Tensions in the anti-atrocity regime: Is the relationship of the Responsibility to Protect and the International Criminal Court truly win-win?

Abstract
The Responsibility to Protect (R2P) principle and the International Criminal Court (ICC) are at the heart of international society’s anti-atrocity regime. Given that R2P and the ICC seek to prevent the same set of atrocity crimes, conventional wisdom assumes that their relationship is “win-win” in nature: the ICC helps to protect populations from atrocity crimes, while R2P generates political support for enforcing atrocity law. However, this conventional wisdom lacks systematic empirical scrutiny. This article provides the first systematic, empirical examination of the relationship between the ICC and R2P, testing whether the widely held “win-win” hypothesis holds for one of the critical building blocks of the R2P-ICC nexus: the UN Security Council’s utilization of its ICC referral power in order to end impunity and protect populations from atrocity crimes. Methodologically, the article employs a comparative case study design, given the extremely small case universe (Darfur, Libya, Syria). The empirical findings call into question the conventional wisdom by showing that the relationship of the ICC and R2P is not necessarily “win-win”. Thus far, the Security Council’s utilization of its ICC referral power in order to end impunity and protect populations from atrocity crimes has neither advanced the objectives of R2P nor the objectives of the ICC. The article finds that Security Council referrals to the ICC are an ineffective instrument to protect populations from atrocity crimes. The article also demonstrates that Security Council referrals to the ICC do not generate political support for enforcing atrocity law, but make the Court look weak by exposing its lacking enforcement powers. These empirical findings have implications for policy discussions on anti-atrocity responses in that they caution against using Security Council referrals to the ICC as an instrument to implement R2P short of military intervention. The article further points towards a new research agenda that systematically examines the R2P-ICC relationship and identifies policy solutions to dampen the tensions in the anti-atrocity regime.

Keywords
Anti-atrocity regime, R2P, ICC, Darfur, Libya, Syria

Introduction
The Responsibility to Protect (R2P) principle and the permanent International Criminal Court (ICC) are at the heart of international society’s emerging anti-atrocity regime
(Bellamy, 2016; Rudolph, 2001). Since both R2P and the ICC ultimately aim to prevent and end the same set of atrocity crimes, namely, genocide, war crimes, and crimes against humanity, many scholars and practitioners believe that the relationship between the ICC and R2P is complementary and mutually reinforcing. In his first report on R2P, the UN Secretary-General, Ban Ki-moon, noted that the ICC is “one of the key instruments relating to the responsibility to protect” and “an essential tool for implementing the responsibility to protect” (Ban, 2009). The ICC’s chief prosecutor, Fatou Bensouda, echoed this assessment, proposing that the ICC is “a tool in the R2P toolbox” and “the legal arm of the responsibility to protect” (Bensouda, 2012; Adams, 2015). This assumption also informs the work of civil society organizations. The executive-director of the Global Center for the Responsibility to Protect believes that, “the ICC plays a crucial role in the prevention of mass atrocity crimes and the implementation of R2P” (Adams, 2015). And the International Coalition for the Responsibility to Protect, which is linked to the Coalition for the ICC, claims that R2P and the ICC enjoy a “complementary relationship”, as the ICC’s deterrence effect serves the objectives of R2P and R2P helps “the ICC’s quest to end impunity by advocating for states to assume judicial responsibilities” (ICRtoP, 2016). In short, a widely held conventional wisdom assumes that the relationship of the ICC and R2P is of a “win-win” nature: the ICC provides an instrument to protect populations from atrocity crimes, while R2P generates political support for enforcing atrocity law.
However, this conventional wisdom lacks systematic empirical scrutiny. The question thus lingers: Is the relationship of the ICC and R2P truly “win-win”?

This article takes a first step towards empirically testing the widely held hypothesis that the ICC-R2P relationship is “win-win” in nature. It needs to be stressed, however, that the scope of the inquiry is bounded, due to the fact that the relationship of the ICC and R2P is multi-dimensional. Scholars have identified several areas where positive synergies between the ICC and R2P could theoretically occur: the “shadow of the ICC” (Bensouda, 2014), the ICC’s policy of positive complementarity (Ainley, 2015; Mennecke, 2015; Saxon, 2015: 136-138), the ICC’s moral-legal educational role (Saxon, 2015: 134-136), the ICC’s preliminary examinations (Saxon, 2015: 132-133; Mennecke, 2015), or timely Security Council referrals to the ICC (Olasolo, 2010; Mennecke, 2015; Ainley, 2015). A comprehensive and systematic assessment of the ICC-R2P nexus requires a detailed examination of each of these different dimensions.

As a first step in this new research agenda, this article examines one of the key dimension of the ICC-R2P nexus: the UN Security Council’s (UNSC) utilization of its ICC referral power, enshrined in Article 13(b) of the Rome Statute, with the intention to end impunity and protect populations from imminent or ongoing atrocity crimes. This dimension of the ICC-R2P nexus has been advocated, albeit not always implemented, in the context of the human protection crises in Darfur (Sudan), Zimbabwe, Somalia, Sri Lanka, Libya, Israel/Palestine, Syria, and North Korea. A systematic assessment of this
dimension thus contributes a crucial building block to an overall assessment of the ICC-R2P relationship. So, the more limited question that animates this article is: Does the UNSC’s utilization of its ICC referral power in order to end impunity and protect populations at risk of atrocity crimes advance the objectives of both R2P and the ICC?

Figure 1. ICC-R2P building blocks

To examine this research question, the article employs an inductive approach and adopts a comparative case study research design. Relevant cases are defined as instances where the UNSC actively used its ICC referral power under the Rome Statute in order to end impunity and advance the protection of populations at risk of atrocity crimes. This definition excludes instances where the ICC-R2P linkage was an external demand on the UNSC that did not trigger concrete discussion within the Council (such as in the cases of Zimbabwe, Somalia, Sri Lanka, Israel/Palestine, and North Korea),
but includes instances where the UNSC actively discussed the referral of a particular situation to the ICC but in the end failed to do so (such as in the case of Syria). As a result, the entire population of relevant cases consists of only three cases. The first relevant case is the UNSC’s referral of the situation in Darfur (Sudan) to the ICC in resolution 1593 of 31 March 2005. The second relevant case is the UNSC’s referral of the situation in Libya to the ICC in resolution 1970 of 26 February 2011. The third relevant case is the UNSC’s attempted referral of the situation in Syria to the ICC in draft resolution S/2014/348 of 22 May 2014. Given the extremely small case universe, this article studies all three relevant cases in order to maximize the confidence in and generalizability of the findings.

Moreover, these three cases are studied as part of a “structured-focused comparison” (George & Bennett, 2004: 67-72). The case studies are focused in that they only analyze the ICC and R2P related aspects of these complex human protection crises. They are structured in that the same three questions guide the analysis of each of the three cases. This ensures that the collected data is comparable enough to generate cumulative knowledge about this building block of the ICC-R2P relationship. The three guiding questions (Qs) are:

Q1: What was the UNSC’s rationale for discussing a referral of the situation to the ICC?
Q2: Did the UNSC’s ICC referral efforts help to protect populations at risk of atrocity crimes?

Q3: Did the UNSC’s ICC referral efforts generate political support for enforcing atrocity law?

The case studies examine these three questions by drawing on multiple data sources in order to allow for triangulation and make the empirical findings robust. The collected data stems from a comprehensive document analysis, large-N data on violent conflicts from the Uppsala Conflict Data Program (UCDP), as well as more than 80 semi-structured elite interviews with decision-makers actively involved in the ICC and R2P related aspects of the three cases. The interview subjects were selected in a non-random way, meaning that they were selected according to the author’s judgment about who are the central players that can provide the best insights into the R2P and ICC related aspects of the three cases. A more random sampling technique could have led to the exclusion of key actors and insights (Tansey, 2007). The interviews were conducted from 2012 to 2015 and took place in New York, Washington DC, Geneva, Brussels, Oxford, and London.

The empirical findings of the analysis challenge the conventional wisdom that the relationship between R2P and the ICC is necessarily “win-win” in nature and point towards potential tensions within international society’s emerging anti-atrocity regime. Thus far, the UNSC’s utilization of its ICC referral power in order to end impunity and
protect populations from imminent or ongoing atrocity crimes has in practice neither advanced the primary objectives of R2P nor the primary objectives of the ICC. The article shows that UNSC referrals to the ICC are an ineffective instrument to protect populations from atrocity crimes. While ICC referrals can sometimes exert a limited deterrence effect and sometimes serve as a useful bargaining chip in political negotiations, they can also undermine peace talks, hinder humanitarian assistance, delay the deployment of peace operations, and create vulnerable groups. The article also finds that Security Council referrals to the ICC do not necessarily generate political support for enforcing atrocity law. In fact, the empirical record suggests that ICC referrals tend to have the effect of making the Court look weak by exposing its lack of enforcement powers. This damages the ICC and further diminishes its already limited deterrence effect. The article’s findings thus caution against the frequent and prominent calls on the Security Council to refer situations of imminent or ongoing atrocity crimes to the ICC. A new research agenda needs to examine whether this cautionary warning needs to be extended to the other building blocks of the R2P-ICC relationship and whether there are creative policy solutions to manage the tensions within international society’s anti-atrocity regime.

The article develops this argument in four parts. The first part presents the findings of the Darfur case study. The second part then turns to the findings of the Libya case study. The third part discusses the findings of the Syria case study. The
conclusion compares the case study findings and discusses the implications for policy and future research.

**Case study 1: The Darfur referral**

The first substantial part of this article examines the Security Council’s decision to link R2P and the ICC in the context of the atrocity campaign in Darfur (Sudan). The three Qs set out in the introduction have guided the research into this case and thus structure the presentation of the case study findings.

*Q1: What was the UNSC’s rationale for referring the situation in Darfur to the ICC?*

Violence in Sudan’s western desert region of Darfur escalated in February 2003, when two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), launched an armed revolt against the Sudanese government. The SLM/A and JEM initially outmaneuvered the Sudanese Armed Forces (SAF) and repeatedly attacked government installations across Darfur. The Sudanese government responded to this by recruiting and arming militias with experience in desert combat, the so-called Janjaweed. The SAF and the Janjaweed then jointly embarked on a ruthless counter-insurgency campaign, targeting Darfur’s civilian population in a recurring pattern: the SAF attacked villages from the air and the Janjaweed followed-up with brutal attacks on the ground. This led to the systematic destruction of entire
villages, the killing of tens of thousands of civilians, the systematic rape of women, and the displacement of millions.

The international response to the unfolding atrocity crimes in Darfur was slow. The UNSC became seized on the situation in Darfur in May 2004. Four months later, on 18 September 2004, the Council adopted resolution 1564, which recalled the Sudanese government’s primary responsibility to protect its population and mandated an independent commission of inquiry (CoI-Darfur) to investigate the atrocity crimes and identify perpetrators with a view to holding them accountable. The UN ambassadors of several Security Council members stressed that the CoI-Darfur was an instrument to remind the Sudanese government of its primary responsibility to protect the population on its territory and to deter further atrocity crimes (UNSC, 2004). In its final report, released on 25 January 2005, the CoI-Darfur determined that the Sudanese government and the Janjaweed are responsible for atrocity crimes and recommended that the UNSC should refer the situation to the ICC in order to “put an end to atrocities” (CoI-Darfur, 2005: 10).

On 31 March 2005, the UNSC then adopted resolution 1593, which followed the recommendation of the CoI-Darfur and referred the situation in Darfur since 01 July 2002 to the ICC. This extraordinary decision, which marked the very first time that the UNSC used its ICC referral power enshrined in Article 13(b) of the Rome Statute, was motivated by two main objectives. First, most Security Council members felt that it was
necessary to end impunity for the shocking atrocity crimes in Darfur. The representatives of Argentina and Greece also stressed that this provided an opportunity to “strengthen the authority of the ICC” and “provide strong support to the Court” (UNSC, 2005). Second, Security Council members hoped that the ICC referral would deter further crimes against the population in Darfur. The UN Ambassador of France noted that the ICC referral is an exceptional measure intended to prevent further atrocity crimes by sending a forceful message to “all those who have committed or might be tempted to commit atrocities in Darfur” (UNSC, 2005). Similarly, the British UN Ambassador noted that the ICC referral sends “a salutary warning to anyone intending to commit any further such atrocities” (UNSC, 2005). The UN Ambassador of Benin invoked the African Union’s (AU) Ezulwini Consensus and explained that the UNSC has the “right to exercise its international responsibility to protect a population when that population’s Government either cannot or will not do so” (UNSC, 2005).

Hence, the Security Council’s rationale for referring the situation in Darfur to the ICC was twofold: (1) to end impunity in Darfur by strengthening the authority of the ICC; and (2) to protect the populations of Darfur from ongoing atrocity crimes by deterring further violations.

Q2: Did the UNSC’s ICC referral help to protect populations from atrocity crimes?

The main way in which the UNSC’s ICC referral was supposed to protect the population of Darfur from further atrocity crimes was by generating a specific
deterrence effect on potential perpetrators, i.e. it was supposed to alter their cost-benefit calculation. The ICC’s chief prosecutor, Luis Moreno-Ocampo, embraced this political mandate, promising that the Office of the Prosecutor (OTP) will play a vital role in “preventing the commission of further crimes” (OTP to UNSC, 2005a: 4) and support the “Council’s comprehensive strategy to protect the life of millions of Sudanese citizens in Darfur” (OTP to UNSC, 2008). The OTP immediately launched a preliminary examination into the situation in Darfur and, on 1 June 2005, decided to initiate a full investigation. On 27 February 2007, then, the OTP applied to the Pre-Trial Chamber I for arrest warrants against the Sudanese Minister of State for Humanitarian Affairs, Ahmed Harun, and the Janjaweed leader Ali Kushayb, alleging that they had worked together in committing crimes against humanity and war crimes in Darfur. Two months later, the Pre-Trial Chamber issued the arrest warrants. In June 2008, the OTP then announced that it has started another investigation into two further cases, involving systematic attacks on civilians in Darfur with responsibility at the highest level, as well as attacks on AU peacekeepers. On 14 July 2008, the OTP officially applied for an arrest warrant against the sitting Sudanese President Omar Al-Bashir (and later against three individuals for the attacks on AU peacekeepers). On 4 March 2009, the Pre-Trial Chamber I issued the arrest warrant against President Al-Bashir for crimes against humanity and war crimes; later followed by another one for acts of genocide. The latest ICC arrest warrant was issued on 01 March 2012 against Abdel Raheem Mohammad
Hussein, the former Minister of the Interior and Special Representative of the President in Darfur.

There is only very limited evidence, however, that would suggest that the ICC’s investigations and arrest warrants advanced the UNSC’s political objective to deter perpetrators of atrocity crimes in Darfur. The Uppsala Conflict Data Program’s (UCDP) data on battle-related deaths in Darfur suggests that the year 2003, i.e. the first year of the civil war in Darfur, was by far the most violent one. In the summer of 2003, battle-related deaths peaked at approximately 3,300 battle-related casualties per month. From late summer 2003 to June 2004, battle-related casualties then continuously decreased from 3,300 per month to approximately 300 per month. From June 2004 to June 2010, deadly violence continued roughly on this level, never exceeding 1,000 battle-related deaths per month. The UCDP’s data supports several conclusions. First, it suggests that the ICC referral did not cause the dramatic reduction in battle-related casualties in Darfur, as the reduction occurred throughout 2004 and thus before the ICC referral of March 2005. Expert observers agree with this finding, stressing that, “the worst fighting of the early conflict had ended by November 2004, simply because most of the villages directly targeted by the GoS and Janjaweed were already deserted at that point” (Wegner, 2015: 120).

Second, the UCDP data shows that atrocities in Darfur continued despite the ICC referral and the ICC’s investigations and arrest warrants; though on a lower level.
The OTP admitted this in its second report to the UNSC (OTP to UNSC, 2005b). Patrick Wegner also observes that, “there were lulls, and the intensity of the violations changed, but the same crimes were still being reported on a daily basis” (Wegner, 2015: 82). Human Rights Watch (HRW) provides a concrete examples for this, explaining that the Sudanese government launched an offensive in February 2008 that represented a “vicious reprise of ‘scorched earth’ counterinsurgency tactics from 2003 to 2005” (HRW, 2008b: 2; also Wegner, 2015: 121-122). Moreover, attacks on peacekeepers and humanitarian workers continued despite the ICC’s intervention (Wegner, 2015: 124). The OTP noted that attacks on humanitarian workers have increased by 150% since it applied for its first arrest warrants (OTP to UNSC, 2007: 7-8).

The third conclusion that could be drawn from the UCDP data is that the ICC referral contributed to preventing a recurrence of large-scale atrocity crimes in Darfur, since atrocities have not again reached the magnitude and intensity of 2003-04. However, expert observers are sceptical about this conclusion, noting that the Sudanese government merely changed its strategy of targeting civilian populations in Darfur, increasingly focusing on blocking humanitarian assistance from reaching IDP camps (Wegner, 2016: 120). If one includes excess deaths from malnutrition and disease, the number of deaths in Darfur rose dramatically from 150,000 in March 2005 to 300,000 in early 2008 (Gruenfeld & Vermeulen, 2009: 230; Wegner, 2015: 121).
There are only two areas where the ICC involvement seems to have exerted a limited deterrence effect on potential perpetrators. First, the ICC’s intervention seems to have contributed to reducing the use of child soldiers by the Darfur rebel groups. Rebel groups stopped using child soldiers from 2007 onwards and gradually handed child soldiers over to UNICEF (Wegner, 2015: 84). Wegner attributes this decision to the rebel groups’ desire to gain international legitimacy by cooperating with the ICC, as well as the “shadow” of the ICC’s prosecution against the Congolese warlord Thomas Lubanga for enlisting and conscripting child soldiers (Wegner, 2015: 84). Second, the ICC’s prosecutorial strategy of simultaneously indicting the Sudanese Minister of State for Humanitarian Affairs, Ahmad Harun, and the Janjaweed leader Ali Kushayb seems to have had the effect of weakening the deadly alliance between the Sudanese government and the Janjaweed. Trying to work out a strategy for dealing with the ICC arrest warrants, the government of Sudan repeatedly arrested the Janjaweed leader Kushayb. Even though Kushayb was never extradited or prosecuted domestically, Janjaweed leaders started to worry that the government might eventually “sell them out to the ICC” and use them “as scapegoats to deflect pressure resulting from the ICC investigations” (Perry, 2007). This drove a wedge between the Sudanese government and the Janjaweed, causing Janjaweed fighters to defect and join the anti-government rebellion (Perry, 2007; Wegner, 2015: 89, 113). Even the notorious Janjaweed commander Musa Hilal allegedly contemplated joining the anti-government rebellion,
as he believed that “they [the Government of Sudan] would turn him over to the ICC to save themselves” (Natsios, 2008: 84).

While the ICC’s intervention in Darfur thus exerted, at best, a limited deterrence effect, it negatively affected the objective to protect populations in at least four ways. First, the OTP’s confrontational prosecution strategy hampered the delivery of humanitarian assistance. On 05 March 2009, in direct response to the ICC’s decision to issue an arrest warrant against the sitting President of Sudan, the Sudanese government expelled 13 international humanitarian NGOs (including MSF, CARE, Oxfam, Save the Children, the International Rescue Committee, and the Norwegian Refugee Council) and revoked the licenses to operate of three national humanitarian NGOs (Wegner, 2015: 135). In anticipation of the ICC’s subsequent genocide arrest warrant against President al-Bashir, the Sudanese government withdrew the permits of another twenty-six humanitarian organizations. The Sudanese government justified the expulsion of humanitarian actors by claiming that humanitarian workers were spying for the ICC – an impression that was fuelled by the OTP (Peskin, 2009b: 309). The Sudan experts Alex de Waal and Julie Flint criticize the ICC prosecutor for hinting repeatedly “that he got his information from humanitarian agencies. The damage done by this is incalculable. Sudanese security believes international agencies have been passing information to the ICC” (Flint & de Waal, 2009). The expulsion of humanitarian agencies had a negative impact on the humanitarian situation in Darfur, especially with
regards to food security, nutrition, water, sanitation, health, shelter, and protection. Together, the expelled humanitarian agencies had been providing 50-70% of the humanitarian assistance in Darfur, and it is estimated that their expulsion directly affected 1.5 million individuals in need of assistance.

Second, the ICC activities diminished the Sudanese government’s willingness to cooperate with the hybrid AU-UN peacekeeping operation in Darfur (UNAMID), a peace operation that had the protection of civilians as its core mandate. The Sudanese government worried that UNAMID would assist the ICC in the enforcement of arrest warrants, provide information to the ICC, and provide logistical support for ICC investigations (Kastner, 2014). In the context of investigations in other countries, such as in the Democratic Republic of the Congo, the OTP has considered peacekeeping troops on the ground to be an important source of information. After the OTP applied for the arrest warrant against President Bashir, the Sudanese government thus threatened that it “could no longer assure the safety of UN-AU peacekeepers in Darfur” (Kastner, 2014: 478; HRWa, 2008). On 21 October 2008, the GoS announced that it was investigating whether UNAMID peacekeepers were collaborating with the ICC and directly threatened UNAMID staff should the arrest warrant against President Bashir be issued (Wegner, 2015: 135). According to the former US Special Envoy to Sudan, Andrew Natsios, the Sudanese government was “especially fearful that it [UNAMID]
will collect evidence of the 2003-4 slaughters in preparation for war crimes trials before the ICC in the Hague” (Natsios, 2008: 82).

Third, there is some evidence that suggests that the ICC involvement made peace talks on Darfur more difficult. This is certainly true for the so-called Doha Talks, which were scheduled to commence in February 2009. However, after the ICC issued the first arrest warrant against President al-Bashir in March 2009, the JEM refused to negotiate with the Sudanese government, arguing that they were not willing to negotiate with an indicted international criminal (Wegner, 2015: 128). As a result, the Doha talks had to be suspended.

Fourth, the ICC involvement increased the vulnerability of those individuals seen as willing or able to cooperate with and provide information to the ICC. Put differently, the ICC created a new category of targets. Senior members of the Sudanese government repeatedly and publicly threatened that individuals cooperating with the ICC had to expect serious repercussions. On 21 February 2009, for example, the government’s intelligence chief, Abdallah Salah Gosh, publicly warned those cooperating with the ICC by threatening: “we will cut off their hands, head and body parts” (OTP to UNSC, 2009: 6). Similarly, government spokesman Osman al-Aghbash warned that the Sudanese armed forces “will firmly deal with whoever cooperates with the so-called International Criminal Court” (OTP to UNSC, 2009: 6). And indeed, government-affiliated militias repeatedly attacked UNAMID and humanitarian staff due
to their alleged links with the ICC (Glassborrow, 2009; Wegner, 205: 135). Thus far, moreover, the Sudanese government has arrested twenty humanitarian workers for cooperating with the ICC (Baldo, 2010: 7; Wegner, 2015: 135).

It can be concluded, therefore, that the ICC referral did not have a significantly positive effect on the protection of populations in Darfur. While the ICC referral may have exerted a limited deterrence effect, it also impeded the delivery of humanitarian assistance, jeopardized political mediation efforts, made the deployment of UNAMID more difficult, and increased the vulnerability of individuals cooperating with the ICC. In sum, therefore, the UNSC’s ICC referral proved to be an ineffective instrument for protecting the population of Darfur from atrocity crimes.

Q3: Did the UNSC’s ICC referral generate political support for enforcing atrocity law?

The first use of the UNSC’s ICC referral power was controversial amongst Council members. Negotiations on resolution 1593 thus went on for more than two months (from January to March 2005), and key states insisted on inserting a number of restrictions into the text of the resolution. Three restrictions, often referred to as carve-outs, made it into the final text: (1) a jurisdictional restriction; (2) a funding restriction; and (3) a cooperation restriction.

First, the US and other non-ICC States Parties were determined to prevent the ICC from gaining jurisdiction over their nationals. As a result, operative paragraph 6 of resolution 1593 exempted nationals from non-ICC States Parties from ICC jurisdiction
when they act in the context of UN or AU mandated missions. This carve-out was highly controversial, as it generated the perception that the ICC operates with double standards. While the operational relevance of the jurisdictional restriction was very limited, appearing to be operating with double standards is highly problematic for a primarily judicial institution. The UN Ambassador of the Philippines warned therefore that, “the ICC may be a casualty of resolution 1593. Operative paragraph 6 of the resolution is killing its credibility – softly, perhaps, but killing it nevertheless” (UNSC, 2005).

Second, the US, in particular, insisted on inserting a paragraph (operative paragraph 7) that determined that the expenses of the ICC referral should not be borne by the UN, but only by the ICC States Parties. The US argued that Congressional legislation prohibits it from providing funding to the ICC. The insertion of this funding restriction in resolution 1593 outraged the ICC States Parties, who had to bear the financial burden of the ICC’s Darfur investigation. More importantly, however, the financial restriction had negative operational implications for the ICC’s quest to enforce atrocity law in Darfur. Darfur constituted a very challenging context for the ICC to operate in, and thus required, at a minimum, adequate resources and capacities. In 2015, the OTP had to announce that it had to scale down all Darfur-related investigations due to financial shortcomings (OTP to UNSC, 2015: 4). In 2016, the OTP reiterated that, “its ability to effectively and fully discharge its mandate in 2016 will be hampered by
the lack of sufficient resources” (OTP to UNSC, 2015: 5). In short, the failure of the
UNSC to ensure adequate resources for the ICC’s Darfur investigation reduced the
Court’s ability to enforce atrocity law in this particular situation.

Third, resolution 1593 decided to legally oblige only the referred state, i.e.
Sudan, to cooperate with the ICC. Operative paragraph 2 merely “urges” other non-ICC
States Parties to cooperate with the Court. As a result, resolution 1593 did not establish
an obligation for all states to cooperate with the ICC. This decision was highly
problematic, given that the ICC has no police force and relies on the cooperation of
states and international organizations to enforce its decisions. The OTP noted from the
very beginning that the active cooperation of ICC States Parties, non-ICC States Parties,
and the Security Council would be an absolutely crucial element in enforcing atrocity
law in Darfur(1). However, neither the Sudanese government, nor the Security Council
or the ICC States Parties, nor non-ICC States Parties or other international organizations
have provided adequate cooperation and assistance. Thus far, the ICC issued arrest
warrants against five individuals (Bashir, Harun, Hussein, Kushayb, and Banda), all of
which remain at large. The Sudanese authorities ceased to cooperate as soon as the ICC
issued the first arrest warrants. They refused to arrest and surrender any of the suspects
and allowed them to occupy high political offices. Ahmed Harun was made governor of
South Kordofan, and Abdel Hussein was made Minister of National Defense.
The suspects also still travel relatively freely. President Bashir, for example, repeatedly visited non-ICC States Parties (such as Algeria, China, Djibouti, Egypt, Ethiopia, Eritrea, India, Iran, Iraq, Indonesia, Kuwait, Libya, Mauretania, Saudi Arabia, and Qatar), as well as ICC States Parties (such as Chad, the DRC, Kenya, Malawi, Nigeria, and South Africa), without being arrested. UN staff also met with Bashir. The heads of UNAMID and UNMIS attended Bashir’s inauguration after his re-election in 2010, and the UN Deputy Secretary-General Jan Eliasson also met with Bashir. The AU even called on its member states to not cooperate in the execution of the ICC arrest warrants against President Bashir. Shortly after the OTP applied for the arrest warrant, the AU Peace and Security Council noted that this could seriously undermine conflict resolution efforts and requested the UNSC to active Article 16 of the Rome Statute, which allows the UNSC to defer proceedings for a renewable period of 12 months. The AU Assembly supported this request and, as the ICC still issued the arrest warrant, the called on AU member states not to cooperate in the execution of the arrest warrant against Bashir (AU Assembly).

The Security Council has taken no actions to ensure cooperation with the ICC. To date, the ICC has communicated 11 findings of non-cooperation to the UNSC, but the UNSC has not responded to any of the notifications. The UNSC even failed to put the five individuals indicted by the ICC on its Darfur sanctions list, even though the standard of proof applied by the ICC is significantly higher than the one applied by the
Darfur Panel of Experts (Stagno Ugarte, 2012). The UNSC’s failure to ensure cooperation with the ICC has generated the impression that, “the Council uses the ICC whenever it is convenient for Council members, while turning a blind eye on the Court when its mandate needs to be operationalized. This contradiction raises doubts as to what extent the Council usefully serves as an executive arm for the Court” (Verduzco, 2015: 50).

It can be concluded, therefore, that the UNSC’s referral of the situation in Darfur to the ICC did not generate political support for enforcing atrocity law in this bloody civil war. On the contrary, the carve-outs in resolution 1593 actively undermined the Rome Statute, and the failure of key states to provide financial and political support for the Court publicly exposed the ICC’s weaknesses and limitations with regards to enforcement. The OTP had to admit that it “finds it difficult to maintain investigations into Darfur crimes given its case load, resource constraints, and the lack of cooperation” ( ). In sum, the hope that the UNSC would act as the executive organ of the ICC, i.e. the police force that the Court does not have, has been utterly disappointed.

**Figure 2. Findings Darfur case study**

<table>
<thead>
<tr>
<th>Case 1: Darfur</th>
</tr>
</thead>
</table>
| **Q1** | End impunity  
Protect populations from atrocity crimes by:  
✓ Deterring further atrocity crimes |
Case 2: The Libya referral

The second substantial part analyzes the Security Council’s decision to link R2P and the ICC in the context of the 2011 Libya crisis. Again, the three guiding Qs have structured the research into this case, and the findings are presented accordingly.

Q1: What was the UNSC’s rationale for referring the situation in Libya to the ICC?  

On 15 February 2011, in the midst of the “Arab Spring”, protests against the authoritarian regime of Colonel Muammar Gaddafi broke out in Libya’s eastern city of Benghazi. Fuelled by the Gaddafi regime’s violent crackdown, a wave of protests quickly spread across Libya and reached the capitol Tripoli within days. The Gaddafi regime responded to this sudden challenge with excessive force, using live ammunition, machine guns, snipers, and even helicopters to quell protests. According to HRW, Gaddafi’s forces killed at least 233 protestors within the first week of the crisis, predominantly through head and chest wounds (HRW, 2011; HRC, 2012). To veteran observers, Colonel Gaddafi’s response to the popular uprising in Libya appeared to be
significantly more violent and brutal than the government responses seen in Egypt or Tunisia (Rishmawi, ).

International society responded very promptly to the unexpected risk of atrocity crimes in Libya. On 21 February 2011, the Libya crisis came on the UNSC’s agenda in the form of a briefing by the UN Under-Secretary-General for Political Affairs and the Libyan Ambassador to the UN. According to diplomats present at that meeting, Council members were genuinely shocked about the reported level of violence (Brazilian diplomats at UN Mission, 2012). Due to the alarming reports coming out of Libya, they agreed that steps to prevent large-scale atrocities were urgently needed. Negotiations on a resolution were thus concluded very quickly - within 4 to 5 days on an expert level and one afternoon on the ambassador level (Portuguese diplomat at UN Mission, 2012). On 26 February, the UNSC unanimously adopted resolution 1970, which recalled the Libyan government’s primary responsibility to protect, established an arms embargo, imposed targeted sanctions against specific individuals of the Gaddafi regime, and referred the situation in Libya since 15 February 2011 to the prosecutor of the ICC.

The ICC referral was the most controversial part of resolution 1970. While some UNSC members genuinely believed that individuals responsible for the violence in Libya needed to be held accountable in an international process of justice, the primary purpose of the UNSC’s ICC referral was to prevent the violence from escalating into full-fledged atrocity crimes – a risk that many assessed to be very real (… Moss, 2012).
Put differently, the UNSC used its ICC referral power as a coercive tool to change the cost-benefit analysis of individuals associated with the Gaddafi regime. The ICC referral was a stick that intended to deter the leadership level of the Gaddafi regime from inciting and committing a large-scale atrocity campaign and encourage defections from the second tier of the Gaddafi regime. The ICC was also seen as a potentially useful bargaining chip that could become useful in political negotiations with the Gaddafi regime (Mashabane, 2012; Salam, 2012; Stagno Ugarte, 2012).

Hence, it seems that the UNSC’s primary rationale for referring the situation in Libya to the ICC was to protect populations in Libya from an imminent campaign of atrocity crimes by deterring an escalation of violations and encouraging defections from the Gaddafi regime.

**Q2: Did the UNSC’s ICC referral help to protect populations from atrocity crimes?**

The extent to which the ICC referral contributed to the prevention of large-scale atrocity crimes is difficult to determine. The Gaddafi regime was definitely weakened by defections of key ministers, diplomats, and members of the armed forces. Thus, the early ICC referral might have had an impact on the second tier of the Gaddafi regime, which defected in great numbers (Moss, 2012: 10). Moreover, whilst the Gaddafi regime used excessive violence to retake cities and push towards Benghazi, it stopped short of committing large-scale atrocity crimes. The prospect of ICC indictments might have been partially responsible for this restraint. Others argue that the ICC referral also
warned the rebels not to commit atrocities (Moss, 2012: 10). It is not unreasonable to argue, therefore, that the ICC referral had at least some positive effects. The main credit for the prevention of atrocities, however, has to be attributed to the military measures to protect civilians and civilian populated areas in pursuance of UNSCR 1973.

However, there seems to have been a counter-productive tension between the political mediation efforts and the ICC investigation. The twin mediation efforts of the UN and the AU were initiated in the period between the adoption of UNSCR 1970 and 1973. Some argue that the very early ICC referral, the activism of the ICC Prosecutor, and the quick request for arrest warrants closed the door for a political solution by disincentivising the leadership of the Gaddafi regime to resolve the crisis peacefully (Cabral, 2012; US diplomat at UN Mission, 2012; Permanent Mission of Netherlands to UN, 2011). The violence in Libya was directed by few individuals in the inner circle of the Gaddafi regime. Due to the ICC’s prosecutorial policy of going after those individuals that bear the greatest responsibility for the most serious crimes, the Libyan leadership was the natural target of the ICC investigation. For those individuals, the ICC referral meant that they were probably doomed, due to the crimes already committed (French diplomat at UN Mission, 2012). This provided Gaddafi and his inner circle with an incentive to win the struggle at all costs in order to avoid prosecution (Tisdall, 2011; LaFranchi, 2011). Moreover, the ICC referral made exile solutions more difficult. Most states in Europe and Africa are signatories to the Rome Statute and were
therefore, at least in theory, unable to offer Gaddafi refuge. Arguably, the fact that Libya was referred to the ICC by the Security Council imposed an obligation on all UN member states to cooperate with the Court. Thus, some argue that the early ICC referral and the exceptionally quick actions of the ICC prolonged the crisis by blocking a political settlement (Hayner, ; also Snyder and Vinjamuri, 2003: 5-7). For this reason, the Assembly of the AU, at the head of state and government level, decided at its summit in Malabo, Equitorial Guinea, that its member states should not cooperate in the execution of the arrest warrants against Colonel Gaddafi, Saif al-Islam, and Abdullah al-Senussi (Assembly of the AU, 2011). The Assembly also called on the Security Council to make use of its Article 16 deferral powers. In short, the ICC intervention was perceived as constituting an obstacle to the political mediation track.

In sum, the effects for the protection of populations were mixed. The ICC involvement seems to have exerted a limited deterrence effect and encouraged some defections. However, it also hindered the mediation efforts and might have prolonged the conflict.

Q3: Did the UNSC’s ICC referral generate political support for enforcing atrocity law?
To what extent did the Security Council’s referral of the situation in Libya to the ICC help to strengthen the enforcement of atrocity law in that crisis? The implications for the ICC were exclusively negative. Resolution 1970 again included the carve-outs on jurisdiction, cooperation, and funding.
Cooperation was not forthcoming. Libya submitted admissibility challenges in the cases of Saif al-Islam and Abdullah al-Senussi. The one for Saif was rejected but Libya still refused to surrender him to the ICC – without any consequences or intervention by the ICC. Currently, Saif is still in the custody of the Zintan militia. Moreover, ICC investigators were detained in Libya for 26 days, without there being any consequences either.

The limited funding of the referral again proved to be a problem. Unexpected costs related to the Libya referral forced the ICC to request access to a considerable amount from the contingency fund for the period from May to December 2011. The Prosecutor even reported that further investigations in Libya were subject to the availability of funds: “it is not yet determined whether the Office’s investigation into allegations of war crimes will move forward in this or the coming period, depending on the funds available to the Office to conduct the Libya investigations.”

**Figure 3. Findings Libya case study**

**Case 2: Libya**

<table>
<thead>
<tr>
<th>Q1</th>
<th>Protect populations from atrocity crimes by:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>✓ Deterring further atrocity crimes</td>
</tr>
<tr>
<td></td>
<td>✓ Encourage defections from Gaddafi regime</td>
</tr>
</tbody>
</table>

| Q2                  | Very limited deterrence effect              |
|                     | Undermined peace talks and **post-conflict reconstruction** |

| Q3                  | Resolution 1970 undermined Rome Statute     |
|                     | Lack of cooperation and follow-up           |
Case study 3: The attempted Syria referral

The last substantial part of this article presents the findings from the case study of the Security Council’s efforts to link R2P and the ICC in the context of the Syrian civil war. The presentation of the case study findings again follows the three guiding Qs.

Q1: What was the Security Council’s rationale for attempting to refer Syria to the ICC?

The crisis in Syria broke out in mid-March 2011, when protests against the authoritarian rule of President Bashar al-Assad erupted in the city of Deraa. In response, Syrian security forces opened fire on the initially largely peaceful protestors, which sparked additional demonstrations across the country (HRC, 2011a; Slim and Trombetta, 2014: 16). Struggling to contain the popular uprising, the Assad regime promised modest reforms, while issuing “black lists” with persons wanted by the authorities and “shoot to kill”-orders to quell demonstrations (HRC, 2011b: 11). In order to prevent a further escalation of the systematic violence against Syrian civilians, the UN human rights mechanisms and a number of European states proposed that the Security Council should send a deterrence message by referring the situation in Syria to the ICC prosecutor. However, despite several diplomatic initiatives in this direction it took until early 2014 before the Security Council, at the insistence of France, engaged in serious discussion
on a draft resolution (S/2014/348) referring the situation in Syria since March 2011 to the ICC.

France tabled draft resolution S/2014/348 knowing full well that Russia, China, and the US, i.e. three permanent and veto wielding members of the Security Council, were opposed to an ICC referral. However, there were three reasons that convinced France to go ahead with the ICC referral initiative, despite the high risk that it would be vetoed. First, France, like many other states, firmly believed that it was time to end impunity for the shocking and widespread atrocities in Syria. Second, France believed that putting an ICC referral on the official agenda of the Security Council could have the effect of deterring further atrocity crimes, even if the Security Council ultimately failed to refer the situation. In the words of the French Ambassador to the UN, the lingering possibility of an ICC referral could maybe “deter an executioner on the verge of committing a crime”. Third, France strategized that a potential veto by Russia and China on this ICC referral resolution could be leveraged into the adoption of a strong humanitarian resolution on cross-border humanitarian access without consent of the Syrian government (French diplomat at UN Mission, 2015; Australian diplomat at UN Mission, 2015). Political negotiations on such a Security Council resolution took place in parallel, given that the Syrian regime refused to comply with the first humanitarian resolution, that is resolution 2139 of 22 February 2014, and continued to use sieges and starvation as weapons of war. The French draft resolution on the ICC referral was thus
at least partly a strategic bargaining chip intended to improve the protection of populations in Syria by facilitating humanitarian access. On 22 May 2014, draft resolution S/2014/348 was put to a vote and, not unexpectedly, vetoed by Russia and China.

This suggests that France’s rationale for insisting that the UNSC at least seriously discuss referring the situation in Syria to the ICC was twofold: (1) to end impunity; and (2) to protect populations in Syria by deterring further atrocity crimes and by facilitating the delivery of humanitarian aid to individuals in hard-to-reach and besieged areas.

Q2: Did the UNSC’s ICC referral efforts help to protect populations from atrocity?

The primary way in which the French ICC referral initiative of 2014, regardless of its ultimate success, was supposed to enhance the protection of populations in Syria was by deterring perpetrators from committing further atrocity crimes. While it is difficult to get accurate and reliable estimates of battle-related casualties for the Syrian civil war, the data currently available suggests that the official Security Council deliberations on an ICC referral did not exert a deterrence effect on the warring parties in Syria. The conservative estimates of the UCDP put the total number of battle-related deaths in the Syrian civil war from 2011-2015 at 104,254 deaths: 3,784 deaths in 2011, 15,610 deaths in 2012, 9,795 deaths in 2013, and 75,065 deaths in 2014. This shows that there was an approximately 7.7% increase in battle-related casualties in Syria from 2013 (9,795
deaths) to 2014 (75,065 deaths). The Syrian Observatory for Human Rights even puts the total number of battle-related death for the year 2014 at 76,021 deaths (SOHR, 2015). Therese Pettersson and Peter Wallensteen therefore observe that, “the conflict in Syria went on at exceptionally high levels of intensity throughout 2014” (2015: 539).

The Security Council’s active deliberations on referring the situation in Syria to the ICC thus correlates with a dramatic increase, rather than decrease, of violence in Syria. While there is no evidence that would link this dramatic increase in violence to the ICC referral debate, the data clearly shows that the Security Council’s active deliberations on an ICC referral had no measurable deterrence effect on the parties on the ground. This finding is further supported by the field-based observations of the Independent International Commission of Inquiry for Syria (CoI-Syria), which has been documenting crimes in Syria since August 2011. The CoI-Syria assessed repeatedly that perpetrators of atrocity crimes in Syria are “not deterred and do not fear future accountability” (HRC, 2013).

The secondary way in which the French ICC referral initiative was supposed to advance the protection of Syrian populations was by functioning as a bargaining chip in Security Council politics with the ultimate goal to facilitate the adoption of a humanitarian resolution on cross-border humanitarian access without consent of the Syrian government. This occurred against the backdrop of the dramatically worsening humanitarian situation in Syria with 11 million Syrians in direct need of assistance and
the Syrian government’s continuing disregard for humanitarian resolution 2139. And indeed, on 14 July 2014, such a resolution was unanimously adopted as resolution 2165. The resolution reaffirmed the primary responsibility to protect of the Syrian government and authorized UN humanitarian agencies and their implementing partners to use four addition border crossings into Syria without the Syrian government’s consent. This was supposed to enable humanitarian aid to reach up to two million Syrians in hard-to-reach and besieged areas. Several diplomats explained that the ICC referral resolution played an important role in getting this important resolution passed.

Hence, the French ICC referral initiative did not deter perpetrator from committing further atrocity crimes. However, it was an important diplomatic element in securing the adoption of resolution 2165, which enabled humanitarian actors to deliver aid to two million Syrians trapped in hitherto inaccessible areas. Thus, the French initiative has served the objectives of R2P, though in a rather unorthodox way.

Q3: Did the UNSC’s ICC referral efforts generate support for enforcing atrocity law?
Even though it was vetoed, draft resolution S/2014/348 undermined the integrity of the ICC by continuing the practice of inserting carve-outs that undermine the integrity of the Rome Statute. It had a precedence setting function. Moreover, it made the politics on the ICC more controversial. Interestingly, however, it had nevertheless a number of negative effects on the enforcement of atrocity law.
Figure 4. Findings Syria case study

<table>
<thead>
<tr>
<th>Case 3: Syria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Q2</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Q3</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

Balance and conclusion

Even though we still know relatively little about the interactions between the ICC and R2P, there is a widely held conventional wisdom that assumes that their relationship is “win-win” in nature. This article has taken a first step towards systematically scrutinizing the ICC-R2P relationship by testing the validity of the “win-win” hypothesis for one key building block of the ICC-R2P nexus: the Security Council’s utilization of its ICC referral power in order to end impunity and protect populations from atrocity crimes.

Figure 5 compares the empirical findings of the three case studies of Darfur, Libya, and Syria. These findings call into question the widely held conventional wisdom by supporting two conclusions. First, the case studies suggest that Security Council referrals to the ICC are an ineffective instrument for protecting populations from imminent or ongoing atrocity crimes, as they only exert a very limited deterrence
effect, while producing a number of negative effects for the protection of populations from systematic mass violence. Second, the case studies suggest that Security Council referrals to the ICC do not generate political support for enforcing atrocity law, but tend to weaken the Court by exposing its limits with regards to enforcement. It can thus be concluded that the R2P-ICC relationship is not necessarily “win-win” in nature.

Figure 5. Comparative balance sheet

<table>
<thead>
<tr>
<th>Case 1: Darfur</th>
<th>Case 2: Libya</th>
<th>Case 3: Syria</th>
<th>Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>End impunity</td>
<td>End impunity</td>
<td>End impunity</td>
<td>End impunity</td>
</tr>
<tr>
<td>Protect</td>
<td>Protect</td>
<td>Protect</td>
<td>Protect</td>
</tr>
<tr>
<td>populations</td>
<td>populations</td>
<td>populations</td>
<td>populations</td>
</tr>
<tr>
<td>from atrocity</td>
<td>from atrocity</td>
<td>from atrocity</td>
<td>from atrocity</td>
</tr>
<tr>
<td>crimes</td>
<td>crimes</td>
<td>crimes</td>
<td>crimes</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Q2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Limited deterrence effect</td>
<td>Limited deterrence effect</td>
<td>No deterrence effect</td>
<td>Very limited deterrence effect</td>
</tr>
<tr>
<td>Hindered humanitarian assistance</td>
<td>Undermined peace talks</td>
<td>Useful bargaining chip to improve humanitarian access</td>
<td>Usef</td>
</tr>
</tbody>
</table>
It should be stressed, however, that the research presented in this article does not support the conclusion that the linkage of R2P and the ICC can never be “win-win” in nature. After all, the article has only scrutinized the validity of the widely held “win-win” claim for one of the building blocks of the R2P-ICC relationship. The article is best seen, therefore, as a first step in a new research agenda that systematically evaluates the relationship between R2P and the ICC. Future empirical research needs to subject the other building blocks of the R2P-ICC relationship to systematic scrutiny and also try to identify creative policy solutions to deal with the tensions that can evidently arise within international society’s anti-atrocity regime.

Developing a fuller understanding of the interactions of the core elements of the anti-atrocity regime is not only relevant for the scholarly community, but also for policy-makers in charge of responding to imminent or on-going campaigns of atrocity. The findings of this article already have important implications for policy discussions on mass atrocity responses. In particular, they caution against routinely calling on the Security Council to refer situations of imminent or on-going atrocity crimes to the ICC. While this would seem intuitively and morally compelling, the empirical record suggests that it is unlikely to enhance the protection of populations from atrocity, while
risking to damage the Court and diminish whatever limited deterrence effect it might have.

References


Human Rights Watch (2008a)

Human Rights Watch (2008b)


Olasolo, Hector (2010) The role of the International Criminal Court in preventing atrocity crimes through timely intervention: From the humanitarian intervention doctrine and ex post facto judicial institutions to the notion of responsibility to protect and the preventive role of the International Criminal Court. Inaugural lecture as Chair in International Criminal Law and International Criminal Procedure, University of Utrecht, 18 October.


Permanent Mission of the Netherlands to the UN (2011) Summary of Informal Retreat on The Responsibility to Protect after Libya. Tarrytown, New York, 8-9 December.


Interviews:


Mashabane, Doctor (2012) Personal interview with the Deputy Permanent Representative of South Africa to the UN, New York, 23 February.

Moraes Cabral, Ambassador Jose Filipe (2012) Personal interview with the Permanent Representative of Portugal to the UN, New York, 24 February.


RIshmawi, Mona ( ) Personal interview, Geneva.


Salam, Ambassador Nawaf (2012) Personal interview with the Permanent Representative of Lebanon to the UN, New York, 24 February.
