, 15.

deploying UN peacekeepers, imposing a no-fly zone, establishing six safe areas, and supplying the Bosnian Muslims with weapons for self-defence. However, this package of situational crime prevention tools largely failed to prevent and mitigate the Serb campaign of ethnic cleansing, as well as the atrocities committed by Bosnian Croat forces. Yet it shows that international actors took the prevention of international crimes more seriously than is commonly assumed.

Third, the Bosnia case reveals that the situational prevention of international crimes faces some unique challenges if it takes place in the context of armed conflict. If atrocity risk arises during an armed conflict, altering this enabling context through conflict management presents itself as a plausible international crime prevention strategy. However, the Bosnia case shows that conflict management strategies can undermine parallel efforts to deter potential perpetrators and protect potential victims – and *vice versa*. This suggests that close attention needs to be paid to the way that different prevention tools are combined and sequenced. The prevention tools that international actors adopted to deter criminal masterminds and protect potential victims were coercive, partial, and intrusive in nature. Their logic pushed international actors towards supporting the potential victims (the Bosnian Muslims) at the expense of the potential perpetrators (the Bosnian Serbs/Serbs). For example, the sanctions specifically targeted Serbia and Montenegro. The threats of individual criminal accountability were mainly directed at Serb/Bosnian Serb leaders. The no-fly zone aimed at neutralizing the military advantage of the Bosnian Serbs. Bosnian Muslim cities were declared safe areas and UNPROFOR was charged with deterring Bosnian Serb attacks. The US proposal of “lift and strike” is probably the clearest example of a policy based on distinguishing between “good guys” and “bad guys”. These strategies clashed with the rather traditional conflict management efforts that sought to reduce

the permissiveness of the crime situation, e.g. through peace negotiations, humanitarian assistance, or an arms embargo. The conflict management strategies required the cooperation and consent of all parties, even-handedness and impartiality, as well as a certain amount of flexibility and willingness to negotiate with criminal masterminds. International actors that were strongly committed to the conflict management track always attributed blame equally. They treated criminal masterminds, like General Mladic or President Milosevic, with the same respect as the other actors in the Bosnia crisis.²⁶⁰

Fourth, the Bosnia case suggests that the situational prevention of international crimes requires specific capacities and conditions to succeed. Most importantly, the effectiveness of situational crime prevention tools seems to hinge on the capacity of international actors to establish credible and coercive enforcement regimes. Without this, the Bosnia case shows, potential perpetrators are unlikely to be deterred and constrained by sanctions, accountability threats, or air power, whilst potential victims are not protected by no-fly zones or safe areas. There is evidence that Bosnian Serb forces were deterrable by credible displays of military force.²⁶¹ As Malcolm stresses, “all the evidence suggests that, whenever a credible threat of force was made against the Serbs, the Serbs backed down”.²⁶² For instance, NORDBAT’s use of tanks in the safe area of Tuzla deterred Bosnian Serb attacks.²⁶³ Violations of the no-fly zone largely ceased once NATO launched “Operation Deny Flight”, which was authorised to use force. Similarly, the sanctions regime got more effective once NATO launched “Operation Maritime Guard”, which was authorised to use all

²⁶⁰ Finlan, *The Collapse of Yugoslavia*, 55.

²⁶¹ Personal Interview with Ambassador Robert Hunter; also McQueen, *Humanitarian Intervention and Safety Zones*, 78-79.

²⁶² Malcolm, ‘Impartiality and Ignorance’, 120.

²⁶³ Personal Interview with Ambassador Robert Hunter.

necessary measures to enforce the embargo. By contrast, the dual key arrangement turned NATO air support into an ineffective tool, and the failure to provide UNPROFOR with the military capacity to defend the safe areas led to the Srebrenica tragedy. Similarly, the lack of international judicial capacity, as well as the absence of a real track record of international criminal prosecutions, reduced the credibility of the accountability threats. Moreover, the political calculations of key actors were an obstacle to credible enforcement action. For example, the UK and France were reluctant to put their troops in harm's way and prioritised the less coercive mediation track.²⁶⁴ The UN Secretariat feared that coercive action against the Bosnian Serbs would undermine its posture of impartiality and jeopardize the accomplishment of more humanitarian objectives.²⁶⁵

Finally, the Bosnia case shows that unintended consequences and side-effects can emerge from efforts to prevent international crimes. In the Bosnia case, the international crime prevention efforts incentivised all parties to politicize and manipulate the international assessment about “victims” and “perpetrators”, which had some perverse consequences. In some instances, the parties have even committed acts of violence against their own people in order to be identified as “the victims” in need of protection. Besides causing civilian suffering, this turned the international crime prevention efforts into a highly contested and politicized exercise. Moreover, several of the mediation initiatives, which sought to manage the armed conflict with the aim of altering the enabling crime context, have inadvertently triggered violence or ratified ethnic cleansing. In short, the prevention of international crimes can be a controversial endeavour.

²⁶⁴ Gow, ‘Nervous Bunnies’, 27; McQueen, *Humanitarian Intervention and Safety Zones*, 78-79.

²⁶⁵ McQueen, *Humanitarian Intervention and Safety Zones*, 84.

4. Kenya and International Crime Prevention: Lessons from a Success

“The Kenya situation was the first instance in which the United Nations employed a responsibility to protect lens in shaping its response to an ongoing crisis”.

❖ Edward C. Luck, Former UN Special Adviser on the Responsibility to Protect¹

“African Genocide Averted”.

❖ Roger Cohen, Columnist for the New York Times²

On 27 December 2007, Kenyans turned out in record numbers to cast their ballots in the country's fourth multi-party election. Whilst over one hundred parties and nine presidential candidates were registered, the nation's eyes were firmly focused on the contest between two parties and their candidates. On the one side, there was the incumbent President, Mwai Kibaki, who was running for a second term as the candidate of the Party of National Unity (PNU). Kibaki, an ethnic Kikuyu from Central Province, was widely seen as a representative of Kenya's business elite.³ On the other side, there was the prominent opposition activist, Raila Odinga, who was the presidential candidate of the Orange Democratic Movement (ODM). Odinga, an ethnic Luo from Nyanza Province, strongly appealed to the poor and to Kenya's youth. ODM, moreover, took the form of a broader ethno-regional alliance, with a leadership structure that included prominent representatives from five different provinces and ethnic groups (the so-called Pentagon). Most opinion polls placed Odinga in the lead, but the

¹ Edward C. Luck, 'Preface', in E. Lindenmayer and J. L. Kaye, *A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya* (New York: International Peace Institute, 2009), iii.

² Roger Cohen, 'African Genocide Averted', *The New York Times*, 03/03/2008.

³ EU Election Observation Mission (EU EOM), *Final Report on Kenya: General Elections 27 December 2007*, April 2008, 8-9.

race was “too close to call”. Polling day proceeded peacefully and without major disruptions.⁴ The large number of international and domestic election observers was satisfied with the voting process. The first batches of voting results, as well as the national media coverage, reinforced the general expectation of an Odinga victory. By 29 December, however, Odinga’s lead had diminished and rumours about election rigging sparked riots in opposition strongholds. Next day’s announcement of a Kibaki victory triggered the most deadly and destructive inter-ethnic violence ever experienced in Kenya.⁵ The rapidly escalating violence threatened to transform Kenya from a bastion of stability into the scene of atrocity crimes. It was only through the decisive preventive interventions of international actors, as well as the constructive engagement of Kenyan civil society, that this worst-case scenario was averted. On 28 February 2008, after weeks of international mediation, Kibaki and Odinga eventually signed a power-sharing agreement that forestalled an escalation of the violence into atrocity crimes.

This chapter provides an in-depth study of the international crime prevention efforts during Kenya’s post-election crisis. There are several reasons why the Kenya case is well suited to further refine the framework developed in this thesis. First, as former UN Special Adviser on the Responsibility to Protect, Edward Luck, points out, the Kenya crisis was the first time that the UN consciously employed an “R2P lens” to frame its preventive engagement with a crisis.⁶ Whilst the invocation of R2P does not necessarily mean that the international engagement was devoid of strategic motivations and undertaken for purely humanitarian reasons, it does suggest that international actors consciously aimed at

⁴ EU EOM, *Final Report on Kenya*, 1. See also the Report of the Commonwealth Observers Group, *Kenya General Election: 27 December 2007*, Commonwealth Secretariat, 28.

⁵ Commission of Inquiry into Post-Election Violence (CIPEV), *Final Report*, 15 October 2008, vii.

⁶ See, Martin Griffiths and Kofi Annan, *The Prisoner of Peace: An Interview with Kofi Annan* (Geneva: Centre for Humanitarian Dialogue, 2008), 18; Luck, ‘Preface’, iii; Roger Cohen, ‘How Kofi Annan Rescued Kenya’, *New York Review of Books* vol. 55, no. 2 (2008), 52; Personal Interview with Gerry Bennett, *Political Affairs Officer, UN Department for Political Affairs; Coordination and Liaison Officer, AU Panel of Eminent African Personalities* (New York, 13/05/2013).

preventing atrocity crimes. International actors were particularly concerned about the potential for crimes against humanity and ethnic cleansing.⁷ Second, the international involvement in the Kenya crisis constitutes a positive case of international crime prevention. Once international actors recognized the risk of atrocity crimes, they very quickly designed policy strategies that successfully prevented this worst-case scenario. Moreover, international actors were able to do so without having to use military force. In contrast to the Bosnia case, therefore, the Kenya case is widely regarded as a “success story” of international crime prevention.⁸ Third, the Kenya case illuminates the practice of international crime prevention in a peacetime context. Armed conflict was not part of the situational context in the Kenya crisis; nor does Kenya have a history of armed conflict.

In this chapter, it will be argued that the international response to atrocity risk in Kenya generates a series of important insights into the practice of international crime prevention. First, the Kenya case supports the observation that there can be an interrelationship between social and situational crime prevention. In Kenya, the substantial international investment into social crime prevention reinforced the already widely held assumption that the country was an extremely unlikely candidate for atrocity crimes. This contributed to delaying the adoption of situational crime prevention strategies. However, Kenya also shows that social crime prevention measures can help to provide a social infrastructure that enhances the effectiveness of situational crime prevention strategies.

⁷ See, Luck, ‘Preface’, iii; Jendayi Frazer, ‘Ethnic Cleansing in Kenya’, US State Department, 31 January 2008; Griffiths and Annan, *The Prisoner of Peace*, 4, 18.

⁸ See, for example, Human Rights Watch (HRW), *Ballots to Bullets: Organized Political Violence and Kenya’s Crisis of Governance*, vol. 20, no. 1(A), March 2008, 67. For more critical voices on this position see, Serena Sharma, ‘The 2007-08 Post-Election Crisis in Kenya: A Success Story for RtoP?’ in J. Welsh and S. Sharma (eds.), *The Responsibility to Prevent: Overcoming the Challenges of Mass Atrocity Prevention* (Oxford: Oxford University Press, forthcoming); and Noele Crossley, ‘A Model Case of R2P Prevention? Mediation in the Aftermath of Kenya’s 2007 Presidential Elections’, *Global Responsibility to Protect* vol. 5, no. 2 (2013).

Kenya's advanced social structures increased the crime reduction effects that were delivered by situational crime prevention.

Second, the Kenya case reveals further tools that international actors consider appropriate for operationalizing the situational prevention of international crimes. In particular, the Kenya case suggests that political mediation can be an important policy instrument for the prevention of atrocity crimes in a peacetime context. The AU-sponsored Annan mediation formed the centrepiece of the international crime prevention efforts. However, Annan's mediation process was strategically complemented through coercive instruments, such as international threats to cut development aid, to ensure individual criminal accountability for perpetrators of atrocity crimes, and to deny visas to those individuals involved in the ethnic violence. These coercive tools aimed at deterring the criminal masterminds and forcing them to negotiate in good faith.

Third, the Annan mediation shows that mediation might have to deviate significantly from conventional conflict prevention wisdom when it takes place in an international crimes context. Rather than merely facilitating dialogue based on the traditional principles of impartiality, consent, and minimal coercion, Annan's mediation process relied heavily on the coercive capacities of key international actors to ensure "consent" and impose a settlement on the parties. These coercive elements were crucial for the successful outcome of the mediation process. In the Kenya case, this coercive and intrusive *modus operandi* worked well, because international actors regarded the elites on both sides as "perpetrators" of systematic acts of violence.

Finally, the Kenya case exposes that even so-called "success stories" of international crime prevention can give rise to dilemmas and controversies. The late-stage nature of situational crime prevention makes it difficult to avert violence altogether. Kenya's post-election crisis still led to displacement, death, rape, and destruction. Moreover, the Kenya

case suggests that situational crime prevention strategies can clash with democratization efforts. The resolution of the Kenya crisis through a power-sharing agreement has been criticised for undermining democracy in Kenya by installing a bloated and ineffective government. It is also accused of having set the dangerous precedent that those defeated in democratic elections can organise violence to secure governing power.

This chapter proceeds in five steps. The next section analyses the international engagement with Kenya before the general election at the end of December 2007. The second part then provides an in-depth examination of the situational crime prevention efforts during Kenya's post-election crisis. Drawing on that discussion, the third part infers conditions, capacities, and dispositions that are required for the situational prevention of international crimes. The fourth section examines side-effects and unintended consequences that emerged from efforts to prevent international crimes in Kenya. The chapter ends by summarising the key lessons that the Kenya case study generates with regards to the international crime prevention framework developed in this thesis.

4.1. Early Signs and Early Action

This case study begins by examining the international engagement with the situation in Kenya before the outbreak of ethnic violence in December 2007. The discussion shows that before December 2007, there was very little concern about atrocity crimes in Kenya. Whilst there were isolated warnings about the possibility of electoral violence, the vast majority of international actors saw Kenya as a poster child of African democracy and an anchor of peace in a troubled region. Kenya had the reputation of being the “anti-Somalia”.⁹ Moreover, international actors were actively involved in further strengthening Kenya's social prevention structures, including programmes for judiciary reform, police reform, land reform, the promotion of civil society, or the training of electoral monitors. In short, social crime

⁹ Cohen, ‘How Kofi Annan Rescued Kenya’, 51.

prevention was ubiquitous. This reinforced the already widely held assumption that Kenya was an extremely unlikely candidate for atrocity crimes, and thereby contributed to delaying the adoption of situational crime prevention strategies.

Even a cursory glance at Kenya's recent history reveals that the country is no stranger to election-related violence. Since Kenya's return to multi-party politics in 1991, elections have frequently been accompanied by ethnic clashes and displacement of populations.¹⁰ The first two multi-party elections in December 1992 and December 1997 were preceded by episodes of ethnic violence and forced displacement on a relatively large scale.¹¹ In both cases, former President Daniel arap Moi employed violence and displacement strategically to change voting patterns and keep opposition party voters from casting their ballots.¹² Violence was used as an instrument to win elections and secure political power in the new multi-party environment.¹³ Given that Kenyans traditionally vote along ethnic lines and believe that the presidency brings significant advantages for the President's ethnic group, there has always been a strong ethnic element to electoral violence.¹⁴ Thus, the potential for ethnic violence during a Kenyan election year was hardly a secret.

However, the trajectory of Kenya's democratic development seemed extremely promising. In the 2002 election, President Moi's chosen successor, Uhuru Kenyatta, was defeated by the multi-ethnic National Rainbow Coalition, led by Mwai Kibaki. Notably, neither the election campaign nor the transition of power triggered major episodes of violence. In 2005, moreover, President Kibaki produced another direct political contest by putting a new Draft Constitution to a public referendum. Kibaki's former ally, Raila Odinga,

¹⁰ CIPEV, *Final Report*, vii.

¹¹ David Leonard, 'The Political and Institutional Context of the 2007 Kenya Elections and Reforms Needed for the Future', *Journal of African Elections* vol. 8, no. 1 (2009), 75; International Federation for Human Rights (FIDH), *Massive Internal Displacement in Kenya Due to Politically Instigated Ethnic Clashes: Absence of Political and Humanitarian Responses*, no. 471/2 (2007), 5.

¹² This is argued by the Akiwumi Commission of Inquiry, which investigated clashes in Kenya since 1991.

¹³ CIPEV, *Final Report*, 26.

¹⁴ CIPEV, *Final Report*, 22-23.

organised a successful “no”-campaign, which led to the rejection of the government’s proposal. Once more, the political contest remained peaceful. “Both Kenyan and international monitors had praised the 2005 referendum,” David Throup notes, “suggesting that the country was making steady progress towards becoming a full-fledged democracy, one of the great successes of Africa’s so-called second independence”.¹⁵ Similarly, David Leonard explains that, “Kenya had been thought to have made the transition to stable democracy with its peaceful elections in 2002 and 2005”.¹⁶ “It was believed,” he continues, “that Kenya had now entered the ranks of mature democracies”.¹⁷

Moreover, Kenya was widely praised for its colourful and vibrant civil society. In 2004, for example, the Kenyan political activist, Wangari Maathai, was the first African woman to win the Nobel Peace Prize. Kenya had ratified most of the fundamental UN treaties on human rights. It was a party to the African Charter for Human and Peoples’ Rights. It had subjected itself to the jurisdictions of the African Court for Human Rights and the International Criminal Court, and in 2003 established an independent National Commission on Human Rights. Kenya had also won an international award for having one of the freest media in the world, and was the recipient of the 2007 UN public service award for improved transparency, accountability and responsiveness in the civil service.¹⁸ Kenya had also introduced free primary education. The country’s economic performance was equally encouraging, with annual economic growth rates between 5-7%.¹⁹

In addition, international efforts to address remaining grievances and strengthen Kenya’s societal resilience to atrocities were substantial, partly due to Kenya’s strategically

¹⁵ David Throup, ‘The Count’, *Journal of Eastern African Studies* vol. 2, no. 2 (2008), 292.

¹⁶ Leonard, ‘The Political and Institutional Context of the 2007 Kenya Elections’, 71.

¹⁷ Leonard, ‘The Political and Institutional Context of the 2007 Kenya Elections’, 87.

¹⁸ Kenya Joint Assistance Strategy 2007-2012, 7-8.

¹⁹ HRW, *Ballots to Bullets*, 11.

important role in the global war on terror.²⁰ UN-HABITAT was implementing programmes on land reform, urban sector reform, and slum upgrading. The UK and Sweden were promoting reforms of the judiciary and the police. Canada was sponsoring gender equality and civic education programmes. Germany was working to improve Kenya's water management. The US was funding initiatives for improving health care, in particular in relation to HIV/AIDS. The World Bank was promoting further reforms of the public service. UNDP, the US, and the Netherlands were also funding election assistance programmes and the training of domestic election observers. In short, social crime prevention was ubiquitous, though as typically the case, it was not explicitly referred to as such. This substantial international investment into Kenya's social crime prevention structures reinforced the assumption that Kenya was an extremely unlikely candidate for atrocity crimes.

This false sense of security was also reflected in the risk assessments of the world's early warning mechanisms for atrocity crimes. Established as a consequence of the failure to prevent atrocity crimes in the early 1990s, the various international watch lists collectively failed to ring the alarm bells on Kenya, as a short review reveals. First, the risk assessments by genocide scholar Barbara Harff failed to identify Kenya as a country of concern. Her risk assessment of May 2007 did not list Kenya as one of 32 countries at high to medium risk of mass atrocities,²¹ and her subsequent assessment in May 2008 also failed to include Kenya.²² Second, the Minority Rights Group International's (MRGI) risk assessment, "Peoples Under Threat", did not anticipate atrocity risk in Kenya either. The March 2007 assessment did not include Kenya amongst the top 60 countries of concern,²³ whilst the March 2008 assessment put Kenya on position 54. MRGI noted explicitly that the "inter-ethnic violence which

²⁰ Leonard, 'The Political and Institutional Context of the 2007 Kenya Elections', 88.

²¹ Harff's 2007 risk assessment is available at: <http://www.gpanet.org/content/barbara-harffs-risk-assessments>.

²² Harff's 2008 risk assessment is available at: http://www.gpanet.org/webfm_send/9.

²³ The MRGI's 2007 risk assessment is available at: <http://www.minorityrights.org/1000/state-of-the-worlds-minorities/state-of-the-worlds-minorities-2007.html>.

commenced in Kenya following disputed results in the December presidential election was not widely anticipated”.²⁴ Third, the International Crisis Group’s (ICG) early warning list, “Crisis Watch”, did not include Kenya until 2 January 2008, when the post-election violence was already underway. Throughout 2007, ICG had not anticipated atrocity risk in Kenya.²⁵ Finally, Swisspeace’s early warning programme, “FAST International”, also failed to identify Kenya as a country of concern.²⁶ Swisspeace focused on 25 countries, including Burundi, Rwanda, Somalia, and the DRC, but it did not consider Kenya to be a country in need of monitoring.

What is more, there was no early warning on Kenya within the UN system. The UN Office of the Special Adviser on the Prevention of Genocide (OSAPG) was created in 2004 to act as an early warning mechanism to the UN system. OSAPG failed, however, to anticipate atrocity crimes in Kenya. The first UN Special Adviser on the Prevention of Genocide, Juan Mendez, was appointed on a part-time basis in August 2004.²⁷ Mendez admits that, “in March 2007 Kenya was not on the radar of OSAPG”.²⁸ At the time, OSAPG had a list with eight countries that were under on-going watch, but Kenya was not one of them.²⁹ After Mendez stepped down in March 2007, the Special Adviser position was vacant for a few months. His successor, Francis Deng, was only appointed in August 2007. At the time of the Kenya crisis, OSAPG was still in transition and not yet fully operational.³⁰ Similarly, the UN Department of Political Affairs (DPA), especially the Africa I Division that

²⁴ See, Minority Rights Group International, *State of the World’s Minorities 2008*, 46.

²⁵ ICG’s risk assessment is available at: <http://www.crisisgroup.org/en/publication-type/crisiswatch/crisiswatch-database.aspx?CountryIDs={539D35EE-AD35-4FFF-8FA0-97892C533AF3}&page=1>.

²⁶ “Fast International” was operational from 1998 to 2008, see: <http://www.swisspeace.ch/etc/archive/previous-projects/fast-international.html>.

²⁷ With two staff: Ekkehard Strauss (Human Rights Adviser) and Andres Salazar Van Epp (Political Adviser).

²⁸ Personal Interview with Juan Mendez, *UN Special Adviser for the Prevention of Genocide, 2004-2007* (Oxford, 24/07/2013).

²⁹ Personal Interview with Juan Mendez.

³⁰ Personal Interview with Castro Wesamba, *Political Affairs Officer, OSAPG, 2008-present* (New York, 16/04/2013).

covers East Africa, did not have Kenya on the agenda.³¹ In 2007, DPA's focus in East Africa was on Somalia and Sudan. The UN Under-Secretary-General for Political Affairs, B. Lynn Pascoe, did visit Kenya in 2007, but only to attend talks about Somalia.³² "Due to resource restrictions," a senior UN-DPA official explains, "the focus of DPA is on fire-fighting".³³ And Kenya was not considered to be a country in need of a fire brigade. According to the UN official: "In the formal UN system nobody was ringing the alarm bells on Kenya – the violence came as a huge surprise to many people".³⁴ Another UN-DPA staff member similarly admits that atrocity risk in Kenya was not anticipated. "There had been violence with all of Kenya's elections," he argues. "The common assumption was that if there is violence it would be along those lines, maybe a little bit worse, because of what was at stake. The intensity of the violence, however, caught everyone by surprise".³⁵

In much the same way, key governments failed to anticipate the atrocity risk in Kenya. The US government did not predict the eruption of large-scale ethnic violence in Kenya. "Kenya was not perceived as a major potential crisis," the former US Assistant Secretary of State for African Affairs, Jendayi Frazer, reveals, "at least not on the scale that we are talking about. There was no expectation of systematic violence. Maybe rioting in Kibera, but nothing like we saw".³⁶ Frazer further explains: "we had confidence in the Electoral Commissioner. The communication with the US Embassy in Kenya was normal during the pre-election phase. We did not do anything differently".³⁷ This positive impression was shared by the Dutch government, whose Embassy in Nairobi is one of the biggest

³¹ Personal Interview with Roselyn Akombe, *Senior Political Affairs Officer, UN Department of Political Affairs, 2005-present* (New York, 18/04/2013).

³² Personal Interview with Roselyn Akombe; see also UN Press Release, 'Secretary-General Dispatches Senior UN Official to Horn of Africa', 4 June 2007, <http://www.un.org/sg/statements/?nid=2599>.

³³ Personal Interview with Roselyn Akombe.

³⁴ Personal Interview with Roselyn Akombe.

³⁵ Personal Interview with Gerry Bennett.

³⁶ Personal Interview with Jendayi Frazer, *US Assistant Secretary of State for African Affairs, 2005-2009* (Washington D.C., 22/04/2013).

³⁷ Personal Interview with Jendayi Frazer.

representations and has substantial analytical capacity.³⁸ Martijn Dadema, who then served at the Embassy, explains:

We knew that stuff could happen, as there had been violence in context of previous elections. But still, there was not much concern before the violence actually happened. In October, there was an EU Coordination meeting and there was no contingency planning whatsoever. The whole atmosphere was not concerned. Nobody expected that the violence would be like that.³⁹

The Dutch Ambassador to Kenya, Laetitia Van Den Assum, was even planning to go on holidays the day after the elections.⁴⁰ “There was no expectation that post-election violence would happen,” she explains. “I’m not just speaking for the Dutch government and the international community, but also for the Kenyans”.⁴¹ Kibaki had successfully managed to portray himself as a gentlemen and everyone was expecting a smooth transition in case of an opposition victory.⁴²

Much of the political commentary on Kenya reinforced such optimistic assessments. In March 2007, for example, the Africa specialist Joel D. Barkan claimed that, “Kenya is today one of the most democratic countries in Africa ... Kenya’s principal partners should applaud the country for what it has achieved compared to its neighbours ... the United States should encourage Kenyans to stay the course”.⁴³

The widespread optimism regarding Kenya’s democratic transformation was only marginally tarnished by few isolated warnings about the potential for electoral violence. The earliest warning was issued by the African Peer Review Mechanism (APRM) in its 2006 review of Kenya, though the assessment was confusingly ambivalent. On the one hand, the APRM praised Kenya as an “island of peace within a troubled region” and stressed that “compared to its neighbours, who are often plagued by civil unrest and insurrections, Kenya

³⁸ Personal Interview with Ambassador Laetitia Van Den Assum, *Dutch Ambassador to Kenya, 2006-2011* (London, 29/10/2013).

³⁹ Personal Interview with Martijn Dadema, *Deputy Permanent Representative to UNEP and UN-HABITAT, Embassy of the Netherland in Kenya, 2007-2010* (New York, 19/04/2013).

⁴⁰ Personal Interview with Martijn Dadema.

⁴¹ Personal Interview with Ambassador Laetitia Van Den Assum.

⁴² Personal Interview with Ambassador Laetitia Van Den Assum.

⁴³ Barkan, ‘Kenya: More Than Half Full!’.

is a bastion of stability”.⁴⁴ The assessment highlighted that Kenya is a regular contributor to UN peacekeeping operations, an active peace mediator for regional conflicts, the host to many refugees, and the base of several international organizations.⁴⁵ Furthermore, it applauded Kenya for guaranteeing the full enjoyment of civil and political rights, press freedom and open political debate, a vibrant civil society, and a strong women’s lobby.⁴⁶ According to the APRM, Kenyan political practices are “well worthy of emulation by other countries in Africa”.⁴⁷

On the other hand, however, the APRM noted that Kenya is a deeply divided society in which the politicisation of ethnicity could lead to internal conflict.⁴⁸ It stressed that Kenya exhibited risk factors for civil conflict, such as ethnic divisions, polarised political debate, occasional violence, socio-economic disparities, and corruption.⁴⁹ The APRM also expressed concern about incitement to ethnic violence in the mass media, resembling “the role of FM stations in the build up to the Rwanda genocide”.⁵⁰ It highlighted the need to address such factors in the immediate future to avoid the fate of the former Yugoslavia and Rwanda.⁵¹

In April 2007, moreover, the International Federation for Human Rights (FIDH) warned about the potential for ethnic clashes and internal displacement in the lead-up to the 2007 elections.⁵² FIDH noted that there were already around 380.000 IDPs in Kenya, placing Kenya at the 7th rank in Africa in terms of IDP numbers, largely attributable to violence during past election campaigns.⁵³ FIDH added that at least 30.000 people had already been

⁴⁴ African Peer Review Mechanism (APRM), *Country Review Report on Kenya*, May 2006, 39, 63.

⁴⁵ APRM, *Country Review Report on Kenya*, 39-40.

⁴⁶ APRM, *Country Review Report on Kenya*, 56, 57, 59, 82.

⁴⁷ APRM, *Country Review Report on Kenya*, 82.

⁴⁸ APRM, *Country Review Report on Kenya*, 62-63.

⁴⁹ APRM, *Country Review Report on Kenya*.

⁵⁰ APRM, *Country Review Report on Kenya*, 66, 79.

⁵¹ APRM, *Country Review Report on Kenya*, 66, 241.

⁵² FIDH, *Massive Internal Displacement in Kenya*, 6.

⁵³ FIDH, *Massive Internal Displacement in Kenya* 5, 9.

displaced and 60 killed during the 2007 campaign.⁵⁴ It called on the Kenyan government to adopt strategies for the prevention of violence and displacement, such as fighting impunity and dealing with the problem of small arms.⁵⁵

In December 2007, the tight election race slightly increased concern about election-related violence. Alerted by the human rights abuses during previous election campaigns, the Kenyan National Commission on Human Rights (KNCHR) had launched an election-monitoring project. In its December 2007 report, the KNCHR reported that 70 people were killed and over 2.000 families displaced since July 2007.⁵⁶ It also warned that an increase of hate messages and incitement to violence could further escalate the situation.⁵⁷ Moreover, the KNCHR revealed that a government vehicle assigned to the Assistant Minister for Water, Raphael Wanjala, had been found with weapons, such as machetes, bows and arrows, and Somali swords.⁵⁸ On 18 December, Amnesty International (AI) also warned about electoral violence and noted an increase in human rights violations.⁵⁹ AI called on the Kenyan authorities to take preventive steps.

However, these few warnings did not have much of an impact. Despite awareness about remaining grievances, such as land issues, corruption, and a culture of impunity, the vast majority of international actors did not anticipate major violence in context of the 2007 elections.⁶⁰ The advance signals were simply not strong enough, and international risk assessments were largely positive.⁶¹ The last episodes of electoral violence had occurred ten

⁵⁴ FIDH, *Massive Internal Displacement in Kenya*, 24.

⁵⁵ FIDH, *Massive Internal Displacement in Kenya*, 5, 25.

⁵⁶ Kenya National Commission on Human Rights (KNCHR), 'Still Behaving Badly', Second Periodic Report of the Election-Monitoring Project, December 2007, 5-6.

⁵⁷ KNCHR, 'Still Behaving Badly', 9-11.

⁵⁸ KNCHR, 'Still Behaving Badly', 7.

⁵⁹ Amnesty International (AI), 'Kenya: Amnesty International Calls on the Kenyan Government, Election Candidates and Political Parties to Respect and Protect Human Rights', *AI Index: AFR 32/011/2007*, 18/12/2007.

⁶⁰ Sebastien Babaud and James Ndung'u, *Early Warning and Conflict Prevention by the EU: Learning Lessons from the 2008 Post-Election Violence in Kenya*, Initiative for Peacebuilding (2012), 12.

⁶¹ Personal Interview with Ambassador Laetitia Van Den Assum.

years ago, elections in 2002 and 2005 proceeded peacefully, and Kenya had made impressive progress in terms of democratization. Moreover, international investment into social crime prevention was substantial, which reinforced the overly optimistic assessments that were made of the situation in Kenya. As the Secretary-General of the Kenyan Red Cross, Abbas Gullet, put it after the outbreak of the violence: “no-one imagined the worst-case scenario we seem to be having now”.⁶² Even commentators that stress that electoral violence should have been anticipated, acknowledge that the intensity of the violence was unprecedented.⁶³

4.2. The International Preventive Engagement

The analysis in this section examines how international actors operationalized the situational prevention of international crimes after the outbreak of post-election violence at the very end of December 2007. Deeply shocked by the ferocity of the post-election violence, international actors, as well as Kenyan civil society actors, very quickly assessed that the increasingly systematic violence had the potential to escalate into atrocity crimes. Worried that a country as strategically important as Kenya might suddenly meet the same fate as its notorious neighbours Rwanda, Somalia, or Sudan, international actors quickly designed situational crime prevention strategies to avert this worst-case scenario.⁶⁴ An AU-sponsored mediation process, led by former UN Secretary-General Kofi Annan, formed the centrepiece of the international preventive engagement. However, it should not be overlooked that Annan’s efforts were preceded by other mediation initiatives and complemented by a range of coercive prevention measures, such as threats of aid cuts, threats of visa denials and asset freezes, threats of individual criminal accountability, and the deployment of fact-finding missions. It was the combination of a skilfully conducted mediation process with credible

⁶² *IRIN*, ‘Kenya: Post-poll Violence a National Disaster, Says Red Cross’, 01/01/2008.

⁶³ David Anderson and Emma Lochery, ‘Violence and Exodus in Kenya’s Rift Valley, 2008: Predictable and Preventable?’, *Journal of Eastern African Studies* vol. 2, no. 2 (2008), 328.

⁶⁴ Kenya had long been the East African anchor of stability, an important transportation hub, and a key Western ally in the war on terror.

coercive threats by key international actors that forced Kenya's political leaders to take steps to end the systematic violence and enter into a power-sharing arrangement. As is common with successful instances of preventive action, it is impossible to know with absolute certainty what exactly was prevented in Kenya. For many observers, however, the successful resolution of the Kenya crisis was the "avoidance of another genocide on African soil".⁶⁵

4.2.1. Concerned Citizens for Peace

On 29 December, shortly after polling day, rumours that the government had rigged the elections with the assistance of the Electoral Commission of Kenya triggered first riots in opposition strongholds.⁶⁶ The next day, as President Kibaki was declared the election winner and hastily sworn in for a second term, inter-ethnic violence spread throughout Kenya.⁶⁷ "By the time that Kibaki finished his inaugural address," Throup remarks, "plumes of smoke were already beginning to appear over Kibera and Mukuru, and violence had begun in Kisumu and Kisii".⁶⁸ According to ICG, "hundreds were killed in less than 24 hours. Houses and shops were set ablaze. Thousands began fleeing".⁶⁹ The hotspots of the initial violence were Nairobi's slums, Kisumu (Nyanza Province), Eldoret (Rift Valley), and Mombasa (Coast Province). Much of the violence was systematically directed against ethnic Kikuyus, who were generally assumed to be Kibaki supporters. In Nairobi's slums, Luo gangs started to kill Kikuyu men, rape Kikuyu women, and set fire to Kikuyu shops and houses. At least 50 people were killed in these anti-Kikuyu attacks.⁷⁰ Kikuyu gangs retaliated by beheading and

⁶⁵ Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya* (New York: International Peace Institute, 2009), 2.

⁶⁶ HRW, *Ballots to Bullets*, 4, 35; Throup, 'The Count', 295.

⁶⁷ HRW, *Ballots to Bullets*, 23.

⁶⁸ Throup, 'The Count', 298.

⁶⁹ International Crisis Group (ICG), *Kenya in Crisis*, Africa Report No. 137, 21/02/2008, 9.

⁷⁰ Michelle Osborn, 'Fuelling the Flames: Rumour and Politics in Kibera', *Journal of Eastern African Studies* vol. 2, no. 2 (2008), 322.

mutilating Luo and Luhya residents. On 31 December, Nairobi's police collected the bodies of 38 Luo men that had been forcibly circumcised and left bleeding to death.⁷¹

Deeply shocked by the magnitude and strong ethnic undertones of the violence, Kenyan civil society actors were the first ones to respond. On 31 December, the Kenya National Commission on Human Rights organised a press conference in which it publicly called for an immediate return to peace, condemned politicians for inciting ethnic animosities, and criticised media outlets for disseminating inflammatory and inaccurate information.⁷² The very same day, five prominent members of Kenyan civil society launched the Concerned Citizens for Peace (CCP) initiative, aimed at "stopping the violence and death of innocent Kenyans".⁷³ CCP took the form of an inclusive grassroots process that convened on a daily basis at 8am at the Serena Hotel in Nairobi. Organised in different Working Committees, this bottom-up mediation effort tried to engage and exert pressure on key strategic actors on the domestic level, such as religious leaders, the business community, members of the media, youth leaders, as well as politicians and diplomats. For example, CCP members met with ethno-vernacular FM radio stations that were spreading hate messages; they engaged business leaders to put pressure on the country's leaders; they mobilised religious leaders and the Kenyan churches; and they advised university vice-chancellors on how to prevent the outbreak of violence at universities. This continuous domestic pressure on prominent Kenyans at different levels played an important role throughout the crisis.⁷⁴

Immediately, the CCP initiative established a productive partnership with the media. It was

⁷¹ ICG, *Kenya in Crisis*, 9.

⁷² Throup, 'The Count', 300.

⁷³ The five activists were Ambassador Bethuel Kiplagat, General (retired) Daniel Opande, General (retired) Lazaro Sumbeiywo, Dekha Ibrahim Abdi, and George Wachira. See, George Wachira, *Citizens in Action: Making Peace in the Post-Election Crisis in Kenya 2008* (Nairobi: NPI-Africa, 2010), 51; Bethuel Kiplagat, 'Foreword', in Wachira, *Citizens in Action*, iv.

⁷⁴ On 9 January, the CCP presented a so-called "Citizens Agenda for Peace" with seven items: 1) Restoration of peace, 2) Building of trust and confidence between the political principals, 3) Election closure, 4) Formation of a government of national unity, 5) Agreement on reforms to precede the formation of a coalition government, 6) Setting the date for the next elections, and 7) Restore Kenya's international respectability. See, Wachira, *Citizens in Action*, 16-19.

no coincidence that on 2 January Kenya's main newspapers (Daily Nation, The Standard, and Business Daily) issued a nationwide call for peace by running with the same headline: "Save Our Beloved Nation".⁷⁵

4.2.2. International Scrutiny

Initially, however, ethnic violence continued to intensify despite these domestic calls for peace.⁷⁶ The worst episodes of violence occurred in the North Rift Valley around the towns of Eldoret, Molo, and Kericho, where ethnic Kalenjins systematically cleansed entire areas from Kikuyu families. Houses and shops were systematically burned so as to make displacement permanent.⁷⁷ This was part of a larger Kalenjin plan to chase away the Rift Valley's so-called "outsiders", who were derogatively referred to as "madoadoa" (spots or stains).⁷⁸ Evidence suggests that the violence was masterminded by Kalenjin politicians and businessmen, including senior ODM figures such as William Ruto (a member ODM's Pentagon) and Jackson Kibor.⁷⁹ These criminal masterminds had prepared for violence as a contingency plan should ODM lose the elections. They exerted direct influence over Kalenjin gangs, systematically incited anti-Kikuyu violence, organized transportation for Kalenjin warriors, provided them with weapons, and also paid them to carry out attacks.⁸⁰ On 1 January, one of the worst atrocities happened in Kiambaa, a settlement scheme south of Eldoret, where Kalenjin warriors set fire to a Pentecostal church in which numerous Kikuyus had sought refuge. About 30 people burned to death, including women, children, and disabled

⁷⁵ Wachira, *Citizens in Action*, 9, 29-31.

⁷⁶ ICG, *Kenya in Crisis*, 10.

⁷⁷ UN High Commissioner for Human Rights (UNHCHR), *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, 28 February 2008; also CIPEV, *Final Report*, 50.

⁷⁸ CIPEV, *Final Report*, 63, 92.

⁷⁹ HRW, *Ballots to Bullets*, 38-39; ICG, *Kenya in Crisis*, 13.

⁸⁰ ICG, *Kenya in Crisis*, 11; Anderson and Lochery, 'Violence and Exodus in Kenya's Rift Valley', 333; CIPEV, *Final Report*, 66.

persons.⁸¹ The church massacre shocked international observers as it reminded them of similar incidences during the Rwandan genocide.⁸² Another epicentre of violence was Kisumu, in the Luo heartland Nyanza Province, where anti-Kikuyu violence caused massive displacement. However, the Kikuyu-dominated police forces significantly contributed to escalating the violence by using excessive force against Luo protestors. The police forces were the only ones carrying fire arms and were responsible for a significant part of the post-election deaths.⁸³ The Nyanza general hospital confirmed that 44 people died of bullet wounds in early January.⁸⁴ Similarly, the police is blamed for having escalated violence in Kakamega, Bungoma, and Webuye in Western Province.⁸⁵ By 6 January, hundreds of people had lost their lives and over 200,000 persons were internally displaced.⁸⁶ As Roger Cohen puts it: “one dead, one thousand on the move”.⁸⁷

Alarmed by what they interpreted as “echoes of Rwanda and Cote d’Ivoire”⁸⁸, key states, such as the UK, the US, and Kenya’s neighbours, took immediate action to prevent the violence from escalating further. The first to exert pressure on the Kenyan leaders to stop the violence were senior British government officials. As Kenya’s former colonial power and its second largest provider of development assistance, the UK was a key player in the Kenya context. Already on 31 December, the British Prime Minister, Gordon Brown, personally called Kibaki and Odinga to urge them to stop the violence.⁸⁹ On New Year’s Day, the British Foreign Minister, David Miliband, and the International Development Secretary,

⁸¹ ICG, *Kenya in Crisis*, 11; HRW, *Ballots to Bullets*, 41.

⁸² ICG, *Kenya in Crisis*, 11. Massacres in churches were a frequent occurrence during the Rwandan genocide, such as the Gikondo Massacre in a Polish Pallotine Mission Church (9 April 1994) or the Nyarubuye Massacre in a Roman Catholic Church (15-16 April 1994).

⁸³ UNHCHR, *Report from OHCHR Fact-finding Mission to Kenya*, 11.

⁸⁴ ICG, *Kenya in Crisis*, 9.

⁸⁵ ICG, *Kenya in Crisis*, 10.

⁸⁶ Anderson and Lochery, ‘Violence and Exodus in Kenya’s Rift Valley’, 333.

⁸⁷ Cohen, ‘African Genocide Averted’.

⁸⁸ Lindenmayer and Kaye, *A Choice for Peace?*, 1.

⁸⁹ BBC, ‘Brown Appeals for Unity in Kenya’, 01/01/2008.

Douglas Alexander, issued a joint statement that strongly denounced the Eldoret church massacre:

We're appalled by and condemn the incidents of violence taking place in Kenya, including horrific killings in several Kenyan cities and towns. We call on all political leaders to urge restraint on their followers and avoid any actions that inflame tensions. We call on those involved, including government security forces and political party supporters, to behave responsibly, to act within the law, and to address their grievances peacefully.⁹⁰

On 3 January, Secretary Alexander went even one step further and warned that the UK might review its aid programme in light of the continuing violence.⁹¹ On 4 January, Foreign Minister Miliband explicitly called for power-sharing as the only possible solution and added that,

Kenya has suffered needlessly from terrible violence in the last week. Many hundreds have been killed and many thousands of lives have been seriously affected. Many more could be if Kenya's leaders don't work together ... This is an important moment and there are two paths ahead. By working together Kenya's political leaders rebuild the confidence of their own people and the international community. Fail to compromise and they forfeit confidence, goodwill and support. Kenya's leaders need to know the seriousness with which the international community views the situation and its shared determination to pursue all avenues to promote a peaceful way forward.⁹²

The following days, Miliband reiterated this warning several times and stressed that UK information indicated the commission of terrible atrocities and ethnic cleansing by both sides.⁹³

The UK's activism was even exceeded by the US. Since the 1960s, the US has cultivated a very close partnership with Kenya. The US has been Kenya's largest provider of development aid and more recently has closely cooperated with Kenya in the war on terror. The US' initial reaction to the contested election was to send a congratulatory note to Kibaki; but they quickly reconsidered this position. On 3 January, US Secretary of State, Condoleezza Rice, personally called Kibaki and Odinga to urge them to stop the violence.⁹⁴

⁹⁰ David Miliband and Douglas Alexander, 'Joint Statement from Foreign Secretary and International Development Secretary on Kenya', 01/01/2008.

⁹¹ *The Guardian*, 'World Leaders Call for Joint Settlement to End Conflict', 04/01/2008.

⁹² David Miliband, 'Kenya: Statement by Foreign Secretary', 04/01/2008.

⁹³ *Channel 4 News*, 'Miliband Interviewed About Kenya', 07/01/2008; see also *BBC News 24*, 'Miliband, Malloch-Brown Interviewed About Kenya', 07/01/2008.

⁹⁴ See, US State Department Press Briefing by Spokesman Sean McCormack, 03/01/2008. On 2 January, the US and the UK had already condemned the Eldoret church massacre and warned that they were closely

Furthermore, Secretary Rice asked her Assistant Secretary of State for African Affairs, Jendayi Frazer, to immediately travel to Kenya. Frazer arrived in Kenya on 4 January, as one of the first international actors on the ground. The objective of Frazer's visit was to bring an immediate end to the increasingly systematic ethnic violence.⁹⁵ "We were trying to calm things down by engaging with all the key players," Frazer explains. "The key was the political leaderships. We knew they could stop the violence, without a doubt".⁹⁶ Frazer knew Kibaki and Odinga personally, which helped her to be very frank in talks with these key protagonists. And her interventions bore fruit. Frazer managed to persuade Odinga to cancel a large protest rally, which could have further escalated the situation. Moreover, she successfully pressured Kibaki to engage in dialogue with the Odinga camp, which he was extremely reluctant to do.⁹⁷ Thus, even though Frazer's visit did not decisively stop the violence, her early interventions were important in terms of paving the way for dialogue.

4.2.3. Regional Mediation Initiatives

Already on 3 January, Nobel Peace Laureate Archbishop Desmond Tutu had visited Kenya. Tutu's visit was officially sponsored by the All Africa Conference of Churches, but had been facilitated by the CCP initiative.⁹⁸ Tutu met separately with Odinga and Kibaki, but could not convince the leaders to compromise their extremist positions. The PNU leaders, in particular, were not interested in any form of outside mediation.⁹⁹ Subsequently, on 7 January, the Africa Forum, an informal conflict prevention network of former African heads of state and government, organized a peace support mission to Kenya. The mission was led by the former President of Mozambique, Joaquim Chissano, and included three other former African heads

monitoring situations, see, 'Statement by United States and United Kingdom on Situation in Kenya', 02/01/2008.

⁹⁵ Personal Interview with Jendayi Frazer.

⁹⁶ Personal Interview with Jendayi Frazer.

⁹⁷ Personal Interview with Jendayi Frazer.

⁹⁸ Wachira, *Citizens in Action*, 20.

⁹⁹ Lindenmayer and Kaye, *A Choice for Peace?*, 5.

of state, namely Tanzania's Benjamin Mkapa, Botswana's Katumile Masire, and Zambia's Kenneth Kaunda. After getting a comprehensive briefing by the UN country team, the former African presidents held consultations with Kibaki, Odinga, and other stakeholders. They also met with Frazer and visited affected areas in Eldoret and Nairobi. The primary objective of the Africa Forum was to listen to the key protagonists and get an impression of the different views on the crisis. Their approach to mediation was very traditional and hands-off. This proved unsuccessful in dampening the violence or initiating dialogue.

Of much more relevance was an initiative of the Chairperson of the African Union (AU), President John Kufuor of Ghana. On 8 January, President Kufuor travelled to Kenya to lend his good offices to ending the ethnic violence. In his capacity as AU chairperson, Kufuor had already tried for days to get access to Kenya, but Kibaki was reluctant to welcome outside mediation and insisted that there was no crisis to manage. Only after mounting international pressure, particularly from the US and the UK, did Kibaki reluctantly agree to receive Kufuor. However, upon arrival Kufuor learned that Kibaki had just appointed Kalonzo Musyoka as Vice-President and also filled 16 ministerial positions in his cabinet – apparently trying to put in place a *fait accompli*. This provocation sparked new violence. Kufuor stayed for two days and held separate meetings with Kibaki and Odinga. He also met with Frazer. Whilst Kufuor's initiative failed to end the ethnic violence, it was important as it secured the agreement of both Kibaki and Odinga to participate in an AU-mandated mediation process. This concession required background pressure from key international actors. Frazer even threatened that there would be “no business as usual” until the crisis was resolved. According to the US Ambassador to Kenya, Michael Ranneberger, Frazer's

warning “rattled the cages of both sides in a helpful way, and highlighted to all our seriousness on the need for rapid progress”.¹⁰⁰

On 10 January, Kufuor announced that former UN Secretary-General Kofi Annan would act as the chief mediator of the so-called AU Panel of Eminent African Personalities (AU Panel). Behind the scenes, the UK and UN-DPA are said to have orchestrated the appointment of Annan.¹⁰¹ The AU Panel was complemented by the former President of Tanzania, Benjamin Mkapa, and the former First Lady of South Africa, Graca Machel. Annan, who was in Ghana at the time of his appointment, quickly headed back to Geneva to start planning the mediation, which was scheduled to be launched on 15 January. Given the systematic and ethnic nature of the violence, Annan has revealed that he felt the need to act very quickly to prevent Kenya from going down the path of Rwanda and Yugoslavia. “I saw the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people,” Annan has explained. “I knew that if the international community did not intervene, things would go hopelessly wrong”.¹⁰² However, an infection forced Annan to spend the next week in hospital. From his hospital bed, he continued to make phone calls to key strategic actors, such as the US, the UK, the EU, the UN, and Kenya’s neighbouring states.

4.2.4. Threats to Cut Development Assistance

Whilst Annan was tied to his hospital bed, however, the situation on the ground did not remain static. In mid-January, tensions began to escalate in Central Province, the Kikuyu heartland. The arrival of large numbers of displaced Kikuyus from the Rift Valley provoked a

¹⁰⁰ US Embassy Nairobi, ‘Kenya’s Electoral Crisis: Working for a Solution’, Cable: Confidential, 17/01/2008, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI200&q=violence>.

¹⁰¹ Personal Interview with Jendayi Frazer; Personal Interview with Roselyn Akombe. UN-DPA also looked at Olusegun Obasanjo as a potential mediator. The idea was dismissed, however, as Obasanjo was an old friend of Raila’s father. The UK had already started to lobby for Annan to be the mediator. Since the AU seemed content to appoint Annan, UN-DPA also supported that decision.

¹⁰² Kofi Annan, cited in Cohen, ‘How Kofi Annan Rescued Kenya’, 52.

counter-campaign to cleanse non-Kikuyus from Thika, Juja, Nyeri, and other towns in Central Province. Verbal warnings and leaflets started to circulate, giving non-Kikuyus a deadline for leaving.¹⁰³ One leaflet stated tellingly: “No more clashes but war. Luo, Luya, and Nandi we give you 24 hrs to pack and go – failure to that we need 200 heads b4 peace hold once more”.¹⁰⁴ Furthermore, ODM renewed its call for nationwide mass action, which threatened to further escalate the violence.

Key international actors responded to these ominous signs by threatening to cut their development assistance to Kenya. The US and the UK had already warned that there would be “no business as usual” should the ethnic violence continue. On 11 January, the Presidency of the EU also stressed that it was monitoring “the situation in Kenya very closely and with great concern ... all political parties in Kenya should recognise that it cannot be business as usual in Kenya until there is political compromise which leads to a lasting solution”.¹⁰⁵ On 15 January, fourteen of Kenya’s leading donors signed a joint statement warning that they were reviewing their development assistance in light of the crisis.¹⁰⁶ The Kenya Joint Assistance Strategy (KJAS), which provided the basis for the provision of development assistance by Kenya’s leading donors, explicitly tied the provision of aid to Kenya’s governance performance in the field of human rights and democracy.¹⁰⁷ Given the “low case”-performance of the Kenyan government, leading donors now threatened to actually scale down their assistance. On 17 January, the European Parliament passed a resolution in which it threatened to sanction Kenya by withholding budgetary support. The resolution condemned the tragic violence, called on “the leadership of the political parties to take responsibility for preventing further violence in the country”, and asked “for all further budgetary support to

¹⁰³ HRW, *Ballots to Bullets*, 55.

¹⁰⁴ HRW, *Ballots to Bullets*, 55.

¹⁰⁵ Presidency of the EU, ‘Statement of the Presidency of the EU on Kenya’, CL08-004EN, 11/01/2008.

¹⁰⁶ Jeffrey Gettleman, ‘Protests Bring New Violence in Kenya’, *The New York Times* 17/01/2008.

¹⁰⁷ Kenya Joint Assistance Strategy 2007-2012, 39.

the government of Kenya to be frozen until a political resolution to the present crisis has been achieved”.¹⁰⁸ On 19 January, the European Commissioner for Development and Humanitarian Aid, Louis Michel, flew to Kenya to personally deliver this message to Kibaki and Odinga. Michel made clear that all options are on the table. The World Bank and the African Development Bank followed suit, warning that they were considering cutting aid.¹⁰⁹ Similarly, the Australian Foreign Minister, Stephen Smith, stated that, “those inciting or engaging in violence should cease immediately ... In this current situation it cannot be ‘business-as-usual’ between Kenya’s leaders and the international community ... We will also limit contact with Kenyan ministers in Nairobi in any situation that may imply support. We will also be keeping under review our development assistance program provided to Kenya under our African regional program”.¹¹⁰

This collective scaling-down of development assistance was seen as an exceptional step that does not happen very often.¹¹¹ Whilst Kenya was not a country that really depended on foreign aid, the cutting of assistance had the potential to significantly affect the investment budget and key development projects. Kenya would still be able to spend on salary, but new investments would have become difficult.¹¹² The step also had symbolic importance, as it delivered the clear message that the international community was serious in its engagement. The discussion of sanctions caused noticeable unease in members of Kenya’s influential business community, which worried that this would have serious effects on their livelihoods. Kenya’s economy had already come to standstill. Flights to Kenya were empty and tourists

¹⁰⁸ European Parliament, ‘Resolution P6_TA (2008)0018’, 17/01/2008.

¹⁰⁹ ICG, *Kenya in Crisis*, 28.

¹¹⁰ Stephen Smith, ‘Media Release: Continuing Crisis in Kenya’, 30/01/2008, http://foreignminister.gov.au/releases/2008/fa-s021_08.html.

¹¹¹ Personal Interview with Ambassador Laetitia Van Den Assum.

¹¹² Personal Interview with Ambassador Laetitia Van Den Assum.

cancelled their trips en masse. This prompted Kenya's business community to increase pressure on the Kenyan leaders to negotiate in good faith.¹¹³

4.2.5. Beginning of the Annan Mediation: Handshake and Agenda

On 21 January, a second wave of systematic ethnic violence erupted in the Rift Valley around the towns of Nakuru, Naivasha, and Molo. This time, violence was mainly perpetrated by Kikuyu gangs, who brutally and systematically cleansed Kikuyu-dominated areas from Luos, Luhyas, Kalenjins, and other perceived ODM sympathisers.¹¹⁴ Roadblocks and ethnic checkpoints went up on the busy Nairobi-Nakuru highway and militias started to check ID cards in buses and taxis. Passengers belonging to the "wrong" ethnic group were brutally lynched.¹¹⁵ Moreover, the houses of non-Kikuyus were being marked. Human Rights Watch (HRW) reported that several atrocities were committed, including the burning of families in their homes, and that the violence was organized, financed, and commanded by Kikuyu elites.¹¹⁶ HRW argues that, "the Kikuyu militias who struck in late January were organized, paid, and directed by local leaders, businessmen, and, in some cases, PNU councillors and mobilizers".¹¹⁷ In support of their assessment, the human rights group gathered evidence that youth in Nakuru and Naivasha were offered "7.000 shillings for taking part and 10-15.000 for each Luo man beheaded".¹¹⁸ According to the Dutch Ambassador to Kenya, it was clear that senior members of the government were involved in planning the violence.¹¹⁹ Whilst preparations should have been made for Kofi Annan's arrival, State House was planning the revenge attacks.

¹¹³ Leonard, 'The Political and Institutional Context of the 2007 Kenya Elections', 74.

¹¹⁴ ICG, *Kenya in Crisis*, 10.

¹¹⁵ ICG, *Kenya in Crisis*, 13.

¹¹⁶ HRW, *Ballots to Bullets*, 43.

¹¹⁷ HRW, *Ballots to Bullets*, 45.

¹¹⁸ HRW, *Ballots to Bullets*, 45-48.

¹¹⁹ Personal Interview with Ambassador Laetitia Van Den Assum; HRW, *Ballots to Bullets*, 45.

It was in this tense atmosphere of steadily worsening violence that Annan finally launched the formal mediation process. On 22 January, approximately three weeks after the eruption of the post-election violence, Annan arrived in Kenya. Even more than before, the former UN Secretary-General felt the need to work very fast to contain the escalating crisis.¹²⁰ He was particularly concerned about the possible commission of crimes against humanity and ethnic cleansing.¹²¹ However, on the day of Annan's arrival, the Chairman of the East African Community, President Yoweri Museveni of Uganda, also travelled to Kenya. Kibaki postponed his scheduled meeting with Annan and met Museveni instead.¹²² Museveni's initiative was strongly encouraged by Kibaki, but equally strongly rejected by ODM. As a close friend of Kibaki, Museveni was seen as decidedly pro-PNU. He was one of the few African leaders to have officially congratulated Kibaki and there were rumours that he had helped to rig the election.¹²³ Annan also condemned Museveni's initiative, as he feared that it would undermine his mediation process. Annan worried that parallel mediation processes would create an incentive for "mediator shopping" and "diplomatic tourism".¹²⁴ From day one, therefore, Annan insisted that it was of paramount importance that the international community stand unitedly behind his mediation initiative.¹²⁵ He wanted to avoid providing the leaders with alternatives if a compromise did not please them. Annan made clear that only he would decide whom to ask for support and when.¹²⁶

On 23 January, Annan arranged meetings with Odinga and Kibaki. Annan's strategy was to get the two leaders to publicly shake hands, believing that this symbolic act would be

¹²⁰ Griffiths and Annan, *The Prisoner of Peace*, 18.

¹²¹ Luck, 'Preface', iii.

¹²² Lindenmayer and Kaye, *A Choice for Peace?*, 8.

¹²³ Osborn, 'Fuelling the Flames', 315-316.

¹²⁴ Lindenmayer and Kaye, *A Choice for Peace?*, 5; also Cohen, 'African Genocide Averted'.

¹²⁵ Personal Interview with Gerry Bennett.

¹²⁶ Annan also encouraged the members of the Africa Forum that were still in Nairobi to leave and only get involved if he explicitly requested them to do so.

an important public confidence-building measure.¹²⁷ As ordinary Kenyans look-up to their ethnic leaders, it was assumed that this signal would ease tensions.¹²⁸ And indeed, Annan managed to convince the leaders to publicly shake hands that very same day. This was generally seen as an important first step towards ending the violence. As US Ambassador Ranneberger remarked at the time, “the meeting sent a very positive signal to the Kenyan people that their leaders are finally engaging in dialogue, and this will have a major impact in dampening violence.”¹²⁹ For the rest of the week, Annan consulted with civil society organizations, church groups, and the business community. Many of the consultations were facilitated by the CCP initiative, which continued to be actively engaged.¹³⁰ It was part of Annan’s mediation strategy to keep civil society actors intimately involved in order to maintain domestic pressure on the parties. For this, Annan also relied on Kenya’s well-functioning media landscape. On the one hand, Annan used the media to spread optimism, keep the public informed on the progress of the talks, and create public confidence in the mediation process. On the other hand, he used the media to create public expectations and promote positions that the negotiation teams were not yet prepared to take.

Given the personal animosities between Kibaki and Odinga, Annan decided that the mediation talks should be conducted with two negotiation teams. The PNU nominated Martha Karua, Sam Onger, Mutula Kilonzo, and Moses Wetangula. The ODM nominated William Ruto, Musalia Mudavadi, Sally Kosgei, and James Orengo. Behind the scenes, the AU Panel’s support secretariat provided critical assistance and started working on a draft agenda for the talks. The Secretariat was staffed with a collection of people from different

¹²⁷ Griffiths and Annan, *The Prisoner of Peace*, 4.

¹²⁸ Personal Interview with Paul Dziatkowicz, *Deputy High Commissioner of Australia to Kenya, 2009-2012* (Geneva, 15/10/2013).

¹²⁹ US Embassy Nairobi, ‘Kibaki-Odinga Take First Step Toward Dialogue’, 25/01/2008, Cable: Confidential, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI281&q=violence>.

¹³⁰ The CCP also shared the details of its peace plan with Annan. See, Wachira, *Citizens in Action*, 16-19; Lindenmayer and Kaye, *A Choice for Peace?*, 8.

organizations. Most members, by some distance, came from the UN. Besides UNDP and UNON staff that was already on the ground, the UN Secretariat sent at least nine current or former staff members to support Annan.¹³¹ UN-DPA provided additional support from New York. Furthermore, three international mediation experts were brought in to contribute expertise on particular issues.¹³² In comparison, the AU's contribution of two officials seems less substantial.¹³³ In many ways, then, this was a UN mediation with an AU label.

On 29 January, the mediation talks were officially launched as the *Kenya National Dialogue and Reconciliation*. His unique international reputation enabled Annan to mobilise strong international support for his efforts. The pressure that started to mount on the Kenyan leaders was enormous. On 28 January, the EU Council threatened that “failure to find a sustainable and consensual political solution would affect donors’ engagement with Kenya and EU Kenya relations”. It further announced that it “will decide upon its next course of action towards the situation in Kenya, and Kenya’s political leaders, on the basis of their engagement with the Eminent Personalities initiative and progress towards the lasting political solution referred to above.”¹³⁴ On 30 January, US Ambassador Ranneberger sent a letter to the Kenyan Minister of Internal Security and ODM’s Secretary-General in which he requested information on those responsible for violence and expressed the US’ strong support for the Annan mediation.¹³⁵ In a statement that received a lot of attention, Jendayi Frazer said

¹³¹ The nine current or former staff members of the UN Secretariat that played a key assistance role were: Joao Honwana (UN-DPA, Director Africa I Division), Margaret Vogt (UN-DPA, Deputy-Director Africa I Division), Luc Ngowet (UN-DPA, Political Affairs Officer Africa I Division); Vladimir Zagorov (UN-DPA); Gerry Bennett (Office of the Secretary-General); Craig Jenness (UN-DPA, Director Electoral Division); Deryck Fritz (UN-DPA, Electoral Division); Michele Griffin (UN-DPA, Mediation Support Unit); Hans Corell (former UN Under Secretary-General for Legal Affairs).

¹³² The mediation experts were Martin Griffiths and Meredith Preston McGhie from the Centre for Humanitarian Dialogue, as well as Priscilla Hayner from the International Centre for Transitional Justice.

¹³³ The two AU delegates to the Panel were: Ambassador Nana Effah-Apenteng (former Permanent Representative of Ghana to UN and Special Adviser to AU Chairperson Kufuor) and Fiona Lortan.

¹³⁴ EU Council Conclusions on Kenya, 2846th External Relations Council meeting, CL08-011EN, 28/01/2008.

¹³⁵ US Embassy Nairobi, ‘Kenya’s Electoral Crisis: Ambassador’s Letter To Minister Of Security And ODM Secretary General Asking For Information On Post-election Violence’, 30/01/2008, *Cable: Unclassified*, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI331&q=violence>.

that there was “ethnic cleansing” happening in Kenya. “I listened to the victims and how they described the situation that they faced,” Frazer stated publicly. “They very clearly said that organised groups came to their homes, told them to pack their stuff and leave; if they resisted then they were attacked, some were obviously killed. That seems to me to be a situation where some groups are trying to get other ethnic groups to leave certain areas. That sounds like ethnic cleansing to me”.¹³⁶ On 31 January, the French Foreign Minister, Bernard Kouchner, expressed France’s strong support for the Annan mediation process and invoked R2P:

Both parties now face a historic responsibility: choose dialogue or bear responsibility for a political and human catastrophe. France reaffirms her confidence in Mr Kofi Annan to pursue his mediation. She also reaffirms her support for the efforts of the African Union and the United Nations Secretary-General to end the violence and find a political solution to the crisis. In the name of the responsibility to protect, it is urgent to help the people of Kenya. The United Nations Security Council must take up this question and act.¹³⁷

On 1 February, after attending the AU Summit in Addis Ababa, UN Secretary-General Ban Ki-moon travelled to Kenya to demonstrate his support for Annan’s mediation effort and urge the Kenyan leaders to stop the violence.¹³⁸ In a public address, Ban noted that, “the people and leaders of Kenya, particularly political leaders, have the duty, and the responsibility, to wake up and reverse this tragic path before it escalates into the horrors of mass killings and devastation we have witnessed in recent history”.¹³⁹

Against the backdrop of this unified international pressure, the two negotiation teams quickly agreed on an agenda. On 1 February, they presented a roadmap with four agenda items. *Agenda Item One* focused on immediate action to stop the violence and restore fundamental human rights and liberties. This was classified as an immediate priority to be resolved within 15 days. *Agenda Item Two* dealt with immediate measures to address the

¹³⁶ Frazer, ‘Ethnic Cleansing in Kenya’.

¹³⁷ Bernard Kouchner, ‘Situation in Kenya’, 31/01/2008, <http://www.ambafrance-uk.org/Bernard-Kouchner-calls-for>

¹³⁸ Lindenmayer and Kaye, *A Choice for Peace?*, 10-11.

¹³⁹ UN Secretary-General Ban Ki-moon, ‘Statement in Nairobi’, 1 February 2008.

humanitarian crisis, and to promote reconciliation, healing and restoration. This item was also to be resolved within 15 days. *Agenda Item Three* focused on the question of how to overcome the current political crisis. The parties agreed that this should also be resolved within 15 days. *Agenda Item Four*, finally, focused on addressing long-term issues believed to be underpinning the crisis, such as constitutional reform, land reform, poverty reduction, or fighting impunity. It was agreed that these long-term issues should be addressed within one year.

4.2.6. Annan Mediation: Agenda Item 1 and 2

Given the worrying trajectory of the violence on the ground, the Annan talks immediately turned to the issue of stopping the violence (Agenda Item One). Already on 1 February, the negotiation teams agreed on concrete steps in this regard. In a public statement, they called on the police to not use live bullets on unarmed civilians in unjustifiable circumstances, and urged the security forces to act with impartiality and without regard to ethnicity. Moreover, they called on the public to “refrain from irresponsible and provocative statements”, encouraged public figures to promote peace rather than violence, and urged victims to “avoid any acts of revenge or retaliation”. Finally, they warned that “impartial, effective and expeditious investigations on all cases of crime and police brutality and/or excessive use of force should be undertaken forthwith”, that “hate and threatening messages, leaflets, sms, or any other broadcasts of that nature must cease forthwith”, and that “all criminal activities, particularly those of a violent nature, should be prosecuted forthwith”.¹⁴⁰

After agreeing on these steps for stopping the violence, the focus of the talks immediately turned to addressing the grave humanitarian crisis (Agenda Item Two). On 4 February, the parties agreed to “assist and encourage displaced persons to go back to their

¹⁴⁰ Kenya National Dialogue and Reconciliation (KNDR), ‘Public Statement on Agenda Item One’, 01/02/2008.

homes or other areas and to have safe passage and security throughout”. They also promised to “provide adequate security and protection, particularly for vulnerable groups, including women and children in the camps”. This was an attempt to reverse the effects of ethnic cleansing. Finally, the parties agreed to establish a Truth, Justice and Reconciliation Commission (TJRC).¹⁴¹ Hence, the agenda items that were most directly related to the prevention of atrocity crimes were resolved within days. This seemed to have an effect, as ethnic violence started to subside markedly at the beginning of February. The political crisis was still not resolved, however.

4.2.7. Coercive Threats: Criminal Prosecution and Visa Restrictions

There was, however, another factor that contributed to dampening the ethnic violence. In parallel to the beginning of Annan’s formal mediation process, key international actors stepped up their engagement with the Kenya crisis by issuing concrete coercive threats, such as threats of visa restrictions and threats of individual criminal accountability. These coercive threats aimed at changing the behaviour of specific individuals that were suspected of masterminding the ethnic violence. Whilst international threats started to be issued towards the end of January, the US, the UN, and the ICC concretized their threats as the Annan mediation turned to the controversial issue of finding a political solution. These actions proceeded strategically, with Annan pulling the strings behind the scenes. Annan coordinated his activities with key Ambassadors on a daily basis, and the US even sent statements to Annan for approval.¹⁴² At strategic moments in his efforts, Annan asked key states to threaten Kenya’s leaders with consequences.¹⁴³ He hoped that this would deter potential perpetrators

¹⁴¹ KNDR, ‘Public Statement on Agenda Item Two’, 04/02/2008.

¹⁴² Cohen, ‘How Kofi Annan Rescued Kenya’, 52.

¹⁴³ Personal Interview with Beatrice Le Fraper du Hellen, *Legal Counsellor and Head of Human Rights Desk, Permanent Mission of France to the UN, 2010-present* (New York, 13/09/2013); Personal Interview with Martijn Dadema.

and mobilise support for his mediation process. Some have compared Annan's performance to that of a conductor.

4.2.7.1. Threats of Criminal Prosecution & Fact-Finding

One strategy to deter individuals suspected of involvement in the inter-ethnic violence was to threaten international or domestic criminal prosecutions. The credibility of such threats was to be enhanced through the deployment of international fact-finding missions. Thus, threats of individual criminal accountability and the deployment of fact-finding missions were complementary elements of the same strategy. The information and support provided by the fact-finding missions was seen as important for international criminal prosecutions.

On 21 January, the UN High Commissioner for Human Rights, Louise Arbour, threatened individuals with criminal accountability and called for an official investigation into the ethnic violence. "The killings have to be investigated expeditiously and impartially," Arbour argued, "and anyone found responsible for human rights abuses must be brought to justice. There must not be, in any case, impunity for what has occurred in Kenya the past few weeks. Any lasting peace in Kenya must be based on truth and accountability".¹⁴⁴ The very same day, the AU's Peace and Security Council not only expressed its strong support for the Annan Mediation, but also requested an "in-depth investigation into those violations with a view to identifying those responsible and bringing them to justice".¹⁴⁵ On 28 January, the EU Council noted that there could be no impunity and stressed the "need for all those involved in these violations to be held accountable". The EU Council also called for "an in-depth investigation with a view to identifying those responsible and bringing them to justice".¹⁴⁶

¹⁴⁴ UNHCHR, 'UN Human Rights Chief Condemns Violence in Kenya, Calls for Truth and Accountability', Press Release, 21/01/2008.

¹⁴⁵ AU Peace and Security Council, 'Press Statement', PSC/PR/BR(CIX), Addis Ababa, 21 January 2008.

¹⁴⁶ EU Council Conclusions on the Situation in Kenya, CL08-011EN, 2846th External Relations Council meeting, 28/01/2008.

The UN Office of the Special Adviser on the Prevention of Genocide (OSAPG) tried to add further credibility to the threats of individual criminal accountability for atrocity crimes. On 28 January, the UN Special Adviser for the Prevention of Genocide, Francis Deng, publicly called on the Kenyan leaders to stop inciting violence and to put an end to the “destructive cycle of attacks and revenge attacks”. “Political and community leaders may be held accountable for violations of international law committed at their instigation,” Deng threatened as part of his prevention efforts. “Leaders need to meet their responsibility to protect the civilian population and prevent the violence”.¹⁴⁷ Moreover, Deng determined that there was imminent danger of large-scale atrocities and even genocide in Kenya. After coordinating with Annan, he publicly announced that OSAPG would send an investigatory team to Kenyan with the aim of creating a deterrent effect on Kenya’s leaders.¹⁴⁸ The OSAPG team interviewed perpetrators and victims, and visited areas affected by violence. On the basis of their field research, the team sent a secret report back to New York, which warned that the violence was likely to get much worse if the crisis was not resolved quickly.¹⁴⁹

The International Criminal Court (ICC) further added to the threats of individual criminal accountability. On 5 February, the Office of the Prosecutor announced that the ICC had begun a preliminary examination of the situation in Kenya.¹⁵⁰ The statement warned that, “Kenya is a State Party to the Rome Statute. The OTP considers carefully all information relating to alleged crimes within its jurisdiction committed on the territory of States Parties or

¹⁴⁷ United Nations, ‘UN Genocide Adviser Urges End to Violence in Kenya, Sends Staffer There’, Press Release, 28/01/2008. OSAPG staffer Castro Wesamba confirms that the accountability threat was a conscious element of OSAPG’s prevention strategy.

¹⁴⁸ Personal Interview with Castro Wesamba.

¹⁴⁹ Personal Interview with Castro Wesamba.

¹⁵⁰ Prior to making a formal request to an ICC Trial Chamber for permission to conduct an investigation, the ICC Prosecutor conducts a “preliminary examination” of the “situation” in a country where crimes allegedly occurred. The OTP may decide to make the subject and nature of its preliminary examinations public. See, ICC Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’, 04/10/2010, The Hague, available at: http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf.

by nationals of State Parties, regardless of the individuals or group alleged to have committed the crime”.¹⁵¹ This standard statement was meant to act as a deterrent for individuals involved in the post-election violence.¹⁵² According to Karen Mosoti, Head of the ICC Office at the UN, “the statement tried to change the mind-set of the political leaders by showing them that inciting or commanding atrocities could led them to ICC. And with the ICC they can’t control the process”.¹⁵³ As Kenya is a state party to the Rome Statute, the ICC has jurisdiction over genocide, war crimes, and crimes against humanity on its territory. The threat of ICC involvement was again orchestrated by Annan, who was in regular contact with the Chief Prosecutor, Luis Moreno-Ocampo.¹⁵⁴

Also on 5 February, Louise Arbour announced that the Office of the High Commissioner for Human Rights (OHCHR) would dispatch a fact-finding mission to Kenya, mandated to “assess allegations of grave human rights violations committed in Kenya” and to make “recommendations on accountability mechanisms”.¹⁵⁵ The objective of the mission was to establish responsibility for grave human rights violations and contribute to holding the perpetrators accountable. It was hoped that this would contribute to averting an escalation of atrocities and prevent future ones. The fact-finding mission was dispatched the next day.

Finally, the UN Security Council got involved, calling for individuals responsible for the ethnic violence to be held criminally accountable. On 6 February, the SC issued a presidential statement on the situation in Kenya – requested by Annan.¹⁵⁶ The presidential statement deplored that “civilians continue to be killed, subjected to sexual and gender-based

¹⁵¹ International Criminal Court, ‘OTP Statement in Relation to Events in Kenya’, The Hague, 05/02/2008.

¹⁵² Personal Interview with Karen Mosoti, *Head of the Liaison Office of the ICC to the UN, 2007-present* (New York, 19/04/2013).

¹⁵³ Personal Interview with Karen Mosoti.

¹⁵⁴ Personal Interview with Francis M. Deng, *UN Special Adviser on the Prevention of Genocide, 2007-2012* (New York, 17/04/2013).

¹⁵⁵ UNHCHR, ‘UN Human Rights Office to Send Human Rights Fact-Finding Mission to Kenya’, Press Release, 05/02/2008.

¹⁵⁶ Personal Interview with Roselyn Akombe.

violence and displaced from their homes”. It expressed strong support for the Annan mediation and urged Kenya’s political leaders to immediately put an end to ethnically-motivated attacks and gross human rights violations. Importantly, the SC stressed the need to “avoid impunity” and to hold the perpetrators of atrocities accountable. It expressed its strong support for the investigative fact-finding missions, and asked to be “informed by the Secretary-General of their findings”. The SC’s involvement reflected a greater and more decisive involvement by the international community. Given that many African statesmen have respect of the SC’s powers, the involvement of the SC was seen as a promising instrument for affecting the behaviour of key individuals.¹⁵⁷

4.2.7.2. Threats of Visa Restrictions

A second strategy that international actors adopted to change the behaviour of the criminal masterminds was to threaten the imposition of visa restrictions and travel bans on individuals suspected of involvement in the violence. This strategy aimed at changing the calculus of Kenya’s leaders by effectively putting them “on probation”. Restricting access to certain countries was judged to be a potentially powerful tool, given the strong links that Kenya’s elites have with OECD countries. For many of the Kenyan leaders, it would have been disastrous, economically and personally, to become international pariahs.¹⁵⁸

On 1 February, the US Ambassador to Kenya, Michael Ranneberger, informed Kenyan leaders that the US would restrict visas of individuals identified as inciting, supporting, or perpetrating violence. Ranneberger warned that the US had already identified a number of individuals for inclusion in its visa lookout system.¹⁵⁹ “Given the personal, educational, and business relationships that most senior Kenyans have with the U.S.,”

¹⁵⁷ Personal Interview with Roselyn Akombe.

¹⁵⁸ ICG, *Kenya in Crisis*, 28.

¹⁵⁹ US Embassy Nairobi, ‘Kenya’s Electoral Crisis: Process of Dialogue Moves Slowly Forward’, 01/02/2008, *Cable: Confidential*, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI357&q=violence>.

Ranneberger reported to Washington, “this is a threat that has already registered an impact, given calls we have received from a number of individuals”.¹⁶⁰ On 5 February, the US Embassy in Nairobi followed up on its threat and sent personal letters to eight individuals, all of them Kenyan politicians and businessmen with links to ODM and PNU.¹⁶¹ The letters informed them that their visa status was under review, due to the suspicion that they are involved in the violence. The letters read as follows:

Dear (name):

This is to notify you that indications you may be involved in supporting, inciting, and perpetrating inter-ethnic violence in Kenya are relevant to your and your family’s eligibility for U.S. visas.

The U.S. Immigration and Nationality Act provides for the denial of visas to individuals for a variety of reasons. The U.S. Department of State reserves the right to make such a determination and reserves the right to suspend action on a visa application until such time that a determination of an individual’s visa eligibility can be made.

We request any and all information from you in writing detailing your efforts to promote an end to violence and the achievement of political and ethnic reconciliation in Kenya.

Sincerely yours,

Michael E. Ranneberger¹⁶²

The US State Department explained that the letters were supposed to put specific individuals on notice. “We’ve identified some individuals who we have reason to believe were involved in inciting violence in the aftermath of the election,” a State Department spokesperson said. “What these letters do is put them on notice that because of these suspicions, they are now having their visa status reviewed. And if, in fact, we can validate these claims to our satisfaction, their visas will be revoked if they currently possess U.S. visas. If not and they ever tried to apply for one, they would be prohibited from entering the

¹⁶⁰ US Embassy Nairobi, ‘Kenya’s Electoral Crisis: Process of Dialogue Moves Slowly Forward’.

¹⁶¹ US Embassy Nairobi, ‘Kenya: Linking Visas to Violence’. The eight individuals that received warning letters were selected by the US Embassy in Nairobi. They were: Richard Ngatia (businessman with PNU links suspected of funding Kikuyu youth groups engaged in violence); Njenga Karume (former minister with PNU ties suspected of having links to the Mungiki and other related criminal organizations); John Mututho (PNU MP for Naivasha suspected of funding Kikuyu youth engaged in ethnic violence); Joshua Kullei (businessman with ODM ties suspected of financing Kalenjin youth groups engaged in ethnic violence); Henry Kosgei (ODM MP for Tinderet suspected of supporting Kalenjin youth groups engaged in violence); William ole Ntimana, (ODM MP for Narok North, suspected of inciting inter-ethnic violence); Zakayo Cheruiyot (ODM MP for Kuresoi, suspected of inciting inter-ethnic violence); Kabando wa Kabando, (ODM MP for Mukurweini, suspected of organizing and inciting inter-ethnic violence).

¹⁶² US Embassy Nairobi, ‘Kenya: Linking Visas to Violence’, 05/02/2008, *Cable: Confidential*, <http://wikileaks.ch/cable/2008/02/08NAIROBI378.html>.

country”.¹⁶³ Furthermore, the State Department hinted that it was considering a range of other measures to deal with those responsible for systematically organizing ethnic violence.¹⁶⁴ The US Embassy in Nairobi simply explained: “We don’t give visas to criminals. Inciting violence is a criminal act”.¹⁶⁵ Ambassador Ranneberger announced that identical letters would be sent to additional individuals as warranted.¹⁶⁶ And indeed, on 8 February, the US sent out five additional letters, addressed to two former MPs (one associated with PNU and one associated with ODM) and three business leaders.¹⁶⁷ A US State Department spokesperson commented meaningfully: “we’re continuing to look at this issue, and I wouldn’t rule out the possibility that we’ll have some more letters of this kind”.¹⁶⁸

Other key Western countries, such as the UK, France, Canada, and Switzerland, followed the US’ example and also threatened to impose travel bans on individuals suspected of promoting violence or obstructing the Annan mediation.¹⁶⁹ The British Foreign Office warned: “We have in the past excluded Kenyan politicians and businessmen on the grounds of corruption. We have the ability to do so and nothing has been ruled out”.¹⁷⁰ The Canadian High Commissioner to Kenya, Ross Hynes, warned Kenyan politicians that Canada was very

¹⁶³ US State Department Press Briefing by Deputy Spokesman Tom Casey, 07/02/2008, <http://iipdigital.usembassy.gov/st/english/texttrans/2008/02/20080211172855eaifas0.1761743.html#axzz2e8KveEw4>.

¹⁶⁴ US State Department Press Briefing by Deputy Spokesman Tom Casey, 07/02/2008.

¹⁶⁵ *Free Republic*, ‘US, Britain, Canada Threaten Visa Bans on Kenyan Politicians’, 08/02/2008, <http://www.freerepublic.com/focus/f-news/1967191/posts>.

¹⁶⁶ US Embassy Nairobi, ‘Kenya: Linking Visas to Violence’.

¹⁶⁷ US Embassy Nairobi, ‘Kenya: More Visa Warning Letters Sent’, 08/02/2008, *Cable: Confidential*, <http://wikileaks.org/cable/2008/02/08NAIROBI420.html>.

¹⁶⁸ US State Department Press Briefing by Deputy Spokesman Tom Casey, 08/02/2008, <http://iipdigital.usembassy.gov/st/english/texttrans/2008/02/20080208174218xjsnommis0.3297235.html#axzz2e8KveEw4>.

¹⁶⁹ Xan Rice, ‘Rice joins Annan in Kenya to push rivals into real power-sharing deal’, *The Guardian*, 19/2/2008.

¹⁷⁰ *Free Republic*, ‘US, Britain, Canada Threaten Visa Bans for Kenyan Politicians’, 8/02/2008; see also Stephen Brown, ‘Donor Responses to the 2008 Kenyan Crisis: Finally Getting it Right?’, *Journal of Contemporary African Studies* vol. 27, no. 3 (2009), 397; On UK visa threat see also, *The Telegraph*, ‘Kenya Threat to British High Commissioner’, 14/02/2008, <http://www.telegraph.co.uk/news/worldnews/1578686/Kenya-threat-to-British-High-Commissioner.html>.

serious about visa denials.¹⁷¹ “The strong message I want to pass to the politicians is that the ban is real and will happen,” Hynes stated publicly. “It’s the Canadian legal system that individuals who subvert democracy and do not respect human rights are denied entry to the country”.¹⁷² The Swiss Embassy in Nairobi noted: “The mediation process is the only way out of the current political crisis. But should the talks fail, Switzerland will consider taking appropriate measures on those considered responsible for the collapse. Switzerland will restrict access to individuals responsible for the failure of the process, for subverting democracy in Kenya, or for promoting or engaging in acts of violence”.¹⁷³

4.2.8. Annan Mediation: Agenda Item 3

With the first two agenda items resolved and international pressure mounting, Annan’s mediation turned to resolving the political crisis (Agenda Item Three). Whilst systematic violence had diminished noticeably since early February, the situation remained extremely tense.¹⁷⁴ Ethnic communities were arming militia groups in preparation for a recurrence of violence. Elisabeth Lindenmayer and Josie Kaye argue that there was evidence of “community elders and gang leaders arming groups of young men in preparation for large-scale ‘contingency plans’ should the talks fail”.¹⁷⁵ Odinga openly admitted this scenario. “The moment it is announced that the talks collapsed, I am sure there will be an eruption countrywide,” he warned. “It will be chaos.” The Kibaki camp responded by accusing Odinga

¹⁷¹ *Free Republic*, ‘US, Britain, Canada Threaten Visa Bans for Kenyan Politicians’, 8/02/2008; see also Brown, ‘Donor Responses to the 2008 Kenyan Crisis’, 397.

¹⁷² Jibril Adan, ‘Kenya: MPs Banned from US’, *The Standard*, 07/02/2008.

¹⁷³ *NTV-Kenya*, ‘No More Swiss Rolls’, 13/02/2008, <http://www.youtube.com/watch?v=DK7CQGsJY6E>.

¹⁷⁴ US Embassy Nairobi, ‘Kenya: February 13 Sitrep’, 13/02/2008, *Cable: Unclassified*, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI477&q=violence>.

¹⁷⁵ Lindenmayer and Kaye, *A Choice for Peace?*, 16.

of inciting violence and destabilizing the country.¹⁷⁶ A leaked diplomatic cable by US Ambassador Ranneberger captures the difficult situation:

Behind the current quiet facade, there is trouble lurking in the shadows. Whether the genie of ethnic-based violence can be put back in the bottle or not clearly hinges on the outcome of the Kofi Annan-led peace talks, now at a pivotal moment. If a compromise is reached that is agreeable to the two sides and most of their followers, then we believe much of the impetus and support for organized violence will fade away. If not, however, then we should brace for a fresh round of violence that could dwarf January's unrest in its scope and ferocity ...there are daily rumours about the formation and arming of ethnic-based militias in different parts of the country. It remains very difficult to confirm rumours that militias are being organized, but where there is so much smoke, there is likely to be fire, and the logic behind this phenomenon is compelling: Should the Kofi Annan-mediated peace talks fail, all sides want to be ready for the violent aftermath.¹⁷⁷

It was clear, therefore, that as long as the political crisis was not resolved, a recurrence of ethnic violence was very likely. This made resolving Agenda Item Three crucial.

However, the negotiations on the political issues proved to be difficult and quickly turned into a "blame game". ODM, on the one hand, continued to accuse the government of having rigged the elections and stolen the presidency. PNU, on the other hand, maintained that Kibaki was the legitimate president, and that ODM was responsible for the post-election violence. As the talks lost momentum, Annan organized a retreat, hoping that a different environment might break the dangerous impasse. From 12 to 14 February, the talks were held at Kilaguni, Tsavo National Park. Annan's negotiation strategy was to turn the political questions into technical ones. He brought in two electoral experts from DPA's Electoral Division to explain the different options to the parties, i.e. re-count, re-tally, and re-run. The idea was to let the parties come to the conclusion that none of these options was really feasible and helpful, and that the only option was to share power.¹⁷⁸ To get movement on the issue of power-sharing, Annan brought in Gernot Erler, German Minister of State in the Federal Foreign Office, to explain the rationale and functioning of grand coalitions. By the

¹⁷⁶ Sheryl Gay Stolberg and Jeffrey Gettleman, 'Rice, in Nairobi, Offers Incentives to End Violence', *The New York Times*, 19/02/2008, <http://www.nytimes.com/2008/02/19/world/africa/19kenya.html>.

¹⁷⁷ US Embassy Nairobi, 'Kenya: Behind a Calm Façade, Hardliners Are Preparing for More Violence', 27/02/2008, *Cable: Secret*, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI574&q=violence>.

¹⁷⁸ Griffiths and Annan, *The Prisoner of Peace*, 9-11.

end of the retreat, the parties had indeed arrived at the conclusion that a re-count, a re-tally, or a re-run would significantly delay the resolution of the current crisis and increase existing tensions. It was decided that an Independent Review Committee should investigate all aspects of the 2007 Presidential election.¹⁷⁹ Whilst this was an important step forward, agreement on the issue of power-sharing was still not in sight.

At this pivotal moment, international actors once more increased the pressure on the parties. Before leaving for a six day Africa Tour (15 to 21 February),¹⁸⁰ US President George W. Bush announced that Secretary Rice would travel to Kenya to support Annan's mediation and to deliver a message directly to the Kenyan leaders: there must be no violence and there ought to be a power-sharing agreement.¹⁸¹ On 16 February, US Assistant Secretary of State Frazer warned publicly:

I think that both have heard our message that it will not be business as usual, and that any individuals who are seen as obstructing the effort towards a peace process, a power sharing agreement, as the President stated, will be subject to possible further sanction by the U.S. We've talked about a visa ban, but there are other issues and ways in which we can try to encourage them to negotiate in good faith.¹⁸²

On 18 February, whilst Bush's Africa Tour made stop in Tanzania, Secretary Rice travelled to Kenya. She stated clearly:

I frankly believe that the time for a political settlement was yesterday. It is really important that this be done and done urgently ... I want to be very clear: The current stalemate and the circumstance are not going to permit business as usual with the United States or, I think, with any other part of the international community ... I do think that we've made clear that we would not countenance people who have been involved in violence against innocent people.¹⁸³

According to participants in Rice's meetings with Kibaki and Odinga, she was exceptionally clear that, "the international community is not ready to allow the violence in Kenya to spiral

¹⁷⁹ KNDR, 'Public Statement on Agenda Item Three', 14/02/2008.

¹⁸⁰ Rice and Frazer accompanied Bush. They stopped in Benin, Tanzania, Rwanda, Ghana, and Liberia.

¹⁸¹ The White House, 'President and Mrs. Bush Discuss Africa Policy, Trip to Africa', Press Release, 14/02/2008, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080214.html>.

¹⁸² The White House, 'Press Briefing by Ambassador Jendayi Frazer', 16/02/2008, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080216-5.html>.

¹⁸³ US Secretary of State Condoleezza Rice, 'Remarks on the Situation in Kenya', 18/02/2008, <http://iipdigital.usembassy.gov/st/english/texttrans/2008/02/20080219131215eafas0.6300775.html#axzz2e8KveEw4>.

out of control and risk a Rwanda-like situation in which hundreds of thousands were killed in 100 days.”¹⁸⁴

Despite these interventions, however, the power-sharing negotiations continued to be difficult. Disagreement revolved around the nature of the position of a Prime Minister. The ODM demanded the creation of a position of Prime Minister with executive powers and substantial responsibilities. Moreover, it wanted the position of Prime Minister to be established by constitutional amendment. The PNU, however, rejected any constitutional amendment and was only willing to accept a Prime Minister with non-executive powers. This was unacceptable to ODM. In particular, the regular clashes between the two sides’ hardliners, Martha Karua (PNU) and William Ruto (ODM), were threatening to derail the talks. Things seemed to unravel. Ranneberger informed Washington that, “we continue to receive reports that individuals on both sides are involved in arming supporters in anticipation of bloodshed should the talks not succeed ... Additional pressure from us and others may be needed in the coming days to help Annan and the parties bring the process to closure. Tensions remain high and if the talks drag on it will be hard for Annan to maintain his positive public posture that progress continues to be made.”¹⁸⁵ The UN Under-Secretary-General for Humanitarian Affairs, John Holmes, warned the Security Council that a recurrence of systematic violence could dwarf anything seen so far.¹⁸⁶

On 26 February, a frustrated Annan decided to suspend the talks. He stated publicly that the government side was putting up obstacles - behaviour which he called unacceptable. He also denounced ODM’s plans for mass action as irresponsible. Annan announced that he would now negotiate directly with the two leaders. This step was strongly backed by key

¹⁸⁴ Bernard Namunane, ‘Kenya: Revealed - Secrets of Talks With Rice’, *The Daily Nation*, 24/02/2008, <http://allafrica.com/stories/200802240002.html>.

¹⁸⁵ US Embassy Nairobi, ‘Kenya Talks - Key Issues Still Unresolved’, 25/02/2008, *Cable: Confidential*, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI545&q=violence>.

¹⁸⁶ UN Security Council, 5845th Meeting, S/PV.5845, 25 February 2008.

international actors, who put additional pressure on the Kenyan leaders by making clear that whoever was responsible for failure will pay a high price.¹⁸⁷ Senior US officials issued ambiguous statements announcing action without specifying what that might be.¹⁸⁸ On 26 February, Secretary Rice noted meaningfully,

I am disappointed by the failure of leadership necessary to resolve all the remaining issues. There can be no excuse for further delay. There can also be no excuse for violence, and those responsible must be held accountable ... I want to emphasize that the future of our relationship with both sides and their legitimacy hinges on their cooperation to achieve this political solution. In that regard, we are exploring a wide range of possible actions. We will draw our own conclusions about who is responsible for lack of progress and take necessary steps.¹⁸⁹

The State Department added: “we are looking at a range of possible actions ... based on what conclusions we draw about who is responsible for lack of progress. We have sent letters to a number of Kenyans explaining to them that they may have their visa privileges revoked. That, I would look at as a first step and certainly, if there is not an agreement between the parties, then I expect you will see other measures taken as well”.¹⁹⁰

On 28 February, Annan arranged a meeting with Kibaki and Odinga. He also asked the President of Tanzania, Jakaya Kikwete, to participate in the meeting to share his experience of governing together with a strong Prime Minister. The meeting took five hours and both leaders eventually insisted on bringing in their lawyers. In the end, however, the marathon session resulted in the signing of a power-sharing agreement, the so-called *Agreement on the Principles of Partnership of the Coalition Government*. The agreement provided for the creation of a position of Prime Minister charged with coordinating and supervising the execution of government functions. It was agreed that the position would be written into the constitution through the National Accord and Reconciliation Act. This

¹⁸⁷ Griffiths and Annan, *The Prisoner of Peace*, 14.

¹⁸⁸ Lindenmayer and Kaye, *A Choice for Peace?*, 11.

¹⁸⁹ US Secretary of State Condoleezza Rice, ‘Statement on Kenya’s Political Solution’, 26/02/2008, <http://iipdigital.usembassy.gov/st/english/texttrans/2008/02/20080226161600xjsnommis6.792849e-02.html#axzz2e8KveEw4>.

¹⁹⁰ US State Department Press Briefing by Deputy Spokesman Tom Casey, 26/02/2008, <http://iipdigital.usembassy.gov/st/english/texttrans/2008/02/20080226165049xjsnommis0.7162897.html#axzz2e8KveEw4>.

power-sharing arrangement resolved Agenda Item Three,¹⁹¹ which prevented a recurrence of systematic ethnic violence in Kenya. Whilst few regarded power-sharing as an ideal outcome, it was assessed to be the most viable alternative to atrocity crimes. “The power-sharing agreement helped to ensure that there was no resumption of violence,” a senior UN-DPA official concludes. “Things would have gone over the edge had there not been a mediation process”.¹⁹² The Danish Ambassador to Kenya, Bo Jensen, suggests that, “the alternative to power-sharing was civil war and ethnic cleansing”.¹⁹³

4.2.9. Annan Mediation: Agenda Item Four

The signing of the power-sharing agreement was a high-point and created a very positive atmosphere in Kenya.¹⁹⁴ On 2 March, with Kenya pulled back from the brink of atrocity crimes, Annan left the country and Oluyemi Adeniji, former Foreign Minister of Nigeria, was appointed to chair the discussions on the long-term issues (Agenda Item Four).¹⁹⁵

On 4 March, the negotiation teams agreed on four important documents. First, they decided to establish a Commission of Inquiry on Post-Election Violence (CIPEV) to be chaired by Justice Philip Waki. The CIPEV reinforced the threat of individual criminal accountability for those involved in atrocity crimes. It was charged with investigating the facts surrounding gross human rights violations and recommending “measures with regard to bringing to justice those persons responsible for criminal acts”. The CIPEV’s mandate mentioned explicitly that it aimed “to prevent any repetition of similar deeds and, in general, to eradicate impunity”.¹⁹⁶ This underlined that accountability was seen as an integral part of

¹⁹¹ KNDR ‘Agreement on the Principles of Partnership of the Coalition Government’, 28/02/2008.

¹⁹² Personal Interview with Gerry Bennett. A very similar assessment of the situation on the ground was made by the Dutch Ambassador to Kenya, see, Personal Interview with Ambassador Laetitia Van Den Assum.

¹⁹³ Ambassador Bo Jensen, cited in Brown, ‘Donor Responses to the 2008 Kenyan Crisis’, 400.

¹⁹⁴ Personal Interview with Priscilla Hayner, Co-Founder of the *International Centre for Transitional Justice and Adviser to the AU Panel of Eminent African Personalities* (Geneva, 15/10/2013).

¹⁹⁵ Lindenmayer and Kaye, *A Choice for Peace?*, 22.

¹⁹⁶ KNDR, ‘Commission of Inquiry on Post-Election Violence’, 04/03/2008.

the solution to the Kenya crisis. Interestingly, both sides were keen to establish a mechanism for ensuring criminal accountability. “Both sides saw themselves primarily as victims and wanted justice,” Priscilla Hayner explains.¹⁹⁷ Second, a Truth, Justice and Reconciliation Commission (TJRC) was established as a more long-term justice mechanism. The TJRC’s mandate clearly stated that, “no blanket amnesties will be provided for past crimes. Individual amnesties may be recommended by the Commission in exchange for the full truth, provided that serious international crimes (crimes against humanity, war crimes or genocide) are not amnestied, nor persons who bear the greatest responsibility for crimes covered by the Commission”.¹⁹⁸ This provision was in accordance with the UN’s policy on amnesties with regards to international crimes. Third, the parties formally established the Independent Review Committee to investigate all aspects of the 2007 election.¹⁹⁹ Finally, the parties agreed on parameters for a constitutional review process.

On 17 April, a 41 member strong power-sharing cabinet was sworn in, with Kibaki as President and Odinga as Prime Minister. On 23 May the parties agreed on an implementation framework for the long-term issues that were identified as having contributed to the post-election crisis. The framework set out strategies for constitutional reform, land reform, poverty eradication, equitable development, reduction of unemployment, and the fight against impunity. The timeframe for these different initiatives ranged from 12 months to 3 years.²⁰⁰ More immediately, the Kenyan authorities launched operations to demobilise armed gangs and stop them from rearming.

Since March 2008, hardly any ethnic violence occurred in Kenya, which vindicates Roger Cohen’s assessment that the decisive international action was a key factor in averting

¹⁹⁷ Personal Interview with Priscilla Hayner.

¹⁹⁸ KNDR, ‘Truth, Justice and Reconciliation Commission’, 04/03/2008.

¹⁹⁹ KNDR, ‘Independent Review Committee’, 04/03/2008.

²⁰⁰ KNDR, ‘Statement of Principles on Long-term Issues and Solutions’, 23/05/2008.

atrocities crimes.²⁰¹ This was achieved through the combination of a skilfully conducted mediation process with well-designed, credible, and coercive threats against key individuals. The fact that international actors did not have to use military force was important for the evolution of R2P, as it showed that R2P can be acted upon without military intervention. It also contributed to Kenya being widely regarded as a “success story” of international crime prevention.

Table 4.1.: Situational Crime Prevention Tools Used in Kenya

Start Date	Tool	Source	Objective
31/12/07	Domestic Mediation Process	- Civil Society	- Stop the ethnic violence - Engage community leaders - Put pressure on Kenya’s elites
31/12/07	International Scrutiny	- Key States	- Deter Kenya’s political leaders
03/01/08	International Mediation Initiatives	- AACC - US - Africa Forum - AU	- Listen to the views of all the parties - Facilitate dialogue between the parties
11/01/08	Threats to Cut Development Aid	- Key States - EU - World Bank	- Deter Kenya’s elites - Send message that international community will take action
21/01/08	Threats of Individual Criminal Accountability	- OHCHR - OSAPG - UNSC - AU - ICC - EU	- Deter criminal masterminds - De-legitimize criminal masterminds
22/01/08	Annan Mediation I - <i>Beginning of Mediation</i>	- AU/UN	- Stop the escalating ethnic violence - Force Kenya’s political leaders to engage in dialogue
04/02/08	Annan Mediation II - <i>Agenda Items 1 and 2</i>	- AU/UN	- Stop the escalating ethnic violence - Reverse ethnic cleansing - Provide humanitarian aid
05/02/08	Visa Restrictions & Travel Bans	- Key States	- Deter criminal masterminds
06/02/08	Fact-Finding Missions	- OSAPG - OHCHR	- Deter criminal masterminds - Gather evidence about atrocities - Enhance credibility of accountability threats
28/02/08	Annan Mediation III - <i>Agenda Item 3</i>	- AU/UN	- Resolve the political crisis - Prevent recurrence of ethnic violence
04/03/08	Annan Mediation IV - <i>Agenda Item 4</i>	- AU/UN	- Address long-term grievances - Prevent recurrence of ethnic violence

²⁰¹ KNDR Monitoring Project, ‘Report on the Status of Implementation of Agenda Item 1’, January 2009.

4.3. Conditions, Capacities, and Dispositions

Based on the detailed analysis of the successful situational crime prevention efforts in the Kenya crisis, this section infers conditions, capacities, and dispositions that are required for the prevention of international crimes. The discussion shows that the social infrastructure of the target state can facilitate situational crime prevention strategies, for example, the presence of civil society and independent media, the existence of an internationally-minded business class, or the ratification of the Rome Statute of the ICC. Moreover, it seems to be important that international actors have the analytic capacity to quickly identify criminal masterminds and possess the domestic legal mechanisms to deny visas for international criminals. In particular, however, the Kenya case shows that political mediation might have to be more coercive and intrusive than is commonly assumed, which requires the unified backing and support of the international community.

4.3.1. Political Mediation

At the centre of the situational crime prevention efforts in Kenya was Annan's mediation process. Political mediation is traditionally seen as an instrument for the prevention and resolution of armed conflict. During Kenya's post-election crisis, however, armed conflict did not provide the situational context; nor did Kenya have an historical record of organized armed actors that would have suggested the likelihood of armed conflict.²⁰² Thus, rather than seeking to prevent or manage armed conflict, the Annan mediation aimed at preventing atrocity crimes.²⁰³ Annan was primarily concerned about inter-communal violence and crimes against humanity.²⁰⁴ At least four lessons can be inferred from this use of political mediation as an international crime prevention strategy.

²⁰² Personal Interview with Castro Wesamba.

²⁰³ Personal Interview with Castro Wesamba.

²⁰⁴ Personal Interview with Castro Wesamba.

First, an important condition for the success of Annan's mediation was that his ability to rally unified international support for his process. Before Annan arrived in Kenya, several mediators had already tried to initiate dialogue, e.g. Archbishop Tutu, US Assistant Secretary of State Frazer, the Africa Forum, AU Chairperson Kufuor, and Uganda's President Museveni. These mediation efforts proceeded in parallel, which created confusion and chaos.²⁰⁵ It led to a lack of clarity and cohesion, and provided the parties with opportunities for "forum shopping". When Annan arrived in Kenya, therefore, he immediately insisted that there could only be one mediation process. Annan wanted to avoid "mediator shopping" and to deprive the negotiation teams of the chance to pursue alternative tracks. The unified international support enabled Annan to exert pressure on the parties without losing their participation. There simply was no alternative process. Thus, the Kenya case suggests that the ability to unite key international actors behind a single mediation process is an important precondition for the effective use of political mediation.

Second, Annan's mediation was highly unconventional in that it relied heavily on international coercion to force Kenya's leaders to end the systematic violence and negotiate in good faith. The early mediation initiatives in Kenya had followed traditional mediation wisdom, approaching it as "a process whereby a third party assists two or more parties with their consent, to prevent, manage, or resolve a conflict by helping them to develop mutually acceptable agreements".²⁰⁶ They saw mediation as "a voluntary endeavour in which the consent of the parties is critical", and where a good mediator promotes "exchange through listening and dialogue".²⁰⁷ In stark contrast to this traditional approach, Annan organized significant amounts of international coercion in support of his mediation process. At strategic moments, he instructed key international actors to threaten Kenya's leaders with real

²⁰⁵ Personal Interview with Gerry Bennett.

²⁰⁶ United Nations Guidance for Effective Mediation, September 2012, 4-5.

²⁰⁷ United Nations Guidance for Effective Mediation, September 2012, 4-5.

consequences should they not end the violence and engage in meaningful dialogue. Annan consciously targeted Kenya's elites, which he identified as the masterminds behind the organized violence. "The leaders did have a lot of influence over their supporters," a UN-DPA official explains. "They influenced whether there would be violence or not. When the leaders called on their supporters to stop the violence it did have an impact".²⁰⁸ The Kalenjin leader William Ruto, for example, is said to have exerted significant influence over the violence in the Rift Valley. As Kalenjin elders and youth claimed: "If Ruto says stop, it will stop".²⁰⁹ Annan's conscious decision to use international coercion to shape elite behaviour infuriated those involved in the process. Martha Karua, the key PNU negotiator, complained bitterly that Annan imposed an outcome on the parties. Annan was even given the nickname "dictator". "It is clear that the belligerents did *not* sit down and agree the power-sharing deal the resilient Annan had brokered," Githongo argues, "at the end of the day, it was only tremendous international pressure that *forced* the two sides to come to an agreement".²¹⁰ Thus, Annan's capacity and willingness to organize significant levels of coercion was a key condition for success, distinguishing his process from the traditional mediation processes. Figure 4.1. illustrates the important role of coercion in Annan's mediation process.

Third, Annan's coercive mode of mediation was facilitated by the international assessment that both sides are "perpetrators" of horrific acts of violence. Neither the Odinga camp nor the Kibaki camp were seen as "victims" (though most EU countries shared Odinga's assessment that the elections were rigged). According to Frazer, the US position was that both camps promoted extremist positions and provoked violence. ODM, on the one hand, was trying to destabilize the country by calling for mass action and inciting systematic violence. PNU, on the other hand, was trying to put in place a *fait accompli* by obstructing

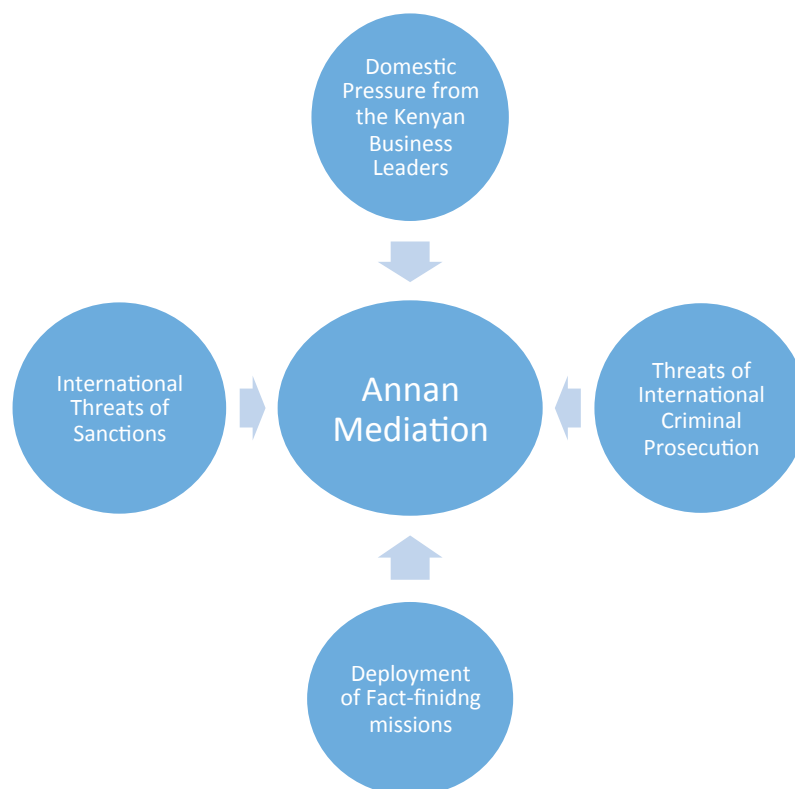
²⁰⁸ Personal Interview with Gerry Bennett.

²⁰⁹ HRW, *Ballots to Bullets*, 39.

²¹⁰ Githongo, 'Kenya – Riding the Tiger', 360.

the mediation talks and using the state apparatus to brutally quell protests.²¹¹ This constellation facilitated a coercive *modus operandi* and helped to circumvent a common dilemma of traditional mediation in atrocity situations, namely, convincing the “victim” to give in to demands of the “perpetrator” - a dilemma that was observable in the Bosnia case. In Kenya, however, the fact that both parties were responsible for ethnic violence made it significantly easier to coercively impose a compromise solution in form of a power-sharing agreement.

Figure 4.1.: Coercive Aspects in Kenya’s Mediation Process



Finally, it was an important success condition that Annan’s top-down mediation, which focused on Kenya’s elites, was complemented by a domestic grassroots mediation process that engaged local communities. The domestic, bottom-up mediation process

²¹¹ Personal Interview with Jendayi Frazer.

revolved around the CCP initiative and Kenyan human rights groups. These civil society actors directly engaged and mobilised key domestic actors, such as media outlets, religious groups, or the business community. Lindenmayer and Kaye argue that this provided “a vital link between an elite-level process and the grass-roots realities”, and helped “to avoid disenchantment or dangerous disconnect”.²¹² Moreover, Annan was in frequent contact with Kenyan civil society actors and asked them at strategically important moments to increase the domestic pressure on Kenya’s leaders. In short, the CCP initiative and other Kenyan civil society actors provided a social infrastructure that facilitated Annan’s elite-level process.²¹³

4.3.2. Visa Restrictions

Another situational crime prevention strategy that was closely linked to the Annan mediation was to threaten individuals involved in ethnic violence with visa restrictions for them and their families. The US sent thirteen letters to specific individuals. Other OECD countries announced similar visa reviews. The relatively successful use of threats of visa restrictions was facilitated by at least three conditions and capacities.

First, threatening visa restrictions was effective in the Kenya context, because Kenya’s politicians and businessmen had strong personal links to the OECD world and relied heavily on access to Western countries and international markets. Thus, Kenya’s elites had a strong personal interest in maintaining a good international reputation and the ability to travel freely. Under these circumstances, the threats of visa restrictions were effective in pushing Kenya’s leaders to abandon extremist positions in the mediation process and to call on their supporters to end the violence.²¹⁴ As a staff member of the AU Panel recalls: “The threat of travel bans did have a big impact, because the negotiators and their allies had children studying in the US and other Western countries. It would really have affected them

²¹² Lindenmayer and Kaye, *A Choice for Peace?*, 23.

²¹³ Lindenmayer and Kaye, *A Choice for Peace?*, 23.

²¹⁴ ICG, *Kenya in Crisis*, 28.

personally, if that had been implemented. Some started to adopt a very defensive kind of posture. One could see this with Martha Karua. It certainly helped the mediation process succeed”.²¹⁵ Similarly, US Ambassador Ranneberger noted in a confidential cable to Washington that the US letters made a constructive impact:

While we have not revealed the names of those who received letters, word has leaked from some of the recipients and has generated real concern among others that they could be next. I have had a number of calls from key people on both sides suddenly asking to see me urgently to discuss their ideas for promoting peace and stopping violence ... We also understand that President Kibaki is asking questions about letters that have gone to some people on his side because he is concerned that such people may have been involved in violent activities. (One of the letters went to the owner of a club where a meeting took place to raise funds. Martha Karua and other key people on the government side took part in the meeting and were concerned to learn that we knew about it. The money, ostensibly for humanitarian assistance, was channelled to Kikuyu youth gangs operating in the Naivasha area).²¹⁶

Second, it was important that international actors had the capacity to relatively quickly identify the key targets, namely, the criminal masterminds and their enabling support networks. Given Kenya’s regional and strategic importance, many countries maintained rather big and well-staffed embassies in Nairobi, which possessed the necessary intelligence capacity to quickly identify target individuals. The US Embassy was crucial in this regard and played a lead role on the ground. Some of the European embassies, such as the Dutch Embassy, possessed substantial capacity as well.²¹⁷

Third, another international capacity that enhanced the effectiveness of the visa restriction threats was that many of the key countries had the necessary domestic legal authority to deny visas to individuals involved in international crimes. For example, the *US Immigration and Nationality Act* allows the denial of visas to individuals for a variety of reasons, including implication in international crimes. Canada and the UK have similar legislation, which enhanced the credibility of the visa threats.

²¹⁵ Personal Interview with Gerry Bennett.

²¹⁶ US Embassy in Nairobi, ‘Kenya’s Electoral Crisis: Nearing The Crunch Point’, 08/02/2008, Cable: Confidential, <http://cablegatesearch.wikileaks.org/cable.php?id=08NAIROBI419&q=violence>. Interestingly, there are rumours that Martha Karua has actually been denied a visa to attend a meeting in Geneva, Switzerland, in early March 2008. Moreover, it is rumoured that Karua’s son, who was studying in Australia, was denied re-entry into Australia.

²¹⁷ Personal Interview with Ambassador Laetitia Van Den Assum.

4.3.3. Individual Criminal Accountability and Fact-Finding

Finally, international actors tried to change the calculus of the criminal masterminds by threatening to hold them criminally accountable for their involvement in the post-election violence. The ICC's Office of the Prosecutor publicly announced a preliminary examination of the situation in Kenya, whilst OSAPG and OHCHR dispatched fact-finding missions to Kenya to gather evidence about atrocity crimes and identify individuals responsible. Thus, threats of individual criminal accountability and the deployment of fact-finding missions were elements of the same strategy. At least three lessons can be inferred from the accountability threats in the Kenya crisis.

First, an important condition that enhanced the credibility of the accountability threats was that Kenya had signed and ratified the Rome Statute of the ICC. This meant that the Court had jurisdiction over genocide, war crimes, and crimes against humanity in Kenya. Moreover, it allowed the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, to launch a preliminary examination into alleged atrocity crimes in Kenya, using his *proprio motu* powers enshrined in Articles 13(c), 15, and 53(1) of the Rome Statute. Annan and Moreno-Ocampo were in frequent contact with each other and coordinated their approaches.²¹⁸

Second, it was important that chief mediator Annan acted as a normative mediator and followed the UN Guidelines for Mediation, which meant that he did not condone amnesties for international crimes. The accountability threats were issued in the context of, and indeed in support of, the on-going mediation process. Whilst parallel mediation efforts can undermine the credibility of accountability threats, as the Bosnia case has shown, this was not observable in the Kenya case. Annan made very clear that the issue of accountability was non-negotiable. "Annan stated repeatedly that there would be accountability for atrocities," a French diplomat at the UN explains. "He said that there is nothing that he can

²¹⁸ Personal Interview with Beatrice Le Fraper du Hellen.

do about accountability, so everybody in Kenya thought that it was a given”.²¹⁹ A staff member of the AU Panel confirms this, explaining that, “there wasn’t any talk about dropping accountability or offering amnesties. In fact, the establishment of a Commission of Inquiry was part of the final agreement”.²²⁰

Third, whilst Annan and Moreno-Ocampo agreed that accountability was non-negotiable, they were willing to do something about the timing of accountability. They decided that it would be best to delay the establishment of a permanent and inflexible international justice process until after the mediation process was successfully completed – and under the condition that Kenya would not itself initiate adequate domestic proceedings.²²¹ This strategy of delaying international justice, whilst excluding the possibility of amnesties for international crimes, maintained the credibility of the accountability threats in the context of the on-going mediation process.

4.4. Unintended Consequences and Side-Effects

This section turns to unintended consequences and side-effects that emerged from the efforts to prevent international crimes in Kenya. The discussion shows that international crime prevention is likely to trigger controversies, even if military force is not employed. In Kenya, controversy revolved around the failure to prevent violence and human tragedy altogether (i.e. the late-stage character of situational crime prevention), as well as the potentially negative implications of the final power-sharing agreement for democratization processes in Kenya and elsewhere.

4.4.1. Human and Material Costs

²¹⁹ Personal Interview with Beatrice Le Fraper du Hellen.

²²⁰ Personal Interview with Gerry Bennett.

²²¹ Personal Interview with Beatrice Le Fraper du Hellen.

Whilst the international prevention efforts in Kenya seem to have averted atrocity crimes, Kenya's post-election crisis still resulted in significant human tragedy and material costs. According to the CIPEV, the post-election violence resulted in at least 1.133 deaths (405 from gunshots), 3.561 severe injuries, hundreds of rapes, 350.000 internally displaced persons, 12.000 refugees, and 45.000 destroyed buildings.²²² These numbers do not necessarily convey the impression that the Kenya case represents a "success story" of international crime prevention. Some commentators have criticised that opportunities at "real" (i.e. earlier) preventive action were missed. They even argue that classifying Kenya as a case of prevention is not straightforward.²²³

Given the late-stage character of situational crime prevention, it seems that even successful instances of prevention are likely to be accompanied by episodes of violence and human tragedy. Francis Deng, then UN Special Adviser on the Prevention of Genocide, captures an essential logic of situational crime prevention when he notes: "many died in Kenya, but in retrospect it could have been much worse".²²⁴ Situational crime prevention strategies focus on preventing the escalation of systematic violence into atrocity crimes. This requires that potential perpetrators, potential victims, and the crime situation can be identified with some clarity, making it difficult to prevent violence altogether. Situational crime prevention blurs the line between prevention and response.

4.4.2. Implications for Democratization Processes

Moreover, the international crime prevention efforts, and more specifically the final power-sharing agreement, had the unintended consequence of undermining democratization processes in Kenya and elsewhere. The principle objective of the Annan mediation was to

²²² CIPEV, *Final Report*, 308-344.

²²³ Sharma, 'The 2007-08 Post-Election Crisis in Kenya', 19-20; Crossley, 'A Model Case of R2P Prevention?', 197-198; Anderson and Lochery, 'Violence and Exodus in Kenya's Rift Valley', 338-339.

²²⁴ Personal Interview with Francis Deng.

prevent ethnic violence from escalating into atrocity crimes, not to improve Kenya's political system or to strengthen democracy in Africa. "Annan's approach emphasised ending violence at all cost," Stephen Brown argues.²²⁵ The final power-sharing agreement was seen as a necessary step to do so. It was not seen as an ideal outcome, but simply as the lesser evil.²²⁶ However, the power-sharing agreement created an inefficient governance structure in Kenya and jeopardized democratization processes elsewhere.

First, the final power-sharing agreement created a dysfunctional government of unity in Kenya. The Kibaki/Odinga government was seriously bloated, containing 41 ministers and several vice-Prime Ministers. There was also a lot of infighting, which paralysed the government.²²⁷ This hindered effective governance and made it difficult to deal with important public policy issues, such as education or health care. Kenyans were extremely dissatisfied with the performance and the huge costs of the government of unity.²²⁸

Second, the Kenyan power-sharing agreement, as the solution to an electoral crises, set a dangerous precedent for democratization processes more generally. The power-sharing agreement in Kenya, it is argued, suggested that democratic procedures do not work and that those defeated in democratic elections can organise violence to secure governing power. As a member of the AU Panel's secretariat remarks: "one criticism that we repeatedly encountered was that the coalition government was undermining democracy in Africa; that this created a precedent where election losers would automatically threaten to organize violence to become part of a coalition government. There was fear that we have opened a 'Pandora's box'; that

²²⁵ Brown, 'Donor Responses to the 2008 Kenyan Crisis', 395.

²²⁶ Personal Interview with Jendayi Frazer.

²²⁷ Personal Interview with Paul Dziatkowiec.

²²⁸ Personal Interview with Paul Dziatkowiec.

this precedent is going to be acted upon elsewhere”.²²⁹ Some preliminary evidence for this claim can be seen in the context of Zimbabwe’s 2008 elections.²³⁰

4.5. Conclusions

The Kenya case study has allowed a number of important observations about the prevention of international crimes in a non-armed conflict context. This concluding section highlights four lessons that are directly relevant with regards to refining, complementing, and problematizing the preliminary international crime prevention framework.

First, the Kenya case study supports the observation that there can be an interrelationship between social and situational crime prevention. Kenya was widely praised for its successful democratization process, its vibrant civil society and media environment, and its promising economic growth rates.²³¹ In addition, international investment into Kenya’s social crime prevention structures was substantial, which reinforced the already widely held assumption that Kenya was an unlikely candidate for atrocity crimes. Thus, the pursuit of social crime prevention added to the creation of a false sense of security and thereby contributed to delaying situational crime prevention efforts. However, the Kenya case also shows that investment into social crime prevention can establish a social infrastructure that enhances the effectiveness of situational crime prevention strategies. It was instrumental for Annan that he was able to make use of Kenya’s independent media to promote controversial issues. Annan also utilized Kenya’s civil society actors and business community to maintain domestic pressure on Kenya’s leaders.²³² The strong personal ties that Kenya’s politicians and business community had established with the OECD world and international

²²⁹ Personal Interview with Gerry Bennett.

²³⁰ On the Zimbabwe case, see, Mark Anstey, ‘Negotiating Out of Conflict: External Interventions in Africa’, in W. Zartman, M. Anstey, P. Meerts (eds.), *The Slippery Slope to Genocide: Reducing Identity Conflicts and Preventing Mass Murder* (Oxford: Oxford University Press, 2012), 342.

²³¹ APRM, *Country Review Report on Kenya*, 56.

²³² ICG, *Kenya in Crisis*, 16.

markets enhanced the effectiveness of the visa restriction threats. And Kenya's ratification of the Rome Statute of the ICC enhanced the credibility of the threats of individual criminal accountability. In short, the international investment into social crime prevention enhanced the effectiveness of situational crime prevention tools.

Second, the international prevention efforts that commenced in late December 2007 help to identify further tools that international actors consider appropriate for operationalizing situational crime prevention. In particular, the Kenya case shows that political mediation can play an important role in efforts to prevent peacetime atrocity crimes. Initially, different international actors launched several traditional mediation initiatives that tried to facilitate dialogue between the parties – with very little success. Eventually, international actors threw their unified weight and support behind Kofi Annan's AU-sponsored and elite-focused mediation initiative, which formed the centrepiece of the international crime prevention efforts. Crucially, Annan's mediation was strategically complemented by coercive tools. At important moments, international actors threatened to cut their substantial development assistance to Kenya, took concrete steps to impose visa restrictions and travel bans on specific individuals and their family members, threatened the criminal masterminds with individual criminal accountability, and deployed fact-finding missions to enhance the credibility of the accountability threats. These instruments of coercion aimed at changing the strategic calculations of the criminal masterminds, as well as at forcing them to negotiate in good faith. Furthermore, an indigenous bottom-up mediation process provided a link to the grassroots realities and mobilised additional pressure from local communities. Whilst Annan's AU-sponsored mediation was a UN mediation in disguise, the CCP initiative was a truly indigenous and "African" contribution to the prevention of atrocity crimes in Kenya.

Third, the Kenya case study shows that political mediation can deviate significantly from conventional wisdom when used as a tool to prevent atrocity crimes in a peacetime

context. Traditionally, political mediation is seen as an instrument to prevent or resolve armed conflict. It is supposed to assist two or more parties in resolving their conflict by facilitating dialogue and promoting mutually acceptable solutions. The mediator is supposed to act impartially and with the consent of the parties. Put differently, political mediation is traditionally seen as a voluntary process that presupposes the willingness of the parties to negotiate.²³³ In the Kenya case, however, mediation looked very different. Rather than merely facilitating dialogue with the consent of the conflicting parties, Annan organized a firework of strategically issued coercive threats to accompany his negotiations. He used these coercive threats to influence the behaviour of the criminal masterminds on both sides. The significant level of international coercion eventually forced the Kenyan leaders to end the inter-ethnic violence and enter into a power-sharing agreement. Kibaki only reluctantly agreed to participate in international mediation after the US and the UK threatened “no business as usual”. Throughout the talks, Annan mobilized domestic and international pressure to keep the parties at the negotiation table and push the agenda forward. The final power-sharing agreement was practically imposed on the parties, which gave Annan the nickname “dictator”. In short, the “voluntary” element of Annan’s mediation process was very limited. The Kenya crisis was well suited for this coercive and intrusive form of mediation as both sides were seen as “perpetrators”. This avoided a common dilemma of mediation in atrocity situations, namely, having to pressure the victim to “give in” to the perpetrator. Moreover, Annan skilfully reconciled political mediation with accountability threats. Annan acted as a “normative” mediator and followed the UN Guidelines for Mediation, which meant that he could not condone amnesties for international crimes. He made clear that accountability was non-negotiable. At the same time, however, Annan and Moreno-Ocampo agreed that the

²³³ See, UN Guidance on Effective Mediation, 4-5.

establishment of a permanent and inflexible international justice process could be delayed until after the mediation process was completed and the coalition government sworn in.

Finally, the Kenya case study suggests that even “success stories” of international crime prevention will be contested and controversial. In Kenya, the situational crime prevention strategies could not completely forestall violence and loss of life. The post-election crisis still resulted in a significant amount of displacements, deaths, rapes, injuries, and destruction. The late-stage nature of situational crime prevention makes it difficult to avert violence altogether. Situational crime prevention seeks to prevent escalations of systematic violence into atrocity crimes, which sometimes blurs the line between prevention and response. In addition, the Kenya case suggests that situational crime prevention efforts can undermine democratization processes. The final power-sharing agreement was crucial to prevent atrocity crimes in Kenya, but it also installed a bloated and inefficient government and set the dangerous precedent that those defeated in democratic elections can secure governing power by organising violence. Some observers argue that this undermined the democratization process in Kenya and elsewhere. In context of Zimbabwe’s 2008 election, for example, there were efforts to act on the Kenya precedent.²³⁴

²³⁴ Personal Interview with Castro Wesamba.

5. Libya and International Crime Prevention: Lessons from a “Controversial Success”

“By any measure, NATO succeeded in Libya. It saved tens of thousands of lives from almost certain destruction”.

- ❖ Ivo Daalder, Permanent Representative of the US to NATO, and James Stavridis, NATO’s Supreme Allied Commander Europe¹

“R2P, R.I.P!”.

- ❖ David Rieff, Writer for the New York Times Magazine²

On 15 February 2011, in the midst of the democratic uprisings of the “Arab Spring”, protests against the authoritarian regime of Colonel Muammar Gaddafi erupted in Libya. The protests broke out in Libya’s eastern city of Benghazi, sparked by the government’s arrest of prominent human rights activists.³ Within days, however, protests spread across the country, even to Libya’s capital Tripoli. Worried that it could be the next casualty of the Arab uprisings, the Gaddafi regime decided to crush the anti-government demonstrations with all means necessary, using live ammunition, machine guns, snipers, and even helicopters.⁴ However, large numbers of protestors continued to demand an end to the regime, challenged Gaddafi’s control over entire cities, and established a National Transitional Council (NTC). On 16 March, after

¹ Ivo Daalder and James Stavridis, ‘NATO’s Victory in Libya: The Right Way to Run an Intervention’, *Foreign Affairs* vol. 91, no. 2 (2012), 3.

² David Rieff, ‘R2P, R.I.P’, *The New York Times*, 07/11/2011.

³ Alison Pargeter, *Libya: The Rise and Fall of Qaddafi* (New Haven and London: Yale University Press, 2012), 213-221.

⁴ UN Human Rights Council, ‘Report of the International Commission of Inquiry on Libya’, A/HRC/19/68, Advanced Unedited Version, 02/03/2012, 6-8.

brutally re-taking most of the contested cities, Gaddafi's troops pushed towards Benghazi, the epicentre of the protests. Colonel Gaddafi publicly threatened that he would now crush the uprising once and for all, prompting international concern about the imminent commission of atrocity crimes. This worst case scenario was averted through the rapid preventive engagement of international actors. In late February, the UN Security Council had already imposed various sanctions on key Libyan decision-makers and referred the situation in Libya to the ICC. On 17 March, with Benghazi about to fall, the Council authorized the use of military force to impose a no-fly zone and protect civilians and civilian populated areas. Almost immediately, NATO launched an air campaign, which stopped the Gaddafi regime's advance on Benghazi and provided an on-going, protective shield against atrocity crimes. On 20 October, after seven months of fighting, Colonel Gaddafi was caught and brutally executed by rebel militias. This not only ended Gaddafi's 42 years rule, but also diminished the risk of atrocity crimes in Libya.

This chapter provides an in-depth study of the international crime prevention efforts in Libya. There are several reasons why the Libya crisis is a good addition to the previous two case studies. First, there is ample evidence that the international preventive engagement in Libya constitutes an instance of international crime prevention. International actors consistently used the language of international crimes and repeatedly invoked R2P. The Security Council referred to Libya's primary responsibility to protect its population from atrocity crimes. Senior policy-makers, such as UN Secretary-General Ban Ki-moon, US President Barack Obama, or UN High Commissioner for Human Rights Navi Pillay, also embraced the international

community's residual responsibility to protect.⁵ The early referral of the situation in Libya to the ICC further indicates that there was concern about international crimes. Second, the Libya case represents a "controversial success" of international crime prevention. Once international actors recognized the imminent risk of atrocity crimes, they very quickly designed prevention strategies that successfully averted this worst-case scenario. Yet, the international crime prevention efforts also facilitated Colonel Gaddafi's brutal death and regime change, which has triggered international controversy. Third, the Libya case is an ideal complement to the Bosnia and Kenya cases, as the international crime prevention efforts in Libya took place in the context of a transition from peacetime to an armed conflict.

In this chapter, it will be argued that the international response to imminent atrocity risk in Libya generates a series of important insights into the practice of international crime prevention. First, international investment into Libya's social crime prevention structures was largely absent, given that Libya had long been internationally isolated. Moreover, international actors failed to anticipate any atrocity risk in Libya and were utterly surprised by the violence that erupted in mid-February 2011. Thus, they had no time to engage in social crime prevention, but had to immediately adopt situational crime prevention measures.

Second, the Libya case reveals a range of tools that international actors consider appropriate for operationalizing all aspects of situational crime prevention. International actors ratcheted-up pressure on the potential perpetrators through targeted sanctions, threats of individual criminal accountability, an ICC referral, and

⁵ See, Ban Ki-moon, 'Briefing to the UN Security Council', S/PV.6490, 6490th Meeting, 25/02/2011; Navi Pillay, 'Statement at the Human Rights Council', 15th Special Session on 'Situation of Human Rights in the Libyan Arab Jamahiriya', 25/02/2011; and Barack Obama, 'Audio Statement from Brazil', 19/03/2011, available at: http://www.youtube.com/watch?v=fSKV_UAqBGo.

NATO's air campaign. They gradually reduced the vulnerability of the potential victims through a no-fly zone, safe areas, supplying weapons and equipment to the rebels, and diminishing the Gaddafi regime's general capacity to harm civilians. International actors also tried to reduce the permissiveness of the crime situation through the provision of international scrutiny, an arms embargo, and mediation efforts to end the internal armed conflict. These situational crime prevention efforts largely abandoned the traditional conflict prevention principles of consent, impartiality, and minimal coercion.

Third, the Libya case suggests that the situational prevention of international crimes requires certain conditions and capacities to be effective. Political mediation and the authorization of military protection measures in the SC require a certain amount of international unity and cooperation. Moreover, international actors need to reconcile the competing logics of different prevention tools, such as accountability threats and mediation; arms embargoes and the strengthening of victim capacity; or ICC referrals and more flexible accountability threats. The effective use of situational crime prevention tools also requires a number of specific international capacities, such as military capacity to monitor arms embargoes or enforce civilian protection mandates, analytic capacity to identify criminal masterminds and their enabling networks, domestic legal capacity to rapidly impose targeted sanctions, or international judicial capacity to reach out to potential defectors.

Finally, the Libya case shows that even successful instances of situational crime prevention can entail dilemmas and controversies. NATO's air campaign directly caused (civilian) casualties and injuries, which outraged the BRICS countries. The international crime prevention efforts also empowered Libyan rebel forces to commit revenge atrocities against alleged Gaddafi loyalists and mercenaries.

Furthermore, the international efforts to prevent atrocity crimes facilitated the proliferation of weapons in Libya, which turned into a proximate cause for instability in the Sahel region. Most importantly, however, the Libya case suggests that regime change can be an “unintended” consequence of situational crime prevention efforts.

This chapter proceeds in five steps. The first section discusses the international engagement with the situation in Libya before the outbreak of anti-government protests on 15 February 2011. The second section then provides a detailed analysis of the situational crime prevention efforts that commenced around 15 February. Based on that discussion, the third section infers conditions, capacities, and dispositions that are required for the situational prevention of international crimes. The fourth section examines side-effects and unintended consequences that emerged from efforts to prevent international crimes in Libya. The chapter ends by summarizing the key lessons that the Libya case study generates with regards to the international crime prevention framework developed in this thesis.

5.1. Early Signs and Early Action

To begin, this chapter discusses the international engagement with the situation in Libya before the outbreak of anti-government protests on 15 February 2011. The discussion shows that Libya had been an international pariah for decades. As a result, there was practically no international investment into the country’s social crime prevention structures. Moreover, there was a complete absence of early warning about atrocity risk in Libya. International actors were utterly surprised by the violence that erupted in mid-February 2011. Thus, they had no time to engage in social crime prevention, but had to immediately adopt situational crime prevention measures.

Colonel Gaddafi came to power in a coup d’état in 1969. To maintain power, the Gaddafi regime brutally suppressed any domestic expression of opposition and on

several occasions reverted to atrocity crimes as an instrument of policy. In 1996, for example, Libyan security forces killed approximately 1.286 prisoners at Abu Salim prison in response to a prison revolt.⁶ From the beginning, moreover, the Gaddafi regime was involved in sponsoring international terrorism, such as the terrorist attacks on the La Belle discotheque in West Berlin (1986), US-bound Pan Am Flight 103 over Lockerbie (1988), or the France-bound UTA Flight 772 over Niger (1989).⁷ As a result, Libya was turned into an international pariah and subjected to crippling international sanctions.

However, Libya's international reputation started to improve in the late 1990s, after the Gaddafi regime denounced international terrorism and handed over the Lockerbie suspects for trial. In December 2003, Gaddafi announced that Libya would also give up its programme to develop weapons of mass destruction. In return, Libya was welcomed back into the international community.⁸ International sanctions were lifted and prominent Western leaders, such as British Prime Minister Tony Blair, French President Jacques Chirac, or Italian President Silvio Berlusconi, visited Gaddafi in Tripoli. The US and Libya also gradually normalised diplomatic and economic relations.⁹ Thus, whilst international engagement with Libya remained limited, the country was widely seen to be on the right track.

This impression was also conveyed by the world's mass atrocity early warning mechanisms that collectively failed to identify Libya as a country of concern before violence broke out in February 2011. A review of the risk assessments of key early warning mechanisms and international organizations evidences this point. First, the

⁶ Pargeter, *Libya*, 170. Most prisoners in Abu Salim were political prisoners.

⁷ Dirk Vandewalle, *A History of Modern Libya*, 2nd edn (Cambridge: Cambridge University Press, 2012), 150-159.

⁸ Pargeter, *Libya*, 189.

⁹ Pargeter, *Libya*, 189.

2009 risk assessment of the prominent genocide scholars Barbara Harff and Ted Robert Gurr listed 22 states as being at medium to high risk of mass atrocities.¹⁰ Libya was not amongst those countries. For Harff and Gurr, the top five countries of concern were Sudan, Burma, Somalia, Iran, and China. Second, the 2009 risk assessment of the *Asia-Pacific Centre for the Responsibility to Protect* anticipated atrocity risk in 25 countries, but Libya was not amongst them.¹¹ The *Asia-Pacific Centre's* top five countries of concern were Sudan, Central African Republic, Somalia, Iraq, and Burma. Third, the 2008-09 risk assessment of the *Genocide Prevention Project* (GPP), which combines data from multiple early warning lists, identified 33 countries at medium to high risk of mass atrocities, but did not anticipate atrocity risk in Libya.¹² The GPP's top five countries of concern were Sudan, Burma, Somalia, Iraq, and Pakistan. Fourth, the *Minority Rights Group International's* 2010 risk assessment, "Peoples Under Threat", also failed to anticipate any atrocity risk in Libya, even though it identified atrocity risk in 68 states.¹³ The top five countries of concern were Somalia, Sudan, Iraq, Afghanistan, and Burma. Finally, the *International Crisis Group's* monthly risk assessment, "Crisis Watch", only included Libya in March 2011, after violence had already broken out.¹⁴ ICG's February 2011 risk assessment only mentioned Cote d'Ivoire, Egypt, Russia, and Albania as countries of concern.¹⁵

Similarly, there was no early warning on Libya in the UN system. The former UN Special Adviser on R2P, Edward Luck, reveals that the Office of the Special

¹⁰ See, Barbara Harff, 'How to Use Risk Assessment and Early Warning in the Prevention and De-Escalation of Genocide and Other Mass Atrocities', *Global Responsibility to Protect* vol. 1, no. 4 (2009), 506-531.

¹¹ Asia-Pacific Centre for the Responsibility to Protect, *Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation* (Brisbane: University of Queensland, 2009), 20-21.

¹² Genocide Prevention Project, *Mass Atrocity Crimes Watch List 2008-09*, available at: <http://www.preventorprotect.org/overview/watch-list.html>.

¹³ Minority Rights Group International, *Peoples Under Threat 2010*, available at: <http://www.minorityrights.org/9885/peoples-under-threat/peoples-under-threat-2010.html>

¹⁴ International Crisis Group, *Crisis Watch No. 91*, Brussels, 01/03/2011.

¹⁵ International Crisis Group, *Crisis Watch No. 90*, Brussels, 01/02/2011.

Adviser on the Prevention of Genocide and Responsibility to Protect (OSAPG) did not consider Libya to be a country of concern before 15 February 2011. According to Luck, OSAPG has a running list of countries deemed to be at risk of mass atrocities, but Libya did not make it on that list before mid-February.¹⁶ This is also confirmed by the former UN Special Adviser on the Prevention of Genocide, Francis Deng, who admits that Libya was on everybody's agenda after 15 February, but not before then.¹⁷

In May 2010, moreover, the UN General Assembly (GA) elected Libya to the UN Human Rights Council (HRC). For this, the GA is supposed to take into account a country's contribution to the promotion and protection of human rights. The GA did not have any major human rights concerns with regards to Libya. In November 2010, moreover, the HRC examined Libya's performance in the field of human rights as part of its Universal Period Review (UPR) process.¹⁸ Libya's UPR did not suggest any risk of atrocity crimes, but provided a largely positive assessment of the human rights situation in Libya. Whilst not denying human rights challenges, the UPR welcomed Libya's steady progress towards a fuller realisation of human rights and its willingness to engage with the international community on human rights issues. Overall, the UPR identified a positive trend.¹⁹ As Jonathan Prentice points out, the UPR did not convey the impression that "the country's leadership was so homicidal in intent that three months later it would pose a clear and present danger to its people".²⁰

¹⁶ Personal Interview with Edward C. Luck, *UN Special Adviser on Responsibility to Protect, 2008-2012* (Oxford, 13/12/2011).

¹⁷ Personal Interview with Francis M. Deng, *UN Special Adviser on the Prevention of Genocide, 2007-2012* (New York, 24/02/2012).

¹⁸ UN Human Rights Council, *Report of the Working Group of the Universal Periodic Review: Libya's Arab Jamahiriya*, A/HRC/16/15, Sixteenth Session, 04/01/2011. The UPR process is a key feature of the HRC and involves a review of the human rights records of all 193 UN Member States once every four years.

¹⁹ Jonathan Prentice, 'The Politics of Intervention: The Art of Talking', *Oslo Forum 2012, Background Papers*, 61.

²⁰ Prentice, 'The Politics of Intervention', 61.

The European Commission's risk assessment on Libya was similarly optimistic and positive. In late January 2011, a delegation of the European Commission's Directorate General for Development and Cooperation (Europeaid) visited Libya to help secure the country's southern border through a satellite system.²¹ In return, a Libyan delegation visited Brussels in mid-February, without there being discussion on any risk of atrocity crimes.²²

Furthermore, it is interesting to note the lack of reporting on Libya by journalists and country experts. *The Guardian*, for instance, printed the first article about potential conflict in Libya on 16 February 2011 – after protests had already broken out. Before mid-February, articles on Libya dealt exclusively with the Lockerbie affair or Libya's relation to Italy. Other international newspapers did not anticipate major crisis in Libya either.

Due to Libya's long international isolation, international investment into the country's social crime prevention structures was largely absent. Given the complete lack of early warning on Libya, moreover, international actors did not have time to implement social crime prevention strategies to eliminate structural risk factors associated with international criminality.²³ Instead, international actors had to immediately employ situational crime prevention measures to prevent an escalation of the increasingly systematic violence against populations in Libya.

5.2. The International Preventive Engagement

This section analyses how international actors operationalized the situational prevention of international crimes in Libya. The discussion shows that international

²¹ Personal Interview with a staff member of the European Commission's Directorate General for Development and Cooperation, 2009-2012 (Oxford, 02/12/2011).

²² Personal Interview with a staff member of the European Commission's Directorate General for Development and Cooperation.

²³ See, Jennifer M. Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back Into RtoP', *Ethics & International Affairs* vol. 25, no. 3 (2011), 262.

actors quickly designed a range of situational crime prevention strategies to respond to the outbreak of political violence in Libya. Even though the bulk of discussion on Libya tends to focus on the military measures adopted to protect civilians and to enforce the no-fly zone, it is important to recognize that international actors adopted several non-military prevention tools before reverting to military force, including targeted sanctions, threats of individual criminal accountability, an arms embargo, and two mediation processes. International actors chose a gradual approach and continuously increased the coerciveness of the prevention tools employed; up to a point where the UN Security Council authorized military intervention without the consent of the Libyan authorities, took sides in what became a civil war, and helped to end Gaddafi's 42 years rule.

5.2.1. International Scrutiny

On 15 February, anti-government protests erupted in Benghazi, the capital of Libya's eastern region Cyrenaica. Inspired by the momentous events of the Arab Spring, protests quickly spread to other cities in the country's East, such as Al-Bayda, Derna, Tobruk, and Ajdabiya. From the beginning, the Gaddafi regime seemed determined to quell the mostly peaceful protests by all means.²⁴ To veteran observers, Colonel

²⁴ That the initial protests were largely peaceful is the assessment of the International Crisis Group, based on extensive field research and interviews: "Inspired by the Arab Spring and attempting to follow its script, most major cities and towns from east to west, including its five largest, rose up – ***initially and mostly peacefully*** – in virtual unison in mid-February 2011". The Human Rights Council's Commission of Inquiry also concludes that Gaddafi forces systematically attacked unarmed protestors. Based on their field research, the commissioners reported that they "received a first-hand account of orders from Colonel Qadhafi to suppress demonstrations 'with all means necessary'. While former Qadhafi officials claimed the initial approach was not to fire until fired upon, evidence collected does not support this. Witnesses detailed how, in Benghazi, protestors were shot near the Juliana Bridge. On 18 February 2011, after rocks were thrown as the funeral procession passed a military base, soldiers fired shots, killing several people. Witnesses reported later finding nine burnt bodies inside the base with their hands bound and with gunshots to the head". See, International Crisis Group, *Holding Libya Together: Security Challenges after Qadhafi*, Middle East/ North Africa Report No. 115, 14/12/2011, 1; Human Rights Council,

Gaddafi's response appeared significantly more brutal than the ones seen in Egypt or Tunisia.²⁵ The HRC's Commission of Inquiry concluded that, "Qadhafi forces engaged in excessive use of force against demonstrators in the early days of the protests, leading to significant deaths and injuries".²⁶ According to Human Rights Watch, at least 233 protestors were killed by Gaddafi forces from 17 to 20 February, predominantly through head and chest wounds.²⁷

In response to Gaddafi's brutal crackdown, international actors issued a wave of condemnatory statements and warnings. This was intended to have a deterrence effect on the Gaddafi regime by showing that the world was watching and prepared to take action if necessary. On 20 February, for instance, the British Foreign Minister, William Hague, stated publicly:

We want to make clear to the Libyan government that just because there aren't television cameras present at the scenes that are going on in Libya that does not mean that the world is not watching, and that doesn't mean that the world is going to ignore the way in which protesters and demonstrators are treated.²⁸

The same day, US Secretary of State, Hilary Clinton, warned that the world is "watching the situation in Libya with alarm". Secretary Clinton added that the Libyan government has "a responsibility to respect the universal rights of the people, including the right to free expression and assembly. Now is the time to stop this unacceptable bloodshed. We are working urgently with friends and partners around the world to convey this message to the Libyan government".²⁹

'Report of the International Commission of Inquiry on Libya', A/HRC/19/68, Advanced Unedited Version, 02/03/2012, 6-8.

²⁵ Personal Interview with Mona Rishmawi, *Chief of Rule of Law, Equality and Non-Discrimination Branch, Research and Right to Development Division, OHCHR, 2009-present* (Geneva, 16/10/2013).

²⁶ Human Rights Council, 'Report of the International Commission of Inquiry on Libya', 6.

²⁷ Human Rights Watch, 'Libya: Governments Should Demand End to Unlawful Killings', 20/02/2011; see also Human Rights Council, 'Report of the International Commission of Inquiry on Libya', 6.

²⁸ See, *Al-Jazeera*, 'Live Blog Libya – February 20', 20/02/2011.

²⁹ Hilary Rodham Clinton, 'Situation in Libya', Press Statement, PRN: 2011/249, Washington D.C., 21/02/2011.

On 22 February, the UN Security Council (SC) condemned the violence in Libya. The SC noted that it will closely follow events and that individuals responsible for attacking civilians will be held accountable.³⁰ The UN Office of the Special Advisers on the Prevention of Genocide and the Responsibility to Protect (OSAPG) publicly explained that, “widespread and systematic attacks against civilian populations by military forces, mercenaries, and aircraft are egregious violations of international human rights and humanitarian law”. OSAPG also warned that, “if the reported nature and scale of such attacks are confirmed, they may well constitute crimes against humanity, for which national authorities should be held accountable”.³¹ According to Special Adviser Ed Luck, the public statement had a preventive rationale, notifying members of the Gaddafi regime that there will be consequences if they did not change course.³²

In addition, UN Secretary-General Ban Ki-moon personally intervened to prevent an escalation of the systematic violence into atrocity crimes. In a 40 minutes telephone conversation with Colonel Gaddafi, Ban tried to convince the Libyan leader to stop attacking protestors.³³ Regional organizations, such as the League of Arab States (LAS), the Organisation of the Islamic Conference (OIC), and the African Union (AU), also denounced the Gaddafi regime’s brutal crackdown, but stopped short of sending clear threats and warnings.³⁴

5.2.2. HRC: Commission of Inquiry & Membership Suspension

³⁰ UN Security Council, ‘Press Statement on Libya’, SC/10180 AFR/2120, 22/02/2011.

³¹ OSAPG/R2P, ‘On the Situation in Libya’, Press Release, 22/02/2011.

³² Personal Interview with Edward Luck.

³³ Personal Interview with Edward Luck.

³⁴ See, Organisation for Islamic Cooperation, ‘OIC General Secretariat Condemns Strongly the Excessive Use of Force against Civilians in the Libyan Jamahiriya’, 22/02/2011; African Union Peace and Security Council, ‘Communiqué RSC/PR/COMM (CCLXI)’, 261st Meeting, 23/02/2011.

Despite this international scrutiny, however, the level of violence continued to escalate. The protest movement gained momentum through a number of high-level defections from the Gaddafi regime, including government ministers, top diplomats, and members of the armed forces.³⁵ As the government's control over the country was crumbling, Libyan security forces intensified efforts to violently suppress any demonstrations against the regime. According to the HRC, 500 to 700 persons were killed from mid-February to the end of the month.³⁶ "Within a period of less than two weeks in February 2011," the ICC's examination concluded, "hundreds of civilians were killed by the Security Forces; hundreds of civilians were injured, primarily as a result of the shootings by the Security Forces and hundreds of civilians were arrested and imprisoned by the Security Forces".³⁷

In addition, the Gaddafi regime started to publicly incite and threaten large-scale atrocities. "If we do not agree today on reforms, we will not be mourning 84 people, but thousands of deaths, and rivers of blood will run through Libya," Saif al-Islam, one of Colonel Gaddafi's sons, threatened. "We will fight until the last man, the last woman, the last bullet".³⁸ Colonel Gaddafi warned the Libyan people saying: "I am not going to leave this land. I will die here as a martyr." He called the protestors "cockroaches", "rats", and "stray dogs", promised to "cleanse Libya house by house", and referred to the 1989 Chinese massacre on Tiananmen Square as a warning.³⁹

³⁵ See, *Reuters*, 'Factbox: Defections from Gaddafi's Libya', 25/08/2011; and *Al-Jazeera*, 'Libyan Pilots and Diplomats Defect', 22/02/2011.

³⁶ UN Human Rights Council, A/HRC/17/45, 07/06/2011.

³⁷ International Criminal Court, Pre-Trial Chamber I, 'Situation in the Libyan Arab Jamahiriya: Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI', *No. ICC-01/11*, 27/06/2011, 13.

³⁸ See, Ian Black, 'Libya on Brink as Protests Hit Tripoli', *The Guardian*, 21/02/2011; *Al Arabiya News*, 'Gaddafi's Son Warns of Rivers of Blood', 21/02/2011.

³⁹ *BBC News*, 'Libya Protests: Defiant Gaddafi Refuses to Quit', 22/02/2011.

Gaddafi was also trying to mobilise a violent societal response on the protestors by calling on Libyans to fight the protestors.⁴⁰

On 25 February, the HRC responded to the escalating crisis by convening a Special Session on Libya. This was an historic moment for the HRC, as it was the first time that it held a special session on a sitting member.⁴¹ The HRC's response on Libya was led by the UK and Hungary, which held the EU Presidency at the time. Strong support was also provided by the Arab Group. It had taken about a week to collect the signatures of 16 member states that are required to hold a special session.⁴² Meanwhile, the UK and Hungary started drafting a resolution to be adopted at the special session. Several rounds of consultations with co-sponsors and other stakeholders revealed surprisingly little resistance to including language on R2P and international crimes.⁴³ Given the special atmosphere of the Arab Spring and the shocking reports coming out of Libya, it would have been difficult to mobilize against the use of this frame.⁴⁴

At the special session, the UN High Commissioner for Human Rights, Navi Pillay, expressed concern about widespread and systematic attacks against civilian populations, denounced the Gaddafi regime's incitement to violence, and reminded the Libyan authorities and the international community of their respective

⁴⁰ See, *The Guardian News Blog*, 'Gaddafi Speech and Libya Turmoil', 24/02/2011. According to Simon Chesterman, the rhetoric of the Gaddafi regime contributed to the unusual clarity of the threat of mass atrocities: "State leaders are usually more circumspect in the threats they make against their populations than was Qaddafi; impending massacres are rarely so easy to foresee." Similarly, Alex Bellamy argues that, "not since Rwanda has a regime so clearly signalled its intent to commit crimes against humanity". See, Simon Chesterman, 'Leading From Behind: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention in Libya', *Ethics & International Affairs* vol. 25, no. 3 (2011), 282; and Alex J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', *Ethics & International Affairs* vol. 25, no. 3 (2011), 265.

⁴¹ Personal Interview with Eric Tistounet, *Chief of Human Rights Council Branch, OHCHR, 2003-present* (Geneva, 17/10/2013); Personal Interview with Mark Horvath, *Deputy Permanent Representative of Hungary to the UN in Geneva, 2010-present* (Geneva, 16/10/2013).

⁴² Personal Interview with Mark Horvath.

⁴³ Personal Interview with Mark Horvath.

⁴⁴ Personal Interview with Mark Horvath.

responsibility to protect.⁴⁵ During the session, the Libyan representatives requested the floor and announced that they would defect from the regime.⁴⁶ The HRC then adopted Resolution S-15/1 by consensus without a vote.⁴⁷ The resolution expressed concern about incitement to atrocities and potential crimes against humanity. It also recalled the primary responsibility to protect of the Libyan authorities, which constituted the first time that a HRC resolution referred to R2P. Most importantly, however, the resolution contained two instruments that aimed at the prevention of international crimes: (1) an International Commission of Inquiry and (2) a membership suspension of Libya.

5.2.2.1. International Commission of Inquiry

At the core of the HRC's efforts to prevent atrocity crimes in Libya was the establishment of a Commission of Inquiry (COI), tasked with investigating alleged violations of international human rights law and establishing the facts of atrocity crimes perpetrated. The COI was also asked to make recommendations on accountability measures "with a view to ensuring that those individuals responsible are held accountable".⁴⁸ The establishment of the COI was seen as a strong and robust measure. There was consensus amongst states that there should be no intermediary steps, but an immediate and strong response.⁴⁹ The Deputy Permanent Representative

⁴⁵ Navi Pillay, 'Statement on Libya', Human Rights Council, 15th Special Session on Situation of Human Rights in the Libyan Arab Jamahiriya, Geneva, 25/02/2011; see also Jose-Luis Gomez del Prado, Chair of the Working Group on the Use of Mercenaries, 'Statement on the Situation in Libya (on Behalf of the Special Procedures Mandate Holders)', Human Rights Council, 15th Special Session on Situation of Human Rights in the Libyan Arab Jamahiriya, Geneva, 25/02/2011.

⁴⁶ Personal Interview with Mark Horvath; Personal Interview with Eric Tistounet.

⁴⁷ Human Rights Council, Resolution A/HRC/S-15/1, 25/02/2011.

⁴⁸ Human Rights Council, Resolution A/HRC/S-15/1, 25/02/2011, OP 11.

⁴⁹ Personal Interview with Mark Horvath.

of Hungary, Mark Horvath, explains: “We thought that we should go in full strength”.⁵⁰

According to Bertrand Ramcharan, COI’s have the potential to calm situations, prevent their deterioration, and protect vulnerable populations.⁵¹ Most importantly, however, the COI was established to deter potential perpetrators of atrocity crimes by lending credibility to threats of individual criminal accountability. “The COI was definitely a preventive tool,” Mona Rishmawi explains. “COI’s collect information for a purpose. The establishment of a COI makes people believe that things are getting very serious. People then want to get out before it gets too bad. COI’s shield people away”.⁵² The diplomats in Geneva suspected that Gaddafi was probably beyond deterrence, but they hoped that the people around him were still deterrable.⁵³ It took a few weeks, however, until the COI was fully operational. Cherif Bassiouni (Egypt/US), Asma Khadr (Jordan), and Philippe Kirsch (Canada) were only appointed on 15 March.

5.2.2.2. *Membership Suspension*

Moreover, the HRC asked the UN General Assembly (GA) to suspend Libya’s membership in the UN’s main human rights body.⁵⁴ Libya’s membership suspension was proposed by the Arab Group, and was seen as a very strong measure.⁵⁵ Suspended states have to move to the very back of the room, have no right to speak, and cannot sponsor resolutions. This step was supposed to signal to the Gaddafi regime that it was again moving towards isolation. On 1 March, the GA followed the

⁵⁰ Personal Interview with Mark Horvath.

⁵¹ Bertrand G. Ramcharan, *The UN Human Rights Council* (New York: Routledge, 2011), 85.

⁵² Personal Interview with Mona Rishmawi.

⁵³ Personal Interview with Mona Rishmawi.

⁵⁴ Human Rights Council, Resolution A/HRC/S-15/1, 25/02/2011, OP 14.

⁵⁵ Personal Interview with Eric Tistounet.

HRC's recommendation, which was the first time that a sitting member was suspended from the body.⁵⁶ The LAS suspended Libya's membership as well.

5.2.3. UN Security Council Resolution 1970

On 26 February, only one day after the breakthrough in the HRC, the UN Security Council (SC) concluded negotiations on a response to the Libya crisis and unanimously adopted Resolution 1970. Libya had first come on the SC's agenda in form of a briefing by the UN Under-Secretary-General for Political Affairs, B. Lynn Pascoe, and the Libyan Permanent Representative to the UN, Abdel Rahman Shalgam. SC members were genuinely shocked about the reported level of violence, which is why negotiations on a resolution were concluded very quickly - within 5 days on an expert level and within one afternoon in the SC.⁵⁷ UNSCR 1970 was adopted on a Saturday, which is unusual and shows the urgency that SC members felt at the time. The UK was the principle drafter of UNSCR 1970, with substantial input provided by France and the US. Coordination with the parallel response of the HRC was limited, even though the UK was the key actor in both settings.

SC members agreed that a strong resolution was needed, but opinions diverged over how strong the resolution should be and in what form certain measures should be adopted.⁵⁸ The P-3 (US, UK, and France) argued that a very strong resolution was needed from the outset.⁵⁹ They even lobbied for the inclusion of "all necessary measures"-language in relation to humanitarian access, which is commonly

⁵⁶ UN General Assembly, 'Suspension of the Rights of Membership of the Libyan Arab Jamahiriya in the Human Rights Council', A/RES/65/265, 01/03/2011.

⁵⁷ Personal Interview with Brazilian Diplomats at the UN (New York, 23/02/2012); Personal Interview with Portuguese Diplomat at the UN (New York, 23/02/2012).

⁵⁸ On 25 February, the Permanent Representative of Libya to the UN, Abdel Rahman Shalgam, who was known for being very loyal to Gaddafi, publicly called on the SC to save his fellow Libyans.

⁵⁹ Personal Interview with a UK Diplomat at the UN (New York, 07/03/2012). The UK was the principle drafter of 1970 and tried to get as much as possible into this first resolution.

associated with military action.⁶⁰ This was rejected by delegations that were cautious not to open the door for military intervention at this point.⁶¹ In late February, the use of military force was not a viable option.⁶² Most SC members wanted to deter members of the Gaddafi regime without exhausting all tools at the outset.⁶³ Thus, a gradual approach was agreed that provided the possibility to ratchet-up pressure in a follow-up resolution.⁶⁴

Resolution 1970 denounced the Gaddafi regime's incitement to violence, explained that widespread and systematic attacks on civilian populations constitute crimes against humanity, and recalled the Libyan government's primary responsibility to protect. At the core of the resolution were four policy instruments, namely, a referral to the International Criminal Court (OP 4 – OP 8), an arms embargo (OP 9 – OP 14), travel bans (OP 15 – OP 16), and asset freezes (OP 17 – OP 21). The different explanations of vote show clearly that these tools aimed at preventing international crimes by deterring the criminal masterminds, i.e. the key members of the Gaddafi regime. "When atrocities are committed against innocents," the US Ambassador to the UN, Susan Rice, explained, "the international community must speak with one voice and today it has". The Nigerian Ambassador, Joy Ogwu, explained that the resolution intended to "deter individuals from supporting or otherwise assisting the regime" and "isolate those currently planning, coordinating

⁶⁰ A first draft of UNSCR 1970 was circulated at 4pm on 25 February. This draft contained an operative paragraph on humanitarian assistance reading: "Authorizes member states to adopt all necessary measures to enable the return to Libya of humanitarian agencies to secure prompt and safe delivery of humanitarian assistance to those in need".

⁶¹ This had also to do with the concern of some states, particularly China and India, for the security of their nationals in Libya. Similarly, Egypt raised such concerns with SC members, even though it was not sitting on the Council. In order to evacuate foreign nationals, the cooperation of the Libyan government was needed.

⁶² Personal Interview with Brazilian Diplomats at the UN.

⁶³ Personal Interview with Ambassador Jose Filipe Moraes Cabral, *Permanent Representative of Portugal to the UN, 2008-present* (New York, 24/02/2012).

⁶⁴ Personal Interview with Brazilian Diplomats at the UN.

and directing the atrocities”.⁶⁵ The Portuguese Ambassador to the UN, Jose Filipe Moraes Cabral, noted that, “the Council was united in sending a clear, swift and strong message to the perpetrators of heinous crimes taking place in Libya ... The perpetrators of these crimes against civilians will be prosecuted”.⁶⁶

5.2.3.1. *Arms Embargo*

An arms embargo was one of the prevention tools that were contained in UNSCR 1970. Operative paragraph 9 instructs all states to “prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya ... of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts of the aforementioned”. Importantly, the arms embargo also prohibited “the provision of armed mercenary personnel”, as there were reports that Gaddafi was recruiting mercenaries.⁶⁷ The SC further called upon all states, especially those adjacent to Libya, “to inspect ... all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports”.⁶⁸ Thus, UNSCR 1970 imposed a full territorial arms embargo.

In the SC deliberations, the arms embargo was uncontroversial. SC members agreed that the Gaddafi regime’s capacity to commit atrocity crimes had to be diminished, and that a strong political message about the regime’s increasing isolation had to be sent. The arms embargo did not target specific individuals, but aimed more generally at reducing the regime’s capacity to commit atrocity crimes.⁶⁹ However, the

⁶⁵ See, UN Security Council, S/PV.6491, 26/02/2011.

⁶⁶ See, UN Security Council, S/PV.6491, 26/02/2011. The other explanations of vote also show that UNSCR 1970 aimed at preventing atrocity crimes. The interviews that I have conducted with diplomats involved in negotiating UNSCR 1970 support this finding.

⁶⁷ UN Security Council, Resolution 1970 (2011), OP 9.

⁶⁸ UN Security Council, Resolution 1970 (2011), OP 11.

⁶⁹ Personal Interview with Doc Mashabane, *Deputy Permanent Representative of South Africa to the UN, 2010-present* (New York, 23/02/2012).

embargo could not reduce the weapons that were already in the country. Moreover, collective enforcement of the arms embargo did only commence in late March.⁷⁰

5.2.3.2. *Targeted Sanctions*

UNSCR 1970 also imposed targeted sanctions on specific individuals of the Gaddafi regime. The targeted sanctions consisted of travel bans and asset freezes. The travel bans required all UN member states to “take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I”. Annex I of UNSCR 1970 listed 16 individuals belonging to the Gaddafi regime. In addition to this, the asset freeze called on all member states to immediately freeze all funds, financial assets, and economic resources of six individuals belonging to the Gaddafi regime.

The imposition of targeted sanctions was also uncontroversial. The targeted sanctions were more or less the “traditional” package, and the language was taken from previous sanctions resolutions.⁷¹ Targeted sanctions were viewed as a straightforward strategy to effect the behaviour of the criminal masterminds by altering their decision-making calculus and constraining their ability to organize the commission of atrocity crimes. Restricting Gaddafi’s access to money was also seen as important to stop him from recruiting mercenaries. There was only minor discussion on the details of the lists. Some feared that it might be counter-productive to target individuals that were essential for political dialogue. Other worried that sanctioning certain entities might have implications for the civilian population.

Importantly, some key states had already imposed financial sanctions on specific individuals suspected to be responsible for human rights violations in Libya.

⁷⁰ NATO, ‘Factsheet: Operation Unified Protector: NATO-led Arms Embargo Against Libya’, October 2011, http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_arms_embargo.pdf.

⁷¹ See the UN sanctions resolutions on Iran: 1737 (2006), 1747 (2007), 1803 (2008), 1929 (2010).

On 21 February, Switzerland froze the financial assets of 29 individuals belonging to the inner circle of the Gaddafi regime.⁷² On 25 February, US President Obama signed Executive Order 13566, which authorized the Department of the Treasury's Office of Foreign Assets Control to freeze all accounts and funds of senior officials of the Libyan government and individuals responsible for or complicit in ordering, controlling, or directing human rights violations.⁷³ On 28 February, moreover, the Council of the European Union extended the UN sanctions to a number of other individuals.⁷⁴ According to the sanctions experts George Lopez and Alexandra dos Reis Stefanopoulos, the international community managed to freeze around \$36 billion in the first weeks, which amounted to nearly half of Gaddafi's useable money.⁷⁵

5.2.3.3. *ICC Referral*

The most controversial element of UNSCR 1970 was the ICC referral. In operative paragraph 4, the SC decided to "refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court". According to Article 13(b) of the Rome Statute, the SC has the power to refer a case to the ICC, even if the target state is not a party to the Rome Statute and the ICC would otherwise not have jurisdiction over atrocity crimes in that country.⁷⁶ Given the

⁷² Schweizerischer Bundesrat, 'Verordnung über Massnahmen gegen gewisse Personen aus Libyen', 21/02/2011.

⁷³ The President (Barack Obama), Executive Order 13566, 'Blocking Property and Prohibiting Certain Transactions Related to Libya', 25/02/2011.

⁷⁴ See, Council of the European Union, Council Decision 2011/137/CFSP of February 28, 2011 Concerning Restrictive Measures in View of the Situation in Libya.

⁷⁵ Alexandra Dos Reis Stefanopoulos and George Lopez, 'From Coercive to Protective Tools: The Evolution of Targeted Sanctions', in T. Weiss and M. Serrano (eds.), *The International Politics of Human Rights: Rallying to the R2P Cause?* (New York: Routledge, 2014), 62.

⁷⁶ See William Schabas, *An Introduction to the International Criminal Court*, 3rd ed (Cambridge: Cambridge University Press, 2007), 151-159; also, Lawrence Moss, *The UN Security Council and the International Criminal Court: Towards a More Principled Relationship* (Friedrich-Ebert-Stiftung: International Policy Analysis, 2012). Security Council referrals to the ICC are rare. Libya

open incitement of the Gaddafi regime and reports about possible crimes against humanity, there was agreement amongst SC members that Libya was a potential case for the ICC – a view also shared by the five SC members that had not signed the Rome Statute.⁷⁷

However, there was disagreement about how to play the “ICC card” at that particular moment. As already alluded to, some states did not want to exhaust all tools at the outset; a logic they also applied to the ICC referral. A majority of SC members argued that the Council should merely threaten with a referral but not yet refer Libya to the ICC.⁷⁸ Proponents of this position argued that a referral at this early stage might complicate a political solution by narrowing space for negotiations and disincentivizing key individuals from participating in peace talks.⁷⁹ Moreover, some worried that an ICC referral could have dangerous implications for the legitimacy of the ICC should there not be sufficient political will to enforce it.⁸⁰ However, those states in favour of referral, particularly France, the UK and Germany, won the debate due to a last minute intervention by the Libyan Ambassador to the UN, who during the final negotiations circulated a letter requesting an ICC referral.⁸¹ This letter shifted the view of many delegations.⁸²

is only the second time that the Council has referred a case to the ICC. The first time was in resolution 1593 (2005), which referred the situation in Darfur to the ICC.

⁷⁷ Personal Interview with Brazilian diplomats at the UN. The five non-parties to the ICC were the US, Russia, China, India, and Lebanon.

⁷⁸ Personal Interview with Ambassador Jose Filipe Moraes Cabral; Personal Interview with a US Diplomat at the UN (New York, 23/02/2012); and Personal Interview with Ambassador Nawaf Salam, *Permanent Representative of Lebanon to the UN, 2007-present* (New York, 24/02/2012).

⁷⁹ Personal Interview with Ambassador Jose Filipe Moraes Cabral; Personal Interview with Doc Mashabane.

⁸⁰ Personal Interview with a Portuguese Diplomat at the UN.

⁸¹ Personal Interview with Ambassador Jose Filipe Moraes Cabral. The letter was written by the French Mission to the UN, which then arranged for it to be signed by the Libyan Ambassador.

⁸² Personal Interview with a US Diplomat at the UN; and Personal Interview with Ambassador Jose Filipe Moraes Cabral.

It is important to note that the primary purpose of the ICC referral was not to establish an independent judicial process for holding individuals criminally accountability. Rather, the SC instrumentalized the ICC as a coercive tool in the service of a specific political result: the prevention of atrocity crimes in the context of on-going violence.⁸³ The ICC was used as a stick to deter the criminal masterminds from committing atrocity crimes.⁸⁴ It was widely agreed that Colonel Gaddafi was probably beyond deterrence, but it was hoped that the ICC referral would deter the second tier of the Gaddafi regime from following orders and committing further atrocities.⁸⁵ The ICC referral was intended to encourage further defections. According to some, the SC never intended that there would be indictments and prosecutions.⁸⁶ UNSCR 1970 explicitly refers to article 16 of the Rome Statute, which gives the SC the power to defer a case for a renewable period of 12 months.⁸⁷ South African diplomats at the UN have explained that their understanding was that the SC would use this power should the ICC involvement become a hindrance to a political solution.⁸⁸

However, the Prosecutor of the ICC, Louis Moreno-Ocampo, assumed his mandate quickly and vigorously. Already on 3 March, after the ICC's Office of the Prosecutor conducted an exceptionally quick preliminary examination, Moreno-

⁸³ Moss, *The UN Security Council and the International Criminal Court*, 8-10.

⁸⁴ Personal Interview with Doc Mashabane; Interview with Ambassador Nawaf Salam; and Interview with Ambassador Bruno Stagno Ugarte, *President of the Assembly of States Parties of the ICC, 2005-2008; Executive Director, Security Council Report, 2011-present* (New York, 20/02/2012).

⁸⁵ Personal Interview with a French Diplomat at the UN (New York, 13/09/2012).

⁸⁶ Personal Interview with a US Diplomat at the UN; Personal Interview with Ambassador Bruno Stagno Ugarte.

⁸⁷ Article 16 of the Rome Statute reads: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

⁸⁸ Personal Interview with Doc Mashabane.

Ocampo made a formal request to an ICC Trial Chamber for permission to conduct an investigation into atrocity crimes in Libya.

5.2.4. UN and AU Mediation

Despite the swift engagement of key international actors, the Gaddafi regime continued to attack civilians and hinder the distribution of humanitarian assistance. The rebels, on the other hand, established a National Transitional Council (NTC), which included many of the high-level defectors.⁸⁹ From early March onwards, pro-Gaddafi forces embarked on a brutal campaign to re-establish control over cities that were contested by the rebels. Government forces systematically and indiscriminately shelled cities, also using military aircrafts. It is noteworthy, though, that Gaddafi forces stopped short of committing large-scale atrocities in the cities that they retook, possibly restrained by the ICC referral. In this climate, the UN and the AU launched parallel mediation initiatives, both trying to find a political solution to the crisis.

5.2.4.1. UN Mediation

On 10 March, UNSG Ban decided to appoint the former Foreign Minister of Jordan, Abdel-Elah Al-Khatib, as his Special Envoy on Libya. Special Envoy Al-Khatib was tasked with exploring ways to resolve the Libya crisis politically.⁹⁰ He explained his job as “stopping the killings”, “ending the suffering of the civilian population”, and

⁸⁹ On 5 March 2011, the NTC held its constitutive meeting in Benghazi and declared itself the “sole national representative of Libya”. It further requested “the international community to fulfil its obligations to protect the Libyan people from any further genocide and crimes against humanity without any direct military intervention on Libyan soil”. See, National Transitional Council, ‘Statement by the Transitional National Council’, 05/03/2011. According to the Libya expert Alison Pargeter, “at the helm of the NTC was a group of technocrats who had defected from the regime when the uprising broke out. They included the former justice secretary, Mustafa Abdeljalil, who was appointed head of the NTC; former chief of National Planning Council, Mahmoud Jibril, who was put in charge of crisis management; and former economy minister, Ali Issawi, who was made responsible for foreign affairs”. Pargeter, *Libya*, 231.

⁹⁰ United Nations, *Letter dated 10 March 2011 from the Secretary-General to the President of the Security Council*, S/2011/126, 11/03/2011.

“preserving the unity of the Libyan people and the territorial integrity of their homeland”.⁹¹ For this, Al-Khatib tried to work with the Libyan government, the NTC, regional governments, and the international community.

Al-Khatib immediately travelled to Libya to assess the situation on the ground, as well as to consult with the Libyan authorities and the NTC.⁹² On 14 March, he met the Libyan Foreign Minister Musa Kusa in Tripoli.⁹³ He also wanted to visit Benghazi to meet with representatives of the NTC. However, Libyan government officials instructed him to wait, claiming that the fighting would be over in two days.⁹⁴ This reveals the limited prospects of a political track at that particular moment. Given the steady progress that the Gaddafi regime was making in retaking contested cities, it seemed not interested in a political settlement. A UN-DPA official explains: “we knew that our Al-Khatib mediation was going nowhere”.⁹⁵

5.2.4.2. *AU Mediation*

A parallel mediation effort was initiated by the AU, which had consistently advocated a political solution to the crisis. Already on 23 February, the AU’s Peace and Security Council (PSC) had called for a lasting political solution. The Chairperson of the AU Commission, Jean Ping, stressed that “only dialogue and

⁹¹ See, *UN News Centre*, ‘UN Envoy Expected in Libya Next Week to Discuss Humanitarian, Political Issues’, 11/03/2011.

⁹² See, *UN News Centre*, ‘Security Council Briefed on Latest Events in Libya as UN Envoy Leaves for Tripoli’, 14/03/2011.

⁹³ See, *UN News Centre*, ‘Security Council Briefed on Latest Events in Libya as UN Envoy Leaves for Tripoli’.

⁹⁴ See, UN Special Envoy Al-Khatib, ‘Remarks of the UN Special Envoy to Libya’, Stanley Foundation Conference on R2P: The Next Decade, New York, 18/01/2012.

⁹⁵ Personal Interview with Roselyn Akombe, *Senior Political Affairs Officer, UN Department of Political Affairs, 2005-present* (New York, 18/04/2013).

consultation will enable the Libyans to find appropriate solutions to the challenges facing their country”.⁹⁶

On 10 March, the PSC met at presidential level and outlined a roadmap for a diplomatic solution.⁹⁷ The AU Roadmap had four elements: (1) immediate cessation of hostilities, (2) cooperation of the Libyan authorities to facilitate the delivery of humanitarian assistance, (3) protection of foreign nationals, and (4) implementation of the political reforms necessary for the elimination of the causes of the crisis.⁹⁸ The AU explicitly rejected “any foreign military intervention, whatever its form”. On 14 March, the AU established an Ad Hoc High-Level Committee (AU Committee) to implement the roadmap, comprising the Heads of State of Mauretania (Mohamed Ould Abdel Aziz), Congo-Brazzaville (Denis Sassou Nguesso), Mali (Amadou Toumani Toure), South Africa (Jacob Zuma), Uganda (Yoweri Museveni), and AU Chairperson Ping.

However, the AU mediation immediately ran into difficulties. On 19 March, the AU Committee met in Mauretania and announced that it would travel to Libya the next day. However, as international air strikes were about to commence, the AU Committee was denied entry to Libya by the SC. The AU’s timing seemed anything but optimal. Moreover, the AU was not really perceived as a “credible interlocutor”. The NTC, in particular, regarded the AU Committee as biased in favour of the Gaddafi regime.⁹⁹ African leaders were divided on whether to denounce Gaddafi’s

⁹⁶ Jean Ping, ‘The African Union Deeply Concerned About the Situation in Libya’, Press Release, 23/02/2011.

⁹⁷ For a good analysis of the AU’s mediation efforts see, Alex de Waal, ‘African Roles in the Libyan Conflict of 2011’, *International Affairs* vol. 89, no. 2 (2013), 365-379.

⁹⁸ Peace and Security Council of the AU, 265th Meeting, Communiqué PSC/PR/COMM.2(CCLXR), 10/03/2011, Paragraph 7.

⁹⁹ When the AU delegation eventually travelled to Benghazi, thousands of Libyans protested outside the hotel where the talks were held. See, Chris McGreal, Harriet Sherwood, Ian Traynor, and Nicholas Watt, ‘Libyan Revolutionary Council Rejects African Union’s Peace Initiative’, *The*

violent crackdown, and there were suspicions about lingering sympathies for Gaddafi.¹⁰⁰ Some also believed that the AU, despite the provisions of Article 4(h) of its Constitutive Act, has a deeply entrenched priority for regime security.¹⁰¹ At the time, therefore, the prospects of the AU initiative seemed very limited.

5.2.5. UN Security Council Resolution 1973

By mid-March, government forces had retaken almost all of the cities that had fallen to the rebels during February. On 16 March, Gaddafi's forces reached Benghazi, the epicentre of the protests and Libya's second largest city with 700.000 inhabitants. Key members of the Gaddafi regime were openly threatening to crush the rebellion once and for all. Saif al-Islam announced on Libyan television that the fighting would be over within 48 hours.¹⁰² Colonel Gaddafi publicly warned that there "will be no mercy and no pity" for rebels in Benghazi.¹⁰³

For most observers and policy-makers the probability seemed extremely high that the fall of Benghazi would lead to a bloody massacre.¹⁰⁴ This probability assessment was based on at least four factors: 1) Gaddafi's blatant disregard for

Guardian, 11/04/2011; *BBC News*, 'Libya: Gaddafi Government Accepts Truce Plan, says Zuma', 11/04/2011.

¹⁰⁰ Mukhisa Kituyi, 'Africa: Libya, Côte d'Ivoire Burn as Africa Runs in Circles', *All Africa*, 26/03/2011; Theresa Reinold, 'Africa's Emerging Regional Security Culture and the Intervention in Libya', in A. Hehir and R. Murray (eds.), *Libya, the Responsibility to Protect, and the Future of Humanitarian Intervention* (Basingstoke: Palgrave Macmillan, 2013), 102-103.

¹⁰¹ Reinold, 'Africa's Emerging Regional Security Culture and the Intervention in Libya', 84.

¹⁰² *Reuters*, 'Timeline: Uprising Against Libya's Muammar Gaddafi', 23/08/2011. This corresponds with the instructions that Libyan government officials gave to Al-Khatib during his visit to Libya.

¹⁰³ Tom Heneghan, 'Gaddafi Tells Rebel City, Benghazi, "We Will Show No Mercy"', *The Huffington Post*, 17/03/2011.

¹⁰⁴ Personal Interview with Ambassador Jose Filipe Moraes Cabral; Personal Interview with Ambassador Nawaf Salam; Personal Interview with Brazilian Diplomats at the UN; Personal Interview with Doc Mashabane; and Personal Interview with a US Diplomat at the UN. The Rwandan President Paul Kagame articulated a similar assessment: "From what the world saw on the sidelines of this conflict, had this action not been taken, the bombardment of that country's towns and cities would have continued, Benghazi most likely would have borne the brunt of a furious administration and hundreds of thousands of lives could well have been lost". See, Paul Kagame, 'Africa: Rwandans Know Why Gaddafi Must Be Stopped', *All Africa*, 24/03/2011.

UNSCR 1970; 2) the Gaddafi regime's inflammatory rhetoric and incitement, which was interpreted as signalling "intent"; 3) the approximately 1000 persons already killed by pro-Gaddafi forces; and 4) Gaddafi's past behaviour, e.g. the 1988 Lockerbie bombing or the 1996 Abu Salim prison massacre, which led observers to "assume the worst". As Mona Rishmawi explains, "Gaddafi was known for the use of naked, vulgar power. People thought that he had the mental and military capacity to do what he promised".¹⁰⁵

The fear that something punitive was about to happen in Benghazi convinced key states on the SC to press for a strong follow-up resolution. The UK, France and Lebanon took the initiative. Early drafts of UNSCR 1973 already included the idea of a no-fly zone, but the controversial authorization of "all necessary measures" to protect civilians and civilian populated areas was added later upon pressure from the US.¹⁰⁶ Whilst the Obama administration was initially reluctant to even support a no-fly zone, its position changed after high-level deliberations.¹⁰⁷ Given that Gaddafi's tanks were already rolling towards Benghazi, the US now argued that a no-fly zone would not be sufficient and that "real" protection measures were needed to prevent a massacre.¹⁰⁸ The US thus drafted a robust paragraph on the protection of civilians, which complicated negotiations on UNSCR 1973. Russia, China, Brazil, India, South Africa, and Germany argued that one should not rush to the use of force and that the non-military prevention tools should be given more time to work.¹⁰⁹ In the end, disagreement on UNSCR 1973 remained.

¹⁰⁵ Personal Interview with Mona Rishmawi.

¹⁰⁶ Personal Interview with Brazilian Diplomats at the UN.

¹⁰⁷ The meeting was attended by President Barack Obama, Secretary of State Hilary Clinton, US Ambassador to the UN Susan Rice, National Security Adviser Samantha Power, Defence Secretary Robert Gates, and some others. There was a heated debate between those advocating a cautious approach and those advocating intervention.

¹⁰⁸ Personal Interview with a US Diplomat at the UN.

¹⁰⁹ Personal Interview with Brazilian Diplomats at the UN.

There are three factors that explain that there was still sufficient political will to pass the resolution and avoid a Chinese or Russian veto. First, the possibility of a massacre in Benghazi was very much on the mind of SC members. There was a strong feeling that Benghazi could very easily become the Srebrenica or Rwanda of this generation.¹¹⁰ Second, there was a sober realization that the non-military prevention tools were not having much of an effect and that there was probably not enough time to see if that would change. Finally, there was regional support for the adoption of more forceful measures. The Gulf Cooperation Council, the OIC, and the LAS supported the establishment of a no-fly zone and other measures to protect civilians. The LAS directly called on the Security Council to “take the necessary measures to impose immediately a *no-fly zone* on Libyan military aviation, and to establish *safe areas* in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya”.¹¹¹

On 17 March, the SC adopted resolution 1973 with the abstentions of China, Russia, India, Brazil and Germany.¹¹² Interestingly, the three African states on the Council voted affirmatively on UNSCR 1973, even though South African President Zuma was advised that the military measures threatened to negate the AU mediation initiative.¹¹³ UNSCR 1973 expressed grave concern at the escalation of systematic violence against civilians, reiterated the Libyan government’s primary responsibility

¹¹⁰ Personal Interview with Ambassador Jose Moraes Cabral. David Cameron framed the Libya crisis through the prism of Srebrenica, see Patrick Wintour and Nicholas Watt, ‘David Cameron’s Libyan War: Why the PM felt Gaddafi had to be Stopped’, *The Guardian*, 02/10/2011. Susan Rice was reminded of Rwanda. Rice was the National Security Council’s Director for International Organizations and Peacekeeping during the Rwandan Genocide in 1994.

¹¹¹ Council of the League of Arab States, ‘The Implications of the Current Events in Libya and the Arab Position’, Extraordinary Session, 12/03/2011; also, Professor Ekmeleddin Ihsanoglu, ‘Statement of OIC Secretary General to the Meeting of the Permanent Representatives on the Situation in the Libyan Jamahiriya’, Organisation of Islamic Cooperation, 08/03/2011.

¹¹² According to Brazilian diplomats at the UN, it was risky to put the resolution to a vote, as Portugal and South Africa were also prepared to abstain on the resolution.

¹¹³ De Waal, ‘African Roles in the Libyan Conflict of 2011’, 368.

to protect its population, and expressed the SC's determination to ensure the protection of civilians. Aiming to prevent further atrocities on a large scale, primarily in and around Benghazi, UNSCR 1973 stressed the need for an immediate ceasefire and a political solution, strengthened the arms embargo and the targeted sanctions, established a no-fly zone over Libya, and authorized "all necessary measures" to protect civilians and civilian populated areas.¹¹⁴

5.2.5.1. Strengthening of Arms Embargo & Targeted Sanctions

The least controversial aspect of UNSCR 1973 was the strengthening of the arms embargo and the targeted sanctions. The resolution expanded the scope and mandate of the arms embargo in two ways. First, it added a paragraph specifically calling on states to stop armed mercenary personnel (OP 16). Second, it authorized member states "to use all measures commensurate to the specific circumstances" to carry out such inspections regarding the arms embargo (OP 13). According to some interpretations, this language meant that UNSCR 1973 authorized the use of military instruments in the enforcement of the arms embargo.¹¹⁵

Furthermore, UNSCR 1973 strengthened and tightened the targeted sanctions in three ways. First, it extended the asset freeze to all Libyan entities directly or indirectly controlled by the government, and thus comprehensively prohibited financial transactions with Libya.¹¹⁶ Second, UNSCR 1973 added the Libyan National Oil Corporation to the list of embargoed entities, which made any purchase of oil from Libya highly problematic. This effectively imposed to an oil embargo on Libya,

¹¹⁴ South African diplomats argues that UNSCR 1973 was implemented selectively as the political track was not pursued to a sufficient extent. Personal Interview with Doc Mashabane.

¹¹⁵ Non-paper, 'An Analysis of UN Security Council resolution 1973 (2011)', unpublished (*in possession of the author*).

¹¹⁶ Non-paper, 'An Analysis of UN Security Council resolution 1973 (2011)'.

closing down another key source of revenue for the Gaddafi regime.¹¹⁷ Third, UNSCR 1973 expanded the list of individuals subjected to the travel restrictions and the asset freeze.¹¹⁸

5.2.5.2. *No-Fly Zone*

Furthermore, UNSCR 1973 imposed a “ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians”. This no-fly zone aimed at reducing the vulnerability of populations that were without defence against Gaddafi’s warplanes. Even though the Gaddafi regime did not have a large air force, it still managed to inflict serious harm with the limited air power that it had available.¹¹⁹ A no-fly zone was thus seen as crucial for reducing the vulnerability of potential victims.

UNSCR 1973 authorized member states “to take all necessary measures to enforce compliance with the ban on flights”. The reference to “all necessary measures” means that the no-fly zone went beyond simply banning aerial activity, but allowed the use of force for enforcement purposes.¹²⁰ US Ambassador Rice explained very clearly during the SC deliberations that, at a minimum, the enforcement of the no-fly zone would involve the destruction of the Gaddafi regimes air defence systems.¹²¹ The no-fly zone covered all Libyan territory, not just the areas in which fighting was taking place or where there was a particular risk to civilians.

¹¹⁷ Non-paper, ‘An Analysis of UN Security Council resolution 1973 (2011)’.

¹¹⁸ Non-paper, ‘An Analysis of UN Security Council resolution 1973 (2011)’.

¹¹⁹ Personal Interview with Simon Adams, *Executive Director, Global Centre for the Responsibility to Protect, 2011-present* (New York, 23/02/2012).

¹²⁰ Michael N. Schmitt, ‘Wings Over Libya: The No-Fly Zone in Legal Perspective’, *The Yale Journal of International Law Online* 36 (Spring 2011), 45.

¹²¹ Personal Interview with Ambassador Jose Filipe Moraes Cabral; Personal Interview with a US Diplomat at the UN.

Theoretically, moreover, it also applied to any aircrafts operated by the rebels.¹²² “The Libyan no-fly zone is unprecedentedly robust,” the international lawyer Michael Schmitt explains. “In terms of geographical coverage, scope of the ban, and enforcement authorization, it is much broader than any previous no-fly zone”.¹²³

5.2.5.3. *Protection of Civilians and Civilian Populated Areas*

Finally, UNSCR 1973 authorized military intervention, short of an occupation force, to protect civilians and civilian populated areas in Libya. This was the first time ever that the SC authorized a military intervention for human protection purposes against a fully functioning state without the consent of that state.¹²⁴ Operative paragraph 4 set out a broad mandate, authorizing states

to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.

The language of “all necessary measures” is UN code for military intervention and all representatives on the SC were aware of the implications of using this language. It is well documented that US Ambassador Rice explained very clearly to the other SC members that this authorization would mean air strikes and military intervention.¹²⁵

Importantly, the mandate also included the protection of “civilian populated areas under threat of attack”. This unusual language, which had not been included in previous SC resolutions on the protection of civilians, aimed at creating very robust

¹²² Schmitt, ‘Wings over Libya’, 57. The rebels had no aircrafts.

¹²³ Schmitt, ‘Wings over Libya’, 46.

¹²⁴ See, Bellamy, ‘Libya and the Responsibility to Protect’, 263; and Alex Bellamy and Paul Williams, ‘The New Politics of Protection? Cote d’Ivoire, Libya and the Responsibility to Protect’, *International Affairs* vol. 87, no. 4 (2011), 825. Target state consent is not a legal requirement if the Security Council acts under Chapter VII of the UN Charter, but in the past some sort of host state consent has usually been sought as a matter of policy - though sometimes coerced. See, Chesterman, ‘Leading From Behind’, 2.

¹²⁵ Personal Interview with Ambassador Jose Filipe Moraes Cabral; Personal Interview with a US Diplomat at the UN.

safe areas - something that the LAS had explicitly called for. It essentially meant that entire cities were off limits for the pro-Gaddafi forces. As one interpretation put it,

This authorizes the coalition forces to intervene to prevent attacks on towns and cities regardless of the fact that such (expected) attacks are directed at civilians or at legitimate military targets ... In short, this resolution aims at stopping Gaddafi from retaking cities held by the rebels.¹²⁶

In so doing, the international community seemed to be taking sides in what had become a civil war. As Jennifer Welsh points out, it concretely moved “the international community toward aiding one side in a conflict and restricting the movements of the other”.¹²⁷

The only restriction on this broad mandate was the exclusion of “a foreign occupation force of any form on any part of Libyan territory”. Thus, the deployment of ground troops for an extended period was not an option. The language only allowed for the limited deployment of paratroopers and some limited rescue operations, e.g. to save pilots.¹²⁸

5.2.6. The Air Campaign

On 19 March, with pro-Gaddafi forces reaching the outskirts of Benghazi, an international coalition of states began to militarily enforce the no-fly zone and the civilian protection mandate.¹²⁹ As part of *Operation Odyssey Dawn*, the US started firing Tomahawk missiles to destroy the Libyan air defence systems, whilst French and British warplanes began to patrol the no-fly zone and to target objects that were posing an immediate threat to civilian populations, such as tanks, armoured vehicles,

¹²⁶ Non-paper, ‘An Analysis of UN Security Council resolution 1973 (2011)’.

¹²⁷ Welsh, ‘Civilian Protection in Libya’, 259.

¹²⁸ Non-paper, ‘An Analysis of UN Security Council resolution 1973 (2011)’.

¹²⁹ As US General Carter Ham explained: “Our goals are simple: We want to protect innocent civilians, prevent attacks against civilian communities, and deter mass atrocities ... our immediate military goals are to prevent further attacks by regime forces on Libyan citizens and opposition groups, especially in and around Benghazi, and to degrade the Qadhafi regime’s capability to resist an internationally patrolled no-fly zone. See, General Carter Ham, ‘Statement: AFRICOM Commander on Commencement of Military Strikes in Libya’, Stuttgart, Germany, 19/03/2011, <http://www.africom.mil/getArticle.asp?art=6222&>.

or rocket launchers.¹³⁰ The US and the UK deployed small groups of CIA and MI6 agents to gather intelligence, identify targets, and guide air strikes in more populated areas.¹³¹ Whilst the US was leading the initial operations, NATO took over very quickly. On 23 March, NATO started to enforce a maritime arms embargo. Two days later, it began policing Libya's airspace in the coastal area. On 31 March, NATO launched *Operation Unified Protector*, which also absorbed the civilian protection mission.¹³² Within a matter of days, the international community's decisive military action secured Benghazi and eastern Libya.¹³³

However, this did not mark the end of the international community's military engagement in Libya, as Gaddafi did not admit defeat. Aided by NATO airstrikes against Gaddafi's forces, the rebels gathered new confidence and re-established control over Libya's east. For weeks, rebel fighters and regime forces clashed along the coastal area east of Sirte and west of Benghazi, with neither side able to make decisive progress.¹³⁴ Civilian populations suffered heavily from this bloody stalemate. The situation in Misrata, Libya's third largest city, was particularly dire. The Gaddafi regime effectively besieged Misrata, cut-off its water supply, and fired indiscriminately into the city.¹³⁵ As the Gaddafi regime evidently continued to pose a threat to its population, NATO maintained the air campaign and continued to provide

¹³⁰ David Kirkpatrick, Steven Erlanger and Elisabeth Bumiller, 'Allies Open Air Assault on Qaddafi's Forces', *The New York Times*, 20/03/2011.

¹³¹ Mark Mazzetti and Eric Schmitt, 'CIA Agents in Libya Aid Airstrikes and Meet Rebels', *The New York Times*, 30/03/2011.

¹³² 18 states contributed to the operation: Belgium, Bulgaria, Canada, Denmark, France, Greece, Italy, Jordan, Netherlands, Norway, Qatar, Romania, Spain, Sweden, Turkey, UAE, UK, and USA. See, NATO, http://www.nato.int/nato_static/assets/pdf/pdf_2011_09/20110901_110901-oup-update.pdf.

¹³³ Personal Interview with Edward Stringer, *Commander UK Air Contingent in Operation Unified Protector, 2011* (Oxford, 23/05/2012); see also Daalder and Stavridis, 'NATO's Victory in Libya', 3; Barack Obama, 'Remarks by the President in Address to the Nation on Libya', National Defense University, Washington D.C., 28/03/2011.

¹³⁴ International Crisis Group, *Holding Libya Together*, 2.

¹³⁵ Personal Interview with Edward Stringer; see also, Pargeter, *Libya*, 236.

a protective shield against atrocity crimes.¹³⁶ NATO planes hit pro-Gaddafi forces whenever they were attacking civilians.¹³⁷ “It was like trying to train somebody that this is not a good thing to do,” a senior NATO official explains. “When they attacked, we corrected them. When they did it again, we corrected them again”.¹³⁸

As time went on, moreover, NATO had to adapt to Gaddafi’s changing tactics and the evolving circumstances on the ground. Columns of armoured vehicles, tanks, and other artillery became less frequent threats to civilians. Instead, there were people in pick-up trucks and in civilian clothes. This made NATO’s civilian protection mandate more complicated. “It started to get fuzzy,” a senior NATO official explains. “The one constant was that the regime kept attacking civilians. The basic thing that we were trying to do did not change either, namely stopping regime forces from attacking civilians. What it took specifically to get them to stop attacking civilians changed in detail, however”.¹³⁹ NATO’s targeting policy became increasingly more aggressive, aiming to degrade the Gaddafi regime’s general capacity to attack civilians by destroying its military infrastructure, command and control nodes, and training facilities.¹⁴⁰

In this context, the “no boots on the ground”- policy was starting to make it more complicated to protect civilians, as it reduced NATO’s ability to gather information and build-up knowledge about what exactly was happening on the ground.¹⁴¹ As a senior official in NATO’s operations division notes,

¹³⁶ Personal Interview with Senior NATO Officials, *Operations Division, Legal Division, and Public Relations Division* (Brussels, 29/05/2012); Personal Interview with a Diplomat in the UK Delegation to NATO (Brussels, 18/06/2012).

¹³⁷ Personal Interview with Senior NATO Officials; Interview with a Diplomat in the UK Delegation to NATO.

¹³⁸ Personal Interview with Senior NATO Officials.

¹³⁹ Personal Interview with Senior NATO Officials.

¹⁴⁰ Personal Interview with Senior NATO Officials; also Eric Schmitt and Steven Lee Myers, ‘Surveillance and Coordination with NATO Aided Rebels’, *The New York Times*, 21/08/2011.

¹⁴¹ Daalder and Stavridis, ‘NATO’s Victory in Libya’, 2-7.

Air power is rapid. It can deploy very quickly, it can be very precise. But the problem is that it is not the same as being there. If you have forces on the ground, they are able to see; they are able to help in the lead up to an operation for the targeting and the battle damage assessment afterwards ... It is another layer of capability and accuracy. If we had been on the ground we probably could have done a better job; knowing what the Gaddafi regime was doing to attack; where they were coming from; what vehicles and weapons they were using.¹⁴²

Moreover, according to Edward Stringer, the Commander of the UK Air Contingent in Operation Unified Protector, the relatively limited number of airplanes available meant that NATO could not provide protection for the entire civilian population.¹⁴³ NATO could merely “dampen down” atrocities.¹⁴⁴ It was also unclear for how long NATO would be able to maintain its protective shield against the Gaddafi regime.¹⁴⁵

5.2.7. Towards “Enduring Protection”

After about three months, therefore, NATO decided to re-interpret the meaning of “all necessary measures” in a way that included diminishing the Gaddafi regime’s overall power and capability to harm civilian populations.¹⁴⁶ As Edward Stringer explains, “we wanted to move away from hunting down conscripts in the field, whilst the root cause of the problem – the leadership of the Gaddafi regime – remained untouched”.¹⁴⁷ The idea was to move from providing an on-going, rolling shield against attacks to ensuring “enduring protection”. On 31 May, NATO’s Combined Forces Air Command’s definition of the end state scenario for Libya changed in this direction. The end game was now defined as: “Regime’s authority, confidence and military capability diminished to a point that forces a complete cessation of hostilities

¹⁴² Personal Interview with Senior NATO Official, Operations Division.

¹⁴³ Personal Interview with Edward Stringer. Stringer explains that the US decided to stop providing planes for NATO operations.

¹⁴⁴ Personal Interview with Edward Stringer.

¹⁴⁵ Personal Interview with Edward Stringer; Personal Interview with a Diplomat in the UK Delegation to NATO.

¹⁴⁶ Personal Interview with Edward Stringer.

¹⁴⁷ Personal Interview with Edward Stringer.

setting the conditions for the enduring protection of civilians and populated areas”.¹⁴⁸

This did not necessarily mean removing the regime itself, but it certainly opened up space for the rebels to counter Gaddafi’s diminished power.¹⁴⁹

Moreover, even though NATO officials insist that their list of targets did not include individuals,¹⁵⁰ air strikes started to hit locations closer to Colonel Gaddafi, e.g. his Bab al-Aziziya compound in Tripoli, killing his son Saif al-Arab and other family members.¹⁵¹ The suspicion lingered that Colonel Gaddafi had become a target of NATO attacks.¹⁵² It also appeared as though NATO was increasingly providing the rebels with air support to give them a chance to break the stalemate on the ground.¹⁵³ NATO seemed to be performing a combat support role for the rebels; though senior militaries involved in the campaign deny that NATO ever became the “air wing” of the rebels.¹⁵⁴

In addition, some states actively supported the NTC’s efforts to oust Gaddafi by providing the rebels with training, intelligence, equipment, and weapons. British

¹⁴⁸ Lt Gen Ralph J. Jodice II, ‘Operation Unified Protector Mission Brief’, Power Point Presentation (*in possession of the author*).

¹⁴⁹ Personal Interview with a Diplomat in the UK Delegation to NATO.

¹⁵⁰ Personal Interview with Senior NATO Officials; Personal Interview with a Diplomat in the UK Delegation to NATO.

¹⁵¹ Mark Hosenball and Missy Ryan, ‘NATO Targeting More Aggressively in Libya-Say Officials’, *Reuters*, 18/05/2011; *BBC News*, ‘NATO Strike Kills Saif Al-Arab Gaddafi, Libya Says’, 01/05/2011.

¹⁵² See, Patrick Wintour and Ewen MacAskill, ‘Gaddafi May Become Target of Air Strikes, Liam Fox Admits’, *The Guardian*, 20/03/2011. According to the international lawyer Dapo Akande, UNSCR 1973 “does not prohibit the targeting of Gaddafi and authorises it where this is deemed necessary to protect civilians and civilian populated areas”. See, Dapo Akande, ‘What Does UN Security Council Resolution 1973 Permit?’, *EJIL:Talk!*, 23/03/2011; for similar arguments see also, Non-paper, ‘An Analysis of UN Security Council Resolution 1973 (2011)’; and Patrick Wintour and Owen Bowcott, ‘Libya: The Legal Case for Deployment’, *The Guardian*, 21/03/2011.

¹⁵³ Chris Stephen, ‘Libyan Rebels Push Towards Brega Backed By NATO Air Strikes’, *The Guardian*, 18/07/2011.

¹⁵⁴ Michael Codner, ‘Military Doctrine and Intervention’, in A. Johnson and S. Mueen (eds.), *Short War, Long Shadow: The Political and Military Legacies of the 2011 Libya Campaign* (Royal United Services Institute for Defence and Security Studies, Whitehall Report 1, 2012), 27-28; and Chris Stephen, ‘Libyan Rebels Push Towards Brega Backed By NATO Air Strikes’, *The Guardian*, 18/07/2011.

Foreign Minister, William Hague, revealed that the UK and France sent military officers to advise the rebels on intelligence-gathering, logistics, and communications.¹⁵⁵ The UK also supplied the rebels with equipment, such as body armour, advanced telecommunication devices, and night vision goggles.¹⁵⁶ In late June, France admitted that it had supplied arms to rebel groups, claiming that it was “an operational decision taken ... to help civilians who were in imminent danger”. France explained that, “a group of civilians were about to be massacred so we took the decision to provide self-defensive weapons to protect those civilian populations under threat.”¹⁵⁷ It is also well documented that Qatar supplied the rebels with significant amounts of weapons, ammunition, and even troops.¹⁵⁸ There can be little doubt, therefore, that the arms embargo was enforced one-sidedly in favour of the NTC.

Despite all this, however, the rebels were unable to break the stalemate on the ground. Towards the end of June, the AU tried to use this situation to revive its efforts to negotiate a ceasefire and a political settlement. For this, the AU engaged in discreet talks with African leaders to find an exile option for Gaddafi - though it was utterly unclear whether Gaddafi was willing to step down and leave Libya.¹⁵⁹ In early June, Gaddafi had again declared that he would choose death before surrender.¹⁶⁰ The AU’s new peace initiative coincided with developments in The Hague, where the ICC

¹⁵⁵ Ian Traynor and Richard Norton-Taylor, ‘Libya: Mission Creep Claims as the UK Sends In Military Advisers’, *The Guardian*, 19/04/2011.

¹⁵⁶ Sean Rayment, ‘How the Special Forces Helped Bring Gaddafi to His Knees’, *The Telegraph*, 28/08/2011.

¹⁵⁷ *Channel 4 News*, ‘France Won’t Rule Out More Libyan Weapon Drops’, 30/06/2011; also Alex Parry and Carlotta Ranieri, ‘French Military Airdropped Arms to Libya Rebels’, *France 24*, 29/06/2011.

¹⁵⁸ Ian Black, ‘Qatar Admits Sending Hundreds of Troops to Support Libya Rebels’, *The Guardian*, 26/10/2011; Ian Black, ‘Libyan Rebels Receiving Anti-Tank Weapons from Qatar’, *The Guardian*, 14/04/2011; see also *CNN*, ‘Wolf Blitzer’s Interview with Hamad bin Khalifa al-Thani: The Emir of Qatar on Arming Libyan Rebels’, 14/04/2011.

¹⁵⁹ De Waal, ‘African Roles in the Libyan Conflict of 2011’, 373-374.

¹⁶⁰ Pargeter, *Libya*, 240.

investigation moved forward at unprecedented speed. On 27 June, the ICC's Pre-Trial Chamber I issued arrest warrants for Colonel Gaddafi, Saif al-Islam, and Abdullah al-Senussi for crimes against humanity (murder and persecution). Amongst other things, the ICC argued that this step would prevent those individuals from using their power to mastermind atrocity crimes in Libya. The arrest warrants also de-legitimized the Gaddafi regime even further by officially turning its core members into international criminals.

With NATO degrading Gaddafi's overall military capacity, the ICC seeking key regime members, and powerful states providing assistance to the NTC, rebel forces eventually managed to break the protracted stalemate in Libya. In late August, rebel forces took Tripoli in *Operation Mermaid Dawn*, which effectively ended the struggle. By then, most international actors had already recognized the NTC as the new and legitimate government of Libya. Colonel Gaddafi's whereabouts remained unknown, however, and the regime strongholds of Sirte and Bani Walid continued to put up fierce resistance. The final battle for these towns was brutal and rebel forces committed serious human rights abuses against local residents.¹⁶¹ On 20 October, NATO air strikes hit Gaddafi's convoy and Libya's long-time dictator was brutally executed by rebel forces. With Gaddafi dead, international actors judged that the risk of atrocity crimes was sufficiently reduced for NATO to end its military operations in Libya.

Overall, Daalder and Stavridis' assertion that the international preventive engagement in Libya successfully averted large-scale atrocity crimes seems

¹⁶¹ Pargeter, *Libya*, 243.

reasonable.¹⁶² However, NATO's increasingly broad interpretation of the UN mandate to protect civilians has triggered international controversy. The BRICS, in particular, criticise that the non-military prevention tools should have been used to better effect and that NATO operations consciously facilitated regime change. Hence, the Libya case is best characterized as a "controversial success" of international crime prevention.

Table 5.1.: Situational Crime Prevention Tools Used in Libya

Start Date	Tool	Source	Objective
20/02/11	International Scrutiny	- Key states - International organizations	- Deter the Gaddafi regime from committing atrocity crimes
25/02/11	Membership Suspension	- Arab League - HRC/GA	- Show Gaddafi regime that it is moving towards isolation and has to change course
25/02/11	Commission of Inquiry	- HRC	- Investigate alleged crimes and identify the individuals responsible - Deter criminal masterminds
26/02/11	ICC Referral	- UNSC	- Deter criminal masterminds - Encourage defections from the Gaddafi regime - De-legitimize the Gaddafi regime
26/02/11	Targeted Sanctions	- Key states - UNSC - EU	- Change the strategic calculations of the criminal masterminds by increasing the costs of their policies - Constrain the means of criminal masterminds
26/02/11	Arms Embargo	- UNSC	- Constrain the Gaddafi regime's capacity to commit atrocity crimes
10/03/11	Political Mediation	- UN - AU	- Negotiate a ceasefire - Find a political solution to the internal armed conflict
17/03/11	No-fly zone	- UNSC - NATO	- Protect potential victims from air attacks
17/03/11	Air Campaign to Protect Civilians and Civilian Populated Areas	- UNSC - NATO	- Protect potential victims from imminent atrocity crimes - Protect potential victims by providing an on-going protective shield - Create safe areas by preventing the Gaddafi regime from attacking entire cities - Degrade Gaddafi regime's general power and capacity to harm civilians
15/04/11	Arming Victims	- Individual governments	- Strengthen victims self-defensive capability - Enable rebels to counter Gaddafi's diminished military and political capacity

¹⁶² Daalder and Stavridis, 'NATO's Victory in Libya', 2-7. For a similar assessment see, Ban Ki-moon, 'Remarks of the UN Secretary-General', Stanley Foundation Conference on R2P: The Next Decade, New York, 18/01/2012.

5.3. Conditions, Capacities, and Dispositions

Based on the detailed discussion of the situational crime prevention efforts during the Libya crisis, this section infers conditions, capacities, and dispositions that are required for the prevention of international crimes. The discussion shows that political mediation and the authorization of military protection measures in the SC require a certain amount of international unity and cooperation. Moreover, international actors need to reconcile the competing logics of different prevention tools, such as accountability threats and mediation; arms embargoes and the strengthening of victim capacity; or ICC referrals and flexible accountability threats. The effective use of situational crime prevention tools also requires a number of specific international capacities, such as military capacity to monitor arms embargoes, execute air campaigns, enforce civilian protection mandates, analytic capacity to identify criminal masterminds and their enabling networks, domestic legal capacity to rapidly impose targeted sanctions, or international judicial capacity to reach out to potential defectors.

5.3.1. Targeted Sanctions

One of the first steps that international actors took to prevent atrocity crimes in Libya was to impose targeted sanctions on individuals associated with the Gaddafi regime. The targeted sanctions were intended to change the behaviour of key Libyan decision-makers and to constrain the criminal masterminds by diminishing funds available for recruiting mercenaries, buying heavy weapons, or paying salaries. At least three lessons can be inferred from the use of targeted sanctions in Libya.

First, the Libya case suggests that it is crucial that international actors have the capacity to enforce targeted sanctions quickly and comprehensively, so as to not give individuals the chance to hide assets or otherwise avoid the impact of the sanctions. In Libya, international actors quickly froze nearly half of the Gaddafi regime's useable

money – despite some problems with blocking Gaddafi’s funds in the international banking system.¹⁶³ Libya still had about 144 tonnes of gold reserves, which it kept inside the country. Already by April 2011, however, the Gaddafi regime was forced to sell parts of its gold reserves in order to pay salaries and continue the campaign against the rebels.¹⁶⁴ It is documented that Gaddafi’s efforts to turn his gold into useable money got increasingly more desperate.¹⁶⁵ Thus, the rapid imposition of targeted sanctions seems to have successfully disrupted Gaddafi’s atrocity campaign. According to Lopez and Stefanopoulos, without the targeted sanctions, the Libya crisis would have been more bloody and protracted.¹⁶⁶

Second, and closely related to the previous point, the Libya case shows that it is important that international actors have the capacity to quickly identify key individuals and their support networks. The US Treasury Department and several intelligence agencies played an important role in this regard.¹⁶⁷ International actors further require specific domestic legal mechanisms that enable them to immediately block transactions, freeze assets, or cut-off trade with the target individuals and entities. In the US, for example, the *Trading With the Enemy Act* and the *International Emergencies Economic Power Act* allowed US President Obama and the US Treasury Department to impose and enforce targeted sanctions very quickly.

Third, the Libya case suggests that it is important that international actors develop credible mechanisms for lifting targeted sanctions imposed on specific individuals in return for positive changes in behaviour. In Libya, for example, it

¹⁶³ Stefanopoulos and Lopez, ‘From Coercive to Protective Tools’, 62.

¹⁶⁴ Michael Peel, Jack Farchy and Roula Khalaf, ‘Gaddafi Regime Sold \$1bn of Gold’, *The Financial Times*, 08/09/2011.

¹⁶⁵ Peel, Farchy, and Khalaf, ‘Gaddafi Regime Sold \$1bn of Gold’; Jack Farchy and Roula Khalaf, ‘Gold Key to Financing Gaddafi Struggle’, *The Financial Times*, 21/03/2011; *Reuters*, ‘Gaddafi Will Try to Sell Libyan Gold: Ex-central Banker’, 25/08/2011.

¹⁶⁶ Stefanopoulos and Lopez, ‘From Coercive to Protective Tools’, 62.

¹⁶⁷ Personal Interview with a US Diplomat at the UN (New York, 23/02/2012).

conveyed an important message that the country's long-time intelligence chief and foreign minister, Musa Kusa, was de-listed from the sanctions list after his defection to the UK in early April 2011.¹⁶⁸

5.3.2. Arms Embargo

Furthermore, UNSCR 1970 imposed a full territorial arms embargo on Libya. This step aimed at reducing the means available to the Gaddafi regime to commit atrocity crimes. At least two lessons can be inferred from the Libyan arms embargo.

First, the Libya case suggests that international actors require significant monitoring and enforcement capacities to effectively impose an arms embargo, especially if the territory in question is vast. In Libya, NATO hailed over 3.100 vessels, boarded around 300 ships, and denied entry to eleven ships because the vessel or its cargo presented a risk to the civilian population.¹⁶⁹ However, weapons and mercenaries still trickled into Libya through the country's southern borders with Chad, Niger, and Sudan. NATO officials admit that the alliance did not have the capacities required to monitor and enforce the arms embargo in all parts of Libya.¹⁷⁰

Second, the Libya case suggests that arms embargoes can be undermined by parallel efforts to strengthen the self-defensive capacities of potential victims. In Libya, several of the states that were instrumental in imposing the arms embargo have subsequently delivered weapons to rebel forces, arguing that this was required to strengthen the capacity of potential victims to defend themselves. The BRICS countries have criticised this as an explicit breach of the arms embargo. However, the drafters of UNSCR 1973 argue that the insertion of the clause "notwithstanding

¹⁶⁸ Scott Shane, 'Sanctions Are Dropped Against Libyan Defector', *The New York Times*, 04/04/2011.

¹⁶⁹ See, NATO, 'Operation Unified Protector: Final Mission Statistics', http://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf.

¹⁷⁰ Personal Interview with Senior NATO Officials.

paragraph 9 of resolution 1970” created a legal exception for the provision of weapons to the opposition for civilian protection purposes.¹⁷¹ The legal debate cannot be resolved here.¹⁷² Politically speaking, however, there was no mutually shared understanding on what exactly the arms embargo permitted or excluded.¹⁷³ This reveals an interesting tension between efforts to reduce the means available to commit atrocities and efforts to strengthen the capacity of potential victims to cope with harm.

5.3.3. Individual Criminal Accountability

Threats of individual criminal accountability formed an essential part of the situational crime prevention efforts in Libya. Whilst accountability threats were issued in different forms and by different institutions, they all aimed at changing the cost-benefit calculus of the criminal masterminds, de-legitimizing the Gaddafi regime by branding key members as international criminals, and encouraging defections from the regime. The aim was not necessarily to initiate an independent, international process of justice. At least three lessons can be inferred from the accountability threats in the Libya crisis.

First, the Libya case suggests that ICC referrals can be problematic, as they are difficult to control for international actors. In the context of a quasi-permanent international justice process, more flexible accountability threats, such as Commissions of Inquiry or formal warnings, lose their potential effects. In Libya, international actors initially threatened that systematic and widespread attacks on civilian populations constitute crimes against humanity for which individuals can be

¹⁷¹ Personal Interview with a US Diplomat at the UN.

¹⁷² See, Dapo Akande, ‘Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?’, *EJIL:Talk!*, 31/03/2011; and Dapo Akande, ‘France Admits to Arming Libyan Rebels: Was this Lawful?’, *EJIL:Talk!*, 01/07/2011.

¹⁷³ Even US Ambassador Rice was not sure what that wording meant when the question was raised in the SC deliberations.

held accountable. The HRC tried to lend credibility to such threats by establishing a COI to investigate alleged atrocity crimes and identify individuals responsible with a view to holding them accountable. It was hoped that this would alter the decision-making process of the criminal masterminds. Only one day later, however, the Security Council took the exceptional decision to refer the situation in Libya to the ICC (even though many SC members would have preferred to merely threaten a referral at this stage). The ICC quickly acted upon its mandate, opened an investigation in early March, requested arrest warrants in mid-May, and issued arrest warrants in late June. The unusually quick establishment of an international justice process undermined the more flexible threats of individual criminal accountability. International actors had to realize that their ability to control the ICC process was very limited. Senior diplomats have expressed disappointment that the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, moved forward so quickly, which is something that they had neither anticipated nor planned.¹⁷⁴ According to a senior US diplomat, “there was a sober realization of the lack of control that the international community has once a case is referred to the ICC”.¹⁷⁵

Second, the Libya case shows that the credibility of threats of individual criminal accountability can be undermined by parallel efforts to negotiate a political solution to an armed conflict. In the Libya case, the political mediation initiatives included efforts to engineer side deals and find an exile option for Gaddafi.¹⁷⁶ The AU Assembly even decided that AU member states should not cooperate in the execution of the ICC arrest warrants in order to facilitate a political solution. The AU Assembly called on “the UN Security Council to activate the provisions of Article 16 of the

¹⁷⁴ Personal Interview with a US Diplomat at the UN.

¹⁷⁵ Personal Interview with a US Diplomat at the UN.

¹⁷⁶ Personal Interview with a French Diplomat at the UN; also Moss, *The UN Security Council and the International Criminal Court*, 10.

Rome Statute with a view to deferring the ICC process on Libya, in the interest of justice as well as peace in the country”.¹⁷⁷ The Ugandan government offered Gaddafi asylum, even though Uganda is a state party of the ICC.¹⁷⁸ Moreover, it was rumoured that Gaddafi could always count on being able to go to Zimbabwe, Belarus, Venezuela, Nicaragua, or Cuba. European ICC member states did not exclude the possibility of an exile solution either. On the contrary, the Italian Foreign Minister, Franco Frattini, explicitly called on Gaddafi to go into exile.¹⁷⁹ According to a French diplomat at the UN, Gaddafi interpreted these mixed messages as a weakness.¹⁸⁰ As deterrence increases with the subjectively expected likelihood of punishment, the efforts to find an exile country for Gaddafi undermined the effectiveness of accountability threats.¹⁸¹

Third, the Libya case suggests that international actors need to strengthen the international judicial capacity to communicate deterrence threats more clearly to potential perpetrators. In particular, the ICC needs to build capacity to reach out to potential defectors and actively encourage defections.¹⁸² “A referral itself is not enough,” the French diplomat argues. “In order to really deter criminals and prevent crimes, you have to follow-up and show that you are serious. Sooner, rather than later,

¹⁷⁷ See, Assembly of the AU, ‘Decision on the Implementation of the Assembly Decisions on the International Criminal Court’, Assembly/AU/Dec.366(XVII), Seventeenth Ordinary Session, 01/07/2011, Malabo, Equatorial Guinea.

¹⁷⁸ *The Nation*, ‘Uganda Would Welcome Gaddafi’, 30/03/2011.

¹⁷⁹ *Al Arabiya News*, ‘World Powers Move Towards Gaddafi Exile Plan’, 30/03/2011.

¹⁸⁰ Personal Interview with a French Diplomat at the UN; also Moss, *The UN Security Council and the International Criminal Court*, 10.

¹⁸¹ Personal Interview with a French Diplomat at the UN. On deterrence more generally see, David M. Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (New York: Routledge, 2009), 29-30; or Donald Bloxham and Devin Pendas, ‘Punishment as Prevention? The Politics of Punishing Genocidares’, in D. Bloxham and R. Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), 633; Moss, *The UN Security Council and the International Criminal Court*, 10.

¹⁸² Personal Interview with a French Diplomat at the UN; see also Dan Saxon, ‘The International Criminal Court and the Prevention of Crimes’, in J. Welsh and S. Sharma (eds.), *The Responsibility to Prevent: Overcoming the Challenges of Mass Atrocity Prevention* (Oxford: Oxford University Press, forthcoming), 7-8.

you need to speak directly to defectors and potential defectors in order to communicate that there might be ways for them to avoid criminal prosecution”.¹⁸³ In Libya, the French diplomat claims, such follow-up proved successful in encouraging defections on the few occasions that it happened.¹⁸⁴ Potential mechanisms for rewarding positive changes in behaviour can be found in Articles 16 and 53 of the Rome Statute. Article 16 gives the SC the power to defer a case for a renewable period of 12 months. However, given the political nature of SC decision-making, Art. 16 deferrals are an unpredictable mechanism. There is also no track record for this mechanism. Article 53 provides another potential mechanism for rewarding positive changes in behaviour, giving the ICC Prosecutor the power to not open an investigation and/or prosecute if he/she does not consider this to be in the interest of justice. However, as already alluded to, the actions of the ICC Prosecutor are difficult to control.

5.3.4. Political Mediation

The mediation processes of the UN and the AU sought to find a political solution to the internal armed conflict in Libya. The BRICS countries, in particular, were very supportive of the political track. At least three lessons can be inferred from the mediation efforts during the Libya crisis.

First, the Libya case suggests that an important success condition for political mediation processes is that they have the unified support of the key international actors. The AU, in particular, has expressed disappointment about the lack of international support for its roadmap. “The pursuit of other agendas in Libya by non-African actors had an impact on the implementation of the AU Roadmap,” the AU

¹⁸³ Personal Interview with a French Diplomat at the UN.

¹⁸⁴ Personal Interview with a French Diplomat at the UN.

argued. “Attempts have been made to marginalize an African solution to the crisis”.¹⁸⁵

The Portuguese Ambassador to the UN partly agrees with this assessment, admitting that “to be consistent, coherent and credible we should have pushed harder on the political front”.¹⁸⁶

Second, the Libya case shows that ICC referrals and international arrest warrants can limit the prospects of a political settlement. In Libya, the ICC referral meant that the leadership of the Gaddafi regime was doomed.¹⁸⁷ This incentivised the criminal masterminds to win the struggle by all means to avoid prosecution.¹⁸⁸ According to Priscilla Hayner, close confidants of Gaddafi say that he felt trapped by the rapid ICC process and did not see any other option than to continue fighting.¹⁸⁹ The preventive ICC referral cornered Gaddafi.¹⁹⁰ Moreover, the ICC arrest warrants made it much harder to find a country that could offer Gaddafi exile. Most states in Europe and Africa are parties to the Rome Statute. At least in theory, these countries could not guarantee Gaddafi protection from prosecution. Some argue, therefore, that the ICC involvement undermined the peace negotiations and made it more difficult to

¹⁸⁵ See, African Union, ‘Official Presentation by the AU to the Libyan Parties of a Proposal on a Framework Agreement for a Political Solution to the Crisis in Libya’, Press Release, Malabo, Equatorial Guinea, 01/07/2011.

¹⁸⁶ Personal Interview with Ambassador Jose Filipe Moraes Cabral.

¹⁸⁷ Personal Interview with a French Diplomat at the UN.

¹⁸⁸ Personal Interview with Ambassador Jose Filipe Moraes Cabral; Personal Interview with a US Diplomat at the UN; Permanent Mission of the Netherlands to the UN, ‘Summary of Informal Retreat on R2P after Libya’, New York, 9/12/2011; Simon Tisdall, ‘This Arrest Warrant Could Make Gaddafi More Dangerous’, *The Guardian*, 27/06/2011; Howard LaFranchi, ‘Libya’s Qaddafi Charged With War Crimes: A Help or Hindrance to NATO?’, *Christian Science Monitor*, 27/06/2011.

¹⁸⁹ Priscilla Hayner, ‘Libya: The ICC Enters During War’, *ECFR Background Paper* (2013), 4.

¹⁹⁰ Prentice, ‘The Politics of Intervention’, 58.

find a political solution to the internal armed struggle.¹⁹¹ The AU Assembly even advised member states not to cooperate in the execution of the ICC arrest warrants.¹⁹²

Third, the Libya case shows that traditional mediation efforts run into problems when the conflicting parties are not prepared to negotiate in good faith. Neither the rebels nor the Gaddafi regime seemed interested in compromise. The Gaddafi regime was intent to maintain power by all means, as the continuing attacks on civilian populations and the “fight until the last bullet”-rhetoric evidence. There is no evidence that Gaddafi was prepared to leave Libya, even though the AU claims to have privately gotten his agreement to do so.¹⁹³ For its part, the NTC stated repeatedly that it would not accept any solution that leaves Gaddafi in power. The NTC also believed that the AU initiative was biased in favour of the Gaddafi regime.¹⁹⁴ The NTC felt vindicated when Jacob Zuma publicly called Gaddafi a “brother leader” and refused to directly talk to the NTC in Benghazi.¹⁹⁵ An op-ed by Ugandan President Yoweri Museveni that praised Gaddafi as a “true nationalist” did not help either. “Gaddafi, whatever his faults, is a true nationalist. I prefer nationalists to puppets of foreign interests,” Museveni explained. “Regarding the Libyan opposition, I would feel embarrassed to be backed by Western warplanes because quislings of foreign interests have never helped Africa”.¹⁹⁶ As the mediation initiatives did not attempt to coerce the NTC and the Gaddafi regime to negotiate in good faith, political mediation played a merely cosmetic role during the Libya crisis.

¹⁹¹ More generally see, Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors: Principle and Pragmatism in Strategies of International Justice’, *International Security* vol. 28, no. 3, 5-7.

¹⁹² See, Assembly of the AU, ‘Decision on the Implementation of the Assembly Decisions on the International Criminal Court’.

¹⁹³ De Waal, ‘African Roles in the Libyan Conflict of 2011’, 373-374.

¹⁹⁴ *BBC News*, ‘Libya: Gaddafi Government Accepts Truce Plan, says Zuma’, 11/04/2011.

¹⁹⁵ *Channel 4 News*, ‘Libya: Gaddafi Accepts African Union Peace Plan’, 11/04/2011; Chris McGreal, Harriet Sherwood, Ian Traynor, and Nicholas Watt, ‘Libyan Revolutionary Council Rejects African Union’s Peace Initiative’, *The Guardian*, 11/04/2011.

¹⁹⁶ Yoweri Museveni, ‘Reflections on the Libyan Crisis’, *The Herald*, 24/03/2011.

5.3.5. Air Campaign

NATO's air campaign was crucial for the prevention of international crimes in Libya. The air campaign quickly eliminated the immediate threat to civilian populations in and around Benghazi, and continued to provide a protective shield against atrocity crimes. NATO's air campaign ended at the end of October, shortly after Gaddafi's death. There are at least two lessons that can be inferred from the air campaign in Libya.

First, the Libya case shows that the geographic context impacts on the effectiveness of an air campaign aimed at the protection of civilian populations. The geographic conditions in Libya were ideal for such an air campaign, as much of the fighting took place in open and largely unpopulated desert terrain. This simplified the identification of legitimate military targets and allowed their destruction without high risk of collateral damage.¹⁹⁷ Difficulties emerged in later phases of NATO's air campaign, when open targets became less frequent and fighting moved closer to the cities. Daalder and Stavridis explain that, "the proximity of the regime's forces, facilities, and equipment to civilian infrastructure ... and the need for NATO to minimize harm to civilians all slowed the operation and at times led to a perception of deadlock and stalemate".¹⁹⁸

Second, the Libya case reveals that the situational prevention of atrocity crimes requires specific military capabilities. In Libya, NATO only had a limited number of warplanes available, which meant that the alliance could not provide protection for the entire civilian population.¹⁹⁹ Moreover, the US' military capabilities were essential for the air campaign. According to senior UK militaries, the US hinted

¹⁹⁷ Personal Interview with Senior NATO Officials.

¹⁹⁸ Daalder and Stavridis, 'NATO's Victory in Libya', 2-7.

¹⁹⁹ Personal Interview with Edward Stringer.

that it would stop providing planes for NATO operations after about three months. As a consequence, it was unclear for how long NATO would be able to maintain its protective shield against the Gaddafi regime.²⁰⁰ This uncertainty was a factor that contributed to NATO's decision to increasingly pursue "enduring protection", i.e. to diminish the Gaddafi regime's overall capacity to harm civilians.

5.4. Unintended Consequences and Side-Effects

This section examines unintended consequences and side-effects that emerged from the efforts to prevent international crimes in Libya. The discussion reveals that the international crime prevention efforts in Libya brought about a number of unintended consequences, such as (civilian) casualties, revenge atrocities by the empowered rebel movement, proliferation of weapons and regional instability, or regime change. These side-effects have turned the Libya crisis into a very controversial episode in global politics.

5.4.1. (Civilian) Casualties

One side-effect of NATO's air campaign to protect civilians and civilian populated areas was that it caused casualties, in some instances civilian casualties. Whilst NATO's military intervention prevented atrocity crimes, the death toll of the Libya crisis is still significant, with estimates ranging from 5.000 to 50.000 casualties.²⁰¹ The high casualty numbers of 30.000 to 50.000 that are put forward by the NTC need to be treated with care, as they are inflated for political reasons, contain duplications, and include missing migrant workers who may have fled the country.²⁰² The numbers show, however, that the fighting between the rebels and Gaddafi forces did not stop as

²⁰⁰ Personal Interview with Edward Stringer; Personal Interview with a Diplomat in the UK Delegation to NATO.

²⁰¹ Rod Nordland, 'Libya Counts More Martyrs than Bodies', *The New York Times*, 16/09/2011.

²⁰² Nordland, 'Libya Counts More Martyrs than Bodies'.

soon as NATO warplanes showed up. On the contrary, some commentators argue that by giving the rebels a fighting chance, the international community prolonged the fighting and contributed to a higher death toll.²⁰³ Following this logic, the Indian Ambassador to the UN, Hardeep Singh Puri, has publicly argued that NATO has “killed thousands in order to save a few hundred”.²⁰⁴ Similarly, Alan Kuperman claims that NATO’s intervention in Libya constitutes a humanitarian failure.²⁰⁵

Moreover, some NATO air strikes have directly caused civilian casualties, which has attracted international criticism, particularly from the BRICS countries.²⁰⁶ Investigations by the HRC and HRW have revealed several instances in which NATO air strikes have killed Libyan civilians.²⁰⁷ It is estimated that NATO air strikes are directly responsible for at least 70 to 80 civilian casualties and many more injuries.²⁰⁸ However, the human rights bodies stress unambiguously that NATO did not deliberately target civilians. In fact, the HRC argues that NATO conducted a “highly precise campaign with a demonstrable determination to avoid civilian casualties”.²⁰⁹ NATO officials stress that the Libya campaign is “the most precise and the most

²⁰³ See, Alan Kuperman, ‘A Model Humanitarian Intervention? Reassessing NATO’s Libya Campaign’, *International Security* vol. 38, no. 1 (2013), 105-136; Mary Ellen O’Connell, ‘How to Lose a Revolution’, *e-International Relations*, 07/09/2011, <http://www-e-ir.info/?p=13728>; and Seumas Milne, ‘If the Libyan War was About Saving Lives, It was a Catastrophic Failure’, *The Guardian*, 26/10/2011.

²⁰⁴ Hardeep Singh Puri, ‘Statement of the Permanent Representative of India to the UN’, Delivered at the Interactive Dialogue on Responsibility While Protecting, February 2011.

²⁰⁵ See, Kuperman, ‘A Model Humanitarian Intervention?’.

²⁰⁶ Russia and China have publicly condemned NATO for the civilian casualties. In the context of its RWP initiative, Brazil has started to advocate the position that even one civilian casualty is one too. See, Davies, ‘The UN Human Rights Council’s Report on Civilian Casualties in Libya’; “Responsibility While Protecting: Elements for the Development and Promotion of a Concept”, General Assembly/Security Council, A/66/551-S/2011/701, November 11, 2011.

²⁰⁷ See, Human Rights Council, ‘Report of the International Commission of Inquiry on Libya’, 17; and Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya*, May 2012.

²⁰⁸ See, Ian Davies, ‘The UN Human Rights Council’s Report on Civilian Casualties in Libya’, *NATO Watch Briefing Paper No. 21*, 21/03/2012.

²⁰⁹ Human Rights Council, ‘Report of the International Commission of Inquiry on Libya’, 22.

careful operation in terms of civilian casualties that has ever been conducted”.²¹⁰

NATO officials explain that, “it is ‘common sense’ in military circles that the risk to civilians in a complex military operation like in Libya can never be zero”.²¹¹ A senior

NATO official reveals that,

It was a bit of a surprise to us all how little readiness there was on the part of those that had been quite insistent that something had to be done to accept that military force involves civilian casualties. There have not been military campaigns involving exploding devices where no one gets hurt. The UN authorized this because they were saying there is a greater good. And there has been very little recognition of this being a trade-off of R2P.²¹²

The Libya case suggests, therefore, that military efforts to prevent international crimes are likely to entail civilian casualties. Interestingly, this side-effect has triggered productive international debate on the development of accountability, reporting, and transparency duties for actors to whom the Security Council delegates the right to use force.²¹³

5.4.2. Revenge Atrocities by Rebel Militias

Another unintended consequence of the international crime prevention efforts in Libya was that the preventive steps empowered the rebel movement to commit revenge atrocities against alleged Gaddafi loyalists and mercenaries. This has been documented by human rights bodies, such as the HRC, HRW, and Amnesty International (AI).²¹⁴ Some of the rebel atrocities may even amount to war crimes and

²¹⁰ Personal Interview with Senior NATO Official, Legal Division.

²¹¹ Personal Interview with Oana Lungescu, *NATO Spokesperson, 2010-present* (Brussels, 29/05/2012).

²¹² Personal Interview with Senior NATO Official, Legal Division.

²¹³ Particularly in context of the Brazilian initiative on “Responsibility While Protecting”. See, “Responsibility While Protecting: Elements for the Development and Promotion of a Concept”, General Assembly/ Security Council, A/66/551-S/2011/701, 11/11/2011.

²¹⁴ See, Amnesty International, *The Battle for Libya: Killings, Disappearances and Torture*, MDE 19/025/2011; Amnesty International, *Detention Abuses Staining the New Libya*, MDE 19/036/2011; Human Rights Watch, *Libya: Militias Terrorizing Residents of “Loyalist” Towns*, Press Release, 30/10/2011; and Medecines Sans Frontières, *Libya: Detainees Tortured and Denied Medical Care*, Press Release, 26/01/2012.

crimes against humanity.²¹⁵ The HRC reports that around 70 Gaddafi supporters were executed with their hands tied in Gaddafi's birthplace, Sirte, in October 2011.²¹⁶ "Scores of suspected al-Gaddafi loyalists were unlawfully killed following capture," Amnesty International (AI) claims. "Militias also looted and burned homes and carried out revenge attacks and other reprisals against alleged al-Gaddafi supporters, forcibly displacing tens of thousands of people".²¹⁷

Moreover, rebel militias systematically directed revenge attacks against African migrant workers and dark-skinned Libyans, who they accused of being mercenaries.²¹⁸ Dark-skinned Libyans from the town of Tawergha were particularly affected by atrocities from the rebel militias. The Gaddafi regime had used Tawergha as the base for the siege of Misrata. Rebel militias simply assumed, therefore, that all Tawerghans were either Gaddafi loyalists or mercenaries.²¹⁹ The HRC has interviewed rebel fighters who stated openly that, "Tawerghans deserved to be wiped off the face of the planet". The HRC reports that the interviewees frequently used racist and derogatory expressions to refer to Tawerghans, such as "slaves", "blacks", and "animals".²²⁰ The HRC and AI have also documented abductions, disappearances, torture, and unlawful killings in Tawergha.²²¹ According to the HRC, rebel forces have ethnically cleansed Tawergha.²²² Similar atrocities took place in the town of Mashashiyya.²²³ In January 2012, moreover, the NGO Medecins Sans Frontieres

²¹⁵ For example, Amnesty International, *The Battle for Libya*; Human Rights Council, 'Report of the International Commission of Inquiry on Libya', 2.

²¹⁶ Human Rights Council, 'Report of the International Commission of Inquiry on Libya', 9.

²¹⁷ Amnesty International, *Militias Threaten Hope for New Libya*, MDE 19/002/2012, 5.

²¹⁸ Amnesty International, *Detention Abuses Staining the New Libya*, 8.

²¹⁹ International Crisis Group, *Holding Libya Together*, 28.

²²⁰ Human Rights Council, 'Report of the International Commission of Inquiry on Libya', 13.

²²¹ Human Rights Council, 'Report of the International Commission of Inquiry on Libya', 9.

²²² Human Rights Council, 'Report of the International Commission of Inquiry on Libya', 13.

²²³ International Crisis Group, *Holding Libya Together*, 28.

suspended its work in detention centres in Misrata, as it learned that it had been treating prisoners between torture sessions.²²⁴

In Resolution 2016, the Security Council officially acknowledged this dilemma and urged the new Libyan authorities “to refrain from reprisals ... and to take all steps necessary to prevent reprisals, wrongful imprisonment and extrajudicial executions”. The SC also reminded the new Libyan authority of its “responsibility for the protection of its population, including foreign nationals and African migrants”.²²⁵ NATO also warned the rebel forces not to attack civilians, explaining that its mandate applied to the protection of civilians on both sides. NATO officials explain: “we did warn the anti-Gaddafi forces: don’t attack civilians. Our mandate was quite clear; there was nothing in the mandate that said only attack pro-Gaddafi forces”.²²⁶ This shows that the line between “perpetrators” and “victims” can be fine and fluid. In Libya, the potential “victims” slowly turned into “perpetrators”. Dealing with such changing identities presents a key challenge for international actors.

5.4.3. Proliferation of Weapons and Regional Instability

Furthermore, the international crime prevention efforts in Libya had the side-effect of facilitating an alarmingly high circulation of weapons in the country, which also caused instability in the wider region.²²⁷ Some states directly supplied weapons to Libyan rebel groups that were seen as potential victims. Weapons also continued to trickle into Libya via Chad, Sudan, and Niger, as NATO did not have the capabilities to comprehensively enforce the arms embargo at Libya’s southern borders. The power vacuum that the fall of the Gaddafi regime created magnified this problem, as there

²²⁴ MSF claims that it treated at least 115 people with torture related injuries. See, Medecins Sans Frontières, *Libya: Detainees Tortured and Denied Medical Care*.

²²⁵ UN Security Council, Resolution 2016 (2011), S/RES/2016, 27/10/2011.

²²⁶ Personal Interview with Oana Lungescu.

²²⁷ Personal Interview with Oana Lungescu.

were no international troops on the ground to secure loose weapons.²²⁸ It catalyzed the emergence of highly armed militias (“revolutionary brigades”), often associated with certain cities.²²⁹ According to Alison Pargeter, Libya started to resemble “a collection of city states”.²³⁰

Moreover, the proliferation of weapons in Libya had destabilizing effects on the wider Sahel region. AU Chairperson, Jean Ping, expressed great concern about “the proliferation, in the region, of weapons emanating from the Libyan military depots”.²³¹ For example, weapons from Libya are often cited as a proximate cause for the destabilization of Mali, which resulted in a military coup in March 2012.²³² According to HRW, the groups that committed atrocities in northern Mali “had previously supported the Libyan government of Muammar Gaddafi and re-entered Mali with weapons from Libya after he was ousted”.²³³ In Resolution 2017, the SC officially acknowledged the problems arising from the proliferation of weapons in Libya, particularly the proliferation of man-portable air-defence systems (MANPADS), and warned about “the risk of destabilization posed by the dissemination in the Sahel region of illicit small arms and light weapons”.²³⁴

5.4.4. Regime change

However, the most controversial side-effect of the international crime prevention efforts in the Libya crisis was the eventual regime change. The Gaddafi regime never stopped trying to attack civilian populations, even after NATO launched its air

²²⁸ Personal Interview with Senior NATO Official, Legal Division.

²²⁹ See, International Crisis Group, *Holding Libya Together*, 18-30.

²³⁰ Pargeter, *Libya*, 248.

²³¹ Jean Ping, ‘The African Union and the Libyan Crisis: Putting the Records Straight’, *Letter from the Chairperson*, Issue 1, November 2011.

²³² Ping, ‘The African Union and the Libyan Crisis’; Christian Caryl, ‘The Lesson from Mali: Do No Harm’, *Foreign Policy*, 11/04/2012.

²³³ Human Rights Watch, ‘Mali: War Crimes By Northern Rebels’, 30/04/2012.

²³⁴ UN Security Council, Resolution 2017 (2011), 31/10/2011.

campaign. In June 2011, therefore, NATO decided to move from providing an on-going, rolling shield against imminent atrocities to ensuring “enduring protection”. This essentially meant the destruction of the Gaddafi regime’s general ability to harm civilian populations, which involved targeting command and control nodes, training facilities, and communication centres.²³⁵ This left the Gaddafi regime exposed and vulnerable to the rebel forces that were receiving additional support from key states. Eventually, rebel forces managed to counter Gaddafi’s diminished power, take control over Tripoli, and put down the resistance in the Gaddafi strongholds Sirte and Bani Walid. The execution of Colonel Gaddafi marked the end of the Gaddafi regime.

Regime change cannot really be described as an “unintended” consequence of the international crime prevention efforts in Libya, given that some very senior foreign policy-makers had defined regime change as the desirable political outcome. However, it is also not entirely accurate to accuse NATO and its allies of having abused the civilian protection mandate to achieve regime change.²³⁶ NATO and its allies did not directly end Gaddafi’s 42 year rule. Rather, NATO’s strategy of providing “enduring protection” opened up space for the rebels to counter the Gaddafi regime’s diminishing power. This was a necessary cause of the regime change. Thus, the Libya case shows that providing “enduring protection” from atrocity crimes can become a facilitating factor for regime change.

²³⁵ Personal Interview with Edward Stringer.

²³⁶ Senior policy-makers publicly identified regime change as the political goal, but explicitly cautioned against pursuing this objective militarily in the context of NATO’s civilian protection operations, see Obama, ‘Remarks by the President in Address to the Nation on Libya’; Barack Obama, David Cameron, and Nicolas Sarkozy, ‘Libya’s Pathway to Peace’, *The New York Times*, 15/04/2011; NATO, ‘Statement on Libya’, 08/06/2011; see also, Ian Black, ‘Libya Regime Change is West’s Goal, but Doubts Remain over How to Achieve it’, *The Guardian*, 15/04/2011.

5.5. Conclusions

The Libya case study has allowed a number of important observations about the prevention of international crimes in the context of a transition from peacetime to an armed conflict. This concluding section highlights five lessons that are directly relevant with regards to further refining, complementing, and problematizing the preliminary international crime prevention framework.

First, the Libya case reveals the world's limited capacity to anticipate atrocity crimes. Before the outbreak of anti-regime protests in Benghazi, international risk assessments did not anticipate any atrocity risk in Libya. On the contrary, the HRC had applauded Libya for its progress in the field of human rights. In Libya, it seems, atrocity risk was triggered in a matter of days. This meant that international actors did not have time to implement social crime prevention programmes. Rather, they had to rapidly design situational crime prevention strategies to avert the systematic violence from escalating into atrocity crimes. Thus, the Libya case does not really allow observations about social crime prevention.

Second, the Libya case reveals a number of tools that states consider useable for operationalizing the situational prevention of international crimes. In the Libya crisis, international actors tried to change the incentives and capacities of the potential perpetrators (i.e. members of the Gaddafi regime) through targeted sanctions, threats of individual criminal accountability, a preventive ICC referral, and NATO's air campaign. Moreover, international actors tried to reduce the vulnerability of the potential victims (i.e. Libyan civilians and rebels) through a no-fly zone, safe areas, supplying "self-defensive" weapons and other essential equipment to the rebels, as well as diminishing the Gaddafi regime's overall capacity to harm civilian populations. Finally, international actors sought to reduce the permissiveness of the

crime situation by providing international scrutiny, imposing an arms embargo, and initiating mediation processes to negotiate a political solution to the internal armed conflict.

Third, the Libya case suggests that situational crime prevention efforts do not necessarily follow the traditional conflict prevention principles of consent, impartiality, and minimal coercion.²³⁷ Almost none of the international crime prevention tools was adopted with the consent of the Libyan government. This was particularly novel with regards to the military measures.²³⁸ Moreover, the international crime prevention measures were designed to punish the Gaddafi regime and protect the rebels (potential victims). The targeted sanctions only applied to individuals and entities belonging to the Gaddafi regime. The ICC referral targeted key members of the Gaddafi regime and stigmatized the entire regime as criminal.²³⁹ The arms embargo was enforced in a one-sided manner, as some states actively supplied weapons to the rebels. The no-fly zone rendered Gaddafi's air force unusable, whilst NATO seemed to provide close air support for rebel advances. The international mandate to protect civilian populated areas prevented the Gaddafi regime from attacking entire cities, regardless of whether they contained legitimate military targets. Finally, the move towards "enduring protection" entailed the destruction of the Gaddafi regime's overall capacity to harm civilians. Thus, international actors sided with the rebel movement in the civil war.

²³⁷ Welsh, 'Civilian Protection in Libya', 258. These principles are still deemed to be central in some accounts of the "responsibility to prevent". See, Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution Press, 2008), 86, 102; International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 24-25, 57-58.

²³⁸ Bellamy and Williams, 'The New Politics of Protection?', 825.

²³⁹ See, Luis Moreno-Ocampo, 'Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya', The Hague, 03/03/2011.

Fourth, the Libya case suggests that the situational prevention of international crimes requires certain conditions and capacities to be effective. Political mediation and the authorization of military protection measures in the SC require a certain amount of international unity and cooperation to succeed. Moreover, international actors need to reconcile the competing logics of different prevention tools, as tools tend to be used as part of a package, rather than in isolation. Prevention tools that can potentially clash are, for example, accountability threats and political mediation; arms embargoes and the provision of “self-defensive” weapons to potential victims; or ICC referrals and more flexible accountability threats. The effective use of situational crime prevention tools also requires a number of specific international capacities, such as military capacity to monitor arms embargoes, execute air campaigns, and enforce civilian protection mandates; analytic capacity to identify criminal masterminds and their enabling networks; domestic legal capacity to rapidly impose targeted sanctions; or international judicial capacity to reach out to potential defectors.

Finally, the Libya case shows that even successful instances of situational crime prevention can entail dilemmas and controversies. In Libya, the military efforts to provide protection for vulnerable populations also caused (civilian) casualties and injuries. This side-effect is likely to occur in the context of any military intervention. Moreover, the international crime prevention efforts empowered the Libyan rebel forces, loosely organized around the NTC, to commit revenge atrocities against alleged Gaddafi loyalists and mercenaries. The potential “victims” slowly turned into potential “perpetrators”. Furthermore, the international crime prevention efforts facilitated an alarmingly high circulation of weapons in Libya, which also triggered instability in the wider region. Most controversially, however, NATO’s efforts to provide “enduring protection” from atrocity crimes involved diminishing the Gaddafi

regime's general capacity to harm populations, which was a crucial facilitator for regime change.

Part Three

The Synthesis

The third part of this thesis provides a synthesis of the research results of the preceding chapters. The aim of this synthesis is to refine and revise the preliminary international crime prevention framework in light of the case study findings. Thus, the following chapter moves back and forth between conceptual assumptions about international crime prevention and empirical observations about how international actors have operationalized the prevention of atrocity crimes in specific situations. This approach of mixing deductive and inductive reasoning helps to illuminate the key elements that characterize an international crimes approach to the prevention of mass atrocities. More specifically, the synthesis has the purpose to refine the preliminary framework in four ways: (1) clarifying the relationship between social and situational crime prevention; (2) populating the framework with policy tools that international actors consider appropriate for operationalizing the situational prevention of international crimes; (3) shedding light on the conditions and capacities that need to be in place for the prevention of atrocity crimes; and (4) elucidating the relationship between the prevention of atrocity crimes and the prevention of armed conflict.

6. An International Crimes Approach to Mass Atrocity Prevention

“The very essence of the Responsibility to Protect is ‘international crimes’ prevention”.

❖ Don Hubert and Ariella Blätter, International Relations scholars¹

This chapter sets out the revised and refined framework for the prevention of international crimes, drawing on the conceptual and empirical insights that have been developed in the preceding chapters. This refined framework captures the consequences of addressing mass atrocities as *international crimes*.

In this chapter, it will be argued that an international crimes approach to the prevention of mass atrocities has a number of distinct characteristics. First, the prevention of international crimes accords primacy to short-term and proximate forms of prevention, so-called situational crime prevention. Whilst an integrated and comprehensive approach to the prevention of international crimes can and should combine both social and situational crime prevention, the predominantly negative interactions between these two forms of crime prevention reinforce the general argument about the primacy that should be accorded to situational crime prevention. The prevention of international crimes resembles primarily a strategic game, rather than a long-term agenda for societal reform.

Second, the tools that international actors consider appropriate for operationalizing all three dimensions of situational crime prevention belong to the

¹ Don Hubert and Ariella Blätter, ‘The Responsibility to Protect as International Crimes Prevention’, *Global Responsibility to Protect* vol. 4, no. 1 (2012), 63.

third pillar of R2P. Situational crime prevention tools are coercive and intrusive in nature, and international actors often employ them in an explicitly partial manner. In cases where the threat of mass atrocities occurs in the context of armed conflict, such a posture of partiality can lead to tension with conflict management strategies that are traditionally pursued in a more impartial manner. In order to reconcile these tensions, international actors need to conceive of atrocity prevention in more strategic and holistic ways.

Third, a distinctive strategy for the prevention of international crimes requires international actors to build generic capacities at the international level, which can then be used to quickly influence the behaviour of potential perpetrators, protect potential victims, and reduce the permissiveness of crime situations. This can be conceived as “external capacity building” – distinct from capacity-building efforts at the national level directed at mitigating the risk of atrocity crimes. Moreover, situational crime prevention requires certain conditions to succeed. It will often be difficult, or even impossible, to replicate these conditions in different cases, which is something that international policy-makers need to take into account when tailoring prevention strategies to a specific context.

Finally, a strategy for the prevention of atrocity crimes can include armed conflict as part of the crime situation – though atrocity crimes do not always occur in the context of armed conflict. Armed conflict constitutes a criminogenic environment that provides incentives, excuses, opportunities, and cover to commit widespread crime. International actors have shown that they consider the prevention, management, and resolution of conflict to be one strategy for the prevention of atrocity crimes. However, efforts to manage and resolve conflict can clash with more partial and coercive prevention tools. Counterintuitively, moreover, situational crime

prevention might require international actors to start or temporarily escalate an armed conflict as a means of preventing atrocity crimes.

This chapter proceeds in five steps. The first section clarifies the relationship between social and situational crime prevention, which are the two constituent elements of international crime prevention. The second section populates the framework with potential tools for operationalizing the situational prevention of international crimes across its three dimensions of perpetrators, victims, and crime situation. The third part illuminates the capacities and conditions that are required to successfully prevent international crimes. The fourth section elucidates the role that the management and resolution of armed conflict can play in an international crimes approach to the prevention of mass atrocities. The concluding section presents the revised framework for the prevention of international crimes.

6.1. Social and Situational Crime Prevention

Drawing on criminological assumptions and empirical observations about the prevention of atrocity crimes, this section discusses the relationship between social and situational crime prevention. The discussion shows that these two forms of crime prevention can interact in at least three ways. The first form of interaction is positive. Social crime prevention can help to provide a social infrastructure that enhances the effectiveness of situational crime prevention. The second form of interaction is more negative. Social crime prevention can trigger violence and atrocity risk, requiring situational crime prevention to play a mitigating role. The third form of interaction is negative too. Social crime prevention can contribute to the creation of a false sense of security and conceal the need for situational crime prevention. This deeper understanding about the relationship between social and situational crime prevention

gives added weight to the general argument that situational crime prevention strategies should be prioritized in policy making.

As elaborated in Chapter 2, criminologists distinguish between social crime prevention and situational crime prevention. The former views crime as the product of underlying social conditions and tries to address structural root causes that push individuals into crime. The latter views crime as the product of rational choices of individuals and seeks to alter more immediate factors that impact on the decision-making of individuals.² Crime prevention theorists and practitioners attach primary importance to situational crime prevention, i.e. to proximate and direct forms of prevention.³ Criminologists have produced considerable empirical evidence for the crime reduction effects of situational crime prevention, whereas the effectiveness of social crime prevention is very difficult to demonstrate empirically.⁴ Criminologists often assume, therefore, that crime opportunities are the real “root causes” of crime, not socio-economic structures.⁵ In short, the prevention of crime is seen as resembling a strategic game, rather than a long-term agenda for societal reform.

However, whilst social and situational crime prevention differ in nature, the two strategies are not *a priori* irreconcilable or incompatible. The criminologist

² See, Adam Crawford, ‘Crime Prevention and Community Safety’, in M. Maguire, R. Morgan, and R. Reiner, *The Oxford Handbook of Criminology*, 4th edn (Oxford: Oxford University Press, 2007), 872; United Nations Economic and Social Council (ECOSOC), ‘United Nations Guidelines for the Prevention of Crime’, Economic and Social Council Resolution 2002/13; John Muncie, ‘Editor’s Introduction’, in J. Muncie (ed.), *Criminology: The Causes of Crime, Vol. 2* (London: SAGE, 2006), vii-xix; or Mangai Natarajan, ‘Introduction’, in M. Natarajan (ed.), *Crime Opportunity Theories: Routine Activity, Rational Choice and their Variants* (Farnham: Ashgate, 2011), xix-xxvii.

³ Natarajan, ‘Introduction’, xv; Rossella Selmini, ‘The European Experience of Crime Prevention’, in S. Shoham, P. Knepper, and M. Kett (eds.), *International Handbook of Criminology* (London: CRC Press, 2010), 528-535; Rick Linden, ‘Situational Crime Prevention: Its Role in Comprehensive Prevention Initiatives’, *ICP Review* vol. 1 (2007), 149.

⁴ Lawrence Sherman et al., ‘Preventing Crime’, in L. Sherman et al. (eds.), *Evidence-based Crime Prevention* (London: Routledge, 2002), 4; Ken Pease, ‘Crime Reduction’, in M. Maguire, R. Morgan, and R. Reiner (eds.), *The Oxford Handbook of Criminology*, 3rd edn. (Oxford: Oxford University Press, 2002), 953.

⁵ Natarajan, ‘Introduction’, xxvii.

Rossella Selmini argues that both prevention strategies should, and often do, form part of one integrated and comprehensive prevention strategy, with an overarching emphasis on situational crime prevention.⁶ Such an integrated approach to the prevention of crimes was also observable in the cases of Bosnia and Kenya - international investment into social crime prevention was largely absent in Libya. In the case of Bosnia, the situational crime prevention efforts were preceded by measures associated with social crime prevention, such as the strengthening of Yugoslavia's federal structures, the promotion of market reforms and economic liberalization, and the support for the democratization process.⁷ In the case of Kenya, international actors ran various long-term programmes to strengthen the country's social prevention structures, such as reform of the judiciary, police reform, land reform, slum upgrading, promotion of civil society, civic education programmes, or the training of domestic election observers.⁸ These activities were not pursued under a "crime prevention" label, but are consistent with the logic of social crime prevention.⁹ It is a general phenomenon that social crime prevention is usually embedded in policy agendas that are not explicitly linked to the prevention of crime.¹⁰

Moreover, the three case studies suggest that social and situational crime prevention can interact in at least three ways; one of them positive and two of them more negative. First, the case of Kenya illustrates that international investment into social crime prevention can establish a social infrastructure that increases the crime

⁶ Selmini, 'The European Experience of Crime Prevention', 530.

⁷ See, Susan Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War* (Washington D.C.: Brookings Institution, 1995), 1-15.

⁸ Kenya Joint Assistance Strategy 2007-2012.

⁹ This is also stressed by UNSG Ban: "The examples included in the report highlight measures that Member States from cross regions have taken that may contribute to addressing risk factors for atrocity crimes and building State resilience, *even if not undertaken with that specific objective*" (emphasis added). Ban Ki-moon, *Responsibility to Protect: State Responsibility and Prevention: Report of the Secretary-General*, A/67/929-S/2013/399, 09/07/2013, 3.

¹⁰ See, UN ECOSOC, 'United Nations Guidelines for the Prevention of Crime'.

reduction effects of situational crime prevention. It was critical for Annan's mediation strategy that he could draw on Kenya's free and independent media to promote controversial issues and put pressure on the negotiation teams. Moreover, the presence of a vibrant civil society facilitated the success of the Annan mediation in important respects. Annan utilized civil society actors to engage local communities, maintain domestic pressure on the political leaders, and organize assistance to IDPs.¹¹ The Kenyan CCP initiative played a particularly important role by providing a link between Annan's elite-level mediation and the grass-roots realities.¹² Furthermore, the presence of an influential business community with strong international links enhanced the effectiveness of the threats of economic sanctions and visa restrictions. Kenya's businessmen relied on access to OECD countries and international markets, which required them to maintain a good international reputation.¹³ Finally, Kenya's ratification of the Rome Statute of the ICC enhanced the credibility of the threats of individual criminal accountability by allowing the prosecutor of the ICC to conduct and publicly announce a preliminary examination into alleged atrocity crimes in Kenya. Thus, the Kenya case evidences that investment into social crime prevention can make a positive contribution to situational crime prevention.

Second, the cases of Bosnia and Kenya suggest that the pursuit of social crime prevention can inadvertently trigger violence and atrocity risk, which necessitates that situational crime prevention efforts actively try to mitigate these negative externalities. In the case of Bosnia, the international efforts to strengthen Yugoslavia's federal structures and institutions partly facilitated the Serb campaign of ethnic cleansing, given that Serbs dominated the key federal institutions, including the

¹¹ International Crisis Group (ICG), *Kenya in Crisis*, Africa Report No. 137, 21/02/2008, 16.

¹² Elisabeth Lindenmayer and Josie Lianna Kaye, *A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya* (New York: International Peace Institute, 2009), 23.

¹³ ICG, *Kenya in Crisis*, 28.

leadership of the federal Yugoslav People's Army.¹⁴ Moreover, the international efforts to promote Yugoslavia's transformation from a socialist society to a liberal market economy and democracy inadvertently triggered violence and created a permissive context for atrocity crimes.¹⁵ Some of the earliest inter-ethnic clashes occurred in the context of the first free and democratic elections in the six Yugoslav republics.¹⁶ In Kenya, the return to democracy and multi-party politics in the early 1990s has also increased atrocity risk. Kenya's political elites have repeatedly used ethnic cleansing as a strategy for changing voting patterns and keeping opposition party voters from casting their ballots.¹⁷ Though widely unexpected, the 2007 election triggered ethnic violence as well.¹⁸ In both cases, international actors had to adopt situational crime prevention measures to mitigate the negative externalities of social crime prevention efforts – with mixed results.

This observation from the case studies speaks to a broader body of literature in International Relations, which suggests that the implementation of measures associated with social crime prevention can enhance the risk of political violence and atrocity crimes in the short to medium term. With regards to the promotion of democracy, numerous qualitative and quantitative studies conclude that democratizing states, usually referred to as anocracies or semi-democracies, tend to be more prone to

¹⁴ Josip Glaurdic, *The Hour of Europe: Western Powers and the Breakup of Yugoslavia* (New Haven: Yale University Press, 2011), 172.

¹⁵ C.I.A., 'Yugoslavia: End of a Nation-Building Experiment', *Special Analysis*, 21/09/1990, http://www.foia.cia.gov/docs/DOC_0000372260/DOC_0000372260.pdf; Woodward, *Balkan Tragedy*, 15.

¹⁶ Neven Andjelic, *Bosnia-Herzegovina: The End of a Legacy* (London: Frank Cass, 2003), 173-178; Woodward, *Balkan Tragedy*, 192-193; Glaurdic, *The Hour of Europe*, 106.

¹⁷ Commission of Inquiry into Post-Election Violence, *Final Report*, 15 October 2008, vii.

¹⁸ The imminent atrocity risk in Libya also erupted in the context of a popular uprising, which the authoritarian regime of Colonel Gaddafi decided to crush with all means necessary. However, the popular uprising in Libya was not the result of international social crime prevention efforts.

political violence than either pure democracies or pure dictatorships.¹⁹ Edward Mansfield and Jack Snyder argue that whilst a world of stable and mature democracies would be safer and less violent, countries do not become mature democracies overnight. The transitional phase from dictatorship to democracy, they argue, is dangerous and contains high risk of political violence.²⁰ Similarly, Michael Mann claims that ethnic cleansing is not a pre-modern or primitive phenomenon, but the dark side of democracy. Historically, Mann argues, ethnic cleansing and democratization have often proceeded hand in hand.²¹ With regards to security sector reform (i.e. improving a country's capacity to deliver justice and security in a transparent, accountable, and professional manner) and the promotion of horizontal equality (i.e. increasing equality between groups), Jonas Claes argues that these measures have the potential to significantly increase the risk of atrocity crimes in the short-term.²² Thus, IR scholarship supports the finding that the pursuit of social crime prevention can trigger international criminality in the short to medium term, which then requires situational crime prevention to mitigate these effects.

Third, the cases of Bosnia and Kenya show that the pursuit of social crime prevention can also conceal the need for situational crime prevention by creating the impression that a country possesses a certain amount of resilience to atrocity crimes. To put it another way, international investment into social crime prevention can

¹⁹ See, for example, James Raymond Vreeland, 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture', *International Organization* vol. 62, no.1 (2008); Patrick Regan and Errol Henderson, 'Democracy, Threats and Political Repression in Developing Countries: Are Democracies Internally Less Violent?' *Third World Quarterly* vol. 23, no. 1 (2002); Edward Mansfield and Jack Snyder, *Electing to Fight: Why Emerging Democracies Go to War* (Cambridge, MA: MIT Press, 2005).

²⁰ Edward Mansfield and Jack Snyder, 'Democratization and the Dangers of War', *International Security* vol. 20, no. 1 (1995), 5.

²¹ Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press, 2005), 4.

²² Jonas Claes, 'Atrocity Prevention at the State Level: Security Sector Reform and Horizontal Equality', *USIP Peacebrief 144*, 23/04/2013, 2-4.

contribute to the creation of a false sense of security and delay situational crime prevention efforts. In Bosnia, early warning about atrocity risk was provided by intelligence agencies, journalists, diplomats, and NGOs. However, international policy-makers did not take these warnings seriously. They believed that atrocities happen in Africa, but not in a well-respected “European” country, such as Yugoslavia. Yugoslavia had the reputation of being a multi-ethnic and tolerant political entity. These positive assessments were reinforced by the on-going international efforts to initiate socio-economic reforms in Yugoslavia. Some international policy-makers even regarded Milosevic as a “Balkan-Gorbachev”, a supporter of a democratic Yugoslavia.²³ This contributed to the creation of a sense of security and delayed situational crime prevention. In the same way, the substantial social crime prevention efforts in Kenya reinforced the widely held assumption that the country was an unlikely candidate for atrocity crimes. Despite some warnings about electoral violence and ethnic cleansing, there was little international concern about atrocity crimes in Kenya. Kenya was seen as the “anti-Somalia” - a poster child of African democracy and an anchor of peace in a troubled region.²⁴ The on-going international efforts to strengthen Kenya’s societal resilience to atrocities reinforced this sense of security and concealed the need for situational crime prevention.

In sum, there are two forms of crime prevention: social and situational crime prevention. These two forms of crime prevention can interact in three ways. One form of interaction is positive or virtuous: social crime prevention can help to build a social infrastructure that enhances the effectiveness of situational crime prevention. However, the other two forms of interaction are more negative: social crime

²³ Glaurdic, *The Hour of Europe*, 11, 22-24; Louis Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (London: Duke University Press, 2002), 4.

²⁴ Roger Cohen, ‘How Kofi Annan Rescued Kenya’, *New York Review of Books* vol. 55, no. 2 (2008), 51.

prevention can increase atrocity risk in the short-term or conceal the need for situational crime prevention efforts. This deeper understanding of the dynamics of the relationship between social and situational crime prevention reinforces the general argument about the primacy that should be accorded to situational crime prevention. In short, whilst an integrated and comprehensive approach to the prevention of international crimes does combine both social and situational crime prevention, in theory and practice primary importance is attached to the situational prevention component. An international crimes approach to mass atrocity prevention revolves predominately around short-term and proximate prevention strategies.

6.2. Operationalizing Situational Crime Prevention

This section seeks to populate the preliminary framework with findings from the three case studies. More specifically, it seeks to elaborate on the tools that international actors consider appropriate for operationalizing the situational prevention of international crimes. The discussion shows that the tools that international actors consider appropriate to operationalize all three dimensions of situational crime prevention belong to the third pillar of R2P (“timely and decisive response”). The logic of international crime prevention pushes international actors to employ these generally coercive and intrusive tools in an explicitly partial way, namely, to threaten punishment to the perpetrators and promise protection to the victims. In cases where the threat of mass atrocities occurs in the context of armed conflict, these partial and coercive efforts to prevent atrocity crimes can clash with conflict management and resolution tools that are traditionally pursued in a more impartial manner. Resolving these tensions requires specific awareness of the relationship between different prevention tools.

As discussed in Chapter 2, criminological thinking about situational crime prevention is structured around four dimensions: perpetrators, victims, situations, and third parties.²⁵ According to the “crime triangle”, third party actors design preventive interventions with reference to the other three crime dimensions.²⁶ First, third parties can try to change the incentives and capacities of the potential perpetrators. For this, criminologists suggest three main strategies, namely, incapacitation, sticks/deterrence, and carrots/inducements. Second, third parties can try to reduce the vulnerability of the potential victims. For this, criminologists suggest two main strategies, namely, strengthening the potential victims’ capacity to cope with harm and reducing the potential victims’ risk of victimisation. Finally, third parties can try to reduce the permissiveness of the crime situation. For this, criminologists suggest three main strategies, namely, eliminating excuses, increasing risk of detection, and reducing the means available to commit crime.

The three case studies have revealed a number of tools that international actors consider appropriate for operationalizing all three dimensions of situational crime prevention.²⁷ It is noteworthy that these tools belong, at least primarily, to the third pillar of R2P (“timely and decisive response”), which is not commonly associated with the “responsibility to prevent”.²⁸ First, the three case studies have identified a range of prevention tools that third parties can use to alter the incentives

²⁵ Pease, ‘Crime Reduction’, 949-950; also Roloef Haveman and Alette Smeulers, ‘Criminology in a State of Denial – Towards a Criminology of International Crimes’, in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 14-15.

²⁶ For information on the crime triangle see, Centre for Problem-Oriented Policing: <http://www.popcenter.org/about/?p=triangle>; also Fred Grünfeld, ‘The Role of Bystanders in Rwanda and Srebrenica: Lessons Learned’, in A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Antwerp: Intersentia, 2008), 458.

²⁷ Note that the following list of potential tools for situational crime prevention is based on only three case studies and is therefore not exhaustive.

²⁸ It is commonly assumed that the “responsibility to prevent” rests on pillars one (“state responsibility”) and two (“international assistance and capacity building”). Note that tools from the first two pillars of R2P were also invoked in the cases of Bosnia and Kenya.

and capacities of the potential perpetrators. International actors have tried to deter potential perpetrators through: different international criminal justice measures, including threats of individual criminal accountability, the establishment of fact-finding commissions, the appointment of a Special Rapporteur, the creation of an ad-hoc criminal tribunal, a preliminary examination of the ICC Prosecutor, and a SC referral to the ICC (Bosnia, Kenya, Libya); different kinds of targeted sanctions, such as visa restrictions, travel bans, and asset freezes (Kenya and Libya); and the authorization of the use of military force (Bosnia and Libya). International actors have also tried to incapacitate criminal masterminds through attempts of targeted killings (Libya) and the de-legitimization of a murderous regime (Libya). It is noteworthy that the use of positive inducements was very limited in all three cases. The measures that came closest to positive inducements were the offer to normalize bi-lateral relations and provide money for post-conflict reconstruction in return for an end to ethnic violence (Kenya) and the promise to lift targeted sanctions in return for positive changes in behaviour (Libya).

Second, the three case studies have identified a range of tools that third parties can use to reduce the vulnerability of potential victims. International actors have tried to strengthen the defensive capacities of potential victims by providing them with weapons and military equipment (Bosnia and Libya). Furthermore, international actors have tried to reduce the potential victims' risk of victimisation through the imposition of no-fly zones (Bosnia and Libya), the creation of safe areas (Bosnia and Libya), the deployment of peacekeeping forces (Bosnia), and the degrading of the military capabilities of the potential perpetrators (Libya).

Third, the case studies have identified tools that third parties can use to reduce the permissiveness of the crime situation. International actors have tried to limit

access to excuses by clearly communicating relevant legal norms regarding atrocity crimes (Bosnia, Kenya, and Libya) and issuing public warnings (Bosnia, Kenya, and Libya). They have also tried to reduce the means available to commit atrocities by imposing arms embargoes (Bosnia and Libya). Finally, international actors have tried to increase the risk of detection by providing international scrutiny (Bosnia, Kenya, and Libya) and deploying monitoring missions (Bosnia, Kenya, and Libya). Moreover, in cases where the threat of mass atrocities occurs in the context of armed conflict, international actors consider diplomatic efforts to manage and resolve armed conflict to be an important atrocity prevention strategy in the crime situation dimension (Bosnia and Libya).

Thus, the three case studies reinforce the argument that the prevention of international crimes relies on tools that are coercive, intrusive, and often partial in nature. In all three cases, the logic of international crime prevention has pushed international actors towards adopting a posture of partiality and employing coercive and sovereignty-infringing prevention strategies. In the case of Libya, the UN Security Council, for the first time ever, authorized a military intervention for human protection purposes against a fully functioning state *without the consent* of that state.²⁹ International actors also took sides in the Libyan civil war and facilitated regime change. There are even allegations about targeted attacks on specific members of the Gaddafi regime. In the case of Bosnia, the no-fly zone aimed at diminishing the Bosnian Serb advantage in air power, which led to the first combat engagement of NATO in history. The safe areas were designed to protect Bosnian Muslim enclaves

²⁹ Alex J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm', *Ethics & International Affairs* vol. 25, no. 3 (2011), 263. Whilst consent is not a legal requirement as long as the Security Council acts under Chapter VII of the UN Charter, the Security Council has always sought some sort of target state consent as a matter of practice – though the consent was sometimes coerced.

and deter Bosnian Serb troops. Moreover, Serb/Bosnian Serb leaders, such as Milosevic, Karadzic, and Mladic, were singled out as the principle targets of international criminal prosecutions. The Kenya case shows that even political mediation, which is typically defined as a voluntary, consensual, and cooperative tool, can be coercive and intrusive in an international crime prevention context.

However, the cases of Bosnia and Libya also show that there can be tension between such coercive and partial efforts to prevent atrocity crimes and strategies to manage and resolve armed conflict.³⁰ First, in the cases of Bosnia and Libya, there was tension between measures related to individual criminal accountability and diplomatic efforts to resolve armed conflict. In the case of Bosnia, the threats of individual criminal accountability and the creation of the ICTY aimed at deterring the criminal masterminds in the context of on-going violence. As deterrence is a subjective mechanism that operates through the risk assessments of the potential perpetrators, it is crucial that threats of individual criminal accountability are perceived as credible.³¹ In the case of Bosnia, the Vance-Owen peace process undermined the credibility of the international accountability threats, as the peace talks demanded keeping the criminal masterminds at the negotiation table. As a result, the criminal masterminds regarded the charges against them as “all temporary”.³² In

³⁰ In the literature this is referred to as the “peace vs justice” dilemma, see, I. William Zartman and Viktor Kremenyuk (eds.), *Peace versus Justice: Negotiating Forward- and Backward-looking Outcomes* (Maryland: Rowman & Littlefield Publishers, 2005); Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability After War* (Cambridge: Polity Press, 2007).

³¹ David M. Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanctions* (New York: Routledge, 2009), 29; Andrew Ashworth and Julian Roberts, ‘Deterrence’, in A. von Hirsch, A. Ashworth, and J. Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy*, 3rd edn (Oxford: Hart Publishing, 2009), 40; also Dan Saxon, ‘The International Criminal Court and the Prevention of Crimes’, in J. Welsh and S. Sharma (eds.), *The Responsibility to Prevent: Overcoming the Challenges of Mass Atrocity Prevention* (Oxford: Oxford University Press, forthcoming), 7-8.

³² Norman Cigar, *Genocide in Bosnia: The Policy of Ethnic Cleansing* (Texas: Texas A&M University Press, 1995), 147; Payam Akhavan, ‘Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order’, *Human Rights Quarterly* vol. 15, no. 2 (1993), 283;

the case of Libya, the Security Council's referral to the ICC also aimed at deterring the criminal masterminds. However, this deterrent effect was undermined by the AU's efforts to negotiate a political solution to the internal armed conflict, including the possibility of side deals and an exile option for Colonel Gaddafi.³³ The AU Assembly even decided that AU member states should not cooperate in the execution of the ICC arrest warrants in order to facilitate a political solution.³⁴ In short, diplomatic efforts to end armed conflict can undermine the credibility of international criminal justice measures.³⁵

At the same time, the two cases also show that political mediation can be hindered by international criminal justice processes. In the case of Bosnia, David Owen and Cyrus Vance have argued that the creation of the ICTY has complicated their peace negotiations, as it is difficult to get leaders to make peace if they are at risk to be criminally prosecuted.³⁶ In the case of Libya, the ICC referral limited the scope for a side-deal or exile solution, as signatories of the Rome Statute could not

Personal Interview with Ambassador Peter Galbraith, *Professional Staff Member of the US Senate Committee on Foreign Relations, 1979-1993, and First US Ambassador to Croatia, 1993-1998* (Washington D.C., 12/09/2012).

³³ Personal Interview with a French Diplomat at the UN (New York, 13/09/2012); also Lawrence Moss, *The UN Security Council and the International Criminal Court: Towards a More Principled Relationship* (Friedrich-Ebert-Stiftung: International Policy Analysis, 2012), 10.

³⁴ See, Assembly of the AU, 'Decision on the Implementation of the Assembly Decisions on the International Criminal Court', Assembly/AU/Dec.366(XVII), Seventeenth Ordinary Session, 01/07/2011, Malabo, Equatorial Guinea.

³⁵ The credibility of accountability threats is generally shaky in an international context, see, Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 169-173; Donald Bloxham and Devin Pendas, 'Punishment as Prevention? The Politics of Punishing Genocidares', in D. Bloxham and R. Moses (eds.), *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), 633.

³⁶ David Forsythe, 'Politics and the International Criminal Tribunal for the Former Yugoslavia', *Criminal Law Forum* vol. 5, no. 2 (1994), 410; Personal Interview with Lord Douglas Hurd, *British Foreign Minister 1989-1995* (London, 12/06/2013); Personal Interview with a US Diplomat at the UN (New York, 23/02/2012).

guarantee Colonel Gaddafi protection from prosecution.³⁷ The ICC referral cornered Gaddafi and reduced the scope for a political solution.³⁸

Interestingly, the Kenya case shows that international criminal justice measures and political mediation can be reconciled if international actors proactively attempt to reconcile the competing logics. In Kenya, international actors threatened individual criminal accountability and the ICC prosecutor publicly announced that he would conduct a preliminary examination into alleged atrocity crimes. However, chief mediator Annan and ICC prosecutor Moreno-Ocampo agreed to delay the establishment of a permanent and inflexible justice process until after the power-sharing agreement was signed.³⁹ Annan communicated to all actors involved in the mediation process that he operated as a “normative mediator”, which meant that he could not condone amnesties for genocide, war crimes, and crimes against humanity - a policy that is codified in the UN Guidelines for Mediation.⁴⁰ This strategy of

³⁷ As of 1 May 2013, 122 states have ratified or acceded to the Rome Statute.

³⁸ See, Jonathan Prentice, ‘The Politics of Intervention: The Art of Talking’, *Oslo Forum 2012, Background Papers*, 61; also Priscilla Hayner, ‘Libya: The ICC Enters During War’, *ECFR Background Paper* (2013), 4. There are only two potential mechanisms in the Rome Statute that would allow for rewarding positive changes in behaviour. Article 16 gives the Security Council the power to defer proceedings for a renewable period of 12 months. Article 53 empowers the ICC Prosecutor to not open an investigation if he believes that prosecutions are not in the interest of justice. Both mechanisms have no track record.

³⁹ The CIPEV led by Justice Philip Waki instructed the Kenyan government to set up a special tribunal to prosecute those responsible for atrocity crimes. As a safeguard against his recommendations being ignored, Justice Waki handed chief mediator Annan a sealed envelope with a list of the key suspects. Annan was instructed to give the envelope to the ICC if no action was taken on the domestic level.

⁴⁰ See, UN Guidance for Effective Mediation, annex to Report of the Secretary-General, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution*, A/66/811, 25/06/2012. The UN Guidelines for Mediation in the Context of Atrocities originated from a UN brainstorming session in 1998 to discuss the peace/justice dilemma, as well as subsequent consultations with those concerned in the UN Secretariat (Peacekeeping, Political and Legal Departments). The thrust of the guidelines was that the UN cannot and should not be associated with amnesties for genocide, war crimes, or crimes against humanity. The guidelines were approved by UNSG Annan and sent out to all UN envoys in 1999. Following the entry into force of the Rome Statute in 2002, the UN Guidelines were updated accordingly. Since 2012 they form part of the UN Guidance for Effective Mediation and are publicly available on the UN website.

sequencing created sufficient space for the political mediation process, without compromising the credibility of the international accountability threats.

Second, the Bosnia and Libya cases illustrate the tension between an impartial arms embargo and the provision of defensive weapons to vulnerable populations. In the case of Bosnia, the imposition of an impartial arms embargo helped to limit the circulation of weapons in the former Yugoslavia, but it also froze the military balance of power on the ground. As the Serbs/Bosnian Serbs had an advantage in terms of military capabilities vis-à-vis the Bosnian Muslims, the arms embargo worked in favour of the potential perpetrators. It deprived the Bosnian Muslims of the means to defend themselves. This has motivated several Islamic states and the US to violate the arms embargo and illegally supply weapons to the Bosnian Muslims. Similarly, the Libyan arms embargo constrained the Gaddafi regime's atrocity campaign, but also prevented the anti-regime forces from acquiring military capabilities for self-defence. This prompted some states to provide the Libyan rebels with military equipment and weapons.

Interestingly, the Libya case also shows that the competing logics of an impartial arms embargo and the provision of weapons to populations at risk can be reconciled if international policy-makers are aware of the potential tension and approach the prevention of atrocity crimes strategically. Operative paragraph 4 of UNSCR 1973 authorized states to take all necessary measures to protect civilians "notwithstanding paragraph 9 of resolution 1970" (i.e. notwithstanding the arms embargo). According to the drafters of UNSCR 1973, this caveat was meant to create a legal exception for the provision of weapons to the opposition for civilian protection

purposes, although this was not understood by all diplomats involved in the process.⁴¹ Adding a legal exception for the supply of defensive weapons to populations at risk to an arms embargo could be a strategy for mitigating the tension between these two prevention tools.

Third, the Bosnia case illustrates that there can be tension between military enforcement action as a strategy to prevent international crimes (e.g. to impose a no-fly zone, to secure safe areas, or to deter attacks on populations) and the deployment of UN peacekeepers, fact-finding missions, or humanitarian assistance operations. International personnel on the ground is often vulnerable to retaliation attacks by the potential perpetrators. In the case of Bosnia, UNPROFOR troops and humanitarian workers were repeatedly targeted or taken hostage by Bosnian Serb forces. As a consequence, the UK and France, who were UNPROFOR's lead troop contributing countries, were increasingly reluctant to sanction robust military enforcement action against the Bosnian Serbs, due to concern about the safety of their nationals on the ground.⁴² Thus, the presence of international personnel on the ground weakened the credibility and effectiveness of military enforcement measures. In the case of Libya, by contrast, the absence of ground troops freed NATO's air campaign from having to take into consideration the safety needs of international personnel on the ground.⁴³

In sum, the tools that international actors consider appropriate for operationalizing all three dimensions of situational crime prevention belong to the third pillar of R2P. These prevention tools are generally coercive in nature and demand a certain degree of interference in internal affairs. Moreover, the logic of

⁴¹ Personal Interview with a US Diplomat at the UN (New York, 23/02/2012). Even Susan Rice was not sure what exactly that wording meant when the question was raised in the SC.

⁴² Paul Diehl, *International Peacekeeping* (Baltimore: Johns Hopkins University Press, 1994), 195.

⁴³ Personal Interview with Senior NATO Officials, *Operations Division, Legal Division, and Public Relations Division* (Brussels, 29/05/2012).

international crime prevention pushes international actors towards employing prevention tools in an explicitly partial manner, namely, to threaten punishment to potential perpetrators and promise protection to potential victims. In cases where atrocity risk occurs in the context of armed conflict, it is important that international actors recognize the potential tension between partial efforts to prevent atrocity crimes and more impartial strategies to manage and resolve armed conflict. International actors need to understand the relationship between these prevention tools, so that they can proactively attempt to reconcile the competing logics. In short, international actors need to conceive of atrocity prevention in strategic and holistic ways.

6.3. Capacity Requirements and Enabling Conditions

Drawing on observations from the three case studies, this section discusses specific capacities and conditions that need to be in place to successfully prevent international crimes. The discussion shows that a distinctive strategy for the prevention of international crimes requires international actors to build generic capacities at the international level, which can then be utilized in specific situations to influence the behaviour of criminal masterminds, protect individuals threatened by atrocity crimes, and manipulate crime situations.⁴⁴ This can be conceived as “external capacity building” – distinct from capacity building efforts at the national level directed at mitigating the risk factors of atrocity crimes. However, situational crime prevention tools also require certain conditions to succeed. It will often be difficult to replicate

⁴⁴ For a similar argument see, Ruben Reike, Serena Sharma, and Jennifer Welsh, ‘The Responsibility to Prevent: A Strategic Framework for Atrocity Prevention’, in J. Welsh and S. Sharma (eds.), *The Responsibility to Prevent: Overcoming the Challenges of Mass Atrocity Prevention* (Oxford: Oxford University Press, forthcoming).

these conditions in different cases, which is something that international policy-makers need to take into account when designing prevention strategies.

As noted in Chapter 2, criminologists argue that third parties are at the centre of situational crime prevention efforts.⁴⁵ Third parties are responsible for designing preventive interventions with reference to the other three crime dimensions. The three case studies have performed the important task of identifying a number of capacities that third parties require to effectively act as international crime preventers. The capacity requirements that are identified in this section are not exhaustive, as they are based on observations from only three cases.⁴⁶ However, the following discussion illustrates the kind of capacity building that an international crimes approach to the prevention of mass atrocities would entail.

First, the cases of Kenya and Libya show that international actors require specific capacities to change and constrain the behaviour of criminal masterminds through targeted sanctions.⁴⁷ In particular, the two cases suggest that international actors need to develop specific capacities that allow them to adopt and enforce targeted sanctions very quickly. Otherwise, the target individuals have the chance to mitigate the sanctions impact, e.g. by hiding assets.⁴⁸ First, states require specific legal mechanisms that enable them to quickly block transactions, freeze assets, or cut-off trade with target individuals and entities. In the case of Kenya, it was the *US*

⁴⁵ Crawford, 'Crime Prevention and Community Safety', 877; Grünfeld, 'The Role of Bystanders in Rwanda and Srebrenica', 458-459.

⁴⁶ The discussion also draws on relevant literature.

⁴⁷ In the case of Bosnia, international actors imposed comprehensive trade sanctions. Since the end of the Cold War, the practice of international sanctions has shifted from imposing comprehensive sanctions on entire states/societies towards the use of targeted sanctions that seek to change and constrain the behaviour of specific individuals. See, Mikael Eriksson, *Targeting Peace: Understanding UN and EU Targeted Sanctions* (Farnham: Ashgate Publishing, 2011), 1-3; Peter Wallensteen and Helena Grusell, 'Targeting the Right Targets? The UN Use of Individual Sanctions', *Global Governance* 18 (2012), 207.

⁴⁸ See, George Lopez, 'Tools, Tasks and Tough Thinking: Sanctions and R2P', Global Centre for the Responsibility to Protect, Policy Brief, New York, 2013.

Immigration and Nationality Act that allowed the US authorities to deny visas to individuals implicated in atrocity crimes. Canada and the UK had similar legislation, which enhanced the credibility of the visa denial threats. In the case of Libya, it was the *Trading With the Enemy Act* and the *International Emergencies Economic Power Act* that allowed US President Obama and the US Treasury Department to quickly impose and enforce sanctions. Second, international actors must have the capacity to identify the right individuals against whom sanctions can be targeted. Research on targeted sanctions suggests that sanctions should primarily target top leaders that are in a position to change policies, as well as their support networks (the so-called enablers).⁴⁹ Identifying these individuals and entities requires specific intelligence capacities. In the case of Kenya, intelligence capacity was provided by large embassies, such as the US Embassy or the Embassy of the Netherlands.⁵⁰ In the case of Libya, the US Treasury Department and intelligence agencies played a key role in identifying target individuals. Third, international actors need to develop credible procedures for the lifting of targeted sanctions in order to be able to induce changes in behaviour.⁵¹

Second, the three case studies show that international actors need to build capacity to quickly deploy professional fact-finding missions or Commissions of Inquiry (COI). In all three cases, international actors deployed fact-finding missions to gather evidence about the alleged commission of atrocity crimes, identify those responsible with a view to holding them accountable, and deter criminal masterminds. The prominent international criminal lawyer Cherif Bassiouni has recently overseen

⁴⁹ Wallensteen and Grusell, 'Targeting the Right Targets?', 226-227.

⁵⁰ Personal Interview with Ambassador Laetitia Van Den Assum, *Dutch Ambassador to Kenya, 2006-2011* (London, 29/10/2013).

⁵¹ Scott Shane, 'Sanctions Are Dropped Against Libyan Defector', *The New York Times*, 04/04/2011; Eriksson, *Targeting Peace*, 13.

the *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*. The Guidelines argue that in order to deter potential perpetrators, COIs have to be dispatched in a timely fashion and conducted in a professional manner - otherwise potential perpetrators do not perceive them as a credible tool.⁵² At the moment, however, international actors lack the capacity to do so. There is no institutionalised structure for fact-finding operations. As a result, COIs have to be established in an ad hoc manner and the infrastructure for each mission needs to be built from scratch.⁵³ There is no pool of experts from which individuals could be selected. There is no uniform database programme. And there is no consistency in the method of evidence gathering, which is important if evidence is to be used in criminal proceedings.⁵⁴ The lack of a centralized fact-finding capacity hinders the effective use of COIs to deter perpetrators of atrocity crimes, as it delays deployments and undermines the credibility of missions.⁵⁵

Third, the three case studies suggest that the prevention of international crimes requires specific international judicial capacity. The ICC is the first permanent international court with jurisdiction over genocide, war crimes, and crimes against humanity, and the prevention of these atrocity crimes is a self-proclaimed goal of the Court.⁵⁶ Whilst it is often assumed that the ICC's preventive impact relates primarily to the creation of general deterrence, the case studies show that international actors can also use the Court to generate specific deterrence and encourage defections in the context of on-going violence. The case of Libya suggests that the ICC needs to build

⁵² See, Cherif Bassiouni and Christina Abraham (eds.), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* (Cambridge: Intersentia and International Institute of Higher Studies in Criminal Sciences, 2013), xv, 9.

⁵³ Bassiouni and Abraham, *Siracusa Guidelines*, 3-5, 9.

⁵⁴ Bassiouni and Abraham, *Siracusa Guidelines*, 5-13.

⁵⁵ Bassiouni and Abraham, *Siracusa Guidelines*, xiv –xv, 9, 13.

⁵⁶ Rome Statute of the International Criminal Court, A/CONF.183/9, 17/07/1998.

capacity to communicate deterrence threats more effectively to potential perpetrators, i.e. to state the law, explain the risk of getting caught, and lay out the consequences.⁵⁷ Moreover, the ICC needs to build specific capacity to reach out to potential defectors and directly encourage defections.⁵⁸ This capacity could be located in the ICC's Outreach Unit, which is part of the ICC's Registry. The Outreach Unit has already the task to explain to communities that are the focus of ICC investigations or prosecutions why certain acts constitute atrocity crimes and illuminate the workings of the Court more generally.⁵⁹ The Outreach Unit could be given the mandate and capacity to directly communicate with potential defectors to explain to them potential mechanisms for rewarding positive changes in behaviour, such as Articles 16 and 53 of the Rome Statute.⁶⁰ The ICC's Office of the Prosecutor could also play a greater role in creating specific deterrence by strengthening the use of preliminary examinations and strategic public statements.⁶¹

Fourth, the cases of Bosnia and Libya illustrate that the prevention of atrocity crimes requires international actors to build specific military capacities, for example, to deter and incapacitate potential perpetrators, establish no-fly zones and safe areas, or impose arms embargoes. The case of Bosnia suggests that the establishment of safe areas requires substantial military capacities. The UN Secretariat famously estimated that at least 30.000 troops would be required to protect the six safe areas in Bosnia.⁶²

⁵⁷ Saxon, 'The International Criminal Court and the Prevention of Crimes', 10.

⁵⁸ Personal Interview with a French Diplomat at the UN (New York, 13/09/2012).

⁵⁹ Saxon, 'The International Criminal Court and the Prevention of Crimes', 13.

⁶⁰ Personal Interview with a French Diplomat at the UN (New York, 13/09/2012).

⁶¹ Saxon, 'The International Criminal Court and the Prevention of Crimes', 17-18; also Martin Mennecke, 'The International Criminal Court', in T. Weiss and M. Serrano (eds.), *The International Politics of Human Rights: Rallying to the R2P Cause?* (New York: Routledge, 2014).

⁶² Personal Interview with Alvaro de Soto, *Special Adviser to UNSG Javier Perez de Cuellar, 1982-1992; Senior Political Adviser to UNSG Boutros Boutros-Ghali, 1992-1994* (New York, 06/09/2012).

UNPROFOR lacked this capacity, which turned the safe areas into death traps.⁶³ The case of Libya suggests that the effective imposition of an arms embargo requires military surveillance and enforcement capacity. NATO officials admit that the alliance did not have enough military capacity to monitor and enforce the arms embargo in all parts of Libya.⁶⁴ Moreover, the case of Libya shows that sustaining a protective air campaign over a longer period of time demands significant military capacity. In Libya, NATO had only a limited number of warplanes available, which meant that the alliance could not provide protection for the entire population.⁶⁵ NATO's air campaign also relied heavily on US military capabilities, which the US was unwilling to provide indefinitely.⁶⁶ Interestingly, the civilian casualties that NATO air strikes entailed have triggered debate on the issue of how the actors to whom the Security Council delegates the right to use force can be held accountable and what their duties are with regards to reporting and transparency.⁶⁷ This points to the need to establish accountability, reporting, and transparency procedures. Moreover, the "Mass Atrocity Response Operations" (MARO) project argues that the need for military measures tends to arise unexpectedly and in context of rapidly escalating situations. It is critical, therefore, that international actors engage in

⁶³ Personal Interview with Ambassador Robert Hunter, *Senior Foreign Policy Advisor to Presidential Candidate Bill Clinton, 1992; US Ambassador to NATO, 1993-1998* (Washington D.C., 12/09/2012); Lee Bryant and Tihomir Loza, 'UN Peacekeeping in Bosnia: Expectations & Realities', in B. Cohen and G. Stamkoski (eds.), *With No Peace to Keep: United Nations Peacekeeping and the War in the Former Yugoslavia* (London: Gainpress, 1995), 57; Carol McQueen, *Humanitarian Intervention and Safety Zones: Iraq, Bosnia and Rwanda* (Basingstoke: Palgrave Macmillan, 2005), 53.

⁶⁴ Personal Interview with Senior NATO Officials, *Operations Division, Legal Division, and Public Relations Division* (Brussels, 29/05/2012).

⁶⁵ Personal Interview with Edward Stringer, *Commander UK Air Contingent in Operation Unified Protector, 2011* (Oxford, 23/05/2012).

⁶⁶ Personal Interview with Edward Stringer; Personal Interview with a Diplomat in the UK Delegation to NATO (Brussels, 18/06/2012).

⁶⁷ Particularly in context of the Brazilian initiative on "Responsibility While Protecting". See, "Responsibility While Protecting: Elements for the Development and Promotion of a Concept", General Assembly/ Security Council, A/66/551-S/2011/701, 11/11/2011.

advance interagency planning and preparation, conduct routine planning exercises, and develop common concepts and vocabulary.⁶⁸

In addition to these capacities that need to be built at the international level, the three case studies show that the situational prevention of atrocity crimes also requires certain conditions to succeed. First, the cases of Bosnia and Libya illustrate that the authorization of certain prevention tools, particularly military measures to prevent atrocity crimes, is subject to the politics of the UN Security Council. The UN Charter framework puts strict constraints on the use of force in international relations. Art. 2(4) of the UN Charter sets out an absolute prohibition of the use of force. There are only two exceptions to this. First, states' inherent right to self-defence in accordance with Art. 51 of the Charter. Second, enforcement action to counter threats to international peace and security authorized by the Security Council under Chapter VII. It has become practice of the Security Council that humanitarian crises and internal conflicts can constitute threats to international peace and security. Thus, military enforcement measures to prevent atrocity crimes require authorization by the Security Council. However, Security Council decision-making is extremely political, given the privileged position of the Permanent Members, which can lead to selectivity and inconsistency.⁶⁹ There are a number of contingent elements that influence Security Council politics, especially the specific interests and strategic alliances of the Permanent Members and the composition of the Council at the time (i.e. the Non-Permanent Members). This makes it difficult for international actors to credibly threaten the use of military measures in advance.

⁶⁸ Sarah Sewall et al., *Mass Atrocity Response Operations: A Military Planning Handbook* (Cambridge: Harvard Kennedy School, Carr Center for Human Rights Policy, and PKSOI, 2010), 29-30.

⁶⁹ See, Adam Roberts and Dominik Zaum, *Selective Security: War and the United Nations Security Council Since 1945* (The International Institute for Strategic Studies: Adelphi Paper 395, 2008).

Second, the three case studies show that the degree of international unity and cooperation influences the success of political mediation initiatives. In the case of Bosnia, Ambassador Cutileiro and Lord Owen have lamented that a lack of support from the US undermined their respective mediation processes at strategically important moments.⁷⁰ Similarly, in the case of Libya, the AU has expressed disappointment about the lack of international support for its roadmap. The lack of international support, the AU claims, damaged the success of the roadmap.⁷¹ In the case of Kenya, conversely, it is widely acknowledged that it was an important condition for success that Kofi Annan managed to rally unified international support for his mediation process.⁷²

Third, the three case studies demonstrate that the effectiveness of political mediation hinges on the willingness of conflicting parties to negotiate in good faith. If parties do not act in good faith, there is very little that mediation initiatives can achieve. In the case of Bosnia, the VOPP failed because the Bosnian Serbs were not prepared to sacrifice the territorial gains that they had made during their campaign of ethnic cleansing. The Bosnian Muslims were also reluctant to negotiate in good faith, given that all peace plans seemed to be ratifying ethnic cleansing.⁷³ In the case of Libya, neither the rebels nor the Gaddafi regime were interested in compromise. The Gaddafi regime was intent to maintain power by all means, and the NTC made clear

⁷⁰ Personal Interview with Ambassador Jose Cutileiro, *Special Adviser to the Portuguese Foreign Minister, 1992-1994; Chair of the Bosnia Talks of the EC Conference on Yugoslavia, 1992* (Brussels, 13/12/2012); Steven Burg and Paul Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (New York: M.E. Sharpe, 2000), 113-116.

⁷¹ See, African Union, 'Official Presentation by the AU to the Libyan Parties of a Proposal on a Framework Agreement for a Political Solution to the Crisis in Libya', Press Release, Malabo, Equatorial Guinea, 01/07/2011; Personal Interview with Ambassador Jose Filipe Moraes Cabral, *Permanent Representative of Portugal to the UN, 2008-present* (New York, 24/02/2012).

⁷² See, Lindenmayer and Kaye, *A Choice for Peace?*, 5.

⁷³ Personal Interview with Lord Douglas Hurd.

that it would not accept any solution that leaves Gaddafi in power.⁷⁴ This made political mediation difficult.

Fourth, the cases of Bosnia and Libya show that geographic circumstances can impact on the success of atrocity prevention strategies. In the case of Bosnia, the impartial arms embargo was very effective for Bosnia, because Bosnia was a land-locked state surrounded by enemy territory. This made it difficult for the Bosnian government to acquire weapons illegally - something that seemed to be no problem for Serbia, Montenegro, and Croatia. In the case of Libya, it facilitated NATO's air campaign that much of the fighting took place in unpopulated desert areas, which simplified the identification of legitimate military targets and allowed their destruction without high risk of collateral damage.⁷⁵ In a densely populated and urban environment, it would have been more difficult for NATO to effectively protect populations.⁷⁶ Moreover, the case of Libya shows that the size of a country matters when it comes to effectively monitoring and enforcing arms embargoes.

In sum, a distinctive strategy for the prevention of international crimes requires the building of generic capacities at the international level, so that situational crime prevention can quickly be activated when the need arises. This thesis has started to identify some of these capacities. Thus, an international crimes approach to the prevention of mass atrocities demands "external capacity building". Moreover, situational crime prevention tools require certain conditions to succeed. It will often be difficult, or even impossible, to replicate these conditions in different cases.

⁷⁴ Alex de Waal, 'African Roles in the Libyan Conflict of 2011', *International Affairs* vol. 89, no. 2 (2013), 373-374.

⁷⁵ Personal Interview with Senior NATO Officials, *Operations Division, Legal Division, and Public Relations Division* (Brussels, 29/05/2012).

⁷⁶ Personal Interview with Senior NATO Officials, *Operations Division, Legal Division, and Public Relations Division* (Brussels, 29/05/2012); Ivo Daalder and James Stavridis, 'NATO's Victory in Libya: The Right Way to Run an Intervention', *Foreign Affairs* vol. 91, no. 2 (2012), 2-7.

International policy-makers need to take this into account when tailoring prevention strategies to a specific context.

6.4. The Role of Armed Conflict

This section elucidates the role that armed conflict plays in a distinct strategy to prevent international crimes. The discussion shows that armed conflict can be part of the crime situation, even though atrocity crimes can also occur in peacetime. War zones are a particularly permissive environment for the commission of widespread crime. Thus, in cases where the threat of mass atrocities occurs in the context of armed conflict, international actors consider the management and resolution of conflict to be a crime prevention strategy. However, efforts to prevent and manage armed conflict can clash with coercive and partial strategies that might seek to create additional or escalate existing conflict as a way to prevent atrocity crimes.

Armed conflict and atrocity crimes are not the same phenomenon.⁷⁷ Not all armed conflicts give rise to atrocity crimes, and many atrocity campaigns occur in the absence of armed conflict.⁷⁸ According to Alex Bellamy, since 1945 around 67% of all cases of atrocity crimes have occurred within the context of armed conflict, whereas 33% have occurred in a peacetime context.⁷⁹ In particular, many of the more recent smaller-scale cases of atrocity crimes have occurred in a peacetime context, such as in Kenya, Guinea-Conakry, or Kyrgyzstan.⁸⁰ It is also noteworthy that atrocity campaigns that did occur in the context of armed conflict did not necessarily have a

⁷⁷ Alex Bellamy, 'Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent', *Policy Analysis Brief: The Stanley Foundation*, January 2011, 1; Paul Bartrop, 'The Relationship Between War and Genocide in the Twentieth Century: A Consideration', *Journal of Genocide Research* vol. 4, no. 4 (2002), 529.

⁷⁸ Bellamy, 'Mass Atrocities and Armed Conflict', 1; Bartrop, 'The Relationship Between War and Genocide in the Twentieth Century', 527-529.

⁷⁹ Bellamy, 'Mass Atrocities and Armed Conflict', 3.

⁸⁰ Bellamy, 'Mass Atrocities and Armed Conflict', 3.

clear causal link to that conflict, for example, Nazi Germany's extermination of Jews during World War II.⁸¹ According to the historian Paul Bartrop: "war does not always have to be present for a genocide to occur; living in a peacetime environment does not safeguard immunity".⁸² In short, the presence of armed conflict is neither a necessary nor a sufficient cause for the occurrence of atrocity crimes. There will be cases in which armed conflict, and its management or resolution, will have no relevance whatsoever for the prevention of international crimes. Armed conflict can be an element of the situational dimension of international crime prevention, but it does not have to be.

However, as briefly noted in Chapter 2, where armed conflict does form part of the situational context, it constitutes what criminologists call a criminogenic environment.⁸³ A criminogenic environment is one that creates incentives, excuses, opportunities, or cover to commit widespread crime. War zones provide the criminal masterminds with easier access to weapons, reduce the risk of detection, and provide access to convincing excuses for the commission of atrocities. Besides war zones, other examples of criminogenic environments are refugee camps or prisons.⁸⁴ Bartrop argues that "there can be no doubt that war contains within it the potential [i.e. opportunities, cover] for a genocidal regime to realise its aims, and probably more easily than in the absence of war".⁸⁵ He goes on to argue that, "there is also the matter of opportunity, which gets to the heart of the matter: to what extent did war provide

⁸¹ Bartrop, 'The Relationship Between War and Genocide in the Twentieth Century', 524-525.

⁸² Bartrop, 'The Relationship Between War and Genocide in the Twentieth Century', 530.

⁸³ Haveman and Smeulers, 'Criminology in a State of Denial', 15; Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2012), 240; Paul Roberts and Nesam McMillan, 'For Criminology in International Criminal Justice', *Journal of International Criminal Justice* vol. 1, no. 3 (2003), 324.

⁸⁴ Smeulers and Grünfeld, *International Crimes and Other Gross Human Rights Violations*, 240; Roberts and McMillan, 'For Criminology in International Criminal Justice', 324.

⁸⁵ Bartrop, 'The Relationship Between War and Genocide in the Twentieth Century', 530.

the best moment for the expression of genocidal projects as the twentieth century proceeded? ... It is quite clear that military conflict does not have to be present for a genocide to occur, though for regimes committing it the presence of war can play a vital role in masking genocidal activities”.⁸⁶ Alex Bellamy also stresses that armed conflict provides an enabling context for atrocity crimes.⁸⁷

The cases of Bosnia and Libya show that international actors consider the prevention, management, and resolution of armed conflict to be strategies for the prevention of atrocity crimes. In the case of Bosnia, the Cutileiro Mediation tried to prevent armed conflict, fearing that the outbreak of armed conflict would lead to atrocities.⁸⁸ Later, the Vance-Owen Peace Process tried to manage and resolve the armed conflict in Bosnia, with the ultimate aim to stop ethnic cleansing.⁸⁹ The Dayton Accords finally sought to resolve the armed conflict and indeed managed to stop ethnic cleansing.⁹⁰ In Libya, the AU Committee also argued that peace negotiations were the best way to dampen the atrocity risk - though the AU efforts were marginalized by the military measures.⁹¹

However, the cases of Bosnia and Libya also show that there are limits to the extent that conflict prevention/management/resolution can be pursued in the context of an international crimes approach to the prevention of mass atrocities. Both cases have demonstrated that the situational prevention of international crimes might have to employ military force to achieve its objective, which is tantamount to creating or

⁸⁶ Bartrop, ‘The Relationship Between War and Genocide in the Twentieth Century’, 524.

⁸⁷ Bellamy, ‘Mass Atrocities and Armed Conflict’, 3.

⁸⁸ Personal Interview with Ambassador Jose Cutileiro, *Special Adviser to the Portuguese Foreign Minister, 1992-1994; Chair of the Bosnia Talks of the EC Conference on Yugoslavia, 1992* (Brussels, 13/12/2012).

⁸⁹ Owen, *Balkan Odyssey*.

⁹⁰ Personal Interview with Ambassador Peter Galbraith, *Professional Staff Member of the US Senate Committee on Foreign Relations, 1979-1993, and First US Ambassador to Croatia, 1993-1998* (Washington D.C., 12/09/2012).

⁹¹ Alex de Waal, ‘African Roles in the Libyan Conflict of 2011’, *International Affairs* vol. 89, no. 2 (2013), 365-379.

escalating existing armed conflict. Put differently, the Bosnia and Libya cases suggest that temporarily escalating, or internationalizing, an armed conflict can – somewhat counterintuitively - be seen as a means of preventing atrocity crimes.⁹² Rather than directing all available resources towards preventing or managing armed conflict, the prevention of international crimes might entail the need to employ military force.

Moreover, the two case studies have revealed that managing and resolving an existing armed conflict can become an obstacle to other international crime prevention efforts. As discussed earlier, peace negotiations can undermine threats of individual criminal accountability, and the deployment of UN peacekeepers and humanitarian assistance operations can hinder the robust military enforcement of victim protection measures. In short, the prevention of armed conflict and the prevention of international crimes might sometimes pull in opposite directions.

In sum, an international crimes approach to the prevention of mass atrocities treats armed conflict as a potential element of the crime situation. War zones constitute a criminogenic environment that provides individuals with enhanced opportunities for the commission of crime; it often facilitates access to weapons; it tends to provide a low-risk setting; and it provides various excuses. International actors have shown that they consider the prevention, management, and resolution of armed conflict to be appropriate tools for the prevention of atrocity crimes. However, diplomatic efforts to resolve conflict might clash with more coercive and partial efforts to deter potential perpetrators and protect potential victims. These efforts might require the creation of additional armed conflict as a strategy to prevent atrocity crimes.

⁹² Bartrop, 'The Relationship Between War and Genocide in the Twentieth Century', 530.


6.5. Conclusions

This chapter has illuminated the key characteristics of an international crimes approach to the prevention of mass atrocities, drawing on both conceptual assumptions from criminology and empirical observation from the three case studies of international crime prevention. Table 6.1. presents the revised framework for the prevention of international crimes.

Whilst this framework might not propose a radically new set of policy tools, it still suggests that the linking of R2P to existing international crime categories has implications for the principle's preventive component. The nexus to international crimes transforms the "responsibility to prevent" into a principle that is primarily focused on the short-term (situational crime prevention), rather than on so-called root causes of atrocity crimes (social crime prevention); that strongly emphasises the role of individuals, especially their choices, capacities, and protection needs; that relies on tools that are predominantly coercive, intrusive, and partial in nature (pillar three tools); that requires the building of generic capacities at the international level, which can be used to quickly influence the behaviour of potential perpetrators, protect potential victims, and reduce the permissiveness of crime situations (external capacity building); and that can lead to tension with efforts to manage and resolve armed conflict.

These implications are unlikely to be applauded in all quarters of the international community. In fact, it can be speculated that an international crimes approach to the prevention of mass atrocities makes the diplomacy around R2P harder, rather than easier. The Conclusion to this thesis will discuss the implications of an international crimes approach to the prevention of mass atrocities in more detail.

Table 6.1.: Revised Framework for International Crime Prevention

	Perpetrators (Incentives)	Victims (Vulnerability)	Situation (Permissiveness)	
Situational Crime Prevention	<p><i>Incapacitation</i></p> <ul style="list-style-type: none"> -Targeted Killings (Libya) -Regime Change (Libya) <p><i>Sticks/Deterrence</i></p> <ul style="list-style-type: none"> -Targeted Sanctions (Kenya, Libya) -Threats of Individual Criminal Prosecution (Bosnia, Kenya, Libya) -Fact-finding Mission/COI (Bosnia, Kenya, Libya) -Preliminary Examination of ICC/Creation of ad hoc Tribunal/ICC Referral (Libya, Kenya) <p><i>Carrots/Inducements</i></p> <ul style="list-style-type: none"> -Financial incentives (Kenya) -Lifting of Sanctions (Libya) 	<p><i>Strengthen Capacity to Cope with Harm</i></p> <ul style="list-style-type: none"> -Providing Weapons and Military Equipment (Bosnia, Libya) <p><i>Reduce Risk of Victimisation</i></p> <ul style="list-style-type: none"> -No-fly Zone (Bosnia, Libya) -Safe Areas (Bosnia, Libya) -Air Campaign (Bosnia, Libya) -Degrading Perpetrator Capacity to Harm Populations (Libya) 	<p><i>Eliminate Excuses</i></p> <ul style="list-style-type: none"> -Explain Legal Norms Regarding Atrocity Crimes (Bosnia, Kenya, Libya) -Public Warnings (Bosnia, Kenya, Libya) <p><i>Increase Risk</i></p> <ul style="list-style-type: none"> -Monitoring Mission (Bosnia) -Special Rapporteur (Bosnia) -Public Scrutiny (Bosnia, Kenya, Libya) <p><i>Reduce Means</i></p> <ul style="list-style-type: none"> -Arms Embargo (Bosnia, Libya) 	Manage and Resolve Armed Conflict: Political Mediation
	<p><i>Social Crime Prevention Can Trigger Violence/ Atrocity Risk and/or Conceal the Need for Situational Crime Prevention</i></p>			
Social Crime Prevention	<p><i>Provide a Social Infrastructure for Situational Crime Prevention and Eliminate Structural and Dispositional Risk Factors Associated with the Development of International Criminality</i></p>			

7. Conclusion

This thesis has sought to shed light on a central but understudied issue in the literature on the responsibility to protect: the consequences of linking R2P to the international crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity. In particular, this thesis has explored the implications of this move to international crimes for the preventive dimension of R2P. To this end, the preceding chapters have developed an international crimes approach to the prevention of mass atrocities, which is informed by criminological research into the prevention of crime/international crime and three empirical case studies of international crime prevention. The thesis does not constitute an unbridled advocacy for such an international crimes approach. The aim has been to reflect upon the implications of R2P's turn to international crimes, whilst also considering potential dilemmas, unintended consequences, and challenges that might follow from this move.

Based on the research conducted in the preceding chapters, it is the central claim of this thesis that if one wants to take R2P's narrow focus on international crimes seriously, this would require a significant re-thinking of the "responsibility to prevent", which is conventionally approached as a form of conflict prevention. More specifically, this thesis argues that *linking R2P to the concept of international crimes turns the "responsibility to prevent" into a principle that is more focused on the short-term, rather than on so-called root causes of atrocity crimes; more focused on individuals (their choices, capacities, and protection needs), rather than on state structures and capacity; more partial regarding perpetrators and victims; and more*

coercive, intrusive, and controversial than is commonly acknowledged in academic writing and policy debates on the subject.

This concluding chapter to the thesis does two things. The first section elaborates on the implications of an international crimes approach for the discourse on the “responsibility to prevent”. The final section then discusses the implications of an international crime approach for global politics more generally.

7.1. Implications for the “Responsibility to Prevent”

This first section highlights four dimensions in which the international crimes approach that has been developed in this thesis differs from more conventional wisdom on the “responsibility to prevent”.

7.1.1. Towards Proximate Prevention Strategies

One of the key arguments that has been developed in this thesis is that an international crimes approach to the prevention of mass atrocities would attach much greater importance to proximate and direct forms of prevention than the discourse on the “responsibility to prevent” typically accounts for. Common opinion, often inspired by conflict prevention theory and practice, tends to approach the “responsibility to prevent” as a principle that is more focused on the long-term and on so-called root causes of atrocity crimes. As a consequence of that approach, the “responsibility to prevent” becomes a principle that, at its core, seeks to promote economic development, democratization, education, security sector reform, or good governance.¹ It is often assumed that preventing atrocity crimes ‘once and for all’

¹ See, Ban Ki-moon, *Responsibility to Protect: State Responsibility and Prevention: Report of the Secretary-General*, A/67/929–S/2013/399, 09/07/2013; Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (London: Routledge, 2011), 119; Lawrence Woocher, ‘The Responsibility to Prevent: Toward a Strategy’, in A. Knight and F. Egerton (eds.), *Routledge Handbook of the Responsibility to Protect* (Abingdon: Routledge, 2012), 31-32;

requires, first and foremost, building societies resilient to atrocity crimes; i.e. establishing adequate and legitimate state structures and institutions.² Alex Bellamy summarises this logic well when he argues that “a world of wealthier, more equitable and more democratic states would be one with far fewer atrocities”.³ Whilst direct forms of prevention are by no means ignored, they are nevertheless seen as secondary and as amounting to mere fire-fighting.⁴ This is the vision that many scholars and diplomats associate with the “responsibility to prevent”.⁵

In contrast to the root-cause focused approach, this thesis has argued that a distinctive strategy for the prevention of international crimes would rely predominately on short-term, proximate forms of prevention that seek to prevent escalations of systematic violence into atrocity crimes. Put in criminological language, an international crimes approach prioritises situational crime prevention, which seeks to reduce crime opportunities and alter the decision-making of particular individuals, over social crime prevention, which seeks to eliminate structural and dispositional factors associated with the development of criminality. Much of the criminological literature on crime prevention is sceptical of claims that distant structural factors impact directly on the commission of crime.⁶ Instead, more

Madeleine Albright and William Cohen (eds.), *Preventing Genocide: A Blueprint for U.S. Policymakers* (Washington D.C.: United States Holocaust Museum, American Academy of Diplomacy, United States Institute of Peace, 2008), 35; International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 23.

² Ban, *Responsibility to Protect: State Responsibility and Prevention*, 2. Note that the only UNSG report on R2P that has prevention in the title focuses primarily on building resilient societies.

³ Bellamy, *Global Politics and the Responsibility to Protect*, 95.

⁴ Bellamy, *Global Politics and the Responsibility to Protect*, 120.

⁵ Alex J. Bellamy, ‘The Responsibility to Protect – Five Years On’, *Ethics & International Affairs* vol. 24, no. 2 (2010), 158. Notable exceptions are, for example, Jennifer Welsh and Tom Weiss, who are more sceptical about long-term prevention approaches.

⁶ Interestingly, it is widely acknowledged in the debate on the responsibility to protect – even by advocates of a more structural approach to prevention – that it is impossible to draw a direct causal link between alleged root causes and the commission of international crimes, and that the risk factors identified are neither necessary nor sufficient causes of international crimes. See Ban,

immediate factors that influence the choices of individuals in the present, such as opportunities or incentives, are seen as the more powerful crime generators – as the real root causes of crime. In short, it is assumed that everybody can commit crime under the right circumstances. International crimes can happen everywhere, no one is immune. This point has also been acknowledged by UNSG Ban in his 2009 and 2013 reports on R2P.⁷

However, as has been elaborated more fully in Chapter 6, both social and situational crime prevention can and should form part of an integrated and comprehensive international crime prevention strategy. In fact, there is evidence that investment into social crime prevention can help to provide a social infrastructure that enhances the effectiveness of situational crime prevention. However, there can be negative forms of interaction between social and situational crime prevention, which reinforces the general argument about the primacy that should be accorded to situational crime prevention. To a large extent, therefore, an international crimes approach resembles a strategic game that seeks to prevent escalations of systematic violence into atrocity crimes, rather than a long-term agenda for socio-economic reform.

7.1.2. Towards Partiality, Coercion, and Interference

Another major argument that has run through this thesis is that an international crimes approach would pursue proximate prevention in a partial, coercive, and intrusive manner. Put differently, this thesis has argued that the traditional conflict prevention

Responsibility to Protect: State Responsibility and Prevention, 4; Woocher, 'The Responsibility to Prevent', 31.

⁷ See, Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary-General*, A/63/667, 12 January 2009, 5; Ban, *Responsibility to Protect: State Responsibility and Prevention*, 7.

principles of impartiality, consent, and minimal coercion do not apply in the same way to the prevention of international crimes.

This assumption is at odds with common opinion that tends to depict the “responsibility to prevent” as the “soft spot” of R2P; i.e., the element that is non-coercive, cooperative, and supportive rather than undermining of state sovereignty.⁸ For instance, Gareth Evans has argued that, “the prevention of mass atrocities, like the prevention of conflict more generally, should start, and if possible finish, with the minimum of intrusion”.⁹ Interestingly, the former UN Special Adviser on the Prevention of Genocide, Francis Deng, publicly admitted that his office deliberately downplayed the coercive and intrusive aspects of the “responsibility to prevent” in an effort to strengthen political consensus on R2P. “When Ed Luck and I were working together and talking to governments, there was initially a strong resistance to R2P,” Deng explains. “We continuously persevered in trying to explain very much that the emphasis is on the first two pillars and played down the third pillar as a tool of last resort ... you have to assure the member states that this is not an intrusive mandate, this is not a threat to your sovereignty, this can be a mandate of collaboration with governments to discharge their responsibilities”.¹⁰

However, this thesis has shown that the current trend in academia and policy circles to depict the “responsibility to prevent” as the consensual, cooperative, and ‘sovereignty friendly’ aspect of R2P, whilst useful in helping to strengthen political

⁸ A notable exception in this regard is the work of Alex Bellamy. Though Bellamy also argues that the prevention of mass atrocities “raises fewer difficult questions about state sovereignty and non-interference” than reactive measures do, he explicitly stresses the importance of abandoning “a blind culture of neutrality that treats all parties as morally equivalent”. See, Alex J. Bellamy, ‘Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent’, *Policy Analysis Brief: The Stanley Foundation*, January 2011, 1, 7.

⁹ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution Press, 2008), 86.

¹⁰ Deng, ‘JISB Interview: The Responsibility to Protect’, 85; see also, Welsh, ‘A Normative Case for Pluralism’, 1201.

consensus on the principle, does not accurately capture the operational reality of international crime prevention. The conceptual research in Chapter 2 has shown that the notion of international crime is predicated on a sharp distinction between perpetrators and victims, promising punishment for the former and protection for the latter. Almost by definition, value judgements, partiality, and coercion are part and parcel of international crime prevention. The three case studies have corroborated this assumption. In all three cases, the logic of international crime prevention has pushed international actors towards adopting a posture of partiality and employing coercive and sovereignty-infringing prevention strategies. Moreover, instead of preventing the use of force at all cost, as conflict prevention does, the international crime prevention efforts studied here have employed military force to change the behaviour of potential perpetrators or provide protection for potential victims. The very logic of international crime prevention seems to demand partiality, coercion, and a certain degree of interference in internal affairs.

It is noteworthy that this finding had already been acknowledged by former UNSG Kofi Annan in his famous 1999 report on the Srebrenica tragedy, as well as the 2000 Brahimi report. UNSG Annan concluded that “a deliberate and systematic attempt to terrorize, expel or murder an entire people (i.e. genocide) must be met decisively with all necessary means, and with the political will to carry the policy through to its logical conclusion”.¹¹ Annan further encouraged UN member states to rethink the “pervasive ambivalence within the United Nations regarding the role of

¹¹ Kofi Annan, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica*, General Assembly, 15/11/1999, A/54/549, 111.

force in the pursuit of peace” and the “institutional ideology of impartiality even when confronted with attempted genocide”.¹²

7.1.3. Towards a Focus on Pillar Three

Directly following on from these observations, this thesis has also provided evidence for the argument that an international crimes approach to the prevention of mass atrocities relies principally on tools from the third pillar of R2P (“timely and decisive response”), which is not commonly associated with the “responsibility to prevent”. The tools that international actors have considered appropriate for operationalising the situational prevention of international crimes in the cases of Bosnia, Kenya, and Libya were summarised and discussed in Chapter 6. Here it suffices to point out that the tools, by and large, belonged to the third pillar of R2P. Thus, Pillar three tools constitute an integral part of international crime prevention.

This finding challenges conventional wisdom on R2P, which assumes that the “responsibility to prevent” rests primarily on pillars one and two (“state responsibility” and “international assistance and capacity-building”). Pillar three is typically seen as becoming relevant once prevention has manifestly failed. In his 2009 report on R2P, UNSG Ban explicitly stressed that, “prevention, building on Pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect”.¹³ Ban’s 2013 report on state responsibility and prevention further entrenched the link between the “responsibility to prevent” and R2P’s first two pillars. According to Bellamy, this conceptualisation is widely held by diplomats at UN Headquarters, which approach R2P as “a broad-based policy agenda focused on the ‘upstream’ prevention of genocide and mass atrocities through capacity-building and

¹² Annan, *The Fall of Srebrenica*, 111. The Brahimi report acknowledged that impartiality can lead to complicity with evil if interpreted as equidistant neutrality, see Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, 21/08/2000.

¹³ Ban, *Implementing the Responsibility to Protect*, 9 and 21.

international cooperation”.¹⁴ Conceptualising the “responsibility to prevent” primarily around pillars one and two is also rampant in academic discourse. Sheri Rosenberg notes that, “Pillars one and two constitute crucial elements in the effective prevention of mass atrocities”.¹⁵ David Simon stresses that: “the realm of activity that will make the greatest difference in preventing atrocities ... lies in the operationalization of the first and second pillars [of R2P]”.¹⁶ Similarly, the International Peace Institute points to the importance of “elaborating prevention, assistance, and capacity-building measures under pillars one and two”.¹⁷

Contrary to the view that the “responsibility to prevent” rests primarily on pillars one and two, this thesis has shown that international crime prevention needs to encompass all three pillars of R2P. In fact, it could be argued that the “responsibility to prevent” rests primarily on pillar three. As a consequence of this finding, the line between prevention and response becomes blurry. UNSG Ban has also recognised this point. In his 2012 report on R2P, Ban argued that “prevention and response must be seen as closely connected” and that “one should not draw too sharp a distinction between prevention and response”.¹⁸ During the GA’s interactive dialogue on the report, UN member-states strongly supported this point. The Permanent Representative of Denmark to the UN noted that, “Running through all three pillars is an absolute commitment to prevention ... all pillars can be considered to be prevention and response. Prevention is part of response”. And Norway’s Permanent

¹⁴ Bellamy, ‘The Responsibility to Protect – Five Years On’, 158.

¹⁵ Sheri Rosenberg, ‘Responsibility to Protect: A Framework of Prevention’, *Global Responsibility to Protect* (2009), 445.

¹⁶ David Simon, ‘Building State Capacity to Prevent Atrocity Crimes: Implementing Pillars One and Two of the R2P Framework’, Policy Analysis Brief, The Stanley Foundation, September 2012.

¹⁷ International Peace Institute, ‘Conflict Prevention and the Responsibility to Protect’, *IPI Blue Paper No. 7: Task Forces on Strengthening Multilateral Security Capacity* (2009), 9, 13. It is noteworthy that the IPI criticises that there is “a tendency to draw on the conflict-prevention toolbox when describing what efforts under the first two pillars might look like”.

¹⁸ Ban Ki-moon, *Responsibility to Protect: Timely and Decisive Response, Report of the Secretary-General*, A/66/874 - S/2012/578, 25 July 2012, 3.

Representative highlighted the “interconnectedness between prevention and response ... prevention relates to all three pillars”.¹⁹

7.1.4. Towards a Focus on External Capacity Building

Finally, this thesis has argued that a distinctive strategy for the prevention of international crimes requires actors to build generic capacities at the international level, so that situational crime prevention can be activated quickly in case of an imminent emergency. To put it another way, the prevention of international crimes requires a certain amount of generic external capacity that can be utilized to influence the behaviour of potential perpetrators, provide protection for potential victims, and reduce the permissiveness of the crime situation. Identifying and then building generic third party capacities is crucial for international crime prevention.

This focus on “external capacity building” is at odds with the current debate on the “responsibility to prevent”, which focuses predominantly on “internal capacity building”, i.e. the domestic capacities that states need to build at home in order to strengthen their resilience to atrocity crimes.²⁰ It is often argued that new capacities at the international level are not required and that it suffices to utilize existing capacities in a tailored way.²¹ In contrast, the approach articulated in this thesis suggests that the prevention of international crimes requires the building of more generic external capacities that can then be tailored to be each context.

Chapter 6 has discussed a number of areas in which third party capacities could be enhanced – though in an illustrative rather than exhaustive way. With

¹⁹ For the statements of the representatives of Norway and Denmark, as well as most of the other ones, see the website of the Global Centre for the Responsibility to Protect: <http://www.globalr2p.org/resources/471>.

²⁰ See, Ban, *Responsibility to Protect: State Responsibility and Prevention*; or Bellamy, *Global Politics and the Responsibility to Protect*, 93-121.

²¹ Bellamy, ‘Mass Atrocities and Armed Conflict’, 1, 7.

regards to targeted sanctions, it is crucial that international actors build analytic capacity to quickly identify the right target individuals and that states possess the domestic legal authority to quickly deny visas, block financial transactions, or freeze assets of certain individuals.²² With regards to arms embargoes, it is crucial that international actors build the capacity to monitor vast territory and to develop knowledge about arms manufacturers and suppliers who can be targets of preventive action. With regards to threats of individual criminal accountability, fact-finding missions need to be professionalised, provided with a permanent infrastructure, and guided by a common investigative method.²³ Moreover, the ICC would profit from enhanced capacity to reach out to actual and potential defectors. Finally, international actors need to ensure that they possess adequate military capabilities, strategies, and rules of engagement for deterring potential perpetrators or implementing coercive protection measures, such as no-fly zones or safe areas. This also includes advance interagency planning and preparation, the conducting of routine planning exercises, or the development of common national and coalition concepts and vocabulary.²⁴ These are examples of the kind of capacities that the operationalization of an international crimes approach to the prevention of mass atrocities requires.

Table 7.1. (on the next page) summarises the key differences between an international crimes approach to the prevention of mass atrocities and approaches that are primarily inspired by conflict prevention theory and practice. As the next section will elaborate in more detail, it seems that an international crimes approach to the

²² Thomas Biersteker et al., 'Targeted Sanctions and State Capacity: Towards a Framework for National Level Implementation', in P. Wallensteen and C. Staibano (eds.), *International Sanctions: Between Words and Wars in the Global System* (New York: Frank Cass, 2005), 58.

²³ Cherif Bassiouni and Christina Abraham (eds.), *Siracusa Guidelines for International, Regional and National fact-Finding Bodies* (Cambridge: Intersentia, 2013), 9-13.

²⁴ Sarah Sewall et al., *Mass Atrocity Response Operations: A Military Planning Handbook* (Cambridge: Harvard Kennedy School, Carr Center for Human Rights Policy, and PKSOI, 2010), 29-30.

prevention of mass atrocities is likely to make diplomacy and advocacy around R2P harder, rather than easier.

Table 7.1.: Conflict Approach vs. Crimes Approach

Conflict Prevention Approach	International Crimes Approach
<ul style="list-style-type: none"> ▪ Prioritises Structural Prevention over Direct Prevention 	<ul style="list-style-type: none"> ▪ Prioritises Direct Prevention (Situational) over Structural (Social) Prevention
<ul style="list-style-type: none"> ▪ Focuses on Equal Parties to a Crisis 	<ul style="list-style-type: none"> ▪ Focuses on Perpetrators, Victims, and Crime Situations
<ul style="list-style-type: none"> ▪ Particular Focus on Collectives 	<ul style="list-style-type: none"> ▪ Particular Focus on Individuals and their choices
<ul style="list-style-type: none"> ▪ Tries to Adhere to the Principles of Consent, Impartiality, and Minimal Coercion 	<ul style="list-style-type: none"> ▪ Inherently Partial, Coercive, and Intrusive
<ul style="list-style-type: none"> ▪ Rests Primarily on Pillars One and Two 	<ul style="list-style-type: none"> ▪ Rests Primarily on Pillar Three
<ul style="list-style-type: none"> ▪ Focuses on Internal Capacity Building in At-risk States 	<ul style="list-style-type: none"> ▪ Focuses on External Capacity Building for Third Party Actors

7.2. Implications for Global Politics

This thesis ends by spelling out the implications of an international crimes approach for global politics more generally. In particular, the final discussion focuses on potential problems, challenges, and dilemmas that the operationalization of international crime prevention might entail.

7.2.1. Tensions with Other Policy Agendas

As the research in this thesis has brought out very clearly, one challenge that international crime prevention poses for global politics is that its logic often clashes with, and threatens to undermine, other international policy agendas that many states deem to be important. The three case studies have provided evidence of tension, in different forms and to different degrees, between international crime prevention and efforts to prevent, manage, and resolve armed conflict, deliver humanitarian

assistance to needy populations, promote democracy, or realise developmental objectives. At times, it seems that the logics of international crime prevention and those other international policy agendas are pulling in opposite directions and will be difficult to reconcile.

The cases of Bosnia and Libya have revealed that the situational prevention of international crimes, with its more partial, coercive and intrusive approach, can clash with efforts to prevent, manage, and resolve an armed conflict – should armed conflict form part of the situational context. It is difficult to follow a conflict prevention logic and conduct peace negotiations with key actors in a crisis, whilst at the same time following an international crime prevention logic and treating the key actors as criminal masterminds, threatening them with criminal prosecutions, targeting them with sanctions, or facilitating their removal from power. Moreover, rather than preventing armed conflict at all cost, the international crime prevention efforts in Libya and Bosnia have used military force to achieve their objective. In both cases, the tension between conflict prevention and international crime prevention has led to heated controversy amongst international actors, as some prioritised managing the armed conflict (the AU and BRICS in Libya; the UK, France, and the UN in Bosnia), whilst others prioritised preventing atrocity crimes.

Moreover, as the Bosnia case has demonstrated, the delivery of humanitarian assistance to needy populations can be undermined by parallel efforts to prevent international crimes - and *vice versa*. The provision of humanitarian assistance is based on the humanitarian principles of humanity, neutrality, impartiality, and independence.²⁵ Humanitarian actors regard compliance with these principles as the

²⁵ See, UN Office for the Coordination of Humanitarian Affairs (OCHA), *OCHA on Message: Humanitarian Principles*, June 2012; also International Committee of the Red Cross (ICRC), *Code*

bedrock of their work and as crucial for ensuring safe and sustained access to affected populations. Humanitarian assistance requires the cooperation and consent of the warring parties on the ground, which requires it to be a non-partisan and apolitical act.²⁶ The partial, coercive, and intrusive logic of international crime prevention fundamentally challenges these foundational principles of humanitarian assistance operations. It is difficult to negotiate access and dangerous to provide humanitarian assistance in the context of air strikes or during actual war fighting on the ground. In addition, those engaged in an armed conflict may treat humanitarian actors with suspicion, as the latter can at times be used as sources of information and/or evidence for subsequent efforts to establish accountability for crimes committed. At the same time, however, the very presence on the ground of humanitarian personnel, or traditional and lightly-armed UN peacekeeping forces, undermines coercive international crime prevention efforts, as they are easy targets for retaliation and force international actors to maintain the goodwill of all parties. In the Bosnia case, this dilemma triggered controversy amongst international actors, particularly amongst the UN, states that had contributed troops to UNPROFOR, and states that had not contributed troops to UNPROFOR.

The Kenya case, finally, provides some evidence for a potential tension between the promotion of democracy and efforts to prevent international crimes. The Annan mediation prioritised the prevention of atrocity crimes at all cost, which required the negotiation of a power-sharing agreement.²⁷ However, the negotiated power-sharing agreement also signalled to Kenyans and other democratizing countries

of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief, December 1994.

²⁶ ICRC, *Code of Conduct*.

²⁷ Stephen Brown, 'Donor Responses to the 2008 Kenyan Crisis: Finally Getting it Right?', *Journal of Contemporary African Studies* vol. 27, no. 3 (2009), 395.

that democratic procedures did not work. Moreover, it may have created a dangerous precedent that the losers of democratic elections can still secure governing power by organising systematic violence. There were attempts to act on the Kenya precedent in other African countries such as Burundi and Zimbabwe. Moreover, the power-sharing agreement installed an overly large government that was constantly paralysed and unable to address important policy issues.

In short, the prevention of international crimes will not always be reconcilable with other important international policy agendas. This requires international actors to make hard choices and clarify the importance of international crime prevention in the hierarchy of global governance issues. If international actors' paramount goal is to prevent international crimes, then this objective might have to be pursued at the expense of some other agendas. Prioritising certain policy agendas over others is likely to be a contested and controversial process.

7.2.2. Side-Effects and Unintended Consequences

Another dilemma that international crime prevention poses for international society is the likelihood of side-effects and unintended consequences. The nature of the unintended consequences and side-effects varies from case to case, but the three case studies show very clearly that international crime prevention is unlikely proceed without complications. In fact, these complications have turned even successful instances of international crime prevention into highly controversial episodes in international politics.

In the case of Kenya, controversy was triggered by the power-sharing agreement that was "imposed" on the parties to prevent international crimes. The power-sharing agreement not only set aside democratic procedures, but also put in place an inefficient government that failed to deal with important issues of policy.

Side-effects and unintended consequences were also revealed by the Libya case. The case of Libya has shown that military operations, also those undertaken to protect civilians and prevent atrocity crimes, always contain the risk of causing civilian casualties and injuries. Even when the number of casualties is rather small, as was the case in the Libya episode, this is still a tragic and highly problematic by-product of international crime prevention efforts.²⁸ Probably even more controversial was that NATO's air campaign in Libya became a facilitating factor for regime change. International crime prevention will always contain the possibility that - if murderous individuals that are at the core of a regime refuse to change their behaviour - the provision of "enduring protection" might ultimately require international actors to diminish that individual's/regime's general capacity to harm populations. This can become a necessary facilitator for regime change, as has happened in the Libya case. Regime changes, as also shown by the Libya case, can create power vacuums and can trigger regional instability. In Libya, one consequence of this was the proliferation of weapons within the country and the wider region. This had negative longer-term implications for Libya, as evidenced by the chaos engulfing Libya now.

Such unintended consequences and side-effects are already controversial in and of themselves. This is further magnified by the fact that preventive action always takes place on the basis of probability assessments, i.e. assessments of what is about to happen in specific situations. This inevitably involves uncertainty. Whilst the late-stage character of the situational crime prevention reduces this uncertainty to some extent, such probability assessments are still not an 'exact science' and are likely to be contested. For instance, in the case of Libya there were different assessments about the threat to populations in Benghazi around 15 March 2011. Whilst the vast majority

²⁸ See, UN Human Rights Council, 'Report of the International Commission of Inquiry on Libya', A/HRC/19/68, Advanced Unedited Version, March 2012, 17.

of observers and policy-makers anticipated a large-scale massacre, and thus supported the authorization of military protection measures, others have argued that the Gaddafi regime had neither the intention nor the capacity to commit such an atrocity.²⁹

7.2.3. Challenges of Dealing with Individuals

Finally, an important implication of R2P's move to international crimes is a more pronounced focus on individuals - their behaviour, their choices, and their protection needs. Individuals are central to the concept of "crime", and by linking R2P to international crimes UN member states have put the individual centre stage in two ways.³⁰ First, individuals come into the spotlight as victims of harm that require protection.³¹ This shift from states towards individuals as the principle referent of security is already part of the human security discourse.³² Second, however, linking R2P to international crimes adds to this a focus on individuals as perpetrators of atrocity crimes - as violators of the international community's norms of civilised behaviour that deserve collective punishment.³³ A focus on individuals, therefore, is integral to international crime prevention.

This central role of the individual requires the UN and other international actors to reconfigure their dispositions and capacities towards affecting the behaviour

²⁹ See, Alan Kuperman, 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign', *International Security* vol. 38, no. 1 (2013), 105-136; Mary Ellen O'Connell, 'How to Lose a Revolution', *e-International Relations*, 07/09/2011, <http://www-e-ir.info/?p=13728>; and Seumas Milne, 'If the Libyan War was About Saving Lives, It was a Catastrophic Failure', *The Guardian*, 26/10/2011.

³⁰ See, Welsh, 'A Normative Case for Pluralism', 1203.

³¹ See, Jennifer M. Welsh, 'The Responsibility to Protect: Securing the Individual in International Society', in B. Goold and L. Lazarus (eds.), *Security and Human Rights* (Portland: Hart Publishing, 2007), 363-364.

³² On human security see, S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Bloomington: Indiana University Press, 2006), 2. The focus on individuals as victims was already reflected in the original ICISS articulation of R2P.

³³ See, Welsh, 'A Normative Case for Pluralism', 1203; Antonio Cassese, *International Criminal Law*, 2nd edn (Oxford: Oxford University Press, 2008), 8-11, 33.

of individuals, rather than states. This is challenging for an organization such as the UN, which, traditionally, has been primarily concerned with the security of states, the regulation of state behaviour, and the organisation of peaceful co-existence of states. Ultimately, the UN is still an inter-governmental organisation that is constituted by sovereign states, and the UN Charter regime, at least to a large extent, sets out a view of international order that cherishes the principles of sovereign equality and non-intervention. The emphasis that international crime prevention puts on individuals challenges the sanctity of state sovereignty. In the context of atrocity crimes, the criminal masterminds whose behaviour needs to be changed are often individuals in particular roles, typically associated with the state, e.g. Slobodan Milosevic, Radovan Karadzic, or Ratko Mladic in the Bosnia case; Mwai Kibaki, Raila Odinga, or William Ruto in the Kenya case; and Muammar Gaddafi, Saif al-Islam, or Abdullah al-Senussi in the Libya case. The “responsibility to prevent”, therefore, requires statesmen to manage and handle the behaviour of their own peers. This makes the UN a rather problematic vehicle for implementing the “responsibility to prevent”.

In sum, therefore, the findings presented in this thesis are somewhat counterintuitive. Turning R2P into a principle that deals primarily with the prevention of four specific international crimes was, at least partly, a strategic choice of R2P advocates, intended to reduce controversy around R2P and generate greater political consensus on the principle.³⁴ However, this thesis suggests that preventing international crimes is not a soft, easy, and uncontroversial policy option. This insight is likely to heighten, rather than lessen, the “temperature” on R2P in many capitals around the world. To put it another way, the turn to prevention does not necessarily solve R2P’s controversy problem or heal the diplomatic wounds that opened up after

³⁴ See, Deng, ‘JISB Interview: The Responsibility to Protect’, 85; also Welsh, ‘A Normative Case for Pluralism’, 1201.

NATO's intervention in Libya; at least not if it is accompanied by a move to international crimes.

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Elite Interviews

No	Interviewee	Position	Case	Place	Date
1	Stuart Seldowitz	Legal Adviser, Permanent Mission of the US to the UN, 1991-1996	Bosnia	New York	04/09/2012
2	Alvaro de Soto	Special Adviser to UNSG Javier Perez de Cuellar, 1982-1992; Senior Political Adviser to UNSG Boutros Boutros-Ghali, 1992-1994	Bosnia	New York	06/09/2012
3	Leon Fuerth	National Security Adviser to US Vice President Al Gore, 1993-2000; Coordinator of US Sanctions against Serbia and Montenegro	Bosnia	Washington D.C.	10/09/2012
4	Jim O'Brien	Legal Adviser's Office, US State Department, 1989-1994	Bosnia	Washington D.C.	23/04/2013
5	Ambassador Robert Hunter	Senior Foreign Policy Advisor to Presidential Candidate Bill Clinton, 1992; US Ambassador to NATO, 1993-1998	Bosnia	Washington D.C.	12/09/2012
6	Michael Matheson	Acting Legal Adviser or Principle Deputy Legal Adviser, US State Department, 1990-2000; Person in Charge of Creation of the ICTY	Bosnia	Washington D.C.	25/04/2013
7	Ambassador Peter Galbraith	Professional Staff Member of the US Senate Committee on Foreign Relation, 1979-1993; First US Ambassador to Croatia, 1993-1998	Bosnia	Washington D.C.	12/09/2012
8	Ambassador Jose Cutileiro	Special Adviser to the Portuguese Foreign Minister, 1992-1994;	Bosnia	Brussels	13/12/2012

		Chair of the Bosnia Talks of the EC Conference on Yugoslavia, 1992			
9	Lord Douglas Hurd	British Foreign Minister, 1989-1995	Bosnia	London	12/06/2013
10	Beatrice Le Fraper du Hellen	Legal Counsellor and Head of Human Rights Desk, Permanent Mission of France to the UN, 2010-present	Kenya/ Libya	New York	13/09/2012
11	Priscilla Hayer	Co-founder of the International Centre for Transitional Justice, Adviser to the AU Panel of Eminent African Personalities	Kenya	Geneva	15/10/2013
12	Paul Dzikowicz	Deputy High Commissioner of Australia to Kenya, 2009-2012	Kenya	Geneva	15/10/2013
13	Ambassador Laetitia Van Den Assum	Ambassador of the Netherlands to Kenya, 2006-2011	Kenya	London	29/10/2013
14	Martijn Dadema	Deputy Permanent Representative to UNEP and UN-HABITAT, Embassy of the Netherlands in Kenya, 2007-2010; Head of Political Section & Focal Point for African Affairs and R2P, Permanent Mission of the Netherlands to the UN, 2010-2013	Kenya/ Libya	New York	22/02/2012 07/09/2012 19/04/2013
15	Francis Deng	UN Special Adviser on the Prevention of Genocide, 2007-2012	Kenya/ Libya	New York	24/02/2012 17/04/2013
16	Juan Mendez	UN Special Adviser on the Prevention of Genocide, 2004-2007	Kenya	Oxford	24/06/2013
17	Castro Wesamba	Political Affairs Officer, Office of the Special Adviser for the Prevention of Genocide, 2008-	Kenya	New York	16/04/2013

		present			
18	Roselyn Akombe	Senior Political Affairs Officer, UN Department of Political Affairs, 2005-present	Kenya/ Libya	New York	18/04/2013
19	Gerry Bennett	Political Affairs Officer, UN Department for Political Affairs; Coordination and Liaison Officer, AU Panel of Eminent African Personalities	Kenya	New York	13/05/2013
20	Karen Mosoti	Head of the Liaison Office of the ICC to the UN, 2007-present	Kenya/ Libya	New York	19/04/2013
21	Jendayi Frazer	US Assistant Secretary of State for African Affairs, 2005-2009	Kenya	Washington D.C.	22/04/2013
22	Ambassador Adam Wood	British High Commissioner to Kenya, 2005-2008	Kenya	London	29/11/2013
23	Edward Luck	UN Special Adviser on the Responsibility to Protect, 2008-2012	Libya	Oxford	13/12/2011
24	Mark Simonoff	Legal Advisor, Permanent Mission of the US to the UN, 2008-present	Libya	New York	23/02/2012
25	Doc Mashabane	Deputy Permanent Representative of South Africa to the UN, 2010-present	Libya	New York	23/02/2012
	Magen Govender	Counsellor, Permanent Mission of South Africa to the UN, 2010-2013	Libya	New York	23/02/2012
26	Leonardo Luis Gorgulho	Minister Plenipotentiary, Permanent Mission of Brazil to the UN, 2008-present	Libya	New York	23/02/2012
27	Leandro Vieira Silva	First Secretary and R2P Focal Point, Permanent Mission of Brazil to the UN, 2010-present	Libya	New York	23/02/2012
28	Ana Coelho	First Secretary,	Libya	New York	23/02/2012

		Permanent Mission of Portugal to the UN, 2008-present			
29	Ambassador Jose Filipe Moraes Cabral	Permanent Representative of Portugal to the UN, 2008-present	Libya	New York	24/02/2012
30	Mal Green	First Secretary, Permanent Mission of the UK to the UN, 2009-2013	Libya	New York	07/03/2012
31	Edward Stringer	Commander of the UK Air Contingent in NATO's Operation Unified Protector, 2011	Libya	Oxford	23/05/2012
32	Peter Olson	Legal Advisor, NATO HQ, 2011-present	Libya	Brussels	29/05/2012
33	Oana Lungescu	NATO Spokesperson, 2010-present	Libya	Brussels	29/05/2012
34	Rick Froh	Deputy Assistant Secretary General for Operations, NATO, 2007-present	Libya	Brussels	29/05/2012
35	Rachel Chetham	Operations Team, UK Joint Delegation to NATO, 2010-present	Libya	Brussels	18/06/2012
36	Daniele Marchesi	Libya and Algeria Desk, European Commission's Directorate General for Development and Cooperation, 2010-2012	Libya	Oxford	02/12/2011
37	Ambassador Nawaf Salam	Permanent Representative of Lebanon to the UN, 2007-present	Libya	New York	24/02/2012
38	Ambassador Bruno Stagno Ugarte	President of the Assembly of States Parties of the ICC, 2005-2008; Executive Director, Security Council Report, 2011-present	Libya	New York	20/02/2012
39	Mona Rishmawi	Chief of Rule of Law, Equality and Non-Discrimination Branch, Research and Right to	Libya	Geneva	16/10/2013

		Development Division, OHCHR, 2009-present			
40	Eric Tistounet	Chief of Human Rights Council Branch, OHCHR, 2003-present	Libya	Geneva	17/10/2013
41	Mark Horvath	Deputy Permanent Representative of Hungary to the UN in Geneva, 2010-present	Libya	Geneva	16/10/2013
42	Simon Adams	Executive Director, Global Centre for the Responsibility to Protect, 2011-present	Libya	New York	22/02/2012
43	Ambassador Hardeep Singh Puri	Permanent Representative of India to the UN, 2009-2013	Libya	New York	08/09/2012
44	Jonathan Prentice	Chief Policy Officer, International Crisis Group, 2010-present	Libya	Brussels	25/05/2012
45	Zeeshan Hashmi	Research Analyst, Security Council Report	Libya	New York	20/02/2012
46	Shamala Kandiah Thompson	Senior Research Analyst, Security Council Report	Libya	New York	20/02/2012
47	Paul Romita	Research Analyst, Security Council Report	Libya	New York	20/02/2012
48	Amanda Roberts	Senior Research Analyst, Security Council Report	Libya	New York	20/02/2012