

Judging Aggression in the ICC: the Crime of Aggression, R2P and Unilateral Humanitarian Intervention after Kampala

Abstract

In 2010 in Kampala, Uganda, the States Parties to the International Criminal Court (ICC) agreed on the definition of the crime of aggression and on the jurisdictional prerequisites for its prosecution at the ICC. Nonetheless, fundamental questions concerning the contours of this crime remain unsolved. This paper discusses the ICC role in the debate over the legality of the humanitarian intervention undertaken without Security Council authorization from an international relations perspective and analyzes the impact of the Kampala compromise upon the responsibility to protect doctrine (R2P) as an emerging political doctrine to protect civilians facing severe humanitarian emergencies.

Key-Words – Responsibility to Protect – ICC (International Criminal Law) - Aggression – Kampala – Humanitarian Intervention.

Introduction

The doctrine on humanitarian intervention has since long been a controversial issue, both in law and in the international relations field, and remains so today. The use of armed force without UN Security Council authorization is the most controversial aspect of the use of force for humanitarian purposes, involving legal, political and ethical features of great complexity.

The issues related to military coercion have become far more institutionally dense over the last century. The rising density of international institutions highlights the need to explore the institutional interactions between international regimes governing the use of force in international relations. This approach allows us to examine the humanitarian intervention in our days, and enables us to capture the normative and material dimensions of the problem, emphasizing the tensions and complementarities between the different regimes.

The argument discussed in this paper contends that the theory of the regime complexes helps us to think humanitarian intervention beyond the *jus ad bellum* perspective introduced by the UN Charter, allowing to articulate the approach

concerned with the justifications and limits of the use of force, with the international criminal law regime that deals with the criminal responsibility of individuals for international crimes and the prosecution of individuals for international crimes before international tribunals, and the responsibility to protect (R2P) doctrine understood as the enabling principle that first obligates individual states and then the international community to protect populations from genocide, war crimes, ethnic cleaning and crimes against humanity.

This paper explores the definition of the crime of aggression and the jurisdictional prerequisites for its prosecution at the International Criminal Court (ICC) adopted at the 2010 Review Conference in Kampala and analyzes the impact of the Kampala compromise upon the R2P as an emerging political doctrine to protect civilians facing severe humanitarian emergencies. The tensions and complementarities between the Kampala Amendments and the established rules of *jus ad bellum* will also be discussed. We conclude arguing that this option allows the discussion of the interactions between soft and hard law under the regime complex governing the use of force from an international relations perspective and highlights the complexity of humanitarian interventions in their normative and material dimensions.

After a brief conceptualization of the notion of regime complexes, the insight is applied to the complex domain of the use of force.

The second part of the paper traces the institutional interactions within the regime complex governing the use of force, with a focus on the crime of aggression.

In the final part of the paper, we discuss the interplay between soft and hard law within the regime complex governing the use of force and conclude that the postponement (at least until 2017) of the concrete exercise of ICC jurisdiction over the crime of aggression will allow key actors to challenge the notion of sovereignty and the legal principle of non-intervention, in ways that suggest that soft law related to the R2P doctrine does not “progressively develop” existing hard law in the context of the use of force. This may have important consequences not only for the international criminal law regime, but particularly for the *jus ad bellum* doctrine and the future of R2P as an emerging law.

The Use of Force as a Regime Complex

In the mid-1990s the global governance literature began to be interested in the institutional interplay between regimes and not so much in the interaction at the level of specific regimes (Zelli, Gupta, van Asselt, 2013). The concept of regime complex was initially characterized by Rautiala and Victor (2004: 279) as “an array of partially overlapping and nonhierarchical institutions governing a particular issue-area”. Under the regimes study field, the debate around the concept of regime complex was generating new conceptual proposals focused on the need to refine the definition theoretical aspects initially advanced by Rautiala and Victor in 2004.

For Orsini, Morin and Young (2013: 29) the notion of regime complex refers to the idea of “a network of three or more international regimes that relate to a common subject matter; exhibit overlapping membership; and generate substantive normative, or operative interactions recognized as potentially problematic whether or not they are managed effectively”. Gehring and Faude’s position (2013: 120) approaches the definition proposed by Orsini, Morine and Young when they argue that “regime complexes are best understood as systems of functionally overlapping international institutions that continuously affect each other’s operations”. Thus, the conceptual lens of the regime complex underlines the path dependence in a situation of rising density of international institutions focused on the following characteristics: 1) the constitutive elements of regime complexes are distinct regimes in their own right and the elemental regimes of a complex do not typically exhibit hierarchical relations; 2) these regimes partially overlap; 3) the existence of some kind of divergence between regimes although different forms of interaction may occur; and 4) regime complexes create new opportunities for strategic action through forum shopping, based on material conditions, but interactions take also place over norms and discourses, between other aspects (Orsini, Morin, Young, 2013; Zelli, Gupta, van Asselt, 2013).

Rautiala and Victor (2004) sought to theorize the regime complexes relating its characteristics with the non-hierarchical nature of the international legal system. The horizontal, overlapping structure of a regime complex means that none of the regimes of the complex is supreme over others. In this sense, the emergence of new regimes has implications on existing regimes and rules and there may be situations in which the new regime comes into conflict with the older regime rules. The lens of the regime complexes allows us to describe the complexity of the relations that comprise each

regime (several IOs and treaties) and the institutional interactions and institutional interlinkages between different regimes that rule a common subject matter, revealing patterns of interactions in terms of tensions, contradictions and complementarities.

The central subject matter of this paper is the armed humanitarian intervention by arguing that the issue of armed intervention for humanitarian purposes can be described as a question regulated by a regime complex. It is suggested that this regime complex comprises, as an integral part of it, three distinct regimes. The first is the *jus ad bellum*, associated since the end of World War II to the collective security mechanism established by the UN Charter. This regime prohibits the employment (and the threat of) unilateral armed force outside the framework of individual or collective defense and military operations authorized by the Security Council in the framework of collective security. The regime forbids acts of aggression understood as forms of illegal use of armed force outside the framework established by the UN Charter. The second regime has roots that can be traced back to the World War II Nuremberg trials, referring to the international criminal justice regime that criminalized and assigned individual criminal responsibility to individuals for “crimes against the peace” (in Tokyo and Nuremberg), that is “crimes of aggression”, according to the Rome Statute of the ICC (1998), in addition to other international crimes such as genocide, war crimes and crimes against humanity. The third regime regards to the R2P doctrine. This regime met an important impulse in December 2001 with the publication of the Report entitled “The Responsibility to Protect” (ICISS, 2001), by the International Commission on Intervention and State Sovereignty. The R2P regime complex comprises different instruments in order to deal with mass atrocities committed within state borders. The Report embraces three specific responsibilities: a) to prevent – to address both the root causes and direct causes of internal conflicts and other crises putting populations at risk; b) to react – to respond to situations of compelling human need with appropriate measures, which may include in extreme cases military intervention; c) to rebuild – to provide, particularly after a military intervention, full assistance for recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert (need to establish new rules). The Report gave rise to a number of initiatives that culminated in the adoption of UN World Summit 2005

Outcome¹. This document adopted by consensus endorsed the R2P principle as soft law, understood as an emerging political doctrine to frame the international response and protection of civilians facing serious humanitarian emergencies. The Report of the International Commission on Intervention and State Sovereignty presented the idea that state sovereignty is not absolute, as it requires states to assume the “responsibility to protect” the population under its jurisdiction, suggesting that in the impossibility of a UN Security Council act in extreme situations of human rights violations there are two alternatives. The first is for the UN General Assembly to hold an emergency session under a “Uniting for Peace” procedure, under which a decision to intervene can be made by a two-thirds majority of the General Assembly. The second is for regional organizations to gain Security Council authorization under Chapter VIII of the UN Charter.

The UN Summit's consensual enforcement of the R2P doctrine allows us to discuss the interaction between hard and soft law in the context of armed humanitarian intervention. Such interaction emerges in a world characterized by multiple international *fora* that interrelate the *jus ad bellum*, essentially leveraged in the UN Charter and other international treaties (hard law), with the criminal international justice, also based on hard law instruments (the ICC Statute and complementary legislation) and the UN World Summit 2005 Outcome as a soft law instrument that many see as an evolution in the *jus ad bellum* regime, creating conditions for a more frequent use of armed humanitarian interventions to protect civilians in danger.

In this paper we argue, in line with Schaffer and Pollack (2011), that there is an antagonistic interaction between hard law and soft law in the case of humanitarian intervention, but disagree with these authors on the idea that the UN World Summit 2005 Outcome contradicts the UN Charter. In fact, the paper argues that it was the ICISS Report (with the status of soft law) that created conflicts with state sovereignty and the hard law provisions of the UN Charter, not the UN World Summit 2005 Outcome itself. However, the antagonistic interaction of hard and soft law, reflecting a conflict between coalitions of states now is a fact in the context of international criminal justice, focused on the legal and political debate on the definition of the crime of aggression. In the next section we show how revisionist states (the powerful states) gave

¹ World Summit Outcome Document, UNGA Res 60/1 (24 October 2005).

up the initial plan which consisted on the establishment of new soft law norms with the aim of undermining or reorienting existing hard law and opted for a more ambitious strategy that seeks to replace, or at least change substantively, the hard law of the UN Charter by the hard law of the ICC Statute, looking to preserve their strategic interests in the Amendments of the crime of aggression adopted on June 11 2010 in the Review Conference of the Rome Statute held in Kampala, Uganda.

The Crime of Aggression: Humanitarian intervention, Sovereignty and the Norm of Non-intervention

Adam Roberts (1993: 426) defines humanitarian intervention as a “military intervention in a state, without the approval of its authorities, and with the aim of preventing widespread suffering or death among the inhabitants”. For the purposes of this paper humanitarian intervention is defined as “a coercive action undertaken by states involving the use of armed force in another state without the consent of its government, with or without authorization from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law” (Dannish Institute, 1999: 11).

In the post World War II period the discourse on humanitarian intervention has been object of intense debate and divergent positions. The ICISS Report, published in 2001, tried to reframe the debate not as an argument about the “right to intervene” but regarding the “responsibility to protect” with the aim of trying to solve the tensions inherent to the relation between state sovereignty and intervention for human rights protection purposes. Other soft law documents that preceded the 2005 Summit stressed the core ideas of the R2P doctrine, namely the UN High-Level Panel on Threats, Challenges, and Change *A More Secure World: Our Shared Responsibility*² (December 2004) and the UN Secretary-General's Report *In Larger Freedom: Towards Development, Security and Human Rights for All*³ launched in March 2005.

² UN High-Level Panel on Threats, Challenges, and Change *A More Secure World: Our Shared Responsibility*. A/59/565, 2 December 2004.

³ UN Secretary-General's Report *In Larger Freedom: Towards Development, Security and Human Rights for All*. A/59/2005, 21 March 2005.

As noted, in 2005 the R2P doctrine was incorporated into the language of the UN World Summit 2005 Outcome adopted by consensus. It is widely accepted that the UN World Summit 2005 Outcome has the character of soft law.

The definition of soft law and its interaction with the hard law is disputed, nevertheless it can generically be defined as “non-binding instruments, that, even so, still have some legal consequences” (Armstrong, Farrell and Lambert, 2012: 27), constituting themselves normative provisions contained in non-binding texts. Soft law texts are political commitments that can lead to law, but they are not law, and, thus, give rise only to political consequences (Raustiala, 2004: 587).

Common forms of soft law include normative resolutions of international organizations, concluding texts of summit meetings or international conferences, recommendations of treaty bodies overseeing compliance with treaty obligations, bilateral or multilateral memoranda of understanding, executive political agreements, and guidelines or codes of conduct adopted in a variety of contexts. Despite being a contested concept, even the most recent trends of the legal positivism classifies some resolutions of international organizations as soft law because of their high legitimacy (Goldmann, 2012). Indeed, some UN General Assembly resolutions that express states consent may be considered similar to the consent required by binding international law. Godmann (2012: 337) stresses that the ‘normativity of “binding” resolutions of international organizations is high because it plays in many cases the role of a functional equivalent to binding international law’. The so-called “law-declaring resolutions” of the UN General Assembly are guiding principles, non-binding standards and principles because compliance is expected with the norms that these texts contain. Are considered indicators of state consent an expressive vote, the preparatory works of a resolution, the existence of follow-up mechanisms and the later practice following the adoption of a resolution.

In this sense, the UN World Summit 2005 Outcome not only underlines the overlaps between the three regimes on the use of force, but also draws attention to certain policy options for dealing with institutional interactions, including resistance to some ICISS more divisive approaches. Contrary to the argument of Schaffer and Pollack (2011) the ICISS did find broad support for an unlimited, absolute view of sovereignty. In this sense, the UN World Summit 2005 Outcome does not come into tension with the UN Charter Article 2 (7). In terms of legitimacy and from a legal point

of view nothing prevents the Security Council from authorizing an armed intervention on humanitarian grounds. In the 90s of the XX century were authorized several ad hoc interventions. However, the basis for these operations were always ambiguous; it was never invoked a right to humanitarian intervention, but the presence of threats to international peace and security, for example, a stream of refugees as the result of a war (Schaffer and Pollack, 2011).

Heinze and Steele (2013) showed how the UN World Summit 2005 Outcome silenced the discussion on the most discordant issues of the 2001 Report. First, the ICISS argued that the principle of the “responsibility to protect” works when “states cannot or do not want to protect citizens”. The final text of the Summit considers that the principle only is able to operate when the states are “manifestly failing”, that is, only in very special circumstances. In effect, the situations of “occurrence of serious and irreparable harm to human beings, or that are imminently likely to occur”, including “large-scale loss of life” or “large scale ethnic cleansing” are replaced by a responsibility to protect that operates only in cases of genocide, war crimes, crimes against humanity and ethnic cleansing.

From the perspective of the R2P regime complex the 2005 Summit Outcome legitimizes the recent practice of the UN Security Council refocusing the debate on the Security Council and restricting clearly the possibility of the humanitarian use of force to the scope of the Security Council’s powers (Orford, 2011).

This has two different implications. On the one hand, the final declaration of the Summit has not progressively developed the provisions of the UN Charter on the use of force. This is a vague text that does not define decision criteria under the UN Security Council, not referring the UN General Assembly or regional organizations, and that reinforces the state doctrine as liable to individuals (Schaffer and Pollack, 2011). On the other hand, key actors interested in challenging the notion of sovereignty and the legal principle of non-intervention were forced to seek alternative strategies. It is in this context that the powerful states gave up the initial plan which consisted on the establishment of new soft law norms with the aim of undermining or reorienting existing hard law and opted for a more ambitious strategy that involves replacing the hard law of the UN Charter by the hard law of the ICC Statute, looking to safeguard their strategic interests in the Amendments of the crime of aggression adopted in Kampala. In what concerns the use of force the challenge came from a coalition of more

developed countries that putted into question the pre-existing consensus on the principle of absolute state sovereignty protection (Saraiva, 2014).

It is, therefore, in the context of the crime of aggression that the discussion about the unilateral humanitarian intervention gains a new centrality.

It is important to note that the crime of aggression imposes unique factors that are not present in the other three crimes under the ICC's jurisdiction (Kostic, 2011). Before being a legal issue is an international security issue: the first requirement of the definition of aggression is the occurrence of an act of aggression, which means that in the event of the occurrence of a crime of aggression there is an indirect legal impact on the legal sovereignty of states, not just affecting the rights of the accused. It is understood as an international crime committed by a state against another state (Esbrook, 2015) that frequently creates conflict conditions and upheaval in which other atrocity crimes are likely to be perpetrated (Gillett, 2013). On the other hand, after Tokyo and Nuremberg no international ad hoc or special criminal tribunal judged this crime.

The Rome Statute was unable to deal with such a controversial crime, it was then decided that a review conference of the Assembly of States Parties could propose amendments. Thus, the Kampala Conference in 2010 set the parameters and trigger mechanisms of the crime of aggression.

The opposition between diplomats of countries committed with the criminalization of the aggressive war (Argentina, Botswana, Switzerland, Canada, Germany, Italy, Liechtenstein, Sierra Leone, South Africa, Switzerland, Uruguay and Uganda), and powerful countries which sought to collapse the negotiations in order to avoid tighter regulations for military operations, counting with the support of small states guided by realpolitik principles, it is, indeed, central to understand the institutional interactions between the three international regimes governing the use of force in the international relations arena, allowing to highlight the material and normative dimensions of these interactions (Weisboard, 2013).

Kampala has managed to preserve key aspects of the crime definition and jurisdiction criteria, but did not fully allow to safeguard the results of the negotiations, which can still be reversed. In this sense, for many observers it is legitimate to ask whether the aggression provisions will ever enter into force.

The Assembly of States Parties will have to take a further one-time decision to activate the Court's jurisdiction, no earlier than 2017. Also, one year must have passed since the 30th ratification before the Court can exercise its jurisdiction over the crime of aggression. The article 15 ter of the Amendments states that “the Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to the decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute”. It would be the decision taken by States Parties by at least a two-third majority in the context of an Assembly of States Parties or a Review Conference.

It is, therefore, important we consider the process of ratification of the Kampala Amendments and the activation of the jurisdiction as a political space of intervention, involving the possibility of developing contestation dynamics, commitments and even the annulment of the whole process that led to Kampala.

In Kampala, the negotiations over the crime of aggression fractured into two distinct camps. On one side, the five permanent members of the Security Council (P-5) were little interested in the definition of the crime. On the other side, many members of the group of Latin American and Caribbean Countries (GRULAC), the so-called “African Group” of States Parties, a handful of European States and other smaller States Parties defended the expansive definition of the crime (Schaack, 2011).

The United States tried to clearly remove the crime of aggression of the ICC jurisdiction on the grounds that the definition of aggression did not respected international custom. The argument was unanimously rejected by other delegations (Weisboard, 2013). Moreover, there was no significant support for the doctrine of humanitarian intervention among the delegates despite US efforts. The elements of the crime of aggression mandate require that the leader must have control over “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the United Nations Charter”. This wording is the result of a demand from the West to avoid trials of humanitarian intervention or military intervention under the legitimate preventive defense (Kostic, 2011). The Understandings 6 e 7 (ICC Resolution RC/resol.6) that were proposed in the last days of the Kampala conference suggest that the Court will weight an act's “circumstances”. From the perspective of the delegates present at the Conference the expression refers, in fact, to acts with humanitarian aims and purposes, but the legal uncertainty about the legal value of the Understandings does

not allow to conclude beyond doubt that humanitarian interventions do not come to set acts of aggression for ICC Judges (Esbrook, 2015). In this sense, the negotiating States at Kampala were unable to determine ultimately the status of humanitarian intervention leaving the determination to the Judges (Gillett, 2013).

It is important to note that, as stated by Kaufman (2013), the United States have more than one strategy at their disposal to achieve the purpose of modifying the hard law that regulates the use of force. First, the US government could continue to refrain from ratifying the Rome Statute. In the case of an alleged crime of aggression the ICC Prosecutor cannot charge nationals of non-state parties, which means that the Court cannot judge a crime of aggression that may be associated with a humanitarian intervention that the United States decides to do. Second, the US government could ratify the Rome Statute. In this case declaring to the ICC's Register that it does not accept the Court's jurisdiction over aggression. Third, the US government could lobby for further amendments to the definition of the crime of aggression adopted at 2010 Kampala Review Conference. Finally, the activation of the jurisdiction can come to constitute itself the main political space to challenge the discourse over the sovereignist principles of the *jus ad bellum*. Given that negotiating such amendments would be politically and legally difficult, the United States may choose to question and prevent the activation of the jurisdiction, jeopardizing the possibility of the ICC come to judge crimes of aggression.

According to the Status Report on Implementation and Ratification (2016) 28 states have ratified the Kampala Amendments. As mentioned, these amendments will come, at best, into force in 2017, if favorably voted by a two-third majority of states in the context of an Assembly of States Parties or a Review Conference.

For the coalition of states advocating the illegality of the humanitarian exception the activation of the jurisdiction means strengthening their position in the regime complex that regulates the use of force. As mentioned, the crime of aggression is the supreme violation of the *jus ad bellum*, to the extent that the crime by its nature involves both state action and individual conduct. The harmonization of the crime of aggression definition and of the jurisdictional prerequisites for the judgment of this crime (hard law), with the principles that guide the *jus ad bellum*, is for countries that defend the expansive definition of the crime a guarantee of protection against selective strategies of the great powers supported by material capacities in articulation with an ethical

discourse based on the normative content of the need to protect civilians facing severe humanitarian emergencies (R2P) (Gilles, 2013). Second, confirming the illegality of the unilateral humanitarian intervention, as advocated by the ICJ in the Nicaragua Case and in DRC v. Uganda, and the insertion of the language of the UN General Assembly Resolution 3314 (XXIX), Definition of Aggression, which was adopted in 1974, an instrument of soft law, in the definition of the crime of aggression means that the restrictive interpretation of the act of aggression that the Resolution of the UN General Assembly established won't finally a hard law status. Third and last, the harmonization of the hard law instruments of *jus ad bellum* regimes and international criminal justice hinders the promotion of unilateral armed intervention as an emerging norm, being notorious that there is not enough social and legal interaction to support it. Rather, the UN Summit Outcome keeps the recourse to force firmly in the hands of the Security Council.

Hard and soft law can interact in complex ways, as alternatives, complements, and antagonists. As noted by Schaffer and Pollack (2010 and 2011), powerful states have tried to undermine and change existing international understandings in fundamental ways. In this sense, the strategic use of hard and soft law is very present in the regime complex that regulates the use of force, seeking to take advantage of the fragmentation of both the regimes and the international legal *fora*. Shaffer and Pollack (2011: 1171) pointed that there is 'a tendency for individual states to engage in "forum shopping" by selecting particular regimes that are most likely to support the preferred outcomes'.

In the view of the powerful states the establishment of new soft law norms with the aim of undermining or reorienting existing hard law failed, to the extent that the UN Summit Declaration paved the idea that third states not only have legal interests but also legal responsibilities, in particular the Security Council P-5:

"The evolution of the responsibility to protect into a legal norm would shrink the space for political assessments in cases involving failures to protect populations against grave crimes [...]. Security Council decisions would have to meet the requirements of the responsibility to protect, and would be measured against the criteria of legality" (Brunnée and Toope (2010: p.17).

The intervention in Libya in 2013 showed that the position of Western countries is not substantially different from that of Russia and China's on R2P or even of the perspective of emerging countries such as India, Brazil or South Africa on humanitarian intervention. So it seems consensual to conclude that none of these powers takes R2P as a legal obligation to intervene, wanting to maintain the ability to decide case by case (Keating, 2011).

In this sense the “forum shopping” of powerful states will avoid the radical vision of the 2005 Summit Outcome document, helping to build a speech that advocates a casuistry involvement of the Security Council on the armed protection of civilians in danger. This “forum shopping” also allows to exempt leaders of any crime of aggression charge related to an unilateral humanitarian intervention, that is, places outside the ICC's jurisdiction the crimes of aggression committed by leaders involved in acts of aggression while, at the same time, from a legal and political point of view, removes much of the pressure that is being exerted on the P-5 about the responsibility to protect norm, diminishing its potential for collective action.

Hard and Soft Law in the Use of Force Regime Complex

The regime complex approach seems to offer an adequate account of central features for the international law, namely its nonhierarchical and desegregated nature. Overlapping regimes reflect the increasing role of legal arguments and legal concepts in international cooperation (Raustiala and Victor, 2004), because, as Abbott and Snidal state:

“International politics and international law are not alternative realms, but are deeply intertwined. Although one goal of law – as of institutions in general – is to settle key issues so that actors can regularize their interactions, the creation and development of legal arrangements is highly political. This is especially true in the international sphere, where most legal regimes are relatively new and undeveloped. Politics permeates international law and limits its autonomy” (Abbott and Snidal, 2000: 455).

Soft law poses serious challenges to the binary distinction between law and not-law. The soft law is at the heart of the interaction between politics and international law, enhancing the role of the agency in the choice and use of legal instruments, depending

on the characteristics of the issue and the negotiating and institutional context in question. In this sense, hard and soft law can be used by states and other actors as alternatives, complements, or antagonists. As mentioned, for the purposes of this paper soft law instruments are primarily normative provisions contained in non-binding texts, non-binding agreements concluded by states – political declarations, unilateral statements by political authorities, non-binding resolutions, recommendations, and decisions adopted by inter-governmental bodies – fairly eclectic bodies of principles, rules, documents, statements, and various forms of communication (Ellis, 2012). Soft law instruments attest the pluralization of norm-making processes. The adoption of a generic concept of soft law allows us to discuss the role of power and norms in the choice of actors in a broader perspective, as well as the role of soft law in the regime complex that regulates the use of force.

Legal obligations are widely perceived as having particular legitimacy. In fact, the literature on hard and soft law suggests that the hard law is more credible than the soft law, as it increases the renegotiation costs of an agreement, because of the sanctions and losses associated to reputation, and since it produces direct legal effects on national legislation. However, its main drawback is to restrict the freedom of action. In this sense, the major advantage of softer forms of legalization are their lower contracting costs. Abbott and Snidal (2000) identify as the main advantages of soft law the dilution of problems related to sovereignty and security issues. Escape clauses, inaccurate commitments or “political” delegation formulas allow to keep a future control over adverse circumstances that may arise. This perspective suggests that soft law deals better with diversity.

Soft law may also show the formation of a custom, can guide the interpretation of a treaty, authorizes action by IOs and gives rise to obligations in good faith terms as the duty to consider, although the breach of these obligations does not give rise to the liability of states or to a legal dispute under ICJ (Goldmann, 2012).

The idea that soft law can elaborate and complement hard law is very exploited in the existing literature, by understanding that soft law can lead to hard law (treaty or custom) and hard law can be further elaborated by soft law instruments and practices (Schaffer and Pollack, 2010), allowing to think the soft law instruments as proto-forms of binding law. Several empirical studies validate the idea that soft and hard law can be complementary tools. But, as mentioned, this paper explores a different argument that

suggests that states use the opportunities provided by competing legal *fora* to advance their substantive preferences in antagonistic ways.

The case of the regime complex arrangements governing the use of force analyzed in this paper allows us to deepen the study of Schaffer and Pollack (2011) on humanitarian intervention. In their study, Schaffer and Pollack analyzed the interaction between the *jus ad bellum* regime and the R2P regime. However, the Kampala Conference, in 2010, set the parameters and trigger mechanisms of the crime of aggression affecting and reconfiguring the dynamics of the regime complex that regulates the use of force.

Four concluding observations are in order.

First, the use of an antagonistic interaction of soft law – hard law instruments (2001 Report versus *jus ad bellum* and the definition of the crime of aggression that, to a certain extent, makes illegal the armed humanitarian intervention) by powerful states failed, to the extent that it failed the establishment of new soft law norms with the aim of undermining or reorienting existing hard law protecting sovereignty (the World Summit Outcome).

Second, to the extent that the World Summit Outcome legitimizes recent Security Council practices, refocusing the debate in the Security Council and restricting clearly the possibility of humanitarian use of force to the scope of the Security Council powers, frontally contradicts the 2011 Report proposals regarding the use of force, enhancing tensions within the R2P regime.

Third, in the case analyzed in this paper, only powerful states employed forum shopping strategies. At first, powerful states sought to undermine existing *jus ad bellum* hard law trying to ensure in the UN Summit Outcome the recognition of a right to unilateral humanitarian intervention. Given the failure of the attempt, the ethical discourse on the protection of civilians in danger primarily focused on United Nations forums, the focal points for global debates about norms of protection in this speech, became intensely promoted outside the United Nations, mainly within the framework definition of the crime of aggression in the ICC.

Four, and finally, as shown, the normative discourse on the responsibility to protect in a heterogeneous and pluralistic international community is quite difficult to achieve. The strategic use of the R2P concept to justify political pressures on the process of ratification of the Kampala Amendments and the activation of jurisdiction

suggests that from the point of view of the powerful states hard law instruments have greater legitimacy than those of soft law. The strategy that has been followed by the United States regarding the crime of aggression also suggests another interpretation, which emphasizes the importance of binding instruments in the powerful states strategy in situations where there are mixed soft law instruments to the extent that, in such circumstances, soft law shows little transformative potential.

While the Amendment does not expressly exclude humanitarian interventions, it is apparent from the drafting of the Amendment that the Judges will rarely, if ever, prosecute unilateral humanitarian interventions. But, if the United States decides to lobby for further amendments to the definition of the crime of aggression or hinder the activation of jurisdiction what would be the legal consequences in the context of the *jus ad bellum* and the R2P regime?

The essential contested nature of justice in a pluralistic international order suggests that we need to better study the dynamics of the relation soft-hard law in regime complexes in order to understand the deep connection of law and politics. The eventual activation of the ICC jurisdiction may provide us important clues about the dynamics of the use of force regime complex, thus contributing to the understanding of the regime complexes and international regimes in general.

Conclusion

As the previous sections demonstrated, there are sharp disconnections between the understandings of the normative discourse on humanitarian intervention in a heterogeneous and pluralistic international community.

This paper argued that the concept of regime complex is a central concept in the discussion of armed humanitarian intervention, since it allows us to analyze the institutional interplay between the three regimes that make up the regime complex governing the use of force, advocating that the institutional interactions and institutional interlinkages between the different regimes reveal patterns of interactions in terms of tensions, contradictions and complementarities.

The argument discussed in this paper shows that the application of the concept of regime complexes in the study of humanitarian intervention underlines the overlaps between the perspective of the *jus ad bellum* introduced by the UN Charter, the criminal

international law regime that deals with the criminal responsibility of individuals for international crimes and the prosecution of individuals for international crimes before international tribunals and the R2P doctrine that comprises different instruments in order to deal with mass atrocities committed within state borders.

After a quick overview of the concept of regime complexes, the second part of the paper analyzed the institutional interactions between the international regimes governing the use of force in international relations, with a focus on the definition of the crime of aggression and the jurisdictional prerequisites for its prosecution at the ICC, adopted at the 2010 Review Conference in Kampala. In fact, the negotiating States at Kampala were unable to determine ultimately the status of humanitarian intervention leaving the determination to the Judges. This allowed the emergence of a space of resistance and contestation to the hard law that regulates the *jus ad bellum* dynamised by the great powers, and led by the United States, taking advantage of the fact that the Assembly of States Parties will have to take a further one-time decision to activate the Court's jurisdiction, no earlier than 2017.

Overlapping regimes reflect the increasing role of the legal arguments and the legal concepts in international cooperation. The soft law is at the heart of the interaction between politics and international law, enhancing the role of agency in the choice and use of legal instruments, depending on the characteristics of the issue and the negotiating and institutional context in question. In this sense, hard and soft law can be used by states and other actors as alternatives, complements, or antagonists.

As it has been argued throughout this paper it seems clear to us that there is an antagonistic interaction between hard law and soft law in the case of humanitarian intervention. The focus on the regime complex governing the use of force allowed us to deepen the study developed by Schaffer and Pollack in 2011 on R2P. In their study, Schaffer and Pollack just analyzed the interplay of the *jus ad bellum* regime with the R2P regime. However, to the extent that the Kampala Conference, in 2010, set the parameters and trigger mechanisms of the crime of aggression, it became necessary to integrate the aggression crime in the dynamic of the regime complex that regulates the use of force.

In the final part of the paper, we discussed the interplay between soft and hard law within the regime complex governing the use of force and concluded that powerful states sought to undermine existing *jus ad bellum* hard law trying to ensure in the 2005

Declaration Summit the recognition of a right to unilateral humanitarian intervention. Faced with the failure of this attempt, the ethical discourse on the protection of civilians in danger primarily focused on United Nations forums as focal points for global debates about norms of protection has become intensely promoted outside the United Nations, mainly within the framework definition of the crime of aggression in the ICC.

Kampala has managed to preserve the key aspects of the crime definition and of the jurisdiction criteria but it could not fully safeguard the negotiation results. In fact, the US government could lobby for further amendments to the crime of aggression definition adopted at 2010 Kampala Review Conference, or can choose to question and impede the activation of the jurisdiction, jeopardizing the possibility of the ICC judge crimes of aggression.

We conclude that the soft law related to the R2P doctrine does not “progressively develop” existing hard law in the context of the use of force. In the study presented, we conclude also that the most interesting aspect related to the institutional interactions between the international regimes involved in this case are related to how the United States will deal with the crime of aggression until 2017. If the United States decides to lobby for further amendments to the crime of aggression definition or hinders the activation of jurisdiction what would be the legal consequences in the context of the jus ad bellum and to the future of R2P as emerging law?

Therefore, the possible activation of the ICC jurisdiction may provide us important clues concerning the dynamics of the use of force regime complex, thus contributing to the deepening of the understanding of the regime complexes and international regimes in general.

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