

**Role of Legality in Norm Contestation Processes:
A Comparative Study of Multidimensional Norm Change in
Non-Refoulement and Human Protection Norms**

by

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Koç University

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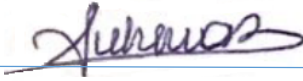
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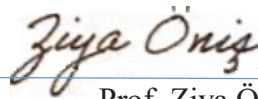
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ABSTRACT

Role of Legality in Norm Contestation Processes: A Comparative Study of
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International norms are not fixed, but are continuously subject to pressures of change through contestations. This dissertation aims to understand the role of legality on the change of norm strength through contestation processes. Contrary to the expectations of mainstream constructivist theories of norm development, legal institutionalization seems neither to prevent the challenges towards the norms, nor ensure resilience of norm strength. Drawing on international legal theory and the constructivist literature, this study introduces a new understanding of legality as process, defined as the use of legal institutions, discourse and argumentative logic, and evaluates its impact on norm strength, utilizing a multidimensional norm strength conceptualization, that for the first time in the literature incorporates norm's meaning along with its authoritative power and global reach.

On the basis of this conceptual framework, I comparatively analyze the evolutionary trajectories of the legal norm of non-refoulement and the non-legal norm of human protection over subsequent cycles of contestations. I employ a combination of discourse and content analysis on the selected documents representing the argumentative positions of contending actors and the nature of contestation processes. The findings demonstrate firstly, that neither formal legality of the norm is a guarantee for a legal logic and language in contestations, nor the lack of formal legality prevents process legality to prevail. Secondly, the legal nature of the contestation processes has a positive influence on norm strength. By linking the contestations both to the international legal system and to the existing intersubjective conventions of the international community, process legality provides the ground for a revised consensus on norms, hence prevents norm weakening. On the other hand, the non-legal or political nature of contestation processes leads to a deadlock in the normative evolution, and even discredits its former gains.

ÖZETÇE

Norm İhtilafı Süreçlerinde Hukukiliğin Rolü: Geri Göndermeme ve İnsani Koruma Normlarında Çok Boyutlu Değişimin Karşılaştırmalı Analizi

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Uluslararası normlar değişmez nitelikte değil, aksine ihtilafı (*contested*) doğaları gereği değişken yapıdadır. Bu tez, norm ihtilafı süreçlerinin (*norm contestation processes*) norm kuvveti üzerindeki etkisinde hukukiliğin rolünü incelemektedir. Sosyal inşacı ana akım norm teorilerinin beklediğinin aksine görülmektedir ki, bir uluslararası normun yasalaşması, söz konusu norma yönelik açık veya kapalı itiraz ve tehditleri ortadan kaldırmamakta, ya da norm kuvvetinin korunacağına dair bir garanti yaratmamaktadır. Uluslararası hukuk teorileri ve sosyal inşacı uluslararası ilişkiler teorisinden kaynak alan bu çalışma, hukukiliği yasal kurallar olarak değil, uluslararası süreçlerde hukuk kurumlarının ve hukuki diskur ve argümantasyon şekillerinin kullanılması olarak tanımlamayı önermektedir. Buna göre hukukun normları koruyucu etkisinin söz konusu normun yasal formundan değil, bu formdan bağımsız olarak hukuki yöntem ve dil ile tartışılmasından geldiği savunulmaktadır. Literatürde ilk kez olarak norm kuvveti, normun otoriter gücü ve küresel yaygınlığının yanı sıra normun kabul edilen anlamını da içine alan çok boyutlu bir şekilde kavramsallaştırılmaktadır.

Bu kavramsal çerçeve baz alınarak, yasal formu bir mülteciler hukuku normu olan geri göndermeme (*non-refoulement*) ve yasal formu olmayan insani koruma (*human protection*) normlarının evrimsel değişimi birbirini izleyen norm ihtilafı süreçleri üzerinden incelenmektedir. Her bir ihtilaf süreci için, tartışmaların hukuki niteliğini ve tarafların tartışma pozisyonlarını gösteren dokümanlar diskur ve içerik analizi yöntemleri ile analiz edilmektedir. Buna göre araştırma bulguları göstermektedir ki normun yasal formda olması hukuki yöntem, mantık ve dil ile tartışılacağına bir garantisi olmadığı gibi, yasal formun yokluğu da tartışmalarda hukuki sürecin öne çıkmasına engel teşkil etmemektedir. İkinci olarak vaka incelemeleri, ihtilaf süreçlerinde hukuki niteliğin norm kuvvetinin değişimi üzerinde pozitif etkili olduğunu göstermektedir. Süreçlerin hukukiliği, norma dair tartışmaları hem uluslararası hukuk sistemine, hem de uluslararası toplumun hâlihazırda kabul etmiş olduğu öznelerarası ilke, kural ve yöntemlere dayandırarak, tartışılan norm üzerinde yeni bir uzlaşmaya varılmasını kolaylaştırmakta, böylece normun sosyal dayanağını tamamen kaybedip zayıflamasını önlemektedir. Bunun aksi durumda ise hukuki nitelikte olmayan siyasi ihtilaf süreçleri normun adaptif dinamiğini sekteye uğratmakta ve hatta mevcut kazanımları geçersiz kılabilir.

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ABBREVIATIONS

AI	Amnesty International
APD	Asylum Procedures Directive
APR	Asylum Procedures Regulation
BRICS	Brazil, Russia, India, China and South Africa
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEE	Central and Eastern European
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention of Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
FRY	Federal Republic of Yugoslavia
HRC	Human Rights Council
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
IL/IR	International Law/International Relations
ILO	Immigration Liaison Offices
IO	International Organization
IR	International Relations
IWC	International Whaling Commission
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OSCE	Organization for Security and Cooperation in Europe
P5	Permanent Five (members of the Security Council)
R2P	Responsibility to Protect
SAR	Search and Rescue
SC	United Nations Security Council
SC Res.	Security Council Resolution
SOD	Summit Outcome Document
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
WWII	Second World War

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CHAPTER 1

INTRODUCTION

In 2003, the world encountered with the inconvenient truth of what is going on in US-controlled Iraqi detention centers, revealed by the reports of the Amnesty International. Human rights violations including inhuman treatments and torture against the combatant detainees in Iraq were being documented by NGOs and the press, such as reports by the Associated Press, and International Committee of the Red Cross apart from several others by the Amnesty International. Within a short period of time information on inhuman treatment and torture in detention centers in Iraq, Afghanistan and Guantanamo by US military, was proven and witnessed by the world thanks to these reports, unsettling photos and leaked memos. (McKeown, 2009; Sikkink, 2013)

It was not a one-time wrong doing by a pro-norm state. The norm, arguably the strongest of the modern era, was not only violated by malpractice; it was being challenged. US was contesting the existing meaning and the boundaries of the norm against torture, both by practice and by discourse. As seen in the leaked memos and official assertions by US officials, the interpretation of the norm, the definition of torture, the applicable context has been so much narrowed down by the US officials, that the norm came to acquire a whole new form for US (Dunne 2007, 276; Liese 2009, 24; McKeown 2009, 13-14; Sikkink 2013; 148). Keeping detainees from the Afghanistan conflict exempt from Geneva Conventions by calling them illegal combatants, or making a new much narrower definition of torture were all attempts of justifying the state attitude by using the law itself in a creative way. (Sikkink 2013, 148-151; Sinclair 2010, 161-163) This challenge constituted a crisis for the torture norm, unleashing a process of contestation where various actors around the world fiercely opposed both the restrictive interpretation of torture norm and the violations of US.

Norm against torture and inhuman treatment has been one of the most widely and unquestionably accepted norms of the international human rights regime. It is a highly

legal and institutionalized norm, codified in various prominent international and regional conventions including, but not limited to the 1949 Geneva Conventions, 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, European Convention of Human Rights, 1985 Inter-American Convention to Prevent and Punish Torture, International Covenant on Civil and Political Rights and Universal Declaration of Human Rights. It is one of the international norms that is accepted to have a *jus cogens* and peremptory nature; underogable and binding upon every state. Yet this extreme multidimensional strength of the norm, its legal quality, broad acceptance, deep entrenchment in domestic and international systems could not prevent it being contested by a super power, backed with a strong rhetoric of security and war against terror. Some scholars have evaluated the unfolded norm contestation as a sign for the torture norm losing its hold as one the strongest international norms. (Sinclair, 2010; McKeown, 2009) Others suggested that the norm was bled but unbowed. (Liese, 2009; Hurd, 2013) After all, the attempted new interpretation of US had been starkly rejected, and US had not only dropped its attitude towards the norm, but also has changed related policies. In any case, this was a striking experience showing unending contestation around even the most legal, most institutionalized and most accepted international norm, and the dynamism of its interpretation and application.

In January 2019, Japan, a long term contestant of the ban on commercial whaling, declared its withdrawal from the International Whaling Commission (IWC), and returned to commercial whaling practices. (Zimmermann, 2019) This constituted an important blow for the whaling ban, which has been weakening with relentless contestation of pro-whaling actors especially in the past two decades. Whaling ban had been instituted in a moratorium by International Whaling Commission (IWC) in 1982, following years long struggle and lobbying efforts of environmentalist NGOs, and anti-whaling countries. Increasing commercial whale-hunting during 1950s and 60s followed by a fast decrease in whale stocks in 1970s, had sparked an environmentalist campaign and a strong reactionary front. Environmentalist opposition to commercial whaling, based on animal rights and the risk of extinctions had gained great publicity worldwide and managed to turn formerly pro-whaling countries like US, UK and New Zealand into stark challengers

of whaling in a short while, leading finally to the acceptance of an almost complete ban on commercial whaling with a soft law document. This constituted the moment of norm creation for whaling ban, which continue to exist ever since. Contestation around the norm, however was never missing. Although not rejecting the memorandum which brought the ban (except Norway), or permanently leaving IWC to be relieved from the restrictions, pro-whaling states strongly challenged the preservationist interpretation of the ban, advocating a conservationist interpretation according to which whales to be managed as natural resources and commercial whaling should be permissible as long as the sustainability of whale stocks will be maintained. (Catalinac and Chan, 2005) Especially after 1990s, efforts were made by pro-whaling actors to loosen the ban arguing that certain whale species were no more endangered. They contested the protectionist anti-whaling logic for having a strictly western approach to the environment, and based their contestation on anti-colonial references. (Deitelhoff and Zimmermann, 2013) They consistently emphasized the cultural aspect of whaling, as being part of the historical identity and traditions of whaling states. (Nagtzaam, 2013) Pro-whaling states neither exercised whaling at the levels of previous decades, nor completely gave up the practice but utilized the exceptions and loopholes of the ban to the maximum. Japan's large scale scientific whaling practices drew lots of reaction from anti-whaling communities, reaching to ICJ, where Australia, a stark anti-whaling country, accused Japan for abusing the exception of scientific whaling for bypassing the ban. The court ruled against Japan and revoked existing permits, without ordering a complete restraint of similar practice, and the scientific whaling program of Japan resumed short after. ("Japan to Resume Whaling", 2015)

Mid-2000s witnessed the intensification of the contestation on the ban, that culminated efforts of pro-whaling states to change the IWC system in order to be able to change the ban, but the efforts failed due to stalemate in IWC power distribution. In 2006, pro-whaling states led by Japan managed to pass a declaration in IWC, opposing the 1982 moratorium for no more having a scientific justificatory ground and proposing the reinstitution of regulated commercial whaling. However, despite the declaration as a solidified step of outright contestation of the ban, the ban remained intact for the required majority vote in IWC could not be achieved. Past 20 years have witnessed never-ending

contestations on the whaling ban, its applicatory limits and its justificatory basis. As of 2020, the ban is still in force, although it is now a weaker norm with looser authority, and less global reach, having accommodated the contested compliance of pro-whaling states in practice. (Zimmermann, 2019)

These two examples conspicuously demonstrate that norms are contested not only in their early development phases when they are trying to diffuse, but also when they are globally adopted, internalized, and highly legalized. Contestation is an integral part of their evolution, and has a potential influence on the way norms are changed, interpreted and applied. In stark contrast to the expectations of mainstream constructivist and liberal institutionalist theories, which assumed legalization as the final point of a linear and unidirectional path of norm development, legality neither prevents the contestation on norms, nor ensure resilience of norm strength in the face of contestations. Leading on from this puzzle, this dissertation will study the relation between legality, contestation and norm strength.

These two examples are in no sense unique. To the contrary, the normative order that was established in liberal lines after the World War II, seems to be under an increasing pressure in the last decade, not only with the structural power shift from the liberal west towards illiberal great powers like Russia and China, but also with the illiberalization of the west itself under rising waves of populism. Russia's annexation of Crimea and its open intervention in eastern Ukraine, Trump's hostile attitude towards international law and international cooperative regimes symbolized in US withdrawal from Paris Agreement, security-oriented responses of European countries to the refugee crisis and dominance of anti-migration sentiments across Europe, UK's decision to leave the European Union with a nationalist discourse are all examples showing the increasing salience of norm challenges and the contestation of even the most established legal norms of the existing international system. This picture, which creates pressing concerns for the future of international law and international normativity and raises new questions regarding the resilience and strength of international norms, makes this study timely, relevant and particularly significant.

Defined as “collective expectations for the proper behavior of actors with a given identity” (Katzenstein, 1996, 5) norms owe their existence to an intersubjective agreement. However, this intersubjective agreement is never fixed and undebated; neither are the norms even when they are highly legalized in international law with treaties, institutions, or courts that protect them. As the above examples demonstrate, norms are contested. They are contested not only in their early development phases, but also when they are internalized and globally extolled. They are contested not only by objectors, but also followers. They are contested even when they are institutionalized, regulated and monitored through legal mechanisms. This contested nature of norms has driven particular attention of IR scholars in the last decade due to the increasing trend of challenges against well-established liberal norms. Contestations around chemical weapon ban, targeted killings, *non-refoulement* of immigrants, personal privacy rights, ICC jurisdiction, and many others accompanied with increasing securitization of international relations and an increased tone of right wing policies in the domestic spheres around the globe led to serious concerns for the fate of the international normative order, and shaken the trust that has been put on the rule of international law and legalization of international norms. All these sparked off a new literature of norm contestation asking critical questions regarding norm change and robustness.

Early constructivist norm literature that dealt with the emergence and unidirectional development of international norms is unsuited to explain the possible changes ongoing after the global establishment of norms. (Finnemore and Sikkink 1998; Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999; 2013; Price, 1998; 2003) In general, they embrace a positivistic and functional understanding of law, and attribute the value-added of law in international affairs to an intrinsic legitimacy which induces state compliance. (dos Reis and Kessler, 2016) According to this, norms become legal when they are duly recognized in international legal documents, or better in domestic legal systems, and from that point on they acquire a stronger position to influence state conduct. On the other hand, critical constructivists like Antje Wiener problematize the assumptions of linearity and unidirectionality in norm evolution, and brings interesting questions related to never-ending contestation processes and perpetual evolution of norms to forefront beginning from late 2000s (Wiener, 2004; 2007; 2014; Wiener and Puetter, 2009; Krook and True,

2010; Deitelhoff and Zimmermann, 2013; Liese, 2009; Sandholtz, 2008; Sandholtz and Stiles, 2009; Wunderlich, 2013). However, in terms of their understanding of law and role of legality they do not challenge their predecessors with a more sophisticated engagement with international legal theory.

It is accepted throughout the critical constructivist norm contestation literature that contestation processes are inherently constructive and constitutive of norms, as they problematize, rejuvenate or degenerate the intersubjective agreement on the contested norms. Therefore, contestations influence norms in different ways, changing them into weaker or stronger versions of their former selves, thereby determining the course of norm evolution. There is a large body of literature that analysed how norms change through contestation (Wiener, 2004; 2007; 2009; 2014; Wiener and Puetter 2009; Müller et al. 2013; Welsh 2013). Debates on whether contestation strengthens or weakens norms (McKeown, 2009; Badescu and Weiss, 2010; Heller, Kahl and Pisoui 2012; Wiener, 2014; Panke and Petersohn, 2016) have been followed by studies which seek to specify the types of contestation that strengthen norms (Deitelhoff and Zimmermann, 2013; 2020), and the conditions under which they do so (Liese, 2009; Sandholtz, 2008; Sandholtz and Stiles, 2009; Müller and Wunderlich, 2018; Lantis and Wunderlich, 2018). However, the question of how some contestations strengthen norms while others weaken them is yet to be answered sufficiently. The role of legality as an explanatory factor of norm change through contestation has only recently attracted some attention (Bower, 2019; Brunnée and Toope, 2019). However, although they do not move from formalist assumptions on law, their conceptualization of law and legality in essence sees legality as a feature of the norms, rather than of the contestation processes. This causes the role of legality as an argumentative rationale which exists independent from norm's formal legality, to remain out of focus in these analyses.

While endorsing the findings of the developing literature on norm contestation, in this dissertation I draw attention to two main shortcomings for a refined understanding of the relation between legality, contestation and norm strength; first the underspecified role of law and legality in norm contestation processes, and second the unidimensional conceptualization of norm strength that blurs out the evolutionary nuances. To address

these two major gaps, I ask the primary research question: *how does legality of contestation processes influence change in norm strength*, and in an effort to give a refined reply, I introduce two novel concepts to the contestation literature; the concept of process legality, defined as the use of legal institutions, discourse and argumentative reasoning, and a multi-dimensional conceptualization of norm strength, composed of norm's authoritative power, global reach and meaning. According to this, I conclude that irrespective of a norm's legal nature process legality in contestations, have a positive overall influence on norm strength, of which sub-dimensions are separately affected in the contestation processes.

1.1. Two Novelties to Norm Contestation Literature: Process Legality and Multidimensional Norm Strength

For a long time in the history of IR discipline law and legality are hardly used as vocabulary, let alone as theoretical instruments. (Dunoff and Pollack, 2012) With liberal institutionalist and constructivist rise in IR theory, norms obtained theoretical significance in the discipline, opening channels for a rapprochement between international law and international relations. First canonical works of early 1990s, calling for interdisciplinarity (Abbott, 1989; Slaughter-Burley, 1993) are followed by the others. (Goldstein et al. 2000; Abbott et al. 2000; Byers and Nolte, 2003; Reus-Smit, 2004; Goldsmith and Posner, 2005; Guzman, 2008; Simmons and Steinberg, 2007; Sinclair, 2010; Reus-Smit, 2004; Goodman and Jinks, 2004) On the international law side, this rapprochement has been built on the politics-friendly international legal theories of New Haven School (Lasswell and McDougal, 1966), international legal process school (Chayes, 1974; Chayes and Chayes, 1993; also Koh, 1997; 2005) and the critical legal studies (Kennedy 1983; 1987; Koskenniemi 1999; 2005), which are theoretically ready to examine the mutually constitutive interaction of international law and international affairs.

Constructivist tradition in IR played an especially critical role in IL/IR nexus, going beyond the instrumental view of law in the rationalist approaches of institutionalist and liberal accounts, and recognizing a normative and constitutive role to international law.

The works of constructivist scholars like Kratochwil (1989), Onuf (1989), or Reus-Smit (2004) provided sophistication to the mainstream understanding of law in international relations, with an emphasis on its role as building identities, shaping interests, defining legitimate behaviors and justificatory discourses (Dunoff and Pollack, 2012, 8). This understanding of international law, which has been embraced by the constructivist accounts of international legal theory (Johnstone, 2003; 2011; Brunnée and Toope, 2000; 2010; Hurd, 2008; 2011) put social interaction and legal practice at the center of efforts for understanding the making and using of law in international affairs (Brunnée and Toope, 2013, 129), and gave a new perspective to study normative evolution, functioning of law and its relation with politics.

Legality, when considered as a determinative factor of norm change in the norm contestation literature, is accepted as a feature of the norm, or as a discourse that is attached to the norm. According to this, some norms are legal and their legality –almost-dictates a certain type of contestation, which in turn has a determinative effect on norm change. (Bower, 2019; Brunner and Toope, 2019). In this study, I aim to engage in an interdisciplinary endeavor at the intersection of international law and international relations, and bring insights to the constructivist understanding of the role of legality in contestation processes through a deeper dialogue with international legal theory. Accepting the value-added of law to be in the particular discursive process, and drawing on the idea of indeterminacy of law in critical legal studies (Koskenniemi, 2005) I argue that formal legality of the contested norm, i.e. it being the part of an international treaty, of international custom, a general principle, or a soft law formation, does not determine the legality of processes through which the norm is contested. This does not mean to say that formal legality and process legality are completely independent. Process legality might be easier and more convenient in cases of formal legal norms. However, neither formal legality guarantees process legality, nor process legality is only possible for formal legal norms. International law is broad, intricate, multi-layered, complex, vague, indeterminate and flexible enough to handle any legal or non-legal norm with legal means and institutions, legal rhetoric and legal argumentative logic. Therefore, questions on the role of legality in norm contestations, should not be focusing only on the formal legal features of the norms, but should examine the use of legality in contestation processes. In

this study, I conceptualize process legality as the use of legal institutions, discourse and argumentative reasoning.

Behavioralist norm analysis, that dominated the norm research until late 2000s, was concerned with the influence of norms in determining state behaviours. Norm strength, therefore was searched not in the internal characteristics of the norm, but in its effects. (Finnemore and Sikkink, 1998; Risse, Ropp and Sikkink, 1999; 2013; Glennon, 2005; Price, 2006; Hyde, 2011) Critical constructivist contestation literature, diverging from the mainstream, problematizes norm fixity and examine the ever-changing meaning and interpretations of norms rather than simply whether or not they influence state actions. However, a concept of norm strength that incorporates norm's changing meaning to the definition of norm strength along with behavioural dimensions is yet to be created, and even the most sophisticated norm contestation studies overlook meaning as a component of norm strength. (Deitelhoff and Zimmerman, 2019) In order to address this gap, I introduce a new multi-dimensional norm strength conceptualization that for the first time converges behavioural and interpretive norm analysis with a single norm strength conceptualization, combining the scope, content and precision of the norm's meaning with its global reach, and authoritative power.

Assessment of norm strength "has been 'perhaps the most stubborn problem' in their scientific analysis." (Raymond, 1997, 206 quoted in Simmons and Jo, 2019) Attempts in the literature conceptualized norm strength using compliant state behaviour (Glennon, 2005), degree of legal institutionalization (Finnemore and Sikkink, 1998; Risse, Ropp and Sikkink, 1999; Percy, 2007), discursive legitimacy (Hurd, 2014), and various combinations of these. (Kratochwil and Ruggie, 1986; Cortell and Davis, 1996; Price, 2006; McKeown, 2009; Sandholtz and Stiles, 2009; Panke and Petersohn, 2012; Deitelhoff and Zimmermann, 2019; Simmons and Jo, 2019) All of these conceptualizations of norm strength, including the ones developed and used within a dynamic account of norm evolution, reflect an essentially behavioural logic that seeks norm strength in its outside effects. Factors intrinsic to the norm, such as the evolutionary change in its meaning are disregarded. Such approaches based on the institutionalization of a norm in domestic/international systems or the ones based on state's rhetorical

acceptance and practical compliance may be useful when comparing relative strengths of different international norms. A norm that is globally accepted in a binding treaty, and entrenched in domestic public discourse may reasonably be evaluated as stronger than an uncoded norm that is actively rejected by a large group of actors. However, when norms are accepted to be in a state of perpetual evolution as recognized in Wiener's contestation framework, norm's "meaning-in-use" (Wiener, 2009) can drastically change through time although its codification or global acceptance remains intact. Changes in norm strength cannot be understood without taking meaning change into account. If torture is defined as "physical pain amounting (...) equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death" as suggested in the Bybee Memo (Sikkink, 2013, 150-51) the meaning of the prohibition of torture norm (a highly legal and legitimate norm that is accepted to be binding with global consensus) would be severely more limited than the generally accepted interpretation under the Convention Against Torture, and would exclude forms of less intense tormenting or psychological torture. Compliance-based or legitimacy-based norm strength accounts, without incorporating an analysis of changes in meaning would fall short of detecting such drastic differences.

Another significant analytical value of the multidimensional conceptualization of norm strength is the nuanced understanding of changes that occur in different dimensions. Contestations might influence norm strength differently at different dimensions, leading to unexpected turns in the evolutionary trajectory of the norm. Going back to the initial examples, the contestation on the torture norm initiated with the challenges of a great power like US have ended up reviving the consensus on the established definition and contributed to descriptive precision of the norm. Level of global acceptance and authoritative power of norm persisted despite the strong challenge the norm had faced. Decades long contestation by pro-whaling actors could not eradicate the whaling ban, nor change the conservation-based interpretation of its meaning to the sustainable protection of a natural resource. However, this resilience in the meaning dimension led to a significant retraction in global reach, with the withdrawal of Japan. Norm's authoritative grasp is also loosened in a way to give more maneuver space for debatable whaling practices by countries like South Korea or Iceland. Although no convention article on

torture has ever been proposed to be changed, or whaling ban of 1982 has never ceased to exist in the past 38 years, this superficial image of solidity, stability and stagnancy is proved illusory as norms are complex constructions and understanding of change requires a nuanced look. After a contestation process, the norm may become more or less imperative, more or less widely accepted; its content may be eroded or enriched, gain or lose precision; its scope may shrink or expand. Different dimensions of norms may be effected differently, and the overall evolutionary path of the norm can only be understood by focusing on each of the dimensions and their interactions with each other. This dissertation aims to shed light on the multi-varied, multi-faceted relation between contestation and norm change, hence utilize the multidimensional norm strength conceptualization, keeping a particular focus on the interaction between the changes of different dimensions.

The central argument that I make in this dissertation can be boiled down to this: the value-added of legality for norm strength is not in the formal characteristics of a legal norm, but in the use of legal institutions and argumentative rationale in contestation processes. Put in more formal terms, it is hypothesized that the legality of contestation processes is not necessarily determined by the formal legality of the norm (hypothesis 1) and that process legality in the contestation processes has a positive effect on at least one dimension of norm strength, preventing norm weakening, if not leading to its strengthening. (hypothesis 2).

1.2. An Evolutionary Model of Multidimensional Norm Change Through Contestation

The research question (how does legality of contestation processes influence change in norm strength) will be replied with a comparative model, examining the evolutionary trajectories of a legal norm; *non-refoulement* and a non-legal norm; human protection. The changes in norm strength; conceptualized with three dimensions of meaning, global reach and authoritative power, will be examined with reference to the nature of the contestation processes being legal or non-legal.

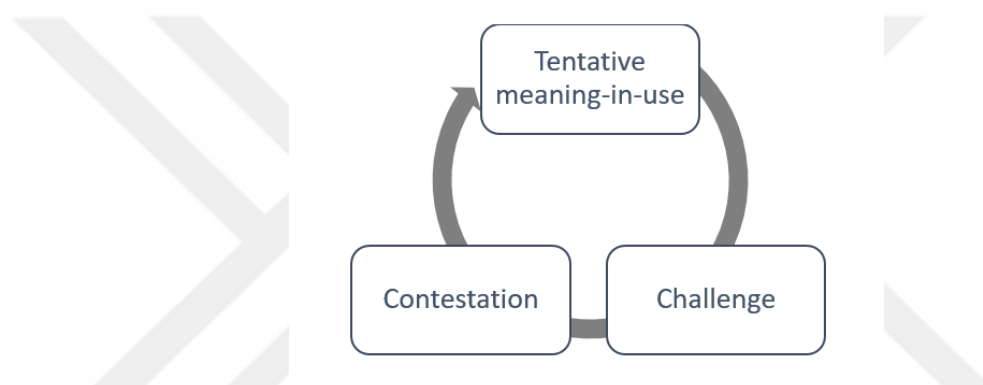
Following Sandholtz (2008; Sandholtz and Stiles, 2009), a cycles of contestation framework is embraced to study the effects of contestations. In this model Sandholtz suggests that as rules can never be as detailed to cover every possible real-life experience, emergence of discussions on the interpretation and application of norms are inevitable. Therefore, normative change happens through a cycle, “linking rules to actions to arguments, which in turn reshape the rules” (Sandholtz, 2008, 101). According to this, norm evolution is a dialectical process that proceeds through cycles of contestation; i.e. practical or discursive challenges to norms and practical or discursive reactions to these challenges. During these contestation cycles actors engage in dialogues, negotiate and argue for their respective positions, using varying institutional settings, practical policy steps and argumentative strategies. At the end of the contestation process, a renewed agreement on the norm is reconstituted, to last only until a new crisis triggers a new contestation cycle. (Figure 1.1)

Examining the evolutionary trajectories of norms through contestation cycles facilitates the observation of subtle norm changes that are otherwise hard to see when we look at the norm and its evolution as a whole. Focusing the analysis to segregated periods and each time singling out a particular aspect of the norm make a more accurate and detailed analysis of norm change possible.

Norms are not self-existent ontological subjects with a fixed meaning across time and space. Rather, they are indeterminate, meaning that what they entail for different actors at different times varies subject to contexts and interpretations. Despite this inherent contestedness, at any given point, we can talk about a vision of intersubjective agreement on the norm; what I call a tentative *status-quo* of the meaning-in-use of an international norm. Different from the absolute indeterminacy of norms as accepted in some critical legal studies (Bianchi, 2016), at tentative status-quo points norms are not openly contested, giving the appearance of a common understanding even though there may still be latent disagreements. At these points, there seems to be a general agreement on a certain –mostly vague and undetailed- understanding of the norm by its followers notwithstanding all the latent interpretation contradictions. However, this agreement is always a temporary one that lasts only until a crisis point (an external event like a war, or

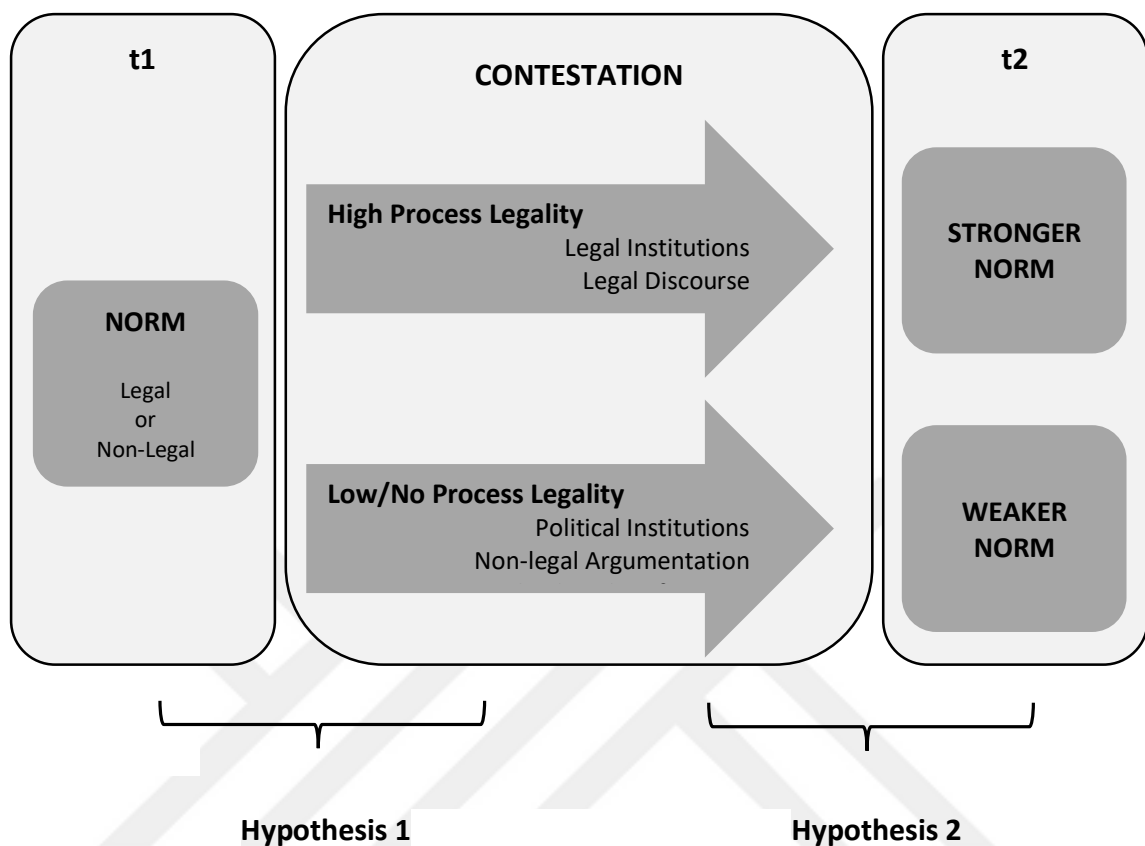
internal tension of contradicting interpretations) where discordant positions of actors vis-a-vis the norm come to light. From there on, a contestation process unfolds, where different positions on the interpretation or application of the norm are advocated by different actors, through various channels and argumentations. At the end, the cycle is completed with a new point of tentative agreement where the norm has been evolved into a new version of its former self. This is a new point of temporary *status-quo* for the agreement on the norm that will continue only until a new contestation process.

Figure 1.1: Cycle of Contestation



The change in norm strength, is the difference of the norm at the end of the contestation process compared to the beginning. As has been demonstrated by numerous studies in the literature, the outcome may be connected to various factors; internal characteristics of the norm, relative powers of the contesting actors, the type of argumentation, overall normative environment, institutional and structural conditions are no doubt all effective. This study, while accepting the importance of all these factors, tries to understand the effect of legality on norm strength. It is proposed that the legality of contestation processes will not necessarily be determined by the formal legality of the norm (hypothesis 1). Secondly, it is expected that process legality in the contestation processes will have a positive relation with norm strength, preventing its weakening, if not leading to its strengthening (hypothesis 2). Therefore, it is expected that the positive influence of legality on norm strength will be more about the effective and consistent use of legal argumentation and legal logic than it is about the depth of formal legal institutionalization of the norm.

Figure 1.2: Model and Hypotheses



1.2.1. Method and Cases:

To reiterate in simplest terms, my main goal is to examine the change of norm strength through contestations and try to understand the role of legality in these processes. In order to be able to differentiate between the effects of formal legality and process legality, two norms will be examined in a comparative design; the legal norm of *non-refoulement* and the non-legal norm of human protection.¹

¹ I am aware that non-refoulement and human protection norms are not similar in terms of norm type, as the former is a standardized procedure in Wiener's typology, and the latter is a fundamental norm. Accepting that this is a handicap for the comparative design, I do not think that this will affect the results in terms of the role of legality.

Non-refoulement is the prohibition of expelling or returning asylum seekers back to risk of persecution. It is one of the most established norms in the area of refugee protection, argued by some to have *jus cogens* status. (Costello and Foster, 2015). It is a legal norm regulated under numerous global and regional conventions, not limited to the UN Convention Related to the Status of Refugees and the Convention against Torture, and has been entrenched into domestic legal systems around the world. Despite its degree of institutionalization and wide acceptance, right interpretation and application of *non-refoulement* has been subject to severe contestations, which provides vast opportunities for investigating the relation between legality, contestation and norm strength.

Norm of human protection on the other hand, is a non-legal norm that has not been recognized in any international agreement or legal document, to the contrary has questionable legal acceptability in the light of UN Charter and recognized exceptions to the principle of non-use of force. Norm of human protection is the idea of protecting people from humanitarian atrocities through international military action. Despite all the controversies around it, it is a deep-seated international norm of which roots goes back to just war tradition of Grotius' times, and has been used as a basis of international action under different rubrics up until present. It has acquired its modern meaning and prominence especially after the cold war. Since then it has evolved under the humanitarian intervention and responsibility to protect frameworks, and has been subject to relentless contestations about its operationalization, limits, means, purposes and all other aspects. Two cases constitute a promising comparative match to observe the differences of contestation processes and norm strength consequences for well-established norms of legal vs. non-legal character.

Case selection in this theoretical framework entails various difficulties and it is difficult to construct a perfect comparative design in Mill's methods of most similar or most different forms. However, the literature on contestation is predominantly, if not uniquely composed of single case studies. Therefore, despite the difficulties and inevitable imperfections, a comparative analysis has analytical value and is fruitful for bringing out new inferences. Both of the selected norms in this study have a long history that renders the analysis of evolutionary processes and observations of change through time possible.

They are both prominent norms subject to high profile debates at the international level. Both norms have observable evolutionary trajectories showing upward and downward trends. They have been re-interpreted through state policies and practices in the past 20 years, leading to subsequent cycles of contestations. They provide observable material and achievable data. Eliminating the possible effects of externalities both of the cases reflect a similar relationship with the broader liberal normative world. Both of the norms lie at the crux between cosmopolitan understandings of global governance that prioritize individuals over states, and the state-centric, security oriented westphalian world order. Both norms have direct relevance with state sovereignty and human rights issues, leading to comparable positions of contesting actors in terms of broader vs. narrower norm interpretations.

For each case, two cycles of contestation will be examined, making four comparable subcases in total. These subcases are selected as prominent contestations that drew considerable public and academic attention, and had clearly demonstrable influence on the norm's evolutionary trajectories. For *non-refoulement* these are the cycles of contestation on interception at sea practices (2009-2012) and on safe country concepts (2005-2016); and for the human protection norm it is the cycles of contestations around 1999 Kosovo (1999-2005) and 2011-13 Libya/Syria crises. Each cycle of contestation starts with a challenge to the existing "meaning-in-use" in the form of an international crisis, a prominent norm violation or enactment of a new legislation. They end with the settling down of the discussions and dropping out of the agenda, creating a renewed agreement at a new tentative *status-quo* for norm's meaning-in-use, or an agreement to disagree.

Determining when each contestation cycle begins and ends, or at which moments to take the snapshots of the norms for comparison of pre- and post-contestation norm strength is a challenge of this model. Focusing the analysis only on a specific aspect of the norm in each contestation cycle, (such as the contestation on the geographical limits of *non-refoulement*, or right authority of human protection) and limiting the examination to a specific place or actors (like Europe for *non-refoulement* and Security Council discussions for human protection) make it practically easier to see when a discussion

becomes a prominent matter in the agenda and when it ceases to be so. As norms are inherently contested any taken snapshot would involve a problematic assessment, however, I accept the limitations for the analytical utility of such an approach.

Three dimensions of norm strength; authoritative power, global reach and meaning (precision, scope and content) will be assessed for the tentative *status-quo* of the meaning-in-use, before and after each contestation cycle. Thereby, the effect of the contestations during that contestation cycle will be seen on the changes of different dimensions of norm strength. It is expected that the direction of change will be different for different dimensions, suggesting that a true assessment of norm strengthening or weakening cannot be made by looking at a single variable like state compliance, but should be made in a multidimensional manner.

For the in-case analysis, to be able to observe the particularities of the processes and mechanisms of influence, this study follows a process tracing method in examining the evolutionary trajectories of selected norms. Process tracing allows deductive analysis to test the hypothesized relation of legality and norm strength. At the same time, it permits an open-ended, inductive analysis of selected periods, which help develop new inferences (Bennett and Checkel, 2015, 7-8). Evolutionary histories of the norms will be examined through a step by step analysis of counter positions in subsequent cycles of contestations. Each contestation process will be examined with respect to the starting crisis, emerged disagreement on the right implementation or right application of the norm, contending positions of major actors, preferred institutional settings, and reciprocal argumentations and strategies of contending parties. As such, process tracing within contestation cycles will make it possible for us to see the operating dynamics that produce (or not) the change in the examined aspect of the norm.

The examination of the material to observe the positions of actors in norm contestation and the way they choose to conduct the contestation processes requires a combination of discourse and content analysis. These textual analysis functions as part of the broader process tracing design. Depending on the particularities of the case, the texts are chosen to represent the official positions of parties to a discussion on a contested norm, their logic

of argumentation in their objections, accusations, replies and justifications as well as the chosen language and wording.

Each cycle of contestation unfolds in a different political and institutional context involving different actors as major contenders like states, IOs and NGOs. Therefore, examined material vary from NGO reports to Security Council resolutions, public statements of state officials or IO meeting minutes. Empirical examinations of these material are tailored according to the particularities of each subcase, which are explained in detail under relevant chapters. The evolutions and contestations of every norm are different, and this is valid for *non-refoulement* and human protection norms, too. Therefore, to address the different requirements of each case I adopt my methodological approach accordingly, giving more weight to process tracing and discourse analysis in *non-refoulement*, and to content analysis in human protection.

For example, contestation on safe country concept is examined through the discourse analysis of general argumentative positions in the ECRE, European Parliament and UNHCR reports on EU Commission drafts or final legislations. On the other hand, for the contestations in Kosovo and Libya/Syria country statements in Security Council meetings in the chosen periods are analyzed following the scheme of Krippendorff's content analysis design (Krippendorff, 2004, 83). Examined texts are reduced down to units, which are in my case sentences or set of sentences that constitute an argumentative statement transmitting an argument with a particular wording and logic. Each of these units represent a legal or non-legal character (Appendix). A culmination of these reflects the nature of the contestation process as legal or non-legal/political.

The discourse and argumentative logic of all analyzed texts are examined with reference to a) their language i.e. whether they use words like 'rights', 'obligations', 'duties' and 'responsibilities', suggesting a legal logic; or words like 'preferences', 'moral necessities', and 'interests' that suggest a political tone; and b) logic of their justifications, i.e. whether they refer to international legal documents and principles, to legal precedents and legal institutions or else to subjective political preferences in justifying their positions. Norm strength for pre- and post-contestation tentative status quo moments are

assessed and compared in each subcase according to how frequently the norm is referred and used as a basis of argumentation (authoritative power), how many states accept/reject it (global reach) and how the generally accepted interpretation of norm has changed in terms of precision, and broadness of content and applicatory scope (meaning).

In a nutshell, it is concluded, that legality of contestation processes is not determined by the formal legality of the norm, but may exist (in different degrees) or not exist as an outcome of actor choices. Supporting the proposition of hypothesis 2, the positive relation between process legality and norm strength has been demonstrated in all of the four subcases. Expanded evaluations of findings will be made in Chapter 5.

This study makes several contributions to the norm contestation literature. Firstly, the role of legality in norm evolution and especially on norm strength has been studied mostly with a formalistic understanding, not only by mainstream constructivists but also, with a more qualified approach, in the contestation literature. (Deitelhoff and Zimmermann, 2019). This study embraces a theoretically informed approach to law and legality in contestations, providing a deeper engagement with international legal theory. The concept of process legality and its differentiation from the mainstream IR focus on formal legality is an enriching approach for the norm contestation literature, which brings a new perspective for the explanatory role of legality in international affairs. Secondly, the proposed tripartite conceptualization of norm strength is a new tool for operationalizing norm strength and observing its changes. It permits a multidimensional evaluation of norm change. Going beyond dichotomous strengthening-weakening approaches such multidimensional conceptualization serves as a better analytical tool for a fine-tuned understanding of norm change, which unfolds differently for different dimensions of norm strength. Such a segregated approach provides the possibility to examine the interaction between different dimensions, of which overall balance determines the norm's evolutionary trajectory. Thirdly, incorporation of meaning as a component of norm strength fulfills a long-neglected necessity in the constructivist literature, and provides a more comprehensive picture of norm strength reflecting changes that are intrinsic to norms. Multidimensional norm strength for the first time brings together the analysis of behavioral effects of norms on international actors and interpretive effects of behaviors

on norms' meanings. By doing this, the two waves of the norm dynamics literature; the classical constructivist approaches that deal with norm diffusion and state compliance, and critical constructivist approaches that deal with the changing meaning-in-use of norms are brought together as different dimensions of a single norm strength concept. Fourthly, two cases of *non-refoulement* and human protection are put side by side for a comparative analysis for the first time. Comparative studies of contestation and norm evolution are not non-existent, but are rather rare in the empirical literature which is dominated by single case studies. And finally, this study contributes to the dialogue between the international law and international relations, with a deepened engagement with international legal theories and analysis of their explanatory powers in international political processes. This study, thus incorporates the cutting edge debates in international legal theory regarding the role of legality in international affairs and its relation with politics, into the political science analysis of international norm change. Bringing together of social constructivist logic with international legal scholarship for the evaluation of norm change will hopefully contribute to the developing area of IL/IR studies as well as the constructivist IR literature on norm dynamics.

1.3. Organization of the Study

The plan of the dissertation will be as follows. In the upcoming Chapter 2, I will present a thorough review of the constructivist IR literature on norm dynamics with the purpose of mapping out what we have learned so far, and what is left unexamined. Then I will propose two novel conceptualizations of this study as analytical tools to better understand the relationship between legality and norm strength in contestation processes. A review of politically informed international legal theories will be given to map the foundations for the understanding of legality this study embraces, and the concept of process legality will be elaborated drawing on constructivism, legal process school, and critical legal theory. Then the multidimensional norm strength conceptualization will be proposed as an analytical tool for a nuanced understanding of the effects of contestations on different aspects of the contested norms.

In Chapter 3, the norm of *non-refoulement* will be examined as the first case study. Two contestation cycles in the evolutionary history of the norm, Italian interception practices in the Mediterranean, and safe country concepts developed in EU Asylum Procedures Directives will be investigated in detail for an assessment of legality in processes. This chapter will show that uniquely legal approach of contesting parties, incorporation of human rights law to the discussions of refugees and migrants, as well as the involvement of ECtHR have played a strong determinative role for norm strengthening in the first contestation cycle, ending up with extraterritorial expansion of *non-refoulement* responsibilities. Whereas, the second cycle on safe country concepts reflected a more limited degree of process legality, hence led to limited and subtle improvements in the norm strength. Overall, although the restrictive, control-oriented approaches dominantly prevail in European asylum policies, a step by step examination of *non-refoulement* through subsequent contestation cycles demonstrates a positive evolutionary trajectory, which corresponds with the use of legality in contestation processes.

Chapter 4 will cover the second case study, on the non-legal norm of human protection, which is defined as the idea of protecting people from humanitarian atrocities through international military action. The evolutionary trajectory of the norm will be examined through two prominent contestation cycles both of which have tremendous effect on the way human protection norm is interpreted; 1999 Kosovo intervention and 2011-2013 Libya/Syria crises. The chapter will demonstrate that while the predominantly legal nature of contestations in the post-Kosovo process leads to the strengthening of the norm under R2P framework, in contrast the non-legal nature of Libya/Syria contestations dominated by political rationale and non-legal argumentations leads to the practical disappearance of R2P-based interventions from the international scene.

Chapter 5 will bring the four subcases of the two empirical chapters together and discuss the findings in a comparative manner. It will show that supporting the proposition of hypothesis 1, the formal legality of the examined norms and the legal nature of the contestation processes are not in an absolute relationship. Presence and absence of process legality is not an outcome of norm's legality, but a choice by contesting actors, underscoring the inevitable and intrinsic politicalness of law as a discursive process. On

the other hand, the positive relation between process legality and norm strength as per hypothesis 2 shows that such politicalness does not make law inconsequential or epiphenomenal. The segmented analysis of change in the multiple dimensions of norm strength will demonstrate how these dimensions react to contestations and process legality separately instead of as a solid whole. The chapter will investigate the interaction of these dimensions with each other, determining the overall trajectory of norm evolution in a balance of trade-offs between width, depth and rigidity.

The conclusion chapter will recap the findings of the dissertation, point out its limitations, and give prospects for future research.



CHAPTER 2

NORM DYNAMISM AND THE ROLE OF LAW

2.1. State of the Art: Norm Dynamics and Norm Contestation

Constructivist interest on norms in international relations in the past 30 years, first tried to prove in an environment dominated by materialist rationalism, that norms actually mattered in international politics (Wendt, 1987; 1992; Ruggie, 1993; Kratochwil and Ruggie, 1986). Once this is widely agreed on, norm studies focused their efforts to account for the role of norms in constructing identities, preferences and interests (Wendt, 1999; Katzenstein, 1996; Finnemore, 1996; Checkel, 1998; Legro, 2000; Rumelili, 2004; Walling, 2013), as well as generating compliance through domestic entrenchment (Checkel, 1997; 1999; Cortell and Davis, 1996), socialization (Risse-Kappen 1994; Johnston 2001) and international social pressures (Keck and Sikkink, 1998; Towns, 2012; Rumelili and Towns, 2017). The initial attention for understanding the ways that norms emerge, diffuse, and influence behaviors, later on turned into how they evade and even disappear. (McKeown, 2009; Panke and Petersohn, 2012; Bloomfield, 2016)

Literature on norm dynamics that has been developing since the end of 1990s is divided into two subsequent approaches; the behaviorist one, which starts with the initial assumption of the internal stability of norms and sees norm dynamism in its diffusion, acceptance or resistance by new state actors; and the reflexive one that sees a continuous evolution of norms². First group of studies examine norm strengthening or norm erosion with the behaviorist logic keeping the assumption of the internal fixity of norms (McKeown, 2009; Dunne, 2007). Reflexive studies of the second group on the other hand, acknowledge that norms are dependent variables as the outcomes of social

² For the first group of studies the dynamism is in norms' influence on state behavior and attitude, they are labeled as behaviorist. For the second group of studies the intersubjective and ever changing character of meaning and clash of norm interpretations lie at the basis of norms' internal dynamism, therefore they are referred as reflexive. (Wiener, 2004).

construction, as well as independent variables explaining state behavior. Therefore, norms are not fixed, but are constantly in flux. In this sense norm dynamism is not limited to a norm's global expansion or retreat, but also includes the effects of such acceptance and resistance processes changing the norms over time. (Wiener, 2004; 2007; 2014; Krook and True, 2010; Wunderlich, 2013; Bloomfield, 2016) How and why this change happens, is the core curiosity that this study shares with this reflexive literature.

At the very core of the behavioralist studies, there was the question of how norms emerge and become influential in so many different settings around the world. Most elaborate theories like the norm life cycle model (Finnemore and Sikkink, 1998), or the spiral model (Risse, Ropp and Sikkink, 1999) are devised to explain the diffusion of norms and state actors' norm adoption and compliance processes. (Keck and Sikkink, 1998; Risse Ropp and Sikkink, 2013; Price, 1998; 2003; Tannenwald, 1999; Schwarz, 2004; Cizre, 2001; Shor 2008; Stachursky, 2013) For long time, norm dynamics literature predominantly dealt with such positive progress; further internalization and global expansion of norms, especially of the liberal norms like human rights. This first group of studies however, has three major weaknesses that limit their explanatory power. The first one is the implicit inevitability of progress towards norm internalization through legalization, in a teleological manner. The second one is the unidirectionality, as there is no consideration of a backwards process where an international norm loses its acquired status. And third is the disregard to the changes in the norm with an assumption of norms being stable and fixed. Subsequent studies came to reply the first two criticisms to some extent, although the third point needed to wait a little more to be finally addressed. This behavioralist group of studies made considerable contribution to the understanding of norm dynamics, especially the way a norm emerges and diffuses to be internalized by even the most unexpected states. The literature has expanded to reply the criticisms of unidirectionality, and norm life cycle logic is used for explaining cases of norm erosion and backsliding (Dunne, 2007; McKeown, 2009; Panke and Petersohn, 2012; Symons and Altman, 2015). However, as norms in these studies were assumed to be internally stable, solid and fixed, these theories were unable to account for what is going on within the norms as they are being embraced, resisted, used, or violated by international actors.

The reflexive group of studies in norm dynamics literature with its roots in “critical constructivism” (Wiener and Puetter, 2009), took norm fixity to its central focus and opened up a new field for all these questions. Built on the Antje Wiener’s idea of norm contestation, this strand of studies shares a multilinear vision of norm dynamics, and a flexible understanding of norms. Diverging from the norm diffusion theories and other conventional constructivist thinking, meaning of norms are assumed to be dynamic and contextual. In this sense norm dynamics is about the evolution of norm’s meaning and internal characteristics through application, interpretation and contestation. While the norms are the independent variables to explain state behavior in the first wave studies, norm contestation studies recognize norm’s ever changing meaning as the dependent variable, being influenced by context, discourse and practice. Norm dynamism is not limited to its global expansion or retreat, but also includes the effects of such acceptance and resistance as constructing and constituting the norms.

One of the leading figures in this line of work with her reflexive approach is Antje Wiener (2004; 2007; 2009) who emphasizes the dual quality of norms as structuring and constructed. Any contending social practice, is constitutive of the norm, in terms of the interpretation of its meaning. Social practices that are demonstrated in the “discursive interventions” such as official texts, policy documents, and debates, are where the meaning of the norm is established. (Wiener, 2004, 201) The “structure of meaning-in-use” or the frames through which we interpret and understand the world (2004, 180) are established by practice and discourse. In turn they guide future practice. These interpretations regardless of their level of legality are intersubjective and socially constructed, and are highly context dependent. Therefore, it is inevitable that in the practice of international norms, there will be different interpretations, hence contestation. (Wiener, 2007; 2009)

Contestation is an intrinsic feature of norms, and is “triggered by contingency, out of context application and in situations of crisis.” (Wiener, 2009, 182) Krook and True (2010) from the same school of thought find the dynamism of norms in two sources; internally, in the tension between different interpretations and meanings accorded to a norm, and externally, in the alignment or conflict of the norm with other norms in the

normative environment. They propose a discursive approach and a view of "norms as processes" as opposed to "norms as things". They argue that lack of precision in international norms help their fast diffusion, but it also causes conflicting interpretations in different contexts leading further dynamism. Wunderlich (2013) also follows the line of Wiener, and elaborates a theory of norm dynamics that acknowledges the contestation of norm meanings and stresses "their contingent, inherently ambiguous and indeterminate nature." (Wunderlich, 2013, 26) Norms are always contested even after legal internalization where norm life cycle theories end the story. Norm change can strengthen a norm by clarification, it may lead to its replacement, or may render it obsolete. According to Wunderlich (2013, 29) change can be triggered by intrinsic factors like contestation of interpretations or extrinsic factors like exogenous crisis, or transformations of the international system.

2.1.1. Contestation and Norm Strength: Alternative Explanations

This new literature of norm contestation has produced a rich array of studies on the relationship between compliance, contestation and norm change; contributing to a better understanding of the relationship between contestation and norm strength, although with contradictory claims.

For Wiener, contestation is potentially a norm-strengthening process as it serves to reveal different interpretations of norms by different actors, hence pave the way for the reconstruction of a shared meaning and further precision of the norm. Badescu and Weiss (2010) similarly suggest that contestation have a positive influence on norm advancement. By showing the contestation around the failed attempts of revoking the responsibility to protect principles in Iraq by US, in South Ossetia by Russia and in Burma by France they show that contestation serves the conceptual clarification through international discussions, and strengthen the norm.

Other studies evaluated contestation as a negative factor for norm's evolution and argued that the fact that a norm is being contested would mean its weakening. McKeown (2009) argues that norm revisionist actors may initiate a "reverse cascade" that could lead to

“norm death” by reframing the norm violations as appropriate, challenging the norm by discourse or practice, and thereby attacking the validity of the norm, emulating non-compliance and threatening norm’s appropriateness internationally. Panke and Petersohn (2012) argue that when non-compliance is not met with sanctions, it would diffuse and the norm would degenerate, either incrementally or rapidly, depending on the contextual factors.³

These studies attributing an automatically strengthening or weakening role to norm contestations cannot explain the variance in the outcomes of different contestation processes. As seen in the evolutionary histories of different norms⁴ contestations may end up strengthening or weakening the norm. Other studies in the literature gave efforts to understand the factors that condition the strengthening/weakening effect of contestation.

Sandholtz (2008; Sandholtz and Stiles, 2009) takes Wiener’s idea of contestation as a source of norm dynamism as his starting point and construct a cyclical theory of evolutionary norm change as a “product of the constant interplay between rules and behavior.” (Sandholtz and Stiles 2009, 6) The inevitable inadequacy of legal rules in specifying the right behavior in every possible situation causes conflicting interpretations by states. These conflicts lead to debates as to the content and requirements of these norms. Debates bring about mutual argumentations and eventually result with a change in the norms; a new understanding of its content and/or its application areas, decrease or increase in its formality, precision, or authoritativeness. They argue that some argumentations are more prone to create norm change in the desired direction depending on the power of the arguing state in communicating ideas, appeal of the argument to fundamental norms which are generally accepted, and references to precedents. (2009, 16) Therefore, the strengthening or weakening effect of contestations will be determined

³ McKeown 2009 and Panke and Petersohn 2012 are closer to behavioralist group of studies as they do not openly question the internal changes of the norms, but look at state attitudes towards the norm to judge norm weakening.

⁴ Apart from the non-refoulement and human protection norms examined in this study, evolutionary trajectories of norms on piracy, slavery, wartime plunder, genocide, or democracy can be found in Sandholtz and Stiles, 2009.

by suggested qualities of the argumentations, and the norm interpretation of the winning side. Problematically, the conditions of a winning argument in this theory is bound to recreate established power relations and privilege the existing normative paradigm, leaving little space for change.

Liese (2009) refuses that contestation necessarily weakens the norm in every case. In his study he shows that the contestation of the torture norm by liberal democracies such as US, UK, and Israel does not weaken the validity of the norm, as the political elites of these states have claimed their cases as exemptions to the norm in the face of a greater evil; global terrorism. They have not contested the validity of the norm, to the contrary declared their allegiance to it.

Deitelhoff and Zimmermann (2013; 2020) theorize this logic, and propose the most widely embraced explanation for the norm strength effect of contestations. They argue that the consequence of norm contestation as its effect on norm robustness depend on the type of contestation being applicatory or validity contestation. According to this, if the focus of contestations will be on how the norm should be applied to particular cases, this would contribute to the solidification of norm's right interpretation and clarify its right implementation, and thereby increase norm robustness. On the other hand, if contestation is about a disagreement on the underlying value of the norm disputing "the shared intersubjective acceptance of their obligatory claims" (Deitelhoff and Zimmermann, 2013, 4), this damages the very fundamental agreement on the righteousness and value of the norm, hence may lead to the demise of its robustness. This is a solid and well-tested theory with high explanatory value for norm strength change through contestation. However, conceptualization of norm strength as norm "robustness" disregards the cases of internal norm change where the norm gets stronger particularly because it is not robust but flexible in meaning. Validity contestation on the underlying intersubjective agreement of a norm might end up strengthening the norm if it causes an evolution in norm meaning, which reinstitute the intersubjective agreement. Likewise, an applicatory contestation might weaken the norm if it becomes powerful enough (Brunnée and Toope, 2019) or if it cannot generate a common denominator for contesting actors and lead to breakaways from the norm.

Table 2.1: A Summary Sample of Constructivist Norm Literature

Early norm studies	Behavioralist Studies (norms as fixed)		Reflexive Studies (norms in flux)	
Ideas and Norms in International Politics	Norm Establishment, Diffusion and Compliance	Erosion Studies	Contestation Studies	Role of Legality in Contestation
Krasner, 1983; Kratochwil and Ruggie, 1986; Wendt, 1987; 1999; Katzenstein, 1996	Finnemore and Sikkink, 1998; Keck and Sikkink, 1998; Risse, Ropp and Sikkink, 1999; 2013; Florini, 1996; Price 1998; Tannenwald, 1999; Checkel 1997; 2001; 2005; Cortell and Davis, 1996; Goodman and Jinks, 2004	Dunn, 2007; McKeown, 2009; Panke and Petersohn, 2014; Symons and Altman, 2015	Wiener, 2004; 2007; 2009; 2014; 2018 Wiener and Puetter, 2009; Krook and True, 2010; Deitelhoff and Zimmermann, 2013; Liese 2009; Sandholtz 2008; Sandholtz and Stiles 2009; Wunderlich 2013; Müller and Wunderlich, 2014; Birdsall 2016; Bloomfield 2016; Welsh 2019	Percy, 2014; Lentis and Wunderlich 2018; Brunnée and Toope 2019; Bower 2019

This non-exhaustive review of norm contestation studies examines norm contestation and norm change from various aspects with regard to the contesting actors and nature of argumentations. Legality however, has not been given an independent role in the analysis of contestation processes and norm change until recently. I propose that legal nature of contestation processes has a determinative role on the contestation's effect on norm strength.

2.2. Law and Legality in International Relations

The engagement of IR scholars with international legal theory has traditionally been limited, although this has relatively changed in the last two decades. Realist disregard of international law as epiphenomenal to power relations without any analytical worth of its own, kept the issue of international norms or legality out of IR literature for the first couple of decades post-WW2. (Dunoff and Pollack, 2012) Liberal theories differed from realists with their implicit recognition of international law through an institutionalist understanding, which saw international norms and norm-based systems as facilitators of international cooperation. Scholars like Keohane (1984; Keohane and Nye, 1977) or Krasner (1983) talked about principles, norms and formalized institutions as elements of international regimes, functionally created and maintained by rational actors for bringing transparency, iterated interactions, reciprocity and stable expectations to international relations. However, this recognition did not lead to a liberal engagement with international legal theory, questioning of international law as a unique type of institution, or a substantive differentiation of legal norms.

This has changed with the legalization project by Abbott et al. in 2000, replying to the calls for interdisciplinarity between international relations and international law disciplines. (Abbott, 1989; Slaughter-Burley, 1993) Based on the rationalist functionalist approach to the role of law in international affairs, the legalization project problematized the causes and consequences of legalization in world politics, and have put forth a theory for this trend towards hard law formations defined by high levels of obligation, precision and delegation. (Abbott et al. 2000; Abbott and Snidal, 2000) These studies are followed by others with the same rationalist functionalist logic, trying to explain why states enter into binding legal arrangements or accept international judiciary, and gave replies mostly with reference to international uncertainties and domestic dysfunctionalities. (Simmons 2002; Simmons, 2013; Koremenos, 2005; Helfer et al. 2011). However, they had several blind spots due to their rationalist assumptions that cannot explain the intersubjective nature of international norms, as well as the inherent power of law independent from enforcement of binding obligations (Finnemore and Toope, 2001).

2.2.1. Constructivist Approach to International Law and Law as Process

Constructivist paradigm with a potential to enlighten these blind spots, has a closer relation with international law compared to other IR theories. Constructivism accepts the foundation of international system to be socially created through interactions and intersubjective understandings. (Ruggie, 1998; Wendt, 1999) The power of international norms and values in international affairs is not only instrumental for reaching predetermined interests, but they are constructive of state identities, roles and preferences. Different from liberalist accounts, this implicitly recognizes an autonomous role to international law, which is independent from the instrumental use of powerful states (Steinberg, 2012; Glennon, 2001) material enforcement (Goldsmith and Posner, 2005; Hathaway 2002; Hafner-Burton, 2005), or from its rational value as a facilitator of cooperation (Krasner, 1983; Keohane, 1984). Main preoccupation of constructivists with law was about the way norms formalize into laws and generate compliance. The explanations that these studies bring to the behavioral influence of norms (and indirectly of international law) were referring to perception of legal legitimacy, state socialization (Finnemore and Sikkink, 1998; Risse, Ropp and Sikkink, 1999) acculturation (Goodman and Jinks, 2004), and pressures of reputation and persuasion (Checkel, 1997; 2001; 2005). These mainstream constructivist works on norm establishment, diffusion and compliance contributed to a socially embedded understanding of law, but they did not enter into an explicit engagement with international legal theory, disregarding its insights on what law is and how it is related with politics. Rather they embraced, like their liberal colleagues, a “common sense idea of law” (Sinclair, 2010; 2011) which assumes determinacy and coherence of legal provisions, as well as an autonomy from politics constituting the highest end of normative development.

As an exception in the constructivist paradigm, a small but effective group of constructivists like Kratochwil (1989), Onuf (1989) and Reus-Smit (2004) differed in this respect with their deeper engagement with international legal theory, and with their efforts to theorize the interaction between international law and international politics. Their common point, was to view international law as a distinct rhetoric and argumentative reasoning with an inherent power on international relations that shape

deliberation and persuasion patterns and influence actor preferences. (Simmons, 2013, 358) According to this, international law is not about the rules but the process of operating international relations.

In his book *Norms, Rules and Decisions* (1989) Kratochwil questions the role of norms in international affairs, and points to the constructive role of norms based on the communicative action theory of Habermas and the relation between language and rule-governed activity (1989, 6). International law, according to his framework is not a set of rules, but a process characterized by a distinctive “style of reasoning” (1989, 205). For understanding the influence of law, his constructivist perspective puts emphasis on the rhetorical features of international law, legal argumentations and the structure of legal reasoning, rather than pedigree, sanctioning and formality. (1989, 186-201) International law is distinctive with its peculiar style of reasoning that is principally based on analogies and transmitted through training of practitioners (211). It is neither a static system of norms nor only a process of claims and counterclaims, but it is “a choice-process characterized by the principled nature of the norm-use in arriving at a decision through reasoning. What the law is cannot therefore be decided by a quick look at statutes, treaties or codes (although their importance is thereby not diminished) but can only be ascertained through the performance of rule-application to a controversy and the appraisal of the reasons offered in defense of a decision.” (1989, 18) Law does not only have a problem-solving character in a world of non-identical preferences. International law is constitutive of international relations as it determines actors and nature of interactions, sets the range of permissible goals, and mold decisions.

Reus-Smith (2004) emphasizes the mutually constructive relationship between law and politics, where international politics is constitutive of the institution of international law, and “law in turn structures and disciplines the expression of politics”. (2004, 4) Sharing Kratochwil’s idea of law’s distinctive style of reasoning, he suggests that legal realm is characterized by a discourse and argumentation based on pre-existing norms and particular practices of justification that delegitimize politics of self-interest. (2004, 38) In other words international law is a process of international interactions, defined by principled argumentation based on existing intersubjective norms and rules, and this

intersubjectivity is the source for legal legitimacy and obligation. International law is not static as written texts, but it “lives in the way which (*actors*) reason argumentatively about the form of these rules, what they prescribe or proscribe, what their jurisdictional reach is, what new rules should be enacted, how these relate to established rules, and about whether a certain action or inaction is covered by a given rule.” (Reus-Smit, 2004, 41)

More recently, two seminal constructivist studies that deeply engage with the meaning and functioning of international law in international relations are the studies by Brunnée and Toope (2010) and Adam Bower (2017). In a joint study by an international lawyer and an IR scholar; Brunnée and Toope (2010) tried to theorize what distinguishes legal norms from other international norms, and proposed an “interactional account of international law” based on social constructivist premises. According to this, the distinctiveness and value-added of law “lies not in form or in enforcement, but in the creation and effects of legal obligation.” (2010, 7) Legal legitimacy of a norm and the sense of commitment that create legal obligation is only possible if a social norm based on a shared social understanding has the criteria of legality (which are generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy and congruence between rules and official action) and is reciprocally and continuously practiced. “Practice of legality” comprise not only compliant behavior, but also legal argumentation, interpretation, contestation or enforcement measures (Brunnée and Toope, 2018, 436) and this gives international law stability and dynamism simultaneously. According to interactional account of law, we cannot talk about law without the coexistence of the requirements of legality and practice of legality simultaneously.

Building on the constructivist tradition, particularly of Reus-Smit (2004) and Brunnée and Toope (2010), Bower (2017) embraces an intersubjective social understanding of international law. Presenting a valuable contribution to the IR literature, he discusses in length what distinguishes international law from other social constructs that define appropriate behaviors and regulate international relations. He asserts that “transition to a legal form marks a turning point in the ontological status of a norm that invests a social standard with the distinctive affirmation of legal process, and consequently a greater

obligatory status.” (Bower, 2017, 35) According to Bower, similar to preceding constructivists, law as a discourse and argumentation not only influence outcomes, but also plays a constructive role on the legal structure by reifying legal practices; “law’s essence is rooted in a principled justificatory discourse in which actors debate the meaning and application of rules, in reference to previously articulated standards. These repertoires of ideas, behaviors, and language aggregate over time as precedents that structure international legal practice. In other words, law is defined both as a body of rules and a process of decision making.” (2017, 14) He attributes the power of law to its embeddedness in the wider international social system comprised of articulated principles, norms, rules and procedures. (2017, 30; Bower, 2015) This “nested” nature of law in intersubjective foundations give law its distinct social power, which comes with the legal form that ensures reiterated practice (2017, 35). Although the central concern of his book is formalization of norms as law through multilateral treaties, actually there is no reason not to further stretch his theoretical framework for the examination of same attributes for non-legal norms, which I argue may be equally “nested” in the wider international social system, hence may be subject to similar practices of legality.

Among the other constructivist scholars that follow a similar process approach to international law Johnstone (2003) examines the role of law by looking at the use of legal argumentation in international interactions. He emphasizes the distinguishing character of principled justificatory discourse, and the role of “interpretive communities” in determining the parameters of acceptable argumentations, which in turn build the intersubjectively accepted interpretations of legal rules. Therefore, international legal practice is not only a problem-solving effort among actors with predefined interests, but it is a constructive process that both creates a sense of obligation in actors, and reinterprets and/or maintains legal rules. “Legal discourse, similarly, is not simply the search for a negotiated agreement on the meaning and application of legal terms. Nor is it the search for some legal truth ‘out there’, waiting to be discovered. It is a practice that operates on the basis of common understandings and shared beliefs about the relationship governed by the rules in question. Thus interpretation of international law is the search for an intersubjective understanding of the norm at issue.” (2003, 449)

Sandholtz (2008; Sandholtz and Stiles, 2009) in his examination of norm change also embraces a constructivist approach to international law, according to which law is not only rules that determinatively guide and constrain actors, but also a dynamic process where the interpretation and application of rules perpetually evolves through purposive actions of contesting actors. Following his predecessor's emphasis on argumentation, he argues that legal argumentation based on precedents, analogies and consistency in like cases have a particularly persuasive nature in contestations. (Sandholtz, 2008, 106) However, falling short of a comprehensive examination of legality, he does not make a distinction between legal or non-legal norms, and assumes that analogical argumentation will be superior for any norm at any setting.

In general, constructivist IR's understanding of international law recognizes that law's functioning and influence in international affairs is not limited to the constraining and regulating effect of rules. It emphasizes the constructive and constitutive effect of interacting on the legal realm; that is with the distinct language of law and legal argumentative reasoning. Legality of processes as such owes its power to the intersubjective agreement on the rules and procedures of legal argument-making and inherent parameters for weighting opposing claims. However, while they successfully theorize how law is different from other means of international interaction as a constitutive social practice based on legal process, they do not question whether this distinct role of legality might prevail for non-legal norms, as well. As a common point in all examined accounts that view law as a process, process legality is an automatic outcome, a necessary consequence and corollary of a formalized law. Law is not perceived as a set of rules, but law as process is strongly and unavoidably attached to the existence of formal rules. Therefore, for the existing accounts, the constructive and constitutive power of legal process is peculiar to legal norms, and legal norms only. Recognizing and accepting the suggested constructivist mechanisms that law acquires its added value in interactive social practices, I argue that these practices do not necessarily require formal legalization of a norm, but under certain circumstances may exist for non-legal norms, as well. Likewise, legal norms might not bring about process legality automatically in all circumstances. Formal legality is not a determinant of process legality, and process legality is not necessarily peculiar to formal laws.

2.2.2. *Legality in Norm Contestation*

In the norm contestation literature, the role of legality on the contestation processes and on the outcomes of contestations have only very recently come to the attention of scholars. Lentis and Wunderlich (2018), argues that legal institutionalization of norm clusters protects the individual norms from changing through contestation by “mitigat(ing) the effects of applicatory contestation and insulate the individual norm cores from validity challenges.” (592) Brunnée and Toope (2019) examines the relationship between legality and norm robustness, and make a similar argument on the positive effect of legality. In so doing, they utilize their interactional account of international law, and suggest that “requirements of legality impose a discipline, such that contestation will normally be applicatory contestation” (2019, abstract), which does not lead to norm weakening. In other words, they suggest that the positive relation between legality of the contested norm and its robustness is through this imposition of an applicatory contestation. However, causing question marks about the solidity of this link, they also accept that applicatory contestations can be so severe to lead to norm destruction (2019, 76) and that validity contestation is not impossible for legal norms. (84)

Bower (2019), examining the contestation around nonimpunity norm and the International Criminal Court also supports the same mechanism. He suggests that legality of the non-impunity norm and its embeddedness in overlapping legal regimes not only provides specification of norm scope and an institutionalized forum for norm assessment, but also a legal rationale of argumentation (Bower, 2019, 91). He argues that legal institutionalization as such automatically brings about the use of international law “as a primary language through which actors discuss the (*International Criminal Court*) and the non-impunity norm.” (90) The dominance of legal language, in return gives the contestation an applicatory character, which is less damaging to norm resilience compared to validity contestation. In his conceptualization of legality, Bower does not make formalistic assumptions, but discusses where the power of legality comes from in line with his earlier study, and points to the language and practice of legality. However, he does not unpack the assumed links between legality and applicatory contestations, and between applicatory contestations and norm robustness, although he admits that in his

case study “were (*the applicatory contestations*) to endure, it would create a new permissive exception within the wider norm of nonimpunity and thus constitute a modest but important weakening of the norm’s universality.” (92).

A common point that these studies share is the association of legality (at least partially) with norm’s formal characteristics. In addition to that, they all presume a link that inevitably ties a legal norm with an applicatory type of contestation. This presumption falsely excludes validity contestations for legal norms, as it fails to see law as an “interpretive concept” in the Dworkinian sense, according to which contestation might well be concerned with what central values underpin international law (Çalı, 2009, 808). Such an approach does not fit to a more critical conceptualization of international law, which accepts that legal norms may be as indeterminate and incoherent as any social norm, hence are susceptible not only to applicatory contestations but also to validity contestations on their very core values and legitimacy. The functioning and influence of legality in norm contestations not only as a feature of the norm but also as a feature of the contestation process remains to be underdeveloped apart from applicatory-validity contestation framework.

Norm contestation literature in IR gets in a closer contact with international law scholarship than other parts of the IR literature. However, its engagement with the theoretical debates in international law regarding the particularities of law, legality, legitimacy and their effects is still limited. Limited engagement with international legal theory results with an inadequate understanding of norms and normative development in international relations, blind to nuances in the varying understandings of legality. In this study I embrace a theoretically informed conceptualization of legality, which draws on both the constructivist foundations and on a critical reading of legal process approaches, hoping to fill the existing gap in IR literature, which according to Sandholtz “clearly (...) needs further theoretical and empirical development.” (2019, 144)

In the next section, I will review the discussions in international legal theory in order to lay the foundations of the understanding of law I embrace in this study. In the final section, I will elaborate on my concept of process legality and the multidimensional

conceptualization of norm strength as novel analytical tools for an understanding of norm change through contestation.

2.3. International Legal Theory: The Way to a Deeper Dialogue

Questions regarding the nature and definition of law in general and in international law have been asked and replied by international legal theorists for decades. It is no doubt that simple-looking questions like ‘what is international law?’, ‘what is it for?’, or ‘how does it function in international affairs?’ are not only very difficult to answer, but are also determinative for the analysis of law and norms in international relations. Therefore, any attempt to scrutinize the effects of legality in international relations should start from a refined understanding of international law and a consistent conceptualization of legality.

International law theory is not a unified block about the nature of its subject; what is international law, how to define it and what to expect from it. Diversity of different understandings of law (and of international law) has been varied from Austinian positivism with the centrality of sovereign authority and enforceability, to Grotius and other naturalists’ emphasis on underlying common morality or reason that makes a norm legal.

Representing the post-realist rapprochement of international law and international affairs, policy-oriented theories have developed in international legal theory, shifting the theoretical focus from the nature of law to explaining its manifestations under different contexts and conditions. (Çalı, 2009, 807) Law is formed within the political context of international interactions and policy choices. So the relevant questions about international law are not about its sources, validity or intrinsic legitimacy, but about its effectiveness in pursuing social goals. Reconceptualizing the role and authority of law in international affairs, these approaches defined “law not as a set of rules, as in traditional approaches, but rather as a process of decision with certain peculiar features.” (Bianchi, 2016; 94). Scholars from the New Haven School, framed international law as an ongoing, authoritative decision-making process that is defined by the value-laden purpose of enhancing human dignity. (McDougal and Reissman, 1980; Reissman, et. al., 2007) By

taking policy to their center stage these theories accepted that law is not value-neutral, and legality does and should permeate in policies to achieve common goals of the society. This shift of focus away from the formal characteristics of law that puts it in a hierarchically superior and autonomous position against politics, towards its embeddedness in international interactions and communicative processes was a brave new perspective in international legal theory.

Scholars from international legal process school, shared the same view of law as process. Leaving the value-laden normative and prescribing aspects of the New Haven School aside, they tried to illustrate international legal processes, where operation and effect of law is determined mostly by extra-legal factors not limited to political and institutional constraints, and legality is used to justify or constrain political action. (Bianchi, 2016, 102; Chayes, Ehrlich and Lowenfeld, 1968; Chayes, 1974; Chayes and Chayes, 1993) Law is embedded in processes of managing international affairs, which functions through a justificatory discourse, monitoring and reporting systems, regular commissions and other operational instruments. (Chayes and Chayes, 1993; 1995; Koh, 1997; 2007; Higgins, 1994) In later versions, functioning of law in international affairs is accepted as a transnational process where public and private actors from domestic and international spheres interact “to make, interpret, enforce and ultimately internalize rules of transnational law” (Koh, 1996, 184). In this approach, similar to its predecessors, the formation, operation and authority of international law is not devoid of policy concerns, nor of the influence of international practices. Repeated interactions of different actors in an international arena evoke norms, force applicable interpretations, and generate legal rules. (Brunnée and Toope, 2012, 131). “Particular readings of global norms” are accepted and internalized by states and other actors only “through repeated cycles of interaction-interpretation-internalization” (Koh, 1997, 567-68).

With their theoretical openness to the interaction between international political context and actors’ policy concerns on the one side, and the interpretation and operationalization of international law on the other side, policy-oriented schools of international law provide critical analytical tools for understanding the role of law in international affairs. Law may not have a commanding, dictating or enforcing power in the international fora, but it

constraints, justifies and organizes actions (O'Connell, 1999), and this requires attention from political scientists as an explanatory factor in international affairs. Reconceptualizing law as a process, shaped by involved actors, repeated interactions, policy choices, and political contexts, rather than a set of intrinsically authoritative rules opens up new perspectives in this endeavor.

Apart from the policy-oriented approaches that embrace law as process, another school of thought that needs to be reviewed for developing a conceptualization of legality fit for an interdisciplinary understanding of law-politics interaction in international affairs, is the critical school of international law. Rejecting the traditional accounts of international law, which may crudely be read as giving it an objective, autonomous, neutral, and just problem-solving position superior to dark and dirty sphere of politics, critical legal theory embraces the intrinsic political nature of law and legal process. Politics is inherent to law; “moral, epistemological and empirical assumptions (*are*) embedded in any particular legal claim, ... which is made to advance the interests of some identifiable political grouping.” (Tushnet 1991, 1517) As law is indeterminate it is highly manipulative, and this puts more powerful actors with greater means for disseminating persuasive arguments in a structurally advantageous position.

Pointing out the fact that competent international lawyers can and do draw contradictory conclusions from the same norms, or may make contradictory legal interpretations of the same written texts, critical legal scholar Koskeniemi argues that international law is structurally indeterminate by nature. (Koskeniemi, 2005) According to Koskeniemi (2005), international legal practitioner works in a dilemma between justifying law based on what states do/accept, hence being “apologetic” of state interests and existing power relations, or based on a superior normative ideal completely independent from state consent and interests hence being “utopian”. These two contradictory faces of international law are equally valid, probable and inescapable in international legal practice. International law therefore, permits the formation of a legal argument from either side, advocating opposing positions in an equally legal manner. Adoption of a position in a legal dispute and the way law is to be used to support/justify this position is a completely political choice that cannot be made based on legal premises alone. Policy

preferences and ideological predispositions are inherent to any legal interpretation and argumentation. In his book, *From Apology to Utopia* (2005), Koskeniemi shows how legal process can be used to advocate or justify all of the conflicting contradictory positions in international disputes in an equally legitimate way. “International law (is) a language that was constructed of binary oppositions that represented possible, but contradictory responses to any international legal problem.” (Koskeniemi, 2011, 298) Legal practitioner may defend any position legally, because modern international law is intentionally structured to be substantively indeterminate. Law cannot substantively resolve conflicts with ready-made solutions, but formally outline the procedures and principles to reach substantive solutions contextually. Legality is not in the content, and cannot determine the substance of neither the arguments nor the outcomes of contestations.

This substantive indeterminacy leaves legality as a certain language and rationality that is a recognizable technical endeavor, without direct predictability on content. “The legal argument inexorably, and quite predictably, allowed the defense of whatever position, while simultaneously being constrained by a rigorously formal language.” (Koskeniemi, 2011, 298) Therefore if we are to search for legality in the international processes, it will not be found in positivist forms or in an intrinsic quality that uphold justice and equity. Rather, it will be in the legal style that legal professionals use (2011, 301); presence or absence of legal discourse and argumentative reasoning.

Legal way of doing things in international relations according to critical scholars like Koskeniemi and Kennedy is attached to a “linguistic style” and a legal rationality, where a normative proposition is tried to be established “by linking it to a factual proposition that we already assume to be true.” (Koskeniemi, 2011, 301, 303; Kennedy 1989) According to this, international law is a discourse, characterized by a dialectical process and contradictory substantive content. (Bianchi 2016, 145) Versions of this view, that has its roots in post-structuralists thinkers like Derrida and Foucault as well as Habermasian critical social theory, has been accepted by other scholars from different schools of thoughts (Sinclair, 2010). Constructivist international relations scholars shares the same linguistic focus that designate international law as a particular style of reasoning with a

constitutive effect on the intersubjective world (Kratochwill 1989), or as a discourse of institutional autonomy and language of justification (Reus-Smit 2004, 5) in international interactions.

Legal discourse and reasoning is a technical endeavor into which international lawyers are socialized throughout their training. (Kennedy 1983; Kratochwill 1989) It entails a particular rhetoric and method of argument making, with references to legal texts, documents, and principles; use of analogies and precedents; involvement of legal institutions and dispute-settlement authority of designated third parties; and construction of legitimacy claims through use of principled ideas and intersubjective beliefs and assumptions (Johnstone, 2003). To say that law is political and indeterminate, does not mean that legal processes with this particular reasoning are inconsequential and epiphenomenal. Although legality in international relations is most of the time not decisive or determinative of outcomes, it is constraining, constitutive and constructive of meanings, identities and relationships. Touching on and building upon all of these insights from international legal process and critical legal theory, Monika Hakimi brilliantly puts why we should care about international law: “a lot of what makes law worthwhile, both domestically and at the international level, is that it commits us ‘to a certain method of arguing about the exercise of public power.’ International law invites people across national borders to communicate in relatively constructive ways about what is happening in the world, why it is happening, and whether anything should be done about it. This discursive practice is not, as some suggest, just cheap talk, a means for achieving concrete ends, or a smokescreen for reinforcing positions of dominance. It has independent, if somewhat intangible, value.” (Hakimi, 2020, 1286)

The intellectual depth and resourcefulness of the discussions in international legal theory bear an underutilized potential for IR scholars, especially of international norms. IR reluctance for engaging in a deeper dialogue with international law except for some recent studies, entraps the works on international norms within a limited understanding of legality. However, more nuanced and qualified grasp of law and legality may present insights for the role of law in international affairs and its mutually constructive interaction with international politics.

In this study, I introduce the conceptualization of process legality drawing on the constructivist foundations and a critical reading of legal process approaches, and as my research question I ask “how does legality effect norm strength in norm contestation processes?” I make two major arguments; first that use of legal means, discourse and reasoning in norm contestations (which I label as process legality) is not a necessary corollary of the contested norm’s legal characteristics (which I label as formal legality). Secondly and more importantly I claim that process legality in norm contestations have a positive influence on norm strength, preventing the erosion of the norm due to the challenges of the contestation.

2.4. Two Novel Conceptualizations

2.4.1. Process Legality

Policy-oriented legal theories such as international legal process school, reconceptualize law as embedded in international practices, and thereby show how international law organizes, enables and justifies international action. IR constructivists have deepened this approach by emphasizing the generative role of international law, constructing actor identities and preferences, and setting the game field. With their focus on rhetoric and the theories of communicative action, they showed the distinctive power of legal arguments in creating sense of legal legitimacy and obligation. On the other hand, constructivists concentrating on the constructive influence of legal discourse and reasoning, underemphasize the role of structural power imbalances and to what degree law may function as another means of ordinary politics (Sinclair, 2010; Kurki and Sinclair, 2010). Insights from critical legal theory complements this gap, as it puts light on the inherent politicalness of law and legal process with its emphasis on law’s indeterminacy and incoherence. Building a synthesis of the insights from these three approaches to international law, in this dissertation I conceptualize legality as a process defined by a particular discourse and argumentative reasoning. Diverging from existing accounts, I detach this discursive and argumentative process from formal legal characteristics of norms (depending on one’s theoretical position, these formal characteristics may come from formal enactment requirements or some internal values). I argue that what makes a

norm formally legal does not necessarily guarantee process legality, and process legality is not possible uniquely for formal legal norms. Hence the value-added of law as a constraining, constitutive and constructive force in contestation processes is not in the formal legal characteristics of norms, but in the legal process.

In almost all IR studies engaging with law and legality, as well as in the traditional theories of international law formal legality of a norm and process legality in the handling thereof are natural corollaries of each other. This is the general position of liberal institutionalist studies such as the legalization project by Abbott et. al (2000), constructivist norm life cycle model (Finnemore and Sikkink, 1998; Risse, Ropp and Sikkink, 1999), as well as (more implicitly) of contestation studies that has dealt with legality (Brunnée and Toope, 2019; Bower, 2019). Therefore, formal legality according to these scholars and others, is where the value-added of law lies in terms of inducing compliance and maintaining norm resilience. Drawing on the political nature and indeterminacy of law as a discourse used in international interactions, the concept of process legality proposed in this study as a novel analytical tool for contestation studies, can emerge independently from formal legality. The variance of the use of process legality in the examined case studies proves that legal norms does not guarantee process legality, and process legality does not necessarily require a legal norm. Rather, process legality in contestations is a choice of contesting actors and is associated with the positive direction of norm evolution regardless of the underlying logic of action (March and Olsen, 1998) behind such choice. The dense web of international legal system with intersecting regimes, universally valid principles, and global institutions permits the utilization of legal method, discourse and argumentation even for non-legal norms. Within the understanding of law as a process, legal logic, i.e. the overarching priority of legal legitimacy and the rule of law, can exist in the absence of formally legal institutions and documents. Legality as a language/method/rationale/technique may gain prominence with increased formal legality. However, we can see in the analysis of the non-legal norm of human protection, that it may find indirect channels.

Legal process is not finding and applying the right rule to an objective fact. It is a constitutive and constructive process, through which facts and norms acquire their

meaning and operationalization. Therefore, process legality has a dual character; on the one hand a structural influence that condition and discipline the interactions and effecting the outcomes, and on the other hand as a social construct that is constituted, maintained, transformed or reified by the reiterated practices of legality. In contestation processes, process legality functions as the common language, history and culture required for intersubjective understandings that are indispensable for normative development. It plays a structural role to unite contesting actors on the shared ground of pre-existing norms, principles, decision-making parameters and assessment procedures. and thereby make corresponding claims meaningful and perceptible. Process legality, “informs the respective decision-makers about the nature of the interaction ... sets the range of permissible goals which the actors can pursue; it specifies the steps necessary to insure the validity of their official acts and assigns weight and priority to different claims.” (Kratochwil, 1989, 251) Therefore it helps the formation of a “reasoned consensus” (Risse, 2000, 2) that contribute to a renewed inter-subjectivity. As law is grounded in the intersubjective social agreements on pre-existent norms and procedures, use of legality by contesting actors confirms and strengthens these agreements, further embeds actors to legality, and reinforce the priority of legal legitimacy over other legitimacy claims. Process legality in a norm contestation constructs and/or reinforces the bounds of the norm with this common intersubjective ground, contributes to the perception of legality, set a precedent strengthening the prospects of legal process in the future interactions regarding the norm. Therefore, legal process has a self-reinforcing effect, which reflects as a norm-strengthening factor in contestation processes and a reaffirmation of the rule of law.

Process legality does not occur automatically, even for the most institutionalized and embedded legal norms. Although certain norms, certain institutional settings, certain discussions might constitute better opportunities for the involvement of legal institutions and use of legal discourse and argumentation, in the final analysis legality turns into legal practice through the active initiative and effort of actors. Agency plays a critical role both in taking the strategical decision to defend preferences on legal grounds instead of taking a political or moral position, and in practically making the legal arguments and rebuttals in the relevant diplomatic settings. In line with the critical legal theory law is

indeterminate. More than one possibly opposing rule might be applicable to a specific situation and past legal practice might provide a range of contradictory precedents. Therefore, legal agents have a direct role for cultivating a particular interpretation of referenced rules by finding analogies and claiming congruence with precedents, in order to fit the law to the desired policy position. This critical role of agency, however is not unlimited, but bound by existing intersubjective agreements on norm meaning and practice; shared rules, principles and decision-making procedures inherent to legal sphere; legitimacy perception of the world community, and the constitutive power of legal argumentation that entraps actors (Keck and Sikkink, 1998; Schimmelfennig, 2001) altering their preferences and influencing the nature and substance of future interactions.

Parties to a contestation have unfixed preferences that they pursue through various means. Depending on the context and conditions of the particular contestation these preferences might be based on material interests (logic of consequences) or based on ideational reasons such as a genuine belief on the righteousness of their interpretation (logic of appropriateness). The choice for a legal or non-legal argumentation is a contextual one conditional on the nature of the contested norm, of the immediate subject of contestation, institutional setting, available instruments and political leverages, ideational and political positions of contesting actors vis-à-vis each other, and many other factors. Not categorically denying that law might have an added value in argument-making, according to which legal arguments are considered more legitimate or more powerful by actors, questioning the accuracy or reasons of this effect is not an undertaking of this study. In this study I assume that choice for the nature of argumentation is context-dependent. Contesting actors may choose to make legal or non-legal arguments based on their rational calculations for the best way to forward their preferences in that particular instance. The reasons why a particular actor chooses to make a particular form of argument are also beyond the limits of this study, but I accept that legality of the contested norm is among these factors that influence the choice for process legality, although it does not by itself determine this choice.

Likewise, legality of the processes does not decisively determine the contestation outcomes. In light of the critical legal thinking, international law is indeterminate and

flexible. Its substance, meaning and limits are subject to interpretation and open to manipulation by different actors pursuing their preferences. Therefore, law does not provide ready-made answers to contestations, but it acquires a meaning and authority through legal processes. We cannot speculate on which particular norm interpretation will prevail by looking only at law or legal process. It is determined by a host of other factors not limited to structural power hierarchies of contesting actors and the political context. Not all actors are in an equal position in arguing for a particular norm interpretation in contestation processes, and legality does not necessarily level these inequalities. To the contrary law is embedded to structural power hierarchies both in its creation and its operation. Therefore, both the contestation process and the outcome is always (partially) politically determined. However, this does not mean to say that legality is epiphenomenal. Although it does not decisively determine substantive outcomes of contestations, it influences them as it conditions the acceptable practical and rhetorical actions. Legal language and reasoning, which is constructed upon a dense network of intersubjective rules and principles, shared understandings, and accepted procedures for weighting conflicting claims discipline the contestation processes. This makes a renewed agreement on the norm more likely and prevent a complete decay of the contested norm.

Upcoming chapters that empirically examine *non-refoulement* and human protection cases will demonstrate that process legality prevents norm weakening in contestations, if not lead to norm strengthening. I contend that it contributes to norm strength, as it serves to create a common, concrete basis for contesting parties to build upon for the further evolution of the norm. It anchors the norm to the existing international legal system, invoking the shared consciousness and intersubjective understanding of argumentative relevance embedded to it, even when the norm itself lacks formal legal characteristics. Process legality dictates its own rationale, method, morality, politics and instruments within the confines of law, thereby protecting the normativity (if not necessarily the substance of the norm) during contestations.

Process legality is defined as the use of legal institutions, discourses and argumentative reasoning, as opposed to political institutions and argumentations in a contestation process. Legal institutions here are the institutions with the authority of norm

interpretation, implementation, dispute-settlement and sometime law-making. Courts or ad hoc tribunals are legal institutions as well as quasi-judicial institutions like delegated committees of conventions such as the Human Rights Committee. UN General Assembly or G7 on the other hand are political institutions. Legal argumentation is accepted to have two parts; the first one is the legal discourse with its own jargon and specificities that renders the issue as a technical one and creating a sense of specialization and independence from the daily political struggles. The second aspect of argumentative reasoning is the logic of legitimate and justificatory claim-making and assessment, through use of references to existing legal norms and principles, legal and semi-legal documents, and to the precedent incidents as a peculiarly legal strategy. This kind of an argumentative strategy demarcates the game field and its limits as well as the nature of accepted arguments and justifications. Throughout the case studies, this operationalization will be used, and the discourse and reasoning of the actors actively taking part in the contestation will be examined with reference to a) their language i.e. whether they use words like ‘rights’, ‘obligations’, ‘duties’ and ‘responsibilities’, suggesting a legal logic; or words like ‘preferences’, ‘moral necessities’, and ‘interests’ that suggest a political tone; and b) logic of their justifications, i.e. whether they refer to international legal documents and principles, to legal precedents and legal institutions or else to subjective political preferences in justifying their positions.

2.4.2. Multidimensional Norm Strength

As reviewed at the very beginning of this chapter, two groups of behaviorist and reflexive studies on norm dynamism in constructivist IR literature had differing understandings of norms leading to different understandings of norm change. In mainstream constructivist works norms, once created, exist autonomously with a fixed, self-evident meaning. Therefore, norm strengthening or weakening is about the number of states that accept the norm, and the degree of their internalization and compliance. In this behaviorist logic of norm strength, the more states accepting a norm more deeply, the stronger the norm becomes. (Glennon, 2005) The second wave critical constructivist works problematize the meaning of norms as they are differently interpreted by different actors at different times. These are ‘reflexive’ approaches to norm change as the

intersubjective and ever-changing meanings and clash of norm interpretations lie at the basis of norms' internal dynamism. Changes in norm strength here, cannot be taken isolated from changes in the content and limits of the norm's "meaning-in-use" (Wiener, 2004). However, there is not yet a norm strength conceptualization in the literature to cover both of these aspects.

This study brings these two pillars of norm strength together in a single norm strength conceptualization for the first time, by using three dimensions; meaning, i.e. the change in how broadly and precisely the norm is interpreted; global reach, i.e. how many of potential addressees reject or accept the norm; and authoritative power, i.e. how much do its addressees feel the urge to follow it.⁵

In the literature, norm strength/robustness/resilience has been conceptualized in different ways, concentrating on the degree of compliant state practice (Glennon, 2005; Hyde 2011; Finnemore Sikkink, 1998), level of rhetorical acceptance and justificatory use (Hurd 2014; Clark et. al., 2018), or most generally a combination of the two. Kratochwil and Ruggie (1986) assert norms are "counterfactually valid" so non-compliance would not be enough to assess norm strength without "a host of other factors, not the least of which is how the community assesses the violation and responds to it" (765). Cortell and Davis (1996) argues that discourse of authoritative actors as well as national institutionalization of the norm determines the degree of norm's influence. Price (2006) studying the customary law concept in international law, refers to the necessity of both state practice and the expression of belief in norm's legitimacy. Similarly, Sandholtz and Stiles (2009) argue that state practice alone is not an indicator of norm strength, it should be assessed together with how practice is perceived and justified in challenge-reaction processes. Panke and Petersohn (2012) argue that norms degenerate if "non-compliance becomes the rule rather than the exception" due to repeated unsanctioned practice and the way it is discursively framed. More recently, Deitelhoff and Zimmermann (2019) suggests concordance, third party-reactions to violations, compliance and implementation

⁵ This conceptualization of norm strength is not designed to give autonomously explicative numeric values, but to show direction and nature of relative change in norm strength through time.

as the indicators of norm strength. Simmons and Jo (2019) in what they call the “diversity approach” also combine discourse and practice, and argue that “norms are strongest when supported by a broad range of actors with varying motivations, interests, power resources and normative status.” (Simmons and Jo, 2019, 20)

All of these conceptualizations, even the most complex ones used within a dynamic account of norm evolution, equates norm strength with its behavioral influence, disregarding the factors that are intrinsic to norms, such as its content, scope or precision. This constitutes a long-existing gap for the contestation literature which recognizes norms’ internal dynamism, yet cannot account for its association with norm strength.

The multidimensional account of norm strength proposed in this dissertation addresses this gap with the inclusion of meaning as a component of norm strength for the first time. Such an approach does not only provide a more comprehensive analysis of norm strength change through time. It also unveils how each dimension changes separately, being differently influenced from evolutionary pressures of contestation processes. It permits the examination of the interactions among different dimensions, demonstrating the possible trade-off between them (one dimension strengthening as a consequence of the weakening in the other dimension). As such multidimensional conceptualization provides a new analytical tool to explain norm resilience, in the face of never-ending challenges and wearing out effects of contestations.

The first aspect of norm strength; meaning is difficult to measure, yet still vital to make inferences about the existence and direction of overall change. Meaning is different from a textual content. “...Even if we know the words and speak the same language, a word in and by itself provides insufficient information about its meaning.” (Wiener, 2009, 178) Meaning requires an interpretive approach to understand the meaning-in-use, which is the socially recognized, culturally validated meaning actually accorded to the norm in its interpretations and application in a particular context and temporal period. (Wiener, 2009) Therefore variation in the meaning dimension does not necessitate a change in its wording of national and international documents. The way it is referred in the discourses and the

way it is politically and judicially applied to practical cases would give the information of how the norm's content and scope are interpreted.

Interpretation of meaning is by definition not a variable that can be given ordinal values. In order to turn it into a variable of which change can be expressed in positive or negative directions, we may decompose meaning as precision, content and scope. We may rationally assume that the more precise a norm is, the stronger its meaning will be, leaving less space for contestation and having a clearer say upon state behavior. Precise expressions and consistent practices takes away the vagueness of norms that makes them inevitably contestable (although arguably more widely acceptable). Content of a norm may be understood in terms of its comprehensiveness; a narrower or wider version of the norm might be embraced according to the interpretation of the actors. To solidify this with an example, the content of the norm on the prohibition of torture, as defined in the UN Convention on Torture is “any act by which severe pain or suffering, whether physical or mental” intentionally inflicted on a person for stated purposes, with the consent of public officials. (CAT) When US interprets it (as suggested in the 2002 Bybee memo) as “physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death” (Sikkink, 2013, 150-51), this interpretation clearly narrows down the content of the norm by making it more difficult to name an act as torture. Therefore, we can talk about an attempt to weaken the norm through narrowing down its meaning. The third dimension that should be used in evaluating the direction of change in the norm meaning is its scope. The coverage of the norm may be narrowed down by changing the boundaries of the applicable cases; in terms of for whom the norm is valid and under what conditions. Qualifications, reservations and exceptions added to the norms are of such instruments to narrow down the applicable limits. Going over the same example, interpreting the prohibition on torture as being valid only for war prisoners, excluding illegal combatants, or trying to make a case for non-responsibility in extra-territorial cases

are attempts to narrow down the meaning of the norm by shrinking the boundaries of its applicability.⁶

Second aspect of norm strength; the global reach is the extent to which the norm has diffused or retracted globally. This aspect of norm change reflects the diffusion literature's concerns for wider formal acceptance of the norm. It can be influenced from the other two aspects, prescriptive power and meaning. In the analysis, global reach may be operationalized as the supporters of the narrower versus the wider interpretation of norms during and after the contestation periods. When this aspect is singled out, it does not give information on the depth of the formal acceptance. However, in combination with other two aspects it completes the picture, showing change in the width and depth of an international norm.

The third aspect of norm strength, which is norm's authoritative power refers to the degree of the felt obligation with regards to the prescriptions and proscriptions of that international norm. This perceived obligation is linked to norm's legitimacy in the international law literature, although the definition thereof might vary. (Brunnée and Toope, 2010; Bodansky, 2013) Perceived obligation is different from the formal legal obligation stated in the wording of a text and its formal binding nature. It is also different from the "capacity of a particular international law to impose duties or to confer powers on state officials." (Çalı, 2015, 11) Regardless of the level of legality, the degree of the imperativeness of language, or the capacity to impose pre-emptive duties to domestic officials, any norm might be found legitimate to a higher or lower degree by its addressees, and this would influence the "compliance pull" (Franck, 1990) that they feel.

⁶ It is accepted that such conceptualization of meaning makes it impossible to incorporate some aspect of norm interpretations that are unoperational, such as aim or framing.

Table 2.2: Conceptualization and Operationalization of Norm Strength

Dimensions of Norm Strength	Operationalization
Authoritative Power	Frequency of references; reactions to violations
Global Reach	Number and diversity of norm accepting states
Meaning	Precision: How detailed is the norm's meaning-in-use Scope: How wide is the universe of applicable cases Content: How wide is the coverage of norm's substance

Reviewing the legitimacy studies Bodansky (2013) suggests that there are two general conceptualization of legitimacy; normative legitimacy which is based on the qualities of the ruler or the rule, and descriptive legitimacy which is based on the attitude of the relevant audience towards an institution or a norm. This study embraces a descriptive understanding of legitimacy. Legitimacy as a concept related to actor perceptions is a dynamic one that may vary according to different actors, different socio-political and normative settings, different political systems, or different times. As it is not about some inherent characteristics, but about perceptions, it is open to change through contestation, communication and interaction. Bringing this dynamic notion of legitimacy together with the tradition that associates legitimacy with the sense of obligation that law creates (Franck, 1990; Brunnée and Toope, 2010), one may look at the legitimacy traits to understand norm's prescriptive strength. Descriptive legitimacy, i.e. norm's authoritative power can be observed by looking at the frequency of rhetorical commitment to the norm, its use as a justificatory discourse, the reactions given in cases of violations, and efforts to avoid being accused of violation.

State compliance is excluded from the conceptualization of norm strength, because of the difficulty (if not impossibility) of scientifically determining the real normative motivation of compliant behaviors. If the compliant behavior is the consequence of a norm's

authority, we can see that only by looking at the discursive use of norm in the explanatory statements and justifications. On the other violation or non-compliance is not by itself a demonstrator of norm weakness. A norm as strong as “do not kill anyone” is being violated everyday not only by individual murderers but also officially by state hand in wars and interventions. However, the fact that both individuals and states have been killing people since times immemorial did not prevent the dominance of the norm in all moral and political systems around the world. This is because norm violating actions have never been approved or accepted per se. Murderers are criminalized and punished in all domestic legal systems, and states have to give all the effort to somehow justify their actions that result in killings. Therefore, the strength of the norm cannot be visible in compliant or violating actions, but only in the justifications of and reactions to these actions, which is already covered in the authoritative power dimension of the norm strength conceptualization.

In the next two chapters, I will utilize these concepts in the analysis of the evolutionary trajectories of the legal norm of *non-refoulement*, and the non-legal norm of human protection respectively, using the cycles of contestation model.

CHAPTER 3

EVOLUTION OF NON-REFOULEMENT IN EUROPE

3.1. Introduction

In order to analyze the role of legality on norm strength in contestation processes, this chapter examines the legal norm of *non-refoulement* in Europe. It uses the cycles of contestation framework to analyze the dialectical mechanisms that lead norm evolution through ongoing tensions between the state-centric restrictive interpretations and protection-oriented broad interpretations of the norm. The examination of subsequent contestation cycles first on the geographical limits of state responsibility (interception at sea) and then on the substantive standards of the norm (safe country concepts) shows that process legality in contestations leads to relative improvements in the restrictive interpretations, preserving, if not strengthening the constraining power of the norm of *non-refoulement*. It is therefore, concluded that behind the big picture of the current exclusionary and externalizing asylum policies, and the ongoing dominance of the narrow and restrictive interpretation of *non-refoulement* the norm actually evolves in a positive trajectory giving place for optimism.

3.1.1. The Norm of Non-Refoulement

Non-refoulement is one of the most established norms in the area of refugee protection. In the European context it is a well-institutionalized legal norm founded upon two tiers of refugee and human rights laws. It is enshrined in many international and regional conventions to which all European states are party to, not limited to Art. 33 of 1951 Refugee Convention, Art. 3 of CAT, Articles 6 and 7 of ICCPR, Art. 3 of ECHR, Art. 19 of EU Charter of Fundamental Rights, and recognized in various EU legislation like the Asylum Procedures, Qualifications and Return Directives. Yet, despite its legal institutionalization it has been subject to contradicting interpretations and contested practices that play a crucial role in norm evolution through the construction and

reconstruction of its ‘meaning-in-use’. Europe is an important case not only because of its significance in the history of asylum and refugee protection, and its position as a lead migrant destination, but also because of the role it plays as a hub of dynamic norm development. Moreover, cases on European states constitutes by far the largest portion of the case law on *non-refoulement* produced in the global institutions like UN Treaty Bodies. (Çalı, Costello and Cunningham, 2020) Examination of the cycles of contestation in the evolutionary history of the norm demonstrates that formal legal nature of the norm or its entrenchment in international law does not ensure an uncontested implementation, nor does this hard legal nature prevents continuous evolution of the norm.

Literally meaning ‘not returning’, the norm of *non-refoulement* tries to ensure a minimum core of refugee protection, where no one is returned back to the risk of persecution without their asylum request assessed. It took place in 1951 Refugee Convention, the cornerstone of international refugee law, as its foundational principle. According to this; “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (Art. 33(1))

Read together with the definition of refugee in Art. 1(2) of the same Convention⁷, Art. 33 makes it pretty clear that no contracting state can expel or return someone who is outside of the country of his nationality and does not want to go back owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a

⁷ Art. 1(2): Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

particular social group or political opinion back to territories where his life or freedom would be threatened.

However, Art.33 leaves as many aspects of the *non-refoulement* responsibility in the dark, as the ones it sheds light on. Questions regarding who exactly is entitled for such a right, what constitutes the limits for the risk of harm, where does state responsibilities begin are all subject to contestation. With due respect to the importance of all of these questions, this chapter will concentrate on the contestations around where the state responsibility for *non-refoulement* begins geographically, and what safety standards should be ensured for a lawful *refoulement*.

Seeming simple as they are, there are a broad spectrum of answers that may be given to these questions. Narrower interpretations tend to restrict the applicatory limits and content of the norm and thereby empower the states' discretion and minimize responsibilities. Broader interpretations on the other hand, expand the applicatory limits of the norm, strangling state discretion for the sake of more protection to more number of refugees. The contestation between these two approaches in the European context demonstrates itself in control-oriented vs protection-oriented visions and policies on immigration and asylum issues. In this chapter, for purposes of maintaining analytical clarity I will assume idealized positions of European states and the European Commission embracing the narrow interpretation of *non-refoulement* with a state-centric, control-oriented, restrictive approach; and on the opposite side refugee organizations embracing the broad interpretation with a protection-oriented approach⁸. These interpretative variations have survived through several cycles of contestations in the near past, arguably gaining a little more clarity and determinacy at every step. The evolution of the norm and its interpretations, through these contestations, however, is still on the move.

⁸ I am aware that there is great variation among and within European states with regard to the approaches and preferences to asylum and migration issues, and that it is problematic to assume fixed and standardized interests as such. However, I opt for such idealized positions for its analytical utility in simplifying the examined processes and emphasizing the focus on the contestation of contrasting norm interpretations.

The literature on *non-refoulement* in Europe agrees on the dominance of narrower interpretations with restrictive policies, migration prevention logic, and a lack of rights-based approaches. Asylum policies are not rights-oriented but are shaped with the primary concern of deterring irregular migration and minimizing European engagement with refugees, and this results with inadequate protection of refugees and asylum seekers. (Gilbert 2004; Bulley 2017; Trauner 2014; Zetter 2014; Lambert 2014) Most of the studies focus on the EU policies and practices, and their outcomes, saying little about the mutually constructive interaction between law and state practice. Scholars such as Sy, Trauner or Diez examine the deficiencies of protection in restrictive state policies, and draw attention to the gap between EU laws and actual state practices (Trauner, 2016), violations of *non-refoulement* principle (Diez, 2019), and detrimental outcomes of restrictive approaches such as the risk of chain *refoulement* (Sy, 2015). O’Nions (2014) suggests that the problem regarding *non-refoulement* is not only in practices and their outcomes, but also in the EU policies that are becoming ever more restrictive, concentrating on deterring all irregular migration, disregarding human rights obligations. Costello, studying the safe country concepts, evaluates first Asylum Procedures Directive of EU for “embodying lowest common denominator lawmaking at its worst” (2005, 37). In her 2016 study, she acknowledges the improvements in the 2013 recast directive (Costello, 2016). However, she suggests that although “the standards articulated in EU law in the recast Asylum Procedures Directive are appropriate, the institutional structures at national and particularly at the EU level, seem likely to politicize (*safe country*) determinations” (2016, 621) hence may have fatal consequences for refugees. (2016, 609). On the more optimistic side of the debate, Thielemann and El-Enany (2010) objecting the pessimistic criticisms against EU legislations, argue that rather than leading to lowest common denomination EU asylum law has actually upgraded the asylum laws and refugee protection standards in some of the member states. (Thielemann and El-Enany, 2010, 216; Thielemann and El-Enany, 2009) As valuable these studies are in terms of explaining the influence of restrictive interpretations of the norm on state practices and their outcomes, they disregard the fact that policies and practices are not only dependent variables that are effected from norm interpretation, but they are also independent variables constructing and constituting the norm’s meaning-in-use.

Implicitly touching upon this relationship Wiesbrock (2010) argues that the “race to the bottom” among member states, and EU’s focus on restrictive policies has not only practical consequences for refugees, but also has detrimental effects on the rights-oriented approaches of migration control. Cholewinski (2006) similarly suggests that restrictive policies and preventive strategies in European migration policy, generally undermines human rights and its achievements. Klepp (2010), with a legal anthropological perspective looks at border practices in the Mediterranean and argue that the legal basis and formal regulations on refugee policies in the EU are being formed through the practices and *fait accompli* of the bordering countries, and such adaptation of legal norms in local settings would negatively influence the future of *non-refoulement* norm in Europe.

Studies with a more dialectical approach, examining the change of *non-refoulement* practices in interaction with international law come up with more optimistic conclusions regarding the evolutionary trends. Kim (2017), who examines interception at sea practices in Europe concludes that evolved jurisdiction understanding in human rights law and ECtHR jurisprudence have “revived the forgotten principle of *non-refoulement*” in Europe and changed state practice for the good. (Kim, 2017, 70) Hathaway and Gammeltoft-Hansen (2015), recognizes the same improving effect of law on restrictive state policies. They argue that the efforts of states to insulate themselves from their legal liabilities while at the same time deterring refugees are hampered by the international law through developments in concepts like jurisdiction, shared responsibility or responsibility of aiding and assisting. (Hathaway and Gammeltoft-Hansen, 2015) Therefore, with the help of international law, a shift is expected away from the “deterrence paradigm” that minimize costs and legal liabilities for European states. (Gammeltoft-Hansen and Tan, 2017) These studies provide an understanding of norm evolution in a dynamic relationship with practices and counter-practices, where international law contributes to norm-strengthening. However, a systematical analysis of the contestation processes and the way law is involved in these processes still remains under-examined.

This chapter contributes to this literature with the examination of the role of legality on the norm evolution processes, as well as an analysis of the change in the multiple

dimensions of norm strength. For this purpose, the contestation on the limits of state responsibility (interception at sea practices) and the contestation on the substantive standards (safe country concepts) are scrutinized with a focus on the legal/non-legal nature of contestation processes. The influence on norm strength is evaluated by comparing the pre- and post-contestation meaning-in-use with reference to changes in three dimensions of norm strength; meaning, global reach and authoritative power. This chapter aims to bring a new perspective to the literature with its unique narrative of norm evolution based on the dialectics of narrow and broad interpretations, its analytical focus on process legality, and a segmented norm strength analysis.

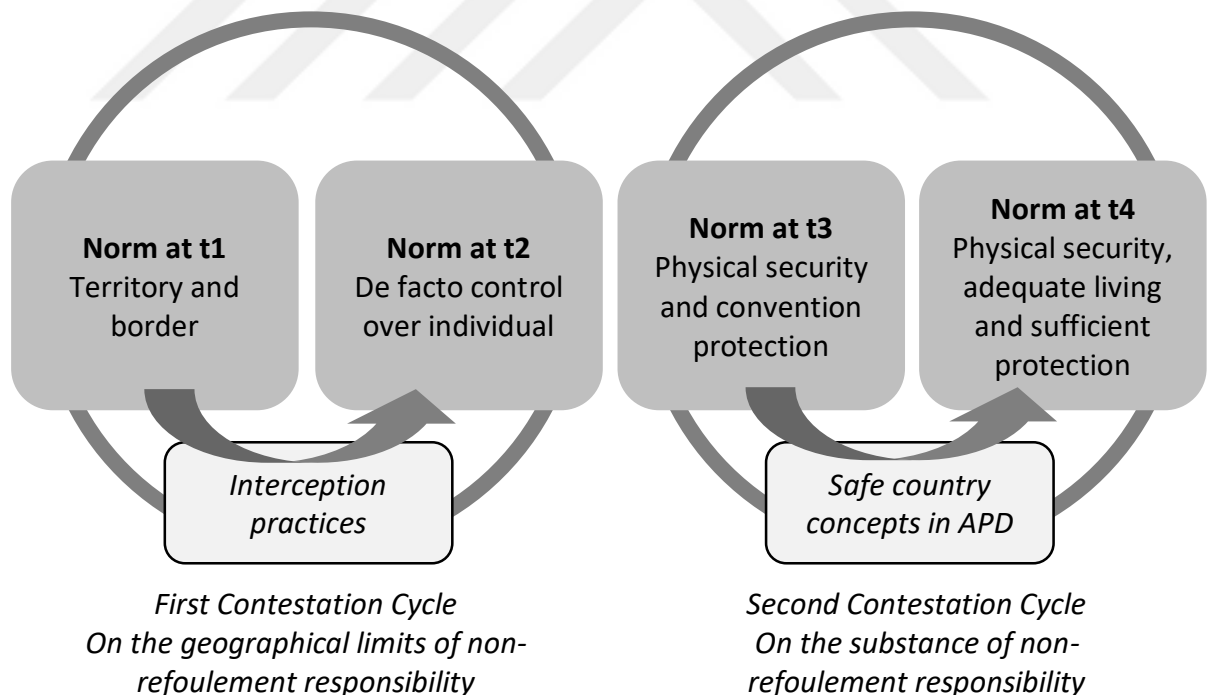
3.1.2. Chapter Outline

In this chapter I will concentrate on two contestation cycles on two prominent aspects of *non-refoulement*, of which interpretations have determinative effect on migration and asylum policies and acceptable state practices. The first one is the contestation around geographical limits of *non-refoulement* responsibility that has been aggravated with the rising interception practices in the Mediterranean in 2000s, and broke out with the peak of crisis in 2009. Interdiction at sea constituted an important part of state efforts to prevent irregular migration. According to this, preventing the incoming refugees on the way before they could reach the state's outer frontiers would not be a breach of *non-refoulement* as the refugee boat in the middle of high seas was obviously not in a state's territory, neither at its frontier. The contestation process on the issue of interdiction at the high seas (2009-2012) reflected a predominantly legal nature, with the involvement of ECtHR and both Italy and the refugee community justifying their positions legally with reference to legal principles and precedents. At the end of this cycle of contestation, came an important change to the interpretation of *non-refoulement* responsibility, detaching it from the state territories and instead linking it to state jurisdiction, which may be based on the exercise of public duties on a territory, or exercise of control over individuals. (*Al-Skeini and others v UK*, 2011; *Hirsi Jamaa and others v Italy*, 2012; Hathaway and Gammeltoft-Hansen, 2015). In its post-contestation meaning-in-use the applicatory limits of *non-refoulement* responsibility has substantively expanded in a way to include not only the refugee within its territories, or at its borders, but also under its jurisdiction in the

international seas in any recognized manner.⁹ This outcome supports the proposition on the positive relation between process legality and norm strength change.

The second contestation cycle examined in this chapter is on the substance of *non-refoulement* responsibility as indirectly determined by the safe country concepts (2005-2016). If it is not possible to legally leave the refugees unprotected once they have reached the jurisdiction of a state one way or the other, then the only way for the European states to evade the responsibility of asylum applications is not to get in any direct contact with the migrants in the first place, or to transfer this responsibility to a third party. For such a transfer to be possible, the third party has to be a safe state without the risk of persecution and it should accept to cooperate. Methods for ensuring this responsibility transfer, including the development of safe country concepts turned out to be the subjects of another contestation cycle.

Figure 3.1: Two cycles of contestation on *non-refoulement*



⁹ There are still questionable issues regarding shared responsibilities in joint patrols and similar cooperative practices. See Giuffrè, 2012, “State Responsibility Beyond Borders: What Legal Basis for Italy’s Push-backs to Libya?” *International Journal of Refugee Law*, 24:4, 692-734.

As part of the European migration and asylum policy, European Commission defined the safe country concepts and designated their implementation in the subsequent versions of Asylum Procedures Directives between 2000 and 2016. Although UNHCR has not *categorically* opposed safe country concepts, the limits and conditions of their implementation as suggested in EU legislation has always been an issue of disagreement and contestation between broader and restrictive views. The interpretation and implementation of safe country concepts have a direct bearing on *non-refoulement* as they create a legally permissible space for non-admission and return of refugees. Therefore, particularly with respect to the issues of individual assessment and safety standards of safe countries, broader safe country concepts mean narrower *non-refoulement* responsibilities for the European states, and vice versa. The examination of Asylum Procedures Directives and the reactions they took from refugee community represented by UNHCR, ECRE and the European Parliament demonstrates that although the implementation of safe country concepts reflect a narrow interpretation of substantive *non-refoulement* requirements, there has been subtle improvements along the lines of reactionary demands. Once again supporting my proposition, examination of the nature of contestation processes suggests a positive relation between process legality and norm strength.

Although these developments in European refugee protection have been analyzed before, a detailed look at the legal nature of contestation processes and their effect on the multiple dimensions of norm strength will be the contribution of this analysis, to both contestation and IR/IL literatures. The specific focus on *non-refoulement* responsibility makes this analysis unique in its concentration on those details of European asylum policies that have a direct bearing on the way *non-refoulement* is interpreted. The analysis of the contestation processes in terms of their legal or political nature reveals how the legal processes, in terms of the use of legal argumentations and involvement of legal institutions play a role in the change of norm strength.

Methodologically the research will follow a process tracing method with discourse analysis, through the step by step examination of subsequent documents which demonstrate the positions of contesting actors. The restrictive challenges to *non-*

refoulement in the examined contestation cycles come from the state actors and the European Commission. On the pro-protection side, UNHCR is the leading institution to advocate a rights-oriented, broader interpretation of *non-refoulement*, that stands against the restrictive claims and initiatives of the state actors in every cycle of contestation. The reports, conclusions, decisions and views of the UNHCR on the related subject are among the material to be examined for the nature of the argumentation (legal vs political). Another important actor that take active part in contestations is the European Council of Refugees and Exiles (ECRE); a pan-European institution that brings together 40 NGOs Europe-wide, with a mission of “promoting the establishment of fair and humane European asylum policies and practices in accordance with international human rights law.” (ECRE, Mission Statement) It is one of the most vocal shareholders on the European asylum policies. A third influential actor, generally supporting the broader interpretations against the restrictive pull by states is the European Parliament. The Parliamentary positions and reports especially during EU legislations constitute an important part of the contestation cycles.

As has been explained in the introductory chapter, legality of the contestation process is determined according to the involvement of (i) legal institutions, such as the judicial bodies; and (ii) legal argumentation and reasoning, which is specified with a legal discourse and references to existing legal norms and legal precedents. Counterfactually, political argumentation would involve more references to power politics and state interests rather than international law. Especially in a topic such as asylum policies, the popular concepts of right-wing politics such as national identity, state security, preservation of cultural identity, economic interests of the state and its citizens etc. would be of high value to a contestation of political nature. For each contestation cycle, pre- and post-contestation norms will be evaluated and compared with reference to changes in three dimensions of norm strength; meaning, global reach and authoritative power.

3.2. First Cycle of Contestation: Geographical Limits of Non-Refoulement Responsibility and Interception at Sea

3.2.1. Background

Geographical applicatory limits of the *refoulement* responsibility, namely the moment when the *non-refoulement* responsibilities of a state vis-à-vis a potential refugee begins, has been one of the most important controversy on the interpretation of the norm. The cycles of contestation in the evolutionary history of the norm shaped by the conflict between broader and narrower interpretations of the applicatory limits. In a rather simplified framing, state actors, with their control-oriented vision try to reduce the costs they have to shoulder and tend to minimize the applicatory limits, while the protection-oriented vision, mostly of individuals, IOs or NGOs, fights for the enhancement of refugee protection hence wider state responsibility for more migrants.

At the very core of the *non-refoulement* responsibility, lies the rather uncontroversial axiom that if a refugee has managed to enter the territories of a state with the aim of seeking asylum, the state has a responsibility of *non-refoulement*; the refugee cannot be sent back to persecution. As the applicatory limits of the *non-refoulement* at this core axiom do not let expulsion of the refugees who are already within the territory back to risk of persecution without appropriate asylum assessment, a restrictive interpretation was possible for excluding the border rejections. In other words, before entering the territories, when the refugees are at the frontiers of the state, *non-refoulement* responsibility would not be applicable.

Such narrow interpretation had been around since the drafting of the 1951 Convention. Several European states in the *travaux préparatoires*, including Belgium, Netherlands, Switzerland, Germany, Italy and Sweden supported the view that *non-refoulement* would not accrue outside of the state frontiers. (Newmark, 1993, 841) UNHCR, defining itself as the protector of the Geneva Convention has always been on the opposite side, embracing a wider interpretation of the norm according to which the *non-refoulement* responsibility of a state is valid at its frontiers. It opposed the rejection at the frontier from

the outset. (Report of the 28th session of the UN Doc. A/AC96/549, 1977) The broader interpretation is solidified with the affirmations of UNHCR Executive Committee Conclusions (EXCOM Conclusions No. 22 (XXXII) (1981), No. 81 (XLVIII) (1997), No. 85 (XLIX) (1998), No. 99 (LV) (2004)) as well as state practice. (Gammeltoft-Hansen, 2014, 585) Whatever the original intentions of the drafters of the vague Convention provisions were, the norm has evolved in a way to incorporate non-rejection at the frontier, through consistent position of the UNHCR and supporting state practice. (Goodwin-Gill and McAdam, 2007; Lauterpacht and Betlehem, 2003) This new broader interpretation of *non-refoulement* is embraced in Europe through decisions of the Council of Europe and the jurisprudence of the ECtHR. (*Amuur v France*, 1996; *Sharifi and others v Italy and Greece*, 2014; *Kebe and others v Ukraine*, 2017; *M.A. and others v Lithuania*, 2017) In EU Charter of Fundamental Rights that was accepted in 2000, right to asylum is guaranteed in a way to close the door for a narrow interpretation of *non-refoulement* that would accept rejection at the frontier. In the sphere of asylum policy, the Dublin II Regulation (European Council Regulation 343/2003; recast Regulation (EU) 604/2013) explicitly states in Art. 3 that “Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum.”

3.2.2. *Interdiction at Sea and Crisis over Italian Practices 2009-2012*

After the point when it was settled that *non-refoulement* responsibilities of states start at their border, there remained no possibility for states to evade their responsibility of asylum assessment once the asylum seekers reach to state borders. The best remaining solution for state actors to relieve this responsibility and accompanying costs, was to prevent migrants from reaching the borders.

Interdiction has not been defined in the international law. The most widely accepted definition at hand is the one UNHCR has proposed in 2000 as “encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective

destination.” (UNHCR, 2000) According to this definition, all extraterritorial activities of states that aim to prevent irregular movement of persons, such as visa requirements, carrier sanctions, assignment of immigration liaison officers (ILO) are interdiction practices. Interdiction at sea, or interception is only one among them. It is evident that many of such forms, especially the visa requirements and carrier sanctions has been widely used in the European context for a long time. Interdiction at sea, however is more of a concern for the interpretation of extraterritoriality today.

Outside of Europe the idea of intercepting the irregular migrants before they reach the borders became very prominent and highly problematic with the Southeast Asian boat people crisis and US policy of interdicting Haitian vessels. Beginning from early 1980s, similar crisis involving thousands of boat people being prohibited from seeking refuge in their destination countries out purged in the Caribbean Sea. Thousands of Haitians, were fleeing to US from the oppressive military regime that took power in their country. US response was to initiate an interception program, based on an agreement with Haiti, to track the refugee boats in the high seas and return them back to Haiti. "Between 1981 and 1991, approximately 25,000 Haitian migrants were interdicted by the Coast Guard." (Palmer, 1998) Until 1992, this procedure included an on-board screening process held by US officials to designate the bona fide refugees. However, after the Kennebunkport Order of Bush in 1992, this procedure has changed abolishing the need of any screenings before sending the refugees back. This policy shift was a sign of a shift in the interpretation of *non-refoulement* by the US, narrowing down the responsibility area to state territories. Seminal and equally controversial Supreme Court decision of *Sale v. Haitian Centers Council*, 1993 supported this policy, despite the contestation by UNHCR. In *Sale* decision UNHCR has stated in its response to the Court, based on its broad interpretation of the Art. 33 of the Convention that "The obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders." (UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993)) *Sale* judgement confirmed the narrow *non-refoulement* interpretation limited only to those refugees who are already within state territories. Contrary to the expectations though, this decision affirming the narrow interpretation of extraterritoriality of *non-refoulement* by the

Supreme Court, could not gain the international upper hand, as the contestation continued with contrary Court decisions around the world.¹⁰

Relative broadness of refugee protection scheme in the European context did not prevent attempts similar to Haitian interception practices. Evading the responsibility of *non-refoulement* by intercepting refugees before reaching the state frontiers were seen in Europe as well. During the mass flows to Italy from Albania in the Yugoslavian war of early 1991, Italy's initial attitude was duly instituting screening procedures. As the inflow continued, however, by August the same year, Italy started to refuse screening processes and returning all the arriving Albanians back to Albania amidst international contestation. At the same time, Italy initiated a program of interdiction, where Italian vessels tracking and escorting refugee ships back to Albania in the Adriatic. (Newmark, 1993, 849)

Interdiction at sea in Europe seems to have never been as drastic as in the Italian push-back operations initiated in 2009 in cooperation with Libya. Similar interdiction practices had been performed in late 1990s and early 2000s, by Italy, Malta and Spain, however in a notably less systematic manner. (Giuffrè, 2012, 698; Klepp, 2010) The first decade of 2000s, witnessed a series of gradually deepening agreements between Italy and Libya to cooperate on the fight against international crimes like terrorism, drug and human trafficking as well as irregular immigration. These agreements, have systematized interception and return practices suggesting a particular narrow interpretation of *non-refoulement*. Italy and Libya signed the Treaty of Friendship, Partnership and Cooperation in 2008 and two technical protocols in 2007 and 2009. In these agreements two sides constructed the shape of the cooperation against irregular migration with joint missions to patrol the Mediterranean, equipment support to Libya for stricter border controls, and financial aid to Libya. For Italy, the deals were relieving them of migratory burden as Berlusconi, then Prime minister of Italy has declared "We have written a page in history. Now we will have fewer illegal immigrants leaving from the coast of Libya

¹⁰ Newmark for example was suggesting in 1993 that "right or wrong, this new interpretation of the UN Convention's prohibition against non-refoulement is likely to have a profound impact upon the field of refugee law." (Newmark, 1993, 858) However, the evolution of non-refoulement has not been in the way he had foreseen. Despite the density of the legal rules and regulations, this story has not unfolded differently in Europe.

and coming to us, and more Libyan oil and gas.” (“Italy Pledge Paves Way”, 2008)¹¹ Readmission of third country nationals who have transited to Italy from Libya was also an important part of the agreements, although the agreements were not formed in standard readmission agreement formats. It is notable that these agreements did not make a distinction between refugees and other irregular migrants, leading to severe problems for the norm of *non-refoulement*.

On 6 May 2009, three boats in distress with irregular migrants of Somalian and Eritrean nationality were intercepted by the Italian coastguard within Maltese search and rescue (SAR) area, and the immigrants were transferred to Italian military vessels which then brought them back to Libya. Different from the general practice in the previous interceptions in the Mediterranean, there had been no screening process for the determination of protection needs of some 230 people in the boats. This was the first time Italy was pushing back migrants without giving them any chance for seeking asylum as part of an official state policy and a bilateral agreement. According to Italy, it was not a violation of its international responsibilities but a legitimate policy practice. Italian interior minister Maroni declared the pushbacks as a successful beginning of a new policy stating that “Today, in the name of all countries of the European Union, we have developed a new model to fight clandestine immigration — that is, to repulse at sea all those who try to enter illegally.” (“Italy returns 227 migrants”, 2009) This constituted an important challenge to the existing interpretation of *non-refoulement* in Europe in two respects; first the Italian state was deflecting all its *non-refoulement* responsibilities, including the first screenings, and such direct return of migrants was being regarded as a successful “turning point” in management of illegal migration. (“Italy turns rescued migrants back”, 2009). Therefore, such immediate pushbacks without any screening for potential refugees was officially declared by Italy to be a new policy, rather than a one-time wrong doing. Italian interior minister embraced the practice as the “rule that we want to apply from today on.” (“Italy returns 227 migrants to Libya”, 2009) Second, although the pushbacks were conducted based on bilateral treaties, no guarantee for handling of

¹¹ In 2008 Friendship Agreement, Italy promising Qaddafi 5 million euros for operating patrol missions for the prevention of migrant outflows, and take back the intercepted refugees coming through Libya. This deal failed in 2011 with Libyan civil war and the NATO bombing campaign.

the asylum applications by Libya was given for the returned migrants despite shady refugee protection standards of Libya.¹²

Such challenge to the understanding of refugee protection and *non-refoulement* attracted reactions immediately. An examination of international responses to Italy's policy demonstrates a concerned reaction from the protection-oriented community with a predominantly legal logic of argumentation. A warning from UNHCR came along right next day of the interception on May 7th, with explicit reference to 1951 Convention, stating the deep concern of the organization, and that the "fundamental importance that the international principle of *non-refoulement* continues to be fully respected." (UNHCR, 7 May 2009) The result of the UNHCR study on the migrants pushed-back to Libya, criticized the new Italian policy of sending the refugees to Libya without any screening of their status by expressing serious concern for the possible undermining of the principle of *non-refoulement*. (UNHCR, 14 July 2009) NGOs were also alarmed with the changing attitude towards the *non-refoulement* responsibility. Human Rights Watch has repeatedly criticized Italy for the forced returns along the lines of the bilateral agreements, for "(violating migrants') right to seek asylum and (putting) them at risk of inhuman and degrading treatment." (HRW, 2009)

Refugee policy director of Human Rights Watch of the time stated that "Italy's interdiction and summary return is a draconian approach to dealing with the influx of migrants. It gives boat people no access to refugee screening or protection." (HRW, 2009) In the related report HRW has publicized in September 2009, the main emphasis was on the principle of *non-refoulement* as an "international legal principle" and "a binding obligation in international human rights law and international refugee law, as well as European and Italian law" (HRW, 2009) In the recommendations part, the report called for the respect to the principle of *non-refoulement* both by Italy and by the EU institutions: "Italy must immediately cease violating its *non-refoulement* obligations. (...) The European Union institutions and its member states should demand that Italy comply with

¹² Libya is not a party to 1951 Convention, does not have a formal agreement with UNHCR, and does not have an effective asylum system.

Art. 3 of the European Convention on Human Rights and cease returning migrants to a place where they are subjected to inhuman and degrading treatment. (...) Frontex should ensure that its operational plans specifically prohibit *refoulement*” (HRW, 2009) The report’s main criticism towards Italy was based on references to established legal principles of international law and legal commitments of Italy. The disregard of its international legal obligations on refugee law and the human rights law, with a particular emphasis on *non-refoulement* was the basis of criticisms and calls for change for a broader interpretation of *non-refoulement*. Amnesty International also drew attention to the illegality of the immediate pushbacks by making a reference to Italy’s *non-refoulement* obligations: “The actions, however, constituted a breach of Italy’s obligations, including the duty not to send individuals to a country where they are at risk of persecution (the principle of *non-refoulement*) and to provide access to a fair and satisfactory asylum procedure.” (Amnesty International, 12 June 2009)

In its report to the Italian government, the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stated that Italy’s *non-refoulement* responsibilities were valid in the context of push back operations in the high seas, due to the extraterritorial jurisdiction that Italy has in these operations. (CoE CPT, 2010, 18) Although the report refrained from asserting clear judgements such as a violation of international norms, or non-fulfilment of international legal responsibilities, it gave a full section to “Legal Safeguards Benefiting Migrants Intercepted at Sea” and under it a sub-section to the *non-refoulement* principle. It concluded that “Italy is bound by the principle of *non-refoulement* wherever it exercises its jurisdiction” and that the requirements thereof have not been realized. “The CPT urges the Italian authorities to substantially review forthwith the current practice of intercepting migrants at sea.” (p.26)

Italian responses to these criticisms reflected a similarly legal nature of argumentation. Italian government responded to the CPT report with an emphasis on the rescue character of this operations, which implies that legal requirements for taking asylum requests and handling thereof were not valid in their particular case. It also, rather ironically claimed

that no intercepted migrant had made an asylum claim to Italian authorities. (Response of the Italian Government, 2010)

The replies of the Italian government were in fact demonstrating a reluctance to directly argue that interception at high seas and forced return do not legally accrue *non-refoulement* responsibility. Instead the argument was based on justifying its actions as being exceptions to the rule as they are 'rescue operations', implying that otherwise the operation would be considered as *refoulement*. It is implied that it would be a violation of *non-refoulement* had the intercepted refugees made asylum applications, regardless of the fact that they were on the high seas. Italy also justified the interdiction and the return practices with reference to the UN Optional Protocol against the Smuggling of Migrants by Land, Sea and Air; and also to the series of bilateral agreements that it has conducted with Libya between 2000 and 2009. Such justifications also have an openly legal logic. However, CPT replied in return that neither such agreements, nor the absence of immediate asylum claims effect the obligations under ECHR including Art. 3 and its *non-refoulement* requirement. In all the accusatory reports during the contestation process, the legal nature of the arguments and references is solid. Similarly, the responses by the Italian Government were also based on a legal justification of why the norm was not applicable in that example, rather than an outright rejection of the norm, or a political justification for the necessity of violation.

Berlusconi, Italian Prime Minister of the time, showed a different logic of justifying Italy's operations. He replied the criticisms for Italy to violate its international responsibilities by suggesting a rather limited interpretation of *non-refoulement*, rejecting any extraterritorial obligations, similar to US interpretation in Sale case. He stated that "Our idea is to welcome only those citizens who are in a position to ask for political asylum and that we must accept according to the international treaties namely those who set foot on our soil, including our territorial waters. For those who are identified outside the territorial waters and have not yet entered Italy, it is worthwhile that it is our right under international treaties to reject them. I see no scandal." ("Berlusconi: La nostra idea",

2009)¹³ The contestation between the narrow and broad interpretations of the extraterritorial application of *non-refoulement* responsibilities is pretty evident here in this quote with the challenging attitude of Italy, similar to the one of the US. However, it is important for an analysis of legality, that once again the response to the objections were in legal lines, justifying themselves with a direct reference to international law and the principle of *non-refoulement*, although with a narrower interpretation of it. The contestation over Italy's interception policies with different actors of the international community involved has been conducted around legal argumentations, both sides bringing about their own interpretation of the legal norm of *non-refoulement*, without rejecting its relevance nor its authoritative superiority.¹⁴

Involvement of the judiciary was another evidence of the legal processes playing the leading role in the evolution of the norm in this cycle of contestation. In 23 February 2012, the Grand Chamber of ECtHR took a unanimous decision in *Hirsi Jamaa and Others v Italy*, finding Italian interception operations in violation with the ECHR, including the prohibition of *refoulement* under Art. 3. Hirsi judgement is the first judgement of the Court unanimously deciding for the violation by a European state of the human rights of migrants intercepted and returned to a third country without any screening process. By this judgement the Court has taken an action to prevent the potential legal vacuum that could have been abused in the interception practices on the high seas. (Giuffrè, 2012, 729) Despite the Italian justifications before the Court based on its bilateral agreements with Libya and the rescue nature of the operations, the Court unanimously recognized Italian jurisdiction for the purposes of Art. 1, and found a violation of Art. 3 ECHR on the prohibition of torture and inhuman treatment, under which *refoulement* is also prohibited, a violation of Art. 4 of Protocol No: 4 on the

¹³ Translated from Italian original using google translate. Retrieved from Il Sole 24Hore, http://www.ilsole24ore.com/art/SoleOnline4/Italia/2009/05/berlusconi-no-italia-multietnica.shtml?refresh_ce=1 9 March 2009, Last Access: 10.06.2020.

¹⁴ Berlusconi sets the general policy of zero-tolerance to irregular migration on rather political grounds; stating that Italy does not want to be a multi-ethnic community. (<http://www.telegraph.co.uk/news/worldnews/europe/italy/5305030/Italy-does-not-want-to-become-multi-ethnic-says-Silvio-Berlusconi.html>) However, when responding to the criticisms this political rhetoric gives way to a legal argumentation, Italy refers neither to its sovereignty nor the political visions for their community. The references are made to international norms and treaties, although with a rather narrow and controversial interpretation.

prohibition of collective expulsions, and of Art. 13 ECHR on the domestic remedy. In its judgement the Court has expanded the position that it had built up in previous case law¹⁵ on extraterritorial jurisdiction and accepted Italian responsibility based on the fact that applicants were under “the continuous and exclusive *de jure* and *de facto* control of Italian authorities” (*Hirsi v Italy* 2012, para.81). On the *non-refoulement* obligations, the Court held that the unfavorable legal and practical situation in Libya for the protection of refugee rights including the risk of *refoulement* to the country of origin, constitutes a breach of *non-refoulement* responsibilities of Italy, stating that “when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they (*the applicants*) would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country.” (*Hirsi v Italy*, 2012, para. 131)

Thereby the Court recognizes an obligation of the sending state to ensure non-repatriation of the refugees to their country of origin arbitrarily by the readmitting country, i.e. guaranteeing protection from indirect *refoulement*. In this decision, the Court has once again strengthened its position previously demonstrated in *M.S.S. v Belgium and Greece*, where the transferring state might be hold responsible for violations in the readmitting country due to inadequacies of its asylum system. It has also affirmed extraterritorial jurisdiction, following its judgement in *Al-Skeini and others v UK*. Thirdly it has confirmed that bilateral agreements with third parties do not necessarily relieve states from their convention responsibilities vis-à-vis refugees.

This judgement, the first judgement of the ECtHR on interception at sea, has drastically changed the way immigrants’ rights in the high seas are interpreted, as well as the legally accepted interpretation of the extra-territorial applicability of *non-refoulement* responsibility of states. It set a critical precedent for the evaluations of state responsibilities in interceptions conducted through joint operations based on bilateral agreements. In the judgement’s immediate implementation by Italy, the Committee of

¹⁵ See particularly *Bankovic and others v Belgium and others*, 2001; *Issa and others v. Turkey* 2004; *Al-Sadoon and Mufdhi v UK*, 2009; *Medvedyev and others v France*, 2010; *Al-Skeini and others v UK*, 2011.

Ministers monitoring the execution of judgements noted that “...the bilateral agreements concluded with Libya remain suspended and there is presently no risk that the violations found by the Court in its judgment will occur again, as the persons possibly intercepted at sea are now sent to specific centers in Italy where they enjoy the guarantees of the Convention; *and* noted further with satisfaction the declaration that collective removals following interceptions at sea will no longer take place and that the *procès verbal* of 3 April 2012 does not imply the resumption of the 2009 collective removal policy to Libya.” (Committee of Ministers, 24-26 September)

In February 2017 Italy has renewed its agreement with Libya with a Memorandum of Understanding in an effort to completely delegate migration control to Libya by providing support to its coast guard, ensuring pull-back and readmission of migrants. It is worth noting that the principle logic of the memorandum as understood from its text does not focus on protection but on responsibility avoidance according to the new understanding of state jurisdiction. There is no reference to refugees or asylum seekers in the whole document, uniting every irregular migrant under the same category of “clandestine” or illegal migrants. Despite the relevant emphasis in Hirsi judgement, there is no conditionality on human rights of refugees and returned migrants in Libya. There is no direct reference to *non-refoulement*, nor any particular emphasis on *non-refoulement* responsibilities in Libya. EU has also engaged in cooperation with Libya, ensuring pull-back of migrants and their readmission to Libya without any direct EU involvement with migrants, in exchange for financial and technical help.

In other words, as exemplified in relations with Libya, after the examined contestation process that is completed in 2012 with Hirsi decision new bilateral and multilateral agreements with migrant sending or intermediary countries took a shape where migration control is completely outsourced, to be managed as far away from the European borders as possible, European states not involving in any direct contact with migrants to avoid any jurisdictional bond.¹⁶ EU 2016 Migration Partnership Framework prioritizes

¹⁶ Measures taken under this new scheme is not devoid of conflicts due to the contested limits of state responsibility vis-a-vis interception incidents. See GLAN-ASGI case before ECtHR on the pull-back policies based on Italy-Libya agreement.

externalization of migration control by shifting previous *non-entrée* measures to non-exit measures conducted by the source or intermediary countries. Bilateral and multilateral agreements with these countries sets the back bone of this strategy where “effective incentives and adequate conditionality (*for the*) cooperation on readmission and return will be a key test of the partnership between the EU and its partners.” (European Council Conclusions, June 28, 2016, EUCO 26/16)

3.2.3. Evaluation of Applicability Limits of Non-refoulement Responsibility at t_2

Hirsi case, with its clear legal position on the extraterritorial *non-refoulement* responsibility of states in the high seas constituted a new tentative *status-quo* for the question of the limits of responsibility. After this point, it became harder if not impossible for states to deny *non-refoulement* responsibility if they directly hinder potential asylum seekers’ escape from risks of persecution. The efforts of states to relieve themselves from *non-refoulement* responsibility shifted to “no touch” policies where not themselves but some other state deals with the movement of migrants. No doubt, this new tentative *status-quo* has its own issues prone to new contestations. The limits of extraterritorial jurisdiction and state responsibility in cases of indirect involvement of the European state with the migrants, or in cases of joint-patrols, and the indirect influence through provision of incentives for third party non-exit policies are left unclarified in Hirsi judgement and are still subject to contestation. (Pijnenburg, 2018, 402; Moreno-Lax and Giuffre, 2017) However, the whole case of Italy-Libya interceptions have contributed another brick to the evolution of its interpretation at a new tentative meaning-in-use. After this point on, the norm of *non-refoulement* is relatively more precise and has relatively wider limits of applicability, not limited by the territories or the physical frontiers of a state, but extending to high seas and international zones in connection with state jurisdiction. According to this, bilateral cooperations with third parties that serves the interference with irregular migrants before they reach the territorial waters do not automatically relieve neither state from their responsibilities as long as there is a jurisdictional bond. *Non-entrée* policies where target states actively deal with migrants and try to prevent migrant inflows towards their territories began to be accepted as legally inadmissible. Thereby, the norm of *non-refoulement* has strengthened compared to early 2000s in its

meaning dimension, due to increase in precision and widening of applicatory limits. The fact that European states had to shift their counter-migration efforts to “contactless control” (Moreno-Lax and Giuffre, 2017) and began to delegate migrant containment to third parties through exit controls and readmissions proves the strength of the *non-refoulement* norm and its authoritative power within its broadened applicatory limits.

Table 3.1: Change of Norm Strength $t_1 - t_2$

NORM STRENGTH AT t_2		Change ($t_1 - t_2$)
Authoritative Power	• Implicit in altered migration management policies.	↑
Global Reach	• All European states	↔
Meaning	<i>Precision</i> • More clarification of limits of state responsibility	↑
	<i>Scope</i> • Widened applicatory limits with extra-territorial jurisdiction	↑
	<i>Content</i> • No return without physical security • Protection in accordance with the Convention • No chain refoulement	↔

In such strengthening of the norm, the role of law is eminent. The interconnection of the norm with human rights law brings in the precedents and interpretations from this area of law making it possible to make a jurisdiction-based responsibility argument. The nature of the involvements by all relevant parties to the contestation on *non-refoulement* in cases of interception at sea reflects legality with prominent references to existing legal documents and case law. In Europe the encounter of the refugee law with ECHR strongly influenced by the jurisprudence of the ECtHR, bringing about an extra layer to interpret the rights of refugees and responsibilities of states. Developing understanding of non-

territorial sources of jurisdiction in human rights law, as has been shaped by the decisions of ECtHR over the years (such as *Bankovic and others v Belgium and others*, 2001; *Issa v. Turkey*, 2004; *Al-Sadoon and Mufdhi v UK*, 2009; *Medvedyev and others v France*, 2010; *Al-Skeini and others v UK*, 2011; detailed in Kim, 2017) has come to expand the applicatory limits of the norm of *non-refoulement*, by detaching it from territoriality in the seminal *Hirsi* decision. The Court, in this sense paved a very important way to solidify the extra-territorial responsibilities of states for *non-refoulement*.¹⁷

3.3. Second Cycle of Contestation: The Substance of Non-refoulement Responsibility and Safe Country Concepts

3.3.1. Background

After the contestation period on limits of *non-refoulement* responsibilities of states, and the *Hirsi* decision that has considerably strengthened the protection-oriented broad interpretation of applicatory limits, states became bound by *non-refoulement* responsibilities and associated asylum processing costs wherever they have *de facto* control over the migrants. As long as this *de facto* jurisdictional link exists between a state and the migrants, that state will be responsible of the possible *non-refoulement* violations. If *non-refoulement* responsibility cannot be evaded, then it should be transferred for states to refrain from their responsibilities. The first requirement for the transfer of responsibility is to find another state ‘responsible’ enough to bear this duty. A very creative (and equally controversial) tool that has been developed in the European continent, became the basis for the allocation of this competence; the safe country concept. It is indeed the product of legal creativity as it proposes the states a way of relieving from asylum assessment and refugee protection responsibilities and related costs, without violating the norm of *non-refoulement*. In theory, the refugee is still

¹⁷ The Court does not hold a progressive stance on extraterritoriality of non-refoulement responsibilities beyond interceptions at sea. In the recent *M.N. and others v Belgium* judgement (2020) the Court rules with a narrow interpretation of extra-territorial jurisdiction, deciding that activities of embassies do not trigger state jurisdiction on third country nationals, unless there is *de facto* physical control over the concerned individual.

protected from the risk of persecution, only with another state undertaking the financial, political and social costs.

Non-refoulement, as it is written in the 1951 Convention and is interpreted in CAT and other human rights treaties prohibits sending a potential refugee, without first assessing their asylum application, back to risk of persecution and to threats to their lives and freedoms based on discriminatory grounds. Therefore, in principle, it is not *refoulement* to send a potential refugee, even without first assessing their asylum application, back to somewhere free from all such risks. The European strategy to construct its asylum procedures around the safe country concepts is built upon this ideational basis. However, the fact that these third countries (which are either refugee producing or transit states around Europe) have lower economic, social and legislative capacities creates questionable standards for asylum seekers and refugees under their responsibility. What safety standards would be enough for not violating *non-refoulement*? This question on the content of the *non-refoulement* responsibility became an area of contestation with the rise of Europe's responsibility transfer strategies.

The entrance of the safe country concept to European migration policy agenda goes back to the "Danish Clause" of 1986, whereby Denmark opened the legislative way to accept certain countries as safe third countries and asylum applications from these countries as "manifestly unfounded." (Hunt, 2014, 504) This policy then spread to other countries of Europe with a very fast pace, with the fear of being the easiest target for the immigrants coming to Europe. (Hunt, 2014) 1992 London Resolutions were the first place the concepts of safe country of origin and safe third country were discussed in the community level, while they became part of the European hard law only with the 2005 Asylum Procedures Directive (to be reformed in 2013). It is necessary to note however that many protective measures suggested in the London Resolutions to accompany the safe country applications in order to ensure individuality of asylum procedures were eroded when the time for hard law making came. (Hunt, 2014, 505-506)

The safe country concept has different variations comprising of different groups of states. First of all, the Common European Asylum Policy (CEAS) agenda and the logic of

burden-sharing make it inevitably necessary for member states to trust in each other. In this sense, it is implicated in both the Schengen Agreement and the Dublin Convention of 1990 that all member states are safe countries of origin and of asylum. They would not create refugees, and will be capable and willing to provide the necessary protection to the asylum seekers and refugees. The Asylum Procedures Directive (APD) regulates four types of safe country concepts. In Art. 35 of the recast APD, a country is accepted to be safe for a particular applicant as the 'first country of asylum' if he/she has already acquired some sort of protection in that country, including the protection from *refoulement*. A second concept, the 'European safe third country' is developed for the European States which are not member of the Union. Developed mostly for the period pre-2003 enlargement it aimed to include the central and eastern European (CEE) countries and creating a buffer belt around the EU against irregular migrants. According to Art. 39 APD, a European safe country has to be a party to the Refugee Convention and ECHR, as well as having in place an asylum procedure prescribed by law.

After the CEE countries had been integrated into the boundaries of the Union with the 2003 enlargement, this buffer belt needed to shift to the transit countries around Europe in the Eastern Mediterranean and Northern Africa, and to the other emigration countries. Countries are accepted to be 'safe third countries' as defined in Art. 38, when the competent authorities are satisfied that the asylum seeker will not be subject to persecution and will have the possibility to claim asylum in that country. The application standards of safe third country procedures are determined by individual member states, in their national legislations. According to the safe third country practices, as long as a link, as defined by the member state, can be established between the irregular migrant within EU territory and the safe third country, they can be sent back to that country without an assessment of the substance of application. (Art. 38 APD) Apart from the safe third countries, some emigration countries are considered to be 'safe country of origin' according to standards determined again by member states independently. These countries are assumed to be not producing refugees, therefore any asylum applications from nationals of these countries would automatically be unfounded. Individual member states have their own standards for determining safe third countries and safe countries of origin, and have different lists of such states. Apart from these separate lists, EU also tried

to come up with a common list of safe countries at the community level as stated in the APD in 2005, however this couldn't be achieved due to the immense disagreements during the rather unproductive negotiations. Related provisions of the Directive are annulled by CJEU upon the objection of the European Parliament in 2008. (CJEU C-133/06 *European Parliament v European Union*, 6 May 2008) 2016 Commission proposal for Asylum Procedures Regulation once again foresees the creation of a common union-level list. However, the proposal is yet to be accepted.

Safe country concepts automatically decrease the burden on the target European state both in terms of the number of processed asylum applications and related monetary costs. Secondly, assuming a state safe makes it unproblematic to send the irregular migrants already within the state territories back to these countries, as they are presumed to provide the internationally required protections to the asylum seekers and refugees. "For the determining authority the equation seems fairly 'simple', the more countries a member state can list as safe, the fewer applications will be considered well founded and subjected to substantive and costly examination procedures." (Hunt, 2014, 503)

When we sketch at the normative level, the safe country concept does not stand in opposition to the core of the *non-refoulement* principle (i.e. do not send a refugee anywhere if there is a risk of persecution). At least the name suggests that there is the requirement of "safety" for not to consign the refugees to the risk of persecution. However, the application entails considerable doubt about the 'safety of the safe countries', creating the risk of a *de facto refoulement* under the permission of law. Therefore, the determination of the standards for the delegation of safe country status as well as the practical application of the procedures in individual cases are like battle fields where wider and narrower understandings of *refoulement* are giving a fight to death.

Narrow interpretation of *non-refoulement* perceives the responsibility to be limited to not sending an asylum seeker back to formally prohibited circumstances. In that sense basic standards of physical safety in a country might suffice to designate that country as safe, and transferring asylum assessment responsibilities of migrants to that country without violating *non-refoulement*. Broader interpretation that is advocated principally by

UNHCR and ECRE on the other hand, finds this unacceptable due to the insufficiency of guarantees for the assessment and protection of refugees. According to the broader view, *non-refoulement* responsibility includes not only the conditions of physical safety for the applicant's life and liberty, but also the possibility of acquiring the refugee status with full substantive standards of the 1951 Convention and of international human rights law.

The legislative history of the asylum procedures in Europe shows that the contestation on safe country concepts is basically between this broader view of *non-refoulement*, which requires convention-based, human rights-respecting and individually determined safety standards and the narrower view which is satisfied with 'sufficient protection' and blanket implementations.

UNHCR does not in principle oppose the idea of sending an asylum seeker to a third country. As early as 1979, it suggested that when "it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State" (UNHCR, 1979) In 1989, it clarified that when refugees and asylum seekers who irregularly moved from a first country of asylum, where they have already found some sort of protection, can be sent back to this state, as long as (i) they are protected against *non-refoulement* and (ii) are permitted to stay there with their basic human rights protected. (UNHCR, 1989). This has been reiterated in 1999 EXCOM Conclusions, where it is also affirmed that "notions such as "safe country of origin", (...) and "safe third country", should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*." (UNHCR, 1999) As has been established in these documents, UNHCR, does not find the idea of determining safe countries, in principle, contrary to the Convention requirements. It accepts the possibility for transferring the responsibility by sending the asylum seeker or refugee to a third country, as long as certain conditions are met.

Asylum Procedures Directive has been the most criticized legislation of the CEAS. (O'Nions, 2014, 99) Both the original directive that was proposed in 2000 (COM (2000) 578 final) and accepted in 2005 (2005/85/EC) and the recast directive that was proposed

in 2009 (COM (2009) 554 final), re-proposed in 2011 (COM (2011) 319 final) and accepted in 2013 (2013/32/EU) have gave way to intense criticisms. These legislating periods set the scene for the contestation on the substance of *non-refoulement* (along with other aspects of refugee protection). The pro-control mandate of the directive from the beginning was aspiring for the prevention of irregular movements towards Europe and minimizing the asylum application channels. On the other front, there is the pro-protection actors with a wider interpretation of *non-refoulement* as an international obligation, entrenched in international refugee and human rights law.

Pro-protection actors have come up with criticisms to the APD from various dimensions such as the shifting burden of proof to asylum seekers, inadequate appeal opportunities, overly large state discretion that obstruct policy harmonization, blanket determinations of safety that overrules individual processing of asylum claims, or unsatisfying standards of safety determination. From the respect of the interpretation and evolution of *non-refoulement* the most critical two dimensions that come to the front are individuality of procedures and the standards for the determination of safety. The evolution of APD and safe country concepts along the lines of these two aspects are examined in this section.

3.3.2. 2000-2005: Creation of an Asylum Procedures Directive

The first proposal for an Asylum Procedures Directive to Determine the Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, was proposed by the Commission in 2000 (COM/2000/0578 final). In this proposal the standards to deem a country as safe were broader and more detailed than the future directives. A whole annex was given to the standards and conditions for the designation of country as safe. According to this, being a party to the Geneva Convention was not a must for safe country designation, but convention standards needed to be respected in the asylum procedures and refugee protection in that country. International human rights standards were given a particular emphasis, as ratification of human rights conventions (ECHR or ICCPR+CAT) was a prerequisite for the determination of a country as safe (European Commission, COM (2000) 578, final Annex I; COM (2002)

326 final, Annex I) No particular emphasis was given for individual assessments of safe country decisions, and blanket application of safe country rules was possible in practice.

Despite its relatively good protection standards, the proposal was not satisfactory for UNHCR and the refugee protection circles. The criticisms were mixed in nature, although a predominantly legal nature can be observed.

UNHCR, in principle declared its acceptance of the safe country concepts, as long as their safety is guaranteed for every individual. (UNHCR, 2001) It emphasized the importance of the ratification of the Geneva Convention, and general implementation of the standards laid down in this Convention as well as the basic standards of human rights law. (UNHCR, 2001, para. 34) It also criticized the proposal for inadequate guarantees for the admittance of the returned refugees by the third country, risking orbit cases stating that: “This approach is clearly inappropriate from an international protection point of view, as it may (...) have serious consequences in terms of refugee protection- including (...) the principle of *non-refoulement*.” (UNHCR, 2001, para. 38)

In 2003, UNHCR has shared its position on the secondary movements of refugees and asylum seekers, including the safe country applications. In the summary conclusions of its expert roundtable, it summarized its position for the safety of safe countries. According to this for “effective protection” of asylum seekers and refugees there should be: no real risk of persecution; respect to fundamental rights not limited to right to life, liberty and to be free from torture; no real risk to be sent to another state without effective protection; explicit agreement of the third state to readmit the asylum seeker; accession and compliance of the third country with the 1951 Convention and/or its 1967 Protocol, unless the destination country can demonstrate that the third state has developed a practice akin to the 1951 Convention and/or its 1967 Protocol; access to fair and efficient asylum procedures; access to means of subsistence sufficient to maintain an adequate standard of living; and consideration by the third country for the special vulnerabilities of the person. (UNHCR, 2003)

The “effective protection” criteria of UNHCR, signifies organization’s interpretation of *non-refoulement* responsibility. According to this, for a transfer of the asylum seeker not be in violation of *non-refoulement*, lack of threats of persecution is not enough. Respect to fundamental rights, not limited to the right to life, liberty, and to be free from torture are required as a minimum. The third country need to have actual practice in accordance with the 1951 Convention regardless of it being officially a party to the Convention or not. Moreover, the transferred asylum seeker must have access to means of subsistence to maintain an adequate standard of living.

Blanket application of safe country concepts and its contradiction with the asylum procedures in refugee and human rights law was another primary concern of UNHCR. UNHCR suggested that “whether a particular third country is safe for the purpose of returning an asylum seeker is not a generic question which can be answered for any asylum seeker in any circumstances” and the determination of safety must be made on an individual basis. (UNHCR, 2001, para.33) Lack of such individuality in the admissibility decisions of asylum applications might risk the *refoulement* of especially the members of minorities and other vulnerable groups.

In its evaluation on the 2000 APD proposal, ECRE demonstrated all facets of process legality with the legal rhetoric that it uses and with insistent references that it made for the existing international legal standards. It criticized the proposed EU directive with direct reference to international refugee law and the *non-refoulement* responsibility as ascribed by it. ECRE suggested that safe country determination should ensure that “a person is only sent to a country which has ratified and implemented the 1951 Refugee Convention, adheres to other human rights standards and has an asylum procedure in place prescribed by law.” (ECRE, 2004, 10) It asked for the withdrawal of the proposal pointing the incongruity of the proposed directive with international law and the “effect that this abdication from international law obligations *would* have on refugee protection within the EU and elsewhere” (ECRE, et al., 2004) ECRE Information Note (2006) shared upon the acceptance of the Directive in 2005, criticized the safe country provisions, by making references to international law, and relevant conventions, primarily the 1951 Convention and 1967 Protocol, and ECHR, but also ICCPR, CAT, European Charter of

Fundamental Rights: “ECRE therefore underlines the need for very strict criteria for the designation of third countries as safe. Namely, it must have ratified and implemented the 1951 Geneva Convention, without geographic limitation, and other international human rights treaties (...), respect its obligations in practice and have a fair and efficient asylum procedure in place.” (ECRE, 2006, 24)

On the individuality of procedures ECRE criticized the directive proposal for not requiring individual examinations in safe country implementations, suggesting that it is “gravely flawed as it permits Member States to deny an individual examination of the asylum application and to return asylum seekers to countries outside the EU without properly making sure that these countries are in fact safe for those persons.” (ECRE, 2004, 10) It pointed to the inadmissibility of blanket designations of security with the individuality principle, suggesting that it “fundamentally conflicts with the principle, enshrined in the 1951 Refugee Convention, that every person should have the right to lodge an asylum application and have it considered on an individual basis.” (ECRE, 2004, 11) In all the examined documents, ECRE based its criticisms almost completely on international legal requirements and legal protection of asylum procedures, demonstrating a visible process legality in the way it contests existing regulations.

In its evaluations of the proposed APD, European Parliament also had a principally legal approach. It emphasized that safety of a country cannot “be answered in a generic fashion (...) for all asylum seekers in all circumstances” but only on an individual basis, for it would entail risks of chain *refoulement* (European Parliament, 2005, p.34) and therefore is legally problematic. Besides the problem of individuality, European Parliament came up with loud criticisms about the proposed Directive’s relation with existing international and regional legal standards. Following the same lines with ECRE, it suggested that both “ratification and implementation of the Refugee Convention and other international human rights treaties, in particular with reference to the principle of *non-refoulement*” should be respected. (European Parliament, 2005 amendment no. 75, 35) European Parliament also drew attention to the need for further emphasis on *non-refoulement* as the core of the international refugee protection (amendments no 2; 75); insertion of the expression “meaningful link” between the asylum-seeker and the relevant safe country,

instead of only “connection” (amendment 79); and to put as a requirement for transfer of the asylum seeker the “explicit consent to (re-)admit the asylum seeker and to provide him/her full access to *procedures*.” (amendment 78).

The amendments proposed by the Parliament were in close parallel to the concerns of UNHCR and ECRE, and were justified on a legal basis referencing the international refugee and human rights law. There was concurrence among the protection-oriented circles that safe countries should comply with Convention standards in practice, respect fundamental rights and provide accessible asylum procedures. Therefore, by 2005, they had an agreed-on understanding on the content of *non-refoulement*. Moreover, safe country decisions, according to this interpretation should only be made after individual examinations, with guaranteed admission of the refugee by the safe state, and a meaningful link between the individual and the safe state. Hence individuality was an essential part in the right implementation of the *non-refoulement*.

The provisions on safe third country and safe country of origin constituted the most difficult aspects of the 2000 proposal to achieve an agreement among the member states, the Parliament and the Council. (Ackers, 2005) This difficulty resulted with the abandonment of the safe country conditions detailed in the annexes, and instead greater state discretion is accepted. The calls by neither of the institutions could find full correspondence in the finalized EU legislation in 2005. To the contrary, Asylum Procedures Directive as accepted in its final form in 2005 had looser standards for designating a country as safe compared to its proposed version, except for certain improvements in individuality and appeal conditions. The prevailing logic in such a renunciation from higher standards was not legal, but functional and pragmatic as stated by a commissioner, “while the Commission had a lot of sympathy for the numerous amendments from the European Parliament to enhance guarantees for applicants, they would not, taking into account the debate in the Council, be able to accept amendments which changed the balance between fairness and efficiency.” (Ackers, 2005, 8)

In the Council Directive 2005/85/EC the conditions for the ratification and observance of the Refugee Convention or the basic human rights treaties disappeared. Safe third country

determination by individual member states is accepted as long as national authorities are satisfied that the life and liberty of refugees are not threatened on discriminatory grounds, principle of *non-refoulement* will be protected, prohibition of removal is respected and a possibility exists to request and receive protection in accordance with Geneva Convention. (Art. 27 (1) (b) and (c), 2005/85/EC) As ratification of the Geneva Convention or implementation of human rights standards were not solidly required and no alternative Union-level standards were put in place, the only remaining condition for the application of the safe third country became the “national authorities to satisfy themselves that the third country concept may be applied to a particular country or to a particular applicant.” (Art. 27 (2)(b), 2005/85/EC) and a non-qualified connection between the third country and the applicant.

A minor improvement find place in the 2005 directive that will further develop in the future was about the individuality. A line is added to the text in Art 27 (2)(c) saying that national rules “as a minimum shall permit the applicant to challenge the application for the safe country concept.” Although it is far from satisfactory for the individuality standards in international law, this ‘permission to challenge’ is an improvement compared to 2000 proposal.

In 2009, the change in the decision making structures of the Union with the Lisbon Treaty, including the increasing role of the Parliament, revived hopes for a more protection-oriented focus and less member state discretion for the sake of more harmonization in a recast APD. These hopes were not completely realized in the 2013 recast directive, insisting on a restrictive interpretation of *non-refoulement*, which is based on rather indiscriminate and loose standards of safe country rules. However, once again some improvements for a stronger *non-refoulement* understanding can also be pointed out.

3.3.3. 2009-2013: Amending the Asylum Procedures Directive

In 2009, Commission adopted its first proposal for a recast Asylum Procedures Directive. With the Lisbon Treaty, the reference in the EU primary legislation (Art 78 TFEU) for granting and withdrawing of asylum and subsidiary protection status changed from

“minimum standards” to “common procedures”. This vision of moving beyond minimum standards and reaching a harmonization around common procedures required the secondary legislation including the Asylum Procedures Directive to be revised accordingly.

There was not a big change in the safe country standards of 2009 proposal compared to 2005 directive, yet we can see some enhancement of the standards. To the list of preconditions for attributing safe third country status, an addition was made in the relevant article to include absence of the “risk of serious harm” among the safety preconditions. (2009 Art. 27/1/b; 2013 Art. 38/1/b) There also was an improvement on the individuality of safe country procedures. Signifying an acceptance of the refugee-oriented view on the individuality of safety, in the 2009 proposal, admissibility interviews are made mandatory before every decision of implementing safe country concepts. (2009 Art. 30; 2013 Art. 34) The right of individuals to appeal the safe country decisions is also broadened to include not only challenging the safety assumption but also the attributed connection of the person to the third state. (2009 Art. 32/2/c; 2013 Art. 38/2/c) Both of the proposed improvements are codified in the final text in 2013 recast APD.

UNHCR’s comments on the safe country provisions in Commission’s 2009 recast proposal were not different from the ones it had made for the original Directive in early 2000s. They emphasized their concern for the wording of “sufficient protection” for first country of asylum in art. 31(b), and called for a change to “effective protection.” In its justification UNHCR gave reference to the ECtHR decision *Abolkhani and Karimnia v. Turkey*, 2009 which establishes that the state sending the applicant under the safe third country procedures to a third country is still responsible to ensure that the applicant is not exposed to a treatment contrary to Art. 3 of ECHR, and otherwise it will be a *refoulement* on part of the sending state. This direct reference to a court judgement to justify the demand for “effective protection” in the receiving state, is a demonstration of the legal process being used in the contestation. Similarly, it made explicit references to the Convention demanding the “setting out of the criteria for effective protection (...) in line with 1951 Convention.” (UNHCR, 2010, p.33)

On the individuality of admissibility, UNHCR once again considered the generalized decision for designating a state as safe for every possible applicant to be carrying the risk of chain *refoulement*. (UNHCR, 2010, p. 35). It criticized the unchanged ‘and/or’ formation in the recast art. 38 (2) (b) (former art. 27 (2) (b) which says “such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe”) that permits the application of safe country provisions without an examination of safety for the particular individual applicant. It called for the change of this provision for the sake of the principle of *non-refoulement*.

ECRE supported UNHCR for the use of “effective protection” instead of “sufficient protection” in the provisions for the sake of a proper interpretation of *non-refoulement*, suggesting that “this is necessary to ensure that not only protection against *refoulement* but the full range of refugee rights enumerated in the Geneva Refugee Convention, the Qualification Directive and other international and European human rights instruments are guaranteed in a first country of asylum.” (ECRE, 2011, 31) ECRE also opposed safe third country concept to be a basis for inadmissibility, stating that “potential irreversible harm” requires scrutiny of each individual case substantively. (ECRE, 2011, p. 30) Once again the objections were made primarily on legal grounds.

European Parliament in its 6 April 2011 resolution proposed amendments on the Commission’s proposal. The major points that it raised against the proposal were once again about the conditions for the safe country of origin and individual application of the safe third country procedures. The Parliament also followed the efforts of UNHCR for demanding the change in the “sufficient protection” requirement into “effective protection”. For the sake of harmonization that had been aimed since Tampere Summit, it opposed the national lists of safe country of origin and safe third country.

Most of the comments of UNHCR, ECRE or European Parliament, once again could not find any concrete reflection on the Commission. In 2011, the Commission amended its 2009 proposal for the recast directive, however there was no substantial change in safe country provisions in light of the recommendations.

On the opposite side of the contestation, the nature of the argumentations of the European Commission supporting its restrictive position is most openly and clearly seen in the explanatory memorandum publicized together with the 2011 amended proposal. Here, the Commission had a remarkably political approach in its replies for criticisms. It presented the new proposal primarily highlighting its efficiency and cost effectiveness. It suggested that “the system proposed in the modified proposal is both efficient and protective. It is cost-effective and helps tackle potential abusive claims. It guarantees that applications will be treated similarly in all Member States. It fully respects fundamental rights and the related developing case-law, thus also helping ensure it can withstand challenge before the courts. At the same time, it is flexible enough to accommodate the particularities of national legal systems. The rules that compose it are clarified and simplified to ensure effective implementation.” (European Commission, 2011, 1-2) All these attributes clearly reflect the state-centric approach favorable for the member states, demonstrate their control-oriented vision and the general aim of limiting the asylum applications in the region as much as possible. Even the reference to respecting fundamental rights is praised in terms of its functional benefit of “withstanding challenges before courts”. The protection-oriented vision, and the references to the international law and protection of refugees are very much in the shadow in the explanatory note, as well as in the text of the new proposal. The Commission in the explanatory memorandum accepted that “most of the proposed amendments (*by the European Parliament*), aimed at strengthen the guarantees for applicants.” (European Commission, 2011, 4) However it also accepted that the European Parliament proposals on the safe country rules, such as the annulment of member state safe country of origin and safe third country lists could not be incorporated into the amended text. Most importantly for the hereby analysis, this position of the Commission is explained and justified on the grounds of feasibility and practical unpreparedness, giving no legal replies or justifications based on international or EU law. This document is important to show the mixed nature of the contestation process, despite the consistent legality by both UNHCR and ECRE. Although the challenges to European policies are made through legal means and argumentations, the replying justifications as demonstrated in the examined documents, are non-legal in character.

2013 final text of the recast APD has codified the safe country provisions as they were given in the 2011 proposal. Thereby, despite strong criticisms by UNHCR and ECRE, as well as demands from the Parliament, no further revision is made to the proposals of 2009 and 2011. “Effective standards” of protection was not incorporated into the safety requirements of safe country determinations, and similarly no amendments are made for the enhancement of individuality in applicability decisions based on safe country rules.

Although it has been harshly criticized for its weak and vague protection standards in the safe country concepts, the 2013 recast directive constitute a relative improvement on the interpretation of non-refoulement content compared to 2005. “No risk of serious harm” as defined in the Qualifications Directive (2011/95/EU) is added to safety requirements (like no threat to life and liberty based on discriminatory grounds) for assigning a safe third country (2013/32/EU, 38/1/b). Importantly, admissibility interviews before safe country-based inadmissibility decisions are made mandatory, contributing significantly to the consensus on individuality of *non-refoulement* decisions. As another improvement in the same direction, the appeal rights of the individual to challenge inadmissibility decisions has widened with permission to challenge “existence of a connection between him and the safe third country” added to the previous right to challenge safety conditions. (2013/32/EU, 38/2/c)

3.3.4. 2016: A New Proposal for Asylum Procedures

In 2016 European Commission proposed a new Asylum Procedures Regulation to replace 2013 Directive. 2016 proposal of the commission turns the Asylum Procedures Directive into a regulation thus making it binding on all member states. Proposed regulation involves several important changes that arguably increase the protection standards, clarify implementation limits and harmonize state policies and practices. One of the most important changes of the regulation is the construction of Union level safe country lists, and mandatory use of safe country concepts. A harmonization of standards and policies throughout Europe is a much awaited development in CEAS, and union-level determination of safety standards for third countries is a step forward. The change of “may” provisions into “shall” removes state discretion for admissibility and accelerated

procedure decisions. Although this prevents state policies to be more progressive than the determined EU standards, it may be evaluated optimistically as it also prevents state practices to be more restrictive than outlined.

Although the concept of “sufficient protection” remains intact and has not been replaced with effective protection despite insistent demands from the refugee community, a detailed definition of sufficient protection is included into the text, providing clarification and precision to the concept. The “sufficient protection” is explained with the baseline conditions explicitly listed in Art. 44(2). As an important step forward compared to 2013, for the first time certain fundamental rights of refugees are incorporated to the protection requirements. According to this, right of legal residence; access to labor market, access to reception facilities, healthcare and education; and the right to family reunification in accordance with international human rights law (44 (2) e, f, g) are among the required conditions for “sufficient protection”.

In the safe third country provision, the requirement for “protection (*of refugees*) in accordance with the Geneva Convention” in Art. 38 of the 2013 Directive is amended as receiving protection “in accordance with the substantive standards of the Geneva Convention ‘or’ sufficient protection as referred to in Art. 44/2” (emphasis added). With this change into an ‘or’ statement the link with the Geneva Convention seems to be weakened. Although this detachment from the Convention as a formal requirement has been criticized both by the NGOs and the UNHCR for harming the refugee protection standards of the Convention regime (Amnesty International, 2017; UNCHR, 2019), the widening of protection conditions in the new definition of sufficient protection constitute, at least on the paper, a relative rapprochement of EU legislation towards the view of the UNHCR and ECRE. The list of sufficient protection requirements covers almost all aspects listed in the “effective protection” standards previously declared by UNHCR (2003). It also hints a broadening of the *non-refoulement* interpretation in Europe which expands to include the conditions for the maintenance of an adequate living along with the physical safety conditions. 2016 APR also contributes to the precision of *non-refoulement*, with more detailed provisions not only on protection standards, but also on

the sources and procedures of safe country determination (Art. 48) and the required connection between the individual and third state.

These improvements in no sense mean a shift to a pro-refugee understanding in European asylum policies, nor the proposed regulation, if it comes to be accepted, will ensure the enjoyment of all stated aspects of protection in practice. However, in evaluating the evolutionary trajectory of *non-refoulement*, these subtle retouches points to a slow and relative enhancement. It is difficult to call this a new tentative *status-quo*, not only because the Regulation is not yet accepted, but also because the contestation does not seem to be coming to a relative stability. The insistence of the pro-protection actors for more direct and formal reliance on international refugee and human rights law, and more concern for the practical implementations in the safe countries still continues. However still, the relative broadening of safe country protection requirements in 2016 might be evaluated to be in support of the proposition, which expects norm strengthening through legal contestation.

3.3.5. Evaluation of the Content of Non-Refoulement Responsibility at t_4

The general state-centric, control-oriented approach to the refugee issue in Europe results with a restricted meaning-in-use of *non-refoulement* in terms of its content. No refugee or asylum seeker shall be sent back to where their safety will be at risk, however the limits of required safety; hence the content of *non-refoulement* is indirectly determined by the safe country concepts. The stricter the standards and conditions to designate a country as safe for *refoulement*, the stronger the *non-refoulement* norm through a wider content, higher precision and authoritative power. In this sense, generally speaking a narrow interpretation of *non-refoulement* prevails in Europe, and looking at the 2016 proposal for APR, one can say that state-centric approach will continue to prevail.

Putting this recognition aside, an evaluation of the relative changes that has been realized throughout the evolution of safe country concepts in subsequent legislations gives a more optimistic picture of a very slowly strengthening norm of *non-refoulement* from 2005 APD to 2013 recast APD and then to 2016 APR proposal. If, for the sake of analysis we

consider the 2016 proposal as the latest tentative meaning-in-use (t4), we may compare it to the former tentative *status-quo* determined with the first APD in 2005 (t3).¹⁸

Table 3.2: Change of Norm Strength t₃ – t₄

NORM STRENGTH AT t ₄		Change (t ₃ - t ₄)
Authoritative Power	• More frequent references in migration legislation • More instruments to avoid <i>non-refoulement</i> responsibilities, implying norm's authority	↑
Global Reach	• All European states	↔
Meaning	<i>Precision</i> • More detailed explanation of 'sufficient protection' requirements • Union-level safe country lists • Less member state discretion in transfer conditions	↑
	<i>Scope</i> • No blanket implementation for safe countries • Obligatory individual assessment of admissibility • Guaranteed third country cooperation	↑
	<i>Content</i> • Access to social services and adequate standard of living added to the safety conditions • Substantial Convention standards or sufficient protection • No chain refoulement	↑

Compared to 2005, requirements to designate a country as safe for a particular refugee has increased leading to a strengthening in the content dimension of *non-refoulement*. The condition of “sufficient protection” for the recognized refugees is broadened with the

¹⁸ As t₃, I compare 2005 Directive instead of 2000 proposal because of the unrepresentative and unique character of the 2000 proposal which had not been followed up by the Commission in the legislation process. The approach in 2000 proposal could never be agreed on and realized in legislation. It does not represent a tentative status-quo for the norm.

inclusion of fundamental rights and maintenance of an adequate standard of living. In 2016, European Charter of Fundamental Rights and ECHR are referred among the conditions of safe third country determination processes for the first time. With the Union-level safe country lists and the roadmap given for the composition thereof, the standards of safety are further clarified. Member state discretion in the determination of safe countries and implementation of safe country policies in particular cases have decreased. This clarification and harmonization of standards has relatively strengthened the precision of the norm of *non-refoulement*. The relative improvements in the individuality of safety determinations, such as the mandatory admissibility interviews, broadened appealing opportunities and guarantees for automatic suspension of return decisions, also signifies a strengthening in the applicatory scope of the norm. More frequent reference to *non-refoulement* in migration and refugee legislation as well as the increasing diversity and sophistication of the instruments to by-pass *non-refoulement* responsibilities of states demonstrates the strengthening of the authoritative power of the norm of *non-refoulement*.

3.4. Conclusion

This chapter examined the evolution of the legal norm of *non-refoulement* in the context of Europe through two main contestation periods. It tried to analyze the relationship between the formal legality of the norm, process legality in the contestations and the change in norm strength. It demonstrated that the dialectical tensions between contesting interpretations leads to norm evolution and construct the meaning-in-use of the norm through contestation processes.

Despite the persistence of preventive strategies and restrictive policies, the norm of *non-refoulement* does not demonstrate a weakening trend in Europe. To the contrary, a segmented analysis of different aspects of *non-refoulement* shows that there are significant improvements in the applicatory limits and individuality of the *non-refoulement* liabilities, as well as some developments in the required protection standards. Process legality in the contestations contribute to the preservation of norm strength by increasing the authoritative power of the norm, and by empowering broader

interpretations. Although at the moment restrictive interpretations of *non-refoulement* seem to prevail especially in terms of the content of the norm, this chapter has demonstrated that legal contestation is a potent mechanism to create pressures for incremental changes, gradually intensifying a rights-based understanding of the norm.

Although no additional document has been created to refine the definition, scope and limits of *refoulement*, the way *non-refoulement* norm and related state responsibilities are interpreted has gradually changed through cycles of contestations in the examined period. This demonstrates the norm as a constantly evolving organism and gives a better understanding as to the mechanisms of change and stability.

When the contestation is unfolded with the use of legal institutions and argumentations to the full as was the case in the first contestation cycle on geographical applicatory limits, contestation leads to a clear strengthening of the norm. When process legality is weaker in the contestation process, with no involvement of international judiciary and political claims on cost-efficiency and border protection as was the case in the second contestation cycle, norm strengthening is limited and subtler.

At the end of the first contestation cycle on the geographical limits of *non-refoulement* responsibility, a new tentative meaning-in-use is reached suggesting a stronger norm, according to which state responsibility is not territorially bound, but may be triggered by continuous and exclusive de jure and de facto control over the migrants. This new understanding of *non-refoulement* responsibility rendered the responsibility evasion efforts of European states through *non-entrée* policies (particularly interdictions at sea) obsolete. Since early 2010s, a European state that is willing to minimize its asylum responsibilities and associated costs without violating *non-refoulement* has two logical options; stopping incoming migrants with the hand of another state (no *de facto* control no responsibility), or returning the migrants to a third state thereby transferring the asylum responsibilities including *non-refoulement*.

A second cycle of contestation, that is still ongoing is unfolded on the issue of required safety standards for legally transferring *non-refoulement* responsibility, in other words on

the content of the *non-refoulement*. Although a new *status-quo* is yet to be achieved, the current meaning-in-use for *non-refoulement* in the 2013 APD, which is the legislation that is still in force today, include guaranteeing minimum physical safety standards and legal opportunities to seek protection. This meaning-in-use appears to be in a phase of further broadening with the inclusion of the access to means for an adequate standard of living to the proposed APR in 2016.

As established in the theory chapter, norm strength for the purposes of this study is composed of three parts; authoritative power, global reach and meaning. Meaning involves the precision, content and scope of the norm. In both of the examined contestation periods, the norm strengthens in terms of its authoritative power and scope (universe of applicable cases). On meaning dimension, while the widened applicatory scope in the first contestation cycle (interception at sea) is a clear achievement, the improvements in the norm's content in the second contestation cycle (safe country concepts) are subtle.

In the first contestation cycle on the applicatory limits of *non-refoulement* responsibility (t1-t2), we observe a strengthening in the scope of the norm in line with the broad protection-oriented interpretations. The norm has evolved in a way to embrace gradually wider limits of state responsibility; hence the universe of applicable cases has expanded. Due to this, we can see a strategical shift in European migration policies towards a “no touch” approach. Although the control-oriented mentality in migration and asylum policies is still evident, the protectionist pressure for a broader interpretation of geographical limits of *non-refoulement* put states in a situation where they had to accept responsibility in situations of direct contact with the migrants. This obliged them to shift their *non-entrée* policies to no-exit policies where the direct control of migrant movements is conducted not by the European state, its vessels or its officials, but by the transit or origin states. It became an established understanding that asylum seekers cannot be left in limbo at the door of a third country which does not accept it to its territories. As the *non-refoulement* responsibility does not disappear, but it has to be transferred, a third party has to embrace this responsibility vis-à-vis the returned migrant. Such conditionality to ensure the admission or readmission of the migrant into the third country has gradually

increased in subsequent legislations. The increasing number of formal and informal readmission agreements by the EU and the member states shows that the meaning-in-use of *non-refoulement* in Europe today includes the practical acceptance of the migrant by the third country. More importantly all these policy changes and strategical shifts in European migration management stand as a proof for the norm's authoritative power.

Strength analysis is more complicated in the second contestation cycle (t3-t4). In the second half of the chapter, the contestation on the content of *non-refoulement* responsibility is examined with regard to the individuality of *non-refoulement* assessments and the safety standards required for *non-refoulement*. On the individuality aspect, it is observed that there has been gradual deepening on the rejection of blanket assessments of *non-refoulement* and the requirement for individual admissibility assessments. Although the determination of countries as safe for return and the use of fast track options of responsibility transfer has not ceased to be popular policies, individual assessments of people with asylum claims are accepted to be the norm to avoid violation of *non-refoulement*. (Although this principle is not implemented effectively and many refugees and asylum seekers face with the risk of *refoulement*, these are bad practices rather than alternative interpretations of the norm.) The gradual enhancement of the right to appeal inadmissibility or return decisions, and now generally accepted automatic suspensive effects in appeal situations, are achievements of the pro-protection fronts against blanket applications of control-oriented policies. This represents a strengthening in the scope dimension of the *non-refoulement* norm.

On the safety standards it is more difficult to make a judgement for strengthening, although there are certain signs of slight improvement. 2016 proposal for APR weakens the links with the Geneva Convention with increased emphasis on sufficient protection. However, at the same time it makes an explicit and relatively more comprehensive definition of the sufficient standards that need to be guaranteed in a safe state. This is praised by the UNHCR (2019), although still found inadequate compared to the “effective protection” standards it demands. Overall, it can be said that in terms of the required safety standards, even though the big picture is far from satisfactory from a protection

point of view, the evolutionary trajectory suggests certain slow and subtle improvements for the content of *non-refoulement* responsibilities.

Evaluated together with the nature of contestation processes, these assessments of norm strength change mostly support my proposition on the relation between process legality and norm strength.

In the first contestation cycle on the applicability limits of *non-refoulement* responsibility, the clear strengthening in both authoritative power and meaning dimensions of norm strength corresponds to a legality of the contestation processes. The contestation between control and protection oriented visions during this contestation cycle had unfolded on legal grounds, using various possibilities of legal process; legal arguments, references to international legal documents, references to precedents, interlinkages with more developed areas of international law, and binding court decisions. The analysis of the first contestation cycle demonstrates that the norm of *non-refoulement* owes most of its expansionary support to its entrenchment within human rights law and the institutions that promote and protect it, including the advocacy networks, NGOs and courts. The refugee law has come to a point where it needs to embrace this wider interpretation thanks to this double-nature of the *non-refoulement*, protecting it within two different legal frameworks. Human rights law provides a progressive push to the norm of *non-refoulement* in Europe due to its deep establishment and institutional entrenchment in the EU. Bringing in the jurisdiction of ECtHR, has a potential for establishing expansive interpretation through enforceable decisions. Saying this, however, it is important to note that the European Court does not always adopt a progressive attitude in interpreting different aspects of *non-refoulement*, compared to other human rights bodies (Çalı, Costello and Cunningham, 2020). Although Hirsi was a seminal judgement for expanding refugee protection at the sea, the recent *M.N. and Others v Belgium* judgement of inadmissibility represents an unwillingness of the Court for further expanding its extra-territoriality interpretation to those being denied access to protection abroad in embassies.

The second cycle of contestation on the safe country concepts also supports the positive relation between legal nature of contestations and norm strength. This time we see that

the limited use of process legality is associated with limited improvement in norm strength. On the one hand, the arguments by pro-protection actors for the improvement of safety standards in inadmissibility and return decisions are mostly framed within a legal reasoning with reference to international refugee and human rights law and related state obligations. However, on the other hand, on part of the European Commission the justifications for loose and indeterminate safety standards were political in nature. Moreover, it may be argued that there has been inadequate involvement of judicial institutions in this second cycle of contestation. There have been no attempts to litigate the claims against loose safety standards in CJEU for a possible violation of fundamental rights. There have not been open interlinkages with the substantive provisions of the human rights law. Supporting this claim, more visible enhancement in the individuality aspect of safe country procedures throughout the examined process can be associated with the fact that it is a better-established norm in international law, and has been subject to ECtHR judgements (*Sharifi and Others v Italy and Greece*; *Khlaifia and Others v Italy*) as part of Protocol 4 to the ECHR, prohibiting collective expulsions.¹⁹ This however, is not the case for the issue of safety standards of safe countries. A report by the research division of the ECtHR accepts this fact by stating that “There have been only a few cases where our Court has expressly and specifically examined the concept of a ‘safe third country’. (...) When dealing with this concept, the Court’s usual reasoning is essentially procedural, i.e., focused on examining the procedural guarantees that must necessarily underpin the evaluation carried out by domestic authorities. (...) The Court has never questioned the legitimacy of the national lists of ‘safe third countries’ as such, nor has it declared that a given third country was (or was not) safe.” (ECtHR, 2018, 6-20) An argumentative strategy by the pro-protection community to utilize the substantive standards of human rights and concrete achievements of the human rights law in the fight for expanding refugee protection could have a constructive effect for broader safety standards, however this has not been utilized. Unlike the series of ECtHR decisions on the extraterritorial state jurisdiction which has led to *Hirsi*, the Court has been inactive on the issue of safety standards. Therefore, it can be argued that the potentials of legal

¹⁹ It is important to note here that the European Court seems to have reversed its attitude in recent *N.D and N.T. v Spain* judgement, with a restrictive interpretation of collective expulsions, potentially opening a door for push back operations.

process have not been used to the full, and this is associated with the limited improvements in norm strength.

In the European context, one obvious step to benefit from the constructive effect of legality in refugee protection would be the separation of the falsely consolidated migration and asylum areas. Right to seek asylum is a right under human rights law, and the subjects of this right constitutes (at least legally) a drastically different segment from most of the irregular migrants. Taking the issue of asylum out of the international migration framework and putting it in human rights agendas could release asylum policies from the restrictive approaches towards economic migrants, and contribute to norm strength with the added support of law as process. A second point that hampers the norm strengthening influence of process legality is the political *quid pro quo* nature of bi and multilateral readmission agreements where one side accepting to receive migrants, and the other giving them aid, visa concessions, etc. in return. Making the situation even worse, in many cases the return and readmission practices are not based on formal readmission agreements, but on informal joint declarations (Diez, 2019) which do not have a legally binding force, nor are subject to legal scrutiny and monitoring. In that sense, regulations that prioritize protection standards of refugees in the externalization policies and recognition of joint and indirect responsibilities are further steps to be taken for more effective process legality in European refugee protection.

CHAPTER 4

RISE AND FALL IN THE EVOLUTION OF HUMAN PROTECTION NORM

4.1. Introduction

Human protection is a broad norm which entails the idea of protecting people from humanitarian atrocities through international military action. The idea has a long history, predating the modern humanitarianism and human rights going back for centuries to the times of Gentili and Grotius who have recognized the wars waged against a sovereign on behalf of the oppressed as just. (Chesterman, 2000, 16-20) The Christian scriptural and natural law basis of this just war understanding for human protection gains a secular and universal character with the development of modern international relations. The idea that was at first limited to protection based on kinship or shared religion evolves into “saving strangers” (Wheeler 2000) after WW2, and gains a higher profile following the cold war. Debates throughout this long history, has not only questioned the legality of such a doctrine, but also its subjects, objects, means and purposes. Regardless of such contestations, the idea for the moral and political (if not always legal²⁰) acceptability of using force for protecting people from atrocities has been an international norm at least

²⁰ For international law scholars that oppose the existence and/or legality of a doctrine of humanitarian intervention see Franck and Rodley, 1973, “After Bangladesh: The Law of Humanitarian Intervention by Military Force.” *American Journal of International Law*, Vol: 67/2, 275-305: Arguing that historically mixed precedents do not let the acceptance of a legal norm that permits such interventions. Brownlie, 1973, “Thoughts on Kind-hearted Gunmen” in Lillich (ed.) *Humanitarian Intervention and the United Nations*. (Charlottesville: University Press Virginia): Arguing for lack of legal basis as well as the inevitability of the abuse of such a doctrine for hegemonial purposes. For international law scholars that defend the doctrine see Lillich, 1969, “Intervention to Protect Human Rights.” *McGill Law Journal*, Vol: 15: Arguing that humanitarian intervention is justifiable both in customary law and in the Charter and is required to protect people from government oppression. Teson, 1997, *Humanitarian Intervention: An Inquiry into Law and Morality*. Dobbs Ferry, (New York: Transnational Publishers): Argues that a moral reading of the tension in international law between state’s and individual’s rights legitimizes humanitarian intervention to protect individuals from tyranny.; Wheeler, 2000, *Saving Strangers*, (Oxford: Oxford University Press): Argues that with the precedents since end of the cold war, SC authorized humanitarian interventions became legitimate.

since the end of the cold war, in the sense that it may legitimately be argued to be “the standard of appropriate behavior” for state actors. (Finnemore and Sikkink, 1998)

Human protection is an umbrella norm which has been solidified under different formations such as humanitarian intervention, responsibility to protect (pillar III) or protection of civilians.²¹ Although each of these doctrines are very different in content, purpose, and policy implications, they all share the same founding idea of protecting people from atrocities by use of force. Examining humanitarian intervention and responsibility to protect (R2P) pillar III²² together under a single norm of human protection puts the norm’s puzzling evolution into sharper focus and allows me to investigate the role of legality on this trajectory. Human protection is not a legal norm. Although it is a standard of appropriate behavior, it does not have a formally legal character in the legal positivist sense. No international legal document creates an obligation, or a right for states to act for the protection of human populations from violence under another state’s sovereign control. There is no *opinio juris*, nor persistent state practice required for the recognition of customary nature. There is “explicit negation of intent to be legally bound” (Abbott, 2000, 410) by many and various states, as well as a rather weak language of commitment. As it is a non-legal norm, the influence of process legality in its evolution can be observed in isolation from the effect of formal legality.

In this chapter, following the same scheme with the previous empirical chapter on *non-refoulement*, the historical narrative of the norm evolution for human protection will be constructed around cycles of contestation. The change in the norm strength between the beginning and end of the contestation processes will be examined for each contestation

²¹ This umbrella norm has been recognized in the literature as such under different rubrics such as “humanitarianism” (Hoffman and Weiss, 2018) or “norms of protection” (Francis, Popovski, Sampford, 2012; Kurtz and Rotmann, 2016). I opt for the label ‘human protection’ in order to differentiate it from moral and legal principles of humanitarianism in the conduct of war, and emphasize it as a single norm that comes up with different faces throughout history, rather than a set of norms.

²² Responsibility to protect is a broader framework than humanitarian intervention. While the former involves the threat or use of military force only (Verwey, 1992), R2P based on the idea of “sovereignty as responsibility” (Deng, et al. 1996) essentially alters the military logic of humanitarian intervention. Use of force under its pillar III is only one aspect of the R2P framework besides responsibility of each state to protect their people (pillar I) and responsibility of the international community to assist (pillar II). Along the lines of the norm of human protection this study focuses only on pillar III.

cycle based on the multidimensional operationalization of norm strength composed of meaning, geographical reach and authoritative power dimensions. The nature of the contestation processes; i.e. the existence (or lack) of process legality will be examined with the aim of analyzing the relationship between norm's formal legality and process legality (hypothesis 1), and between legality and norm strength (hypothesis 2). Again similar to the first case study, this analysis of the nature of contestation will require a discursive examination of the arguments and counter arguments that are made for contending views, as well as the justifications by actors and the institutional settings chosen for discussions and solutions.

Two issues that have been creating the most salient (and observable) contestations for the norm of human protection, both for the literature and for the practitioners are the issues of authorization and operational limits.²³ After humanitarian intervention gained conspicuousness in 1990s, two major crises that have initiated cycles of contestation on the norm were the cases of NATO's unauthorized Kosovo intervention in 1999²⁴ and UN-authorized Libya intervention in 2011. High profile international normative contestations around Kosovo and Libya/Syria crises and drastic norm changes that have occurred at the end of these contestation processes render these two periods best fits for such an examination. Two contestation periods, despite the similarities in terms of identities and interests of involved actors, as well as the parallel between the nature of conflicts on the ground, have induced opposite consequences on norm's trajectory. While the norm became more widely accepted, more precise and more institutionalized under the new R2P framework following the post-Kosovo contestations, it has lost its global acceptance and discursive legitimacy considerably after Libya and Syria. Analyses in this chapter show that legal nature of contestation processes plays a determinative role on this outcome.

²³ Decision making parameters such as the just cause thresholds or precautionary principles is a third salient issue which is excluded in this analysis.

²⁴ For a review of the literature advocating legality, illegality or *lex ferenda* nature of unauthorized intervention in Kosovo see Rodley and Çalı, 2007.

Existing studies on the influence of Libya/Syria contestation on the evolution of human protection norm has a soft spot in explaining the contrast between post-Kosovo norm strengthening and post-Libya/Syria norm weakening.²⁵ Analysts that examine the weakening influence of Libya/Syria on the R2P generally base their arguments on the rising accusations of abuse, which damaged the legitimacy of the norm, and broke up of the global consensus around pillar III. (Welsh, 2013; 2019) The problem here is that the discussions on the legitimacy of action had been similarly made after Kosovo, which was a legally more problematic intervention based on a weaker international norm compared to Libya. Yet, while in the former case the legitimacy debates led to a constructive process that strengthen the human protection norm with its reformulation under a new framework, in the latter they led to almost a complete disappearance of the norm from the international agenda. Rotmann et al. (2014) attribute the norm weakening influence of Libya contestation to great power identities and their irreconcilable normative foreign policies. Hoffmann (2015) claims that agreement on right application and further development of the norm was not possible because contestation after Libya was based on the conflict between state vs human-centred fundamental norms. Yet once again it is not possible to show that in early 2000s the actors did not have similarly opposing identities, diverging interests and conflicting normative positions. Why the constructive engagement we witnessed post-Kosovo on the better implementation of human protection norm is not renewed after the Libya/Syria contestations? What was different in Kosovo and Libya/Syria contestation processes?

²⁵ The discussions on the fate of the norm after Libya intervention varies widely. While some commentators declared R2P to be dead following the over-extended execution of the intervention mandate (Berman and Michaelson, 2012; Rieff 2011; Nuruzzaman 2014) some others celebrated it as the first successful implementation of pillar III. (Evans 2011; 2015; Bellamy 2011; 2015) Some like Glanville (2016) argued that the ongoing impact of R2P on state behavior is not only seen in cases of implementation as Libya, but also in cases where it is not implemented as in Syria. Others, to the contrary, argue that R2P actually was not the basis of action even in Libya. (Morris, 2013) Other scholars like Hehir (2013; 2019) attributed less role to Libya/Syria contestation as they question the agreement on and effectiveness of R2P in the first place, arguing that R2P was deliberately formulated in a way to permit selectivity and was destined to be ineffective from the beginning. Most analysts (Welsh 2013; Orchard 2020) opted for more nuanced analysis of the influence of Libya/Syria on different dimensions of the protection norm but they all agreed on the weakening of its pillar III, dealing with international military action.

4.1.1. Chapter Outline

The construction of the chapter will be as follows. First as a background for the examination of the two contestation cycles I will tell a short historical narrative of the evolutionary history of the norm until the end of 1990s, when the norm is consolidated under humanitarian intervention framework as a right of the international community to use military means with the aim of protecting people from atrocities. Then, the first cycle of contestation that began with the Kosovo intervention in 1999 will be investigated, with respect to the issue of right authority. The contestation unfolds with the unilateral decision of NATO to intervene in Kosovo without a Security Council authorization, which triggers a long and difficult process of contestation on the legitimate authority to mandate humanitarian military missions. This cycle of contestation on right authority lasts until the UN World Summit in 2005, in the outcome report of which a new understanding of the norm of human protection under R2P is accepted unanimously by the world community. This point is a new tentative *status-quo* for the norm, which entails a new ideational basis of intervention, an explicit requirement of Security Council authorization, and better-defined atrocity thresholds. Comparing the strength of this new understanding of the norm at the end of the contestation cycle, to the strength of norm as it was before Kosovo shows that the legal nature of contestation process has led to a more authoritative, more precise and more widely accepted norm of human protection under the R2P framework.

The chapter will continue with a second cycle of contestation that broke out after the multilateral Libya intervention in 2011. The general acceptance of R2P after 2005, and the progress in the norm's evolution in terms of its institutionalization in the international system through a new UN office and regular reports, were not adequate to ensure a contestation-proof application. The rather broad interpretation of the humanitarian mandate given by the Security Council under R2P in resolution 1973, led to a broad military operation in Libya that has not ended until the toppling of Gaddafi and termination of his regime. BRICS countries, all of which have been in the Security Council at the time, strongly objected such a broad interpretation of the humanitarian mandate, claiming that such interpretation would only mean an abuse of the mandate for

political purposes. The contestation that begun in Libya continued in Syrian crisis, and turned into a consistent rejection of any Security Council decision that could even potentially lead to an intervention. In this second contestation cycle, in stark contrast to Kosovo, the contestation process does not have a legal nature, but the argumentations and reasoning were determined with political tones. Supporting my proposition on the relation between legality and norm strength, this has led to norm weakening, with almost complete disappearance of R2P pillar III from international agenda after the Syrian crisis.

Methodologically, to understand the nature of contestation in each contestation cycle, content analysis is conducted on the Security Council meeting minutes (see appendix) on Kosovo intervention (September 1998- May 1999), and on Libyan (January 2011- December 2011) and Syrian conflicts (October 2011- July 2013)²⁶. Council speeches of the state representatives are reduced down to units that constitute an argumentative statement transmitting an argument with a particular wording and logic. These units then are categorized as legal or non-legal (appendix). When it is relevant, other sources reflecting the nature of the official argumentative position of states/institutions are also examined, such as Security Council resolutions, Secretary General reports, statements in NATO meetings, or press releases at official levels. For the post-Kosovo R2P norm development process, ICISS roundtable discussions and country statements on draft summit outcome documents were also used as sources to demonstrate the nature of argumentation. The logic and discourse of the argumentations made by state representatives in the analyzed texts are divided as being legal or non-legal. All the assertions with references to international legal principles, such as sovereignty, non-intervention, territorial integrity as well as references to international legal documents such as the UN Charter or international conventions are considered to be of legal nature. References to Security Council resolutions are also considered as legal argument making. The applications or calls for applications to international courts are similarly evaluated to

²⁶ For Kosovo statements of all Council members have been examined. For Libya and Syria, the statements of only the permanent five and BRICS members are examined as they constitute the most vocal and representative actors in this period of contestation. Although Syria continued to be a subject of Security Council meetings after July 2013, after this date enforced international military action on humanitarian grounds seize to be a major issue in the discussions.

represent a legal logic, and giving the contestation process a legal character. On the other hand, statements based on subjective political preferences of individual states, proclamations stating a belief or conviction of a state for the appropriate/necessary/best/moral course of action are evaluated to reflect a non-legal logic. Objections or justifications by states that do not make direct references to international legal principles but to “unacceptability” of the action or the “bad intentions” of the counterparts are considered to be of political nature, therefore creating a non-legal nature of contestation. It is important to note that all contestation processes are essentially mixed in nature, involving both legal and political claims and ways of argumentation. However, both the number of references as compiled in the relevant appendix and the weight of the dominant arguments and argumentative methods do reflect a predominantly legal or non-legal nature that define the contestation processes.

4.2. Background

4.2.1. Before and During the Cold War

Examples of states taking military action justified on the basis of protecting people from atrocities predate the second half of the twentieth century when international respectability of states are attached to their (at least ostensible) commitment to human rights. 1800s has seen several military engagements by Russia and European states against the Ottomans in the name of saving the fellow Christians in the Greek or Bulgarian insurgencies. (Finnemore, 1996) Although the justifications for such military interferences were protecting people from their states and hence had a humanitarian tone, it was a protection based on kinship or sectarianism (hence was arguably a version of self-defense). The expansion of this humanitarianism to embrace all human beings came with the changing of the normative paradigm of the world in line with the natural law tradition of Europe, recognizing rights of everyone for the sake of being a human being. This paradigm has established its dominance particularly in the aftermath of the WW2, with its institutionalization in the UN Charter, along with the following human rights conventions. Respect and protection of human rights constituted one of the two main pillars of the new international order enshrined in the UN Charter, along with the secrecy

of sovereign equality of states. These two pillars however are proved to be difficult to reconcile in certain cases where the human rights emergencies contradict the principles of sovereignty. This is the most primitive expression of the basis of controversies on the issue of intervention on humanitarian grounds, which in the second decade of the 21st century still perpetuates.

Due to the specific circumstances of the cold war, the dilemma between risking the violation of non-intervention principle or being a by watcher of conscience shocking atrocities was not much of a concern in the first half of the 20th century. The general acceptance was that protecting people from atrocities was not a legitimate reason for military intervention. (Wheeler, 2000, 8) Several occasions during cold war where in total millions of people were killed in the events in Burundi, Nigeria or East Timor met with no initiatives to prevent them. In cases of unilateral interventions, where a serious humanitarian dimension was involved, by India to East Pakistan (Bangladesh) (1971), by Tanzania to Uganda (1979) and by Vietnam to Cambodia (1979), humanitarian arguments have not been used as a basis or justification of their attacks, except to some extent by India. (Heraclides, 2015) The civil war in Congo between 1960-1964, which mobilized US and Belgian forces to intervene has been justified on humanitarian grounds. Although there was no clear reference to a humanitarian intervention by a Security Council resolution, the debates that followed up in the Security Council revealed a certain degree of acceptance by a majority of the states that use of force might in principle be possible on humanitarian grounds. (Howard, 1971) However, the weakness of such acceptance as an international norm can be seen in non-use of it as a concept in 1971 in the very striking case of India, which arguably is one of the first successful humanitarian interventions in the face of the genocidal suppression against the Bengali (Cordera 2015). The initial attempts of India to justify its intervention on humanitarian grounds, faced with straight forward objection by other states in the UN, demonstrating that humanitarian grounds were not enough for a legitimate intervention in international law as of 1971. (Bass, 2016, 252)

4.2.2. Humanitarian Intervention in 1990s

When the 1990s come, bringing about the end of the cold war, the situation was considerably different. End of the cold war has created a visible difference in the conduct of international relations, supported in the background with ideational rise of liberal institutionalism and human rights. This change in the political and ideational structuring of the world brought about a tide of ideational liberalism to countries in the former second and third world, universalizing the principles of democracy and human rights as expectations from legitimate states by the international society. This ideational change has found reflection in the institutional stance of the UN, taking a more active position in the intra-state conflicts and humanitarian crisis, that is described by some as “new interventionism”. (Doyle, 2001)

The new more active role that the international community casted for itself on the issues that were formerly considered strictly under domestic control of sovereign states, began to establish its legal grounds in an incrementally evolving fashion. Internationalization of the intra-state humanitarian issues legitimizing the idea of humanitarian interventions began to give its early signs on 5 April 1991 in the Security Council resolution 688 on the crisis in Iraq. In the resolution, the Council recognized the repression of the state on Iraqi Kurdish population, which led to a flow of refugees, and recognized it as a “threat to international peace and security in the region.” (SC Res. 688) Although this resolution was not taken under Chapter VII, hence was not authorizing a military intervention, later on with the initiatives of US, UK, France and Netherlands, acting on humanitarian grounds safe havens are decided to be established using military force. “This was the first time since the founding of the UN that a group of states had explicitly defended the use of force in humanitarian terms, and this rationale rested uneasily with the nervousness most states felt towards the doctrine of humanitarian intervention.” (Wheeler, 2004, 34) It is worth noting that in this first step of the evolution towards an international norm for intervention on humanitarian grounds, the justification to consider the conflict situation in Iraq as a threat to international peace does not come from the human suffering itself. Rather it is the refugee-creating nature of the oppression that turned the case into a matter of Chapter VII (i.e. “threat to international peace and the security of the region”) that

would legitimize the use of force. Therefore, although the Resolution 688 signifies an important early step towards the idea of legitimate international interventions to protect populations from atrocities, it falls short of recognizing atrocity or the humanitarian crisis as an inherent reason for action.

The case in Somalia the next year in 1992 is different in this sense, and constitutes a further step for the norm of humanitarian intervention. SC Res. 794 states that “Determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.” (SC Res. 794) With this reference the Security Council recognizes that human tragedies of a certain magnitude are not strictly domestic issues. They are perceived as a threat to international peace, and therefore are eligible to be dealt under the Chapter VII of the Charter, which legitimizes the use of force. The Security Council, acting under Chapter VII calls the member states “to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia” (SC Res. 794). Resolution 794 constitutes an important first incident of authorization of use of force under Chapter VII for humanitarian reasons.²⁷

A clear recognition of this as an international norm however, did not come with a low price; but cost near a million lives in inactions of Rwanda and Srebrenica. In 1994, non-use of this new potential tool that had partly formalized in Iraqi and Somalian incidences cost more than 800.000 lives in Rwandan genocide. “UN responded to the genocide with willful ignorance and indifference.” (Barnett, 2002, 4) What is importantly telling about the norm of humanitarian intervention is that during the period beginning with the first warnings from the field on 11 January 1994 about planned assaults on civilians, till the end of the conflict in July 1994 with a unilateral ceasefire by the perpetrators who gained control all over the country, there was no debate in the Security Council on the normative

²⁷ Preventing this resolution to solve all the controversy regarding the permissibility of military intervention in any similar human tragedy however, the Council emphasized the “unique character” of the situation in Somalia “requiring an exceptional response.” (SC Res. 794, 3 December 1992)

acceptability of the use of force. There was no argument for the impenetrability of the sovereignty of Rwanda, or any references to the domestic nature of the humanitarian crisis that keep international society from involving. (Wheeler, 2004, 36) The unwillingness of the states and the UN as an organization to bear the costs of intervention, and their – arguably- conscious ignorance about the severity of the facts in the field is undeniable today after a load of literature on the case. However, the *post facto* consensus to see this inaction not as an inevitable consequence of international law or international politics, but as a failure of UN to fulfill its mandate was the silver lining of this conscience shocking disaster. “All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse. (...) Of all my aims as Secretary-General, there is none to which I feel more deeply committed than that of enabling the United Nations never again to fail in protecting a civilian population from genocide or mass slaughter.” (Annan in UN Press Release, 1999)

4.3. First Cycle of Contestation: Contestation on Right Authority and the Kosovo Crisis

4.3.1. Norm of Human Protection at t_1 : End of 1990s

By the end of this first phase of the norm’s evolutionary development, use of force on humanitarian grounds was now established as acceptable in principle. At the end of 1990s, it was an international norm, creating a shared understanding on appropriate behavior, although it was not a legal norm. There was no binding legal provision in international law as a treaty, convention or resolution to recognize the right of humanitarian intervention let alone an obligation thereof. Although some broad legal interpretations argue for a change of the customary law after all the accumulated state practice since 1990s it is hard to agree in the absence of *opinio juris* with consistent objections from the non-western world, such as the non-aligned states as well as Russia and China. The only legal link that the norm of humanitarian intervention has at this stage of time was coming

from its use by the Security Council always with reference to a legal provision; the Chapter VII of the UN Charter. Accepting that a certain type and magnitude of human suffering can be evaluated as a “threat to international peace and security” is a broadened reinterpretation of the provisions of Chapter VII and hence a reinterpretation of the limits of the legal doctrine of non-use of force. Therefore, although the norm itself does not have high formal legality, the legitimacy of its existence is rooted not only in moral and political principles, but also in international law.

In order to be able to evaluate the change in norm strength after the contestation cycles that will follow on, the analysis should start with the evaluation of the norm’s strength at t_1 right before Kosovo crisis broke out. In terms of authoritative power, although the norm lacked a legal authority, it had a moral and identity-related force coming from the humanitarian values as well as the moral and legal authority of human rights. This can be observed as ‘descriptive legitimacy’ in the humanitarian intervention references of states during Security Council decisions of 1990s.

In terms of the second parameter of norm strength, which is global reach, (i.e. how many of the potential subjects embrace it) the norm had an average score as there was an important number of countries, including China, Russia, and India with an attitude that was at best dubious towards the norm. The third parameter of norm strength; meaning is about the norm’s precision and broadness of its content and applicatory scope.

Table 4.1: Norm Strength at t_1

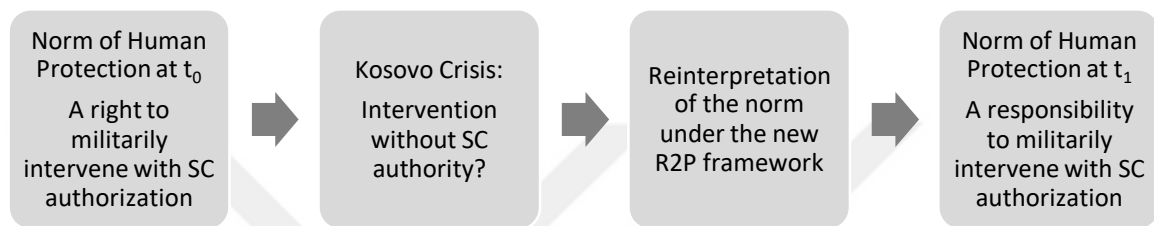
NORM STRENGTH AT t_1

Authoritative Power	• No hard or soft law document, or a declared political commitment, but only a series of practices that may (or may not) be pointing to a new international requirement • Moral strength of the humanitarian discourse
Global Reach	• Contending states not limited to Russia, China and India
Meaning	<i>Precision</i> • Vague, almost indeterminate conditions, criteria, method • Case by case application
	<i>Scope</i> • Only with SC authorization (undeclared) • In cases of humanitarian crises of a certain magnitude
	<i>Content</i> • Use of force to end imminent humanitarian threats only • No operational standards

In terms of precision, the norm at t_1 was quite vague. Under the shadow of contradictory applications, there was no clarity as to the conditions, actors, methods, or limits of such operations. There were no clear prescriptions or proscriptions for the states except for a rather vague notion that a certain magnitude of human suffering under certain circumstances might be an exception to the non-use of force principle of the international system. This vagueness makes it difficult to make a clear assessment of scope and content as well. With the experience of 1990s, it can be said that the application of the norm required a Security Council decision under Chapter VII. Humanitarian intervention was legitimized on the basis that humanitarian catastrophes are threats to international peace and security, which is a legal basis for the use of force, as long as a decision thereto is taken by the Security Council. Therefore, at t_1 a Security Council decision to intervene was a necessary requirement of intervention, although in the general vagueness of the norm this is never put forth explicitly. In terms of the parameters for deciding which crises are eligible for an intervention on humanitarian grounds, once again the picture was pretty vague. The cases that had been found eligible for intervention like Somalia and Iraq, and also the cases of non-intervention (and retrospective remorse about them) reveal that a

certain magnitude of humanitarian crisis involving large scales of deaths, which includes but not limited to genocide, induces the right of humanitarian intervention. It is worth noting however that Security Council had shown special effort to leave these parameters vague by declaring the examples of intervention “unique”, inhibiting them to set legal precedents.

Figure 4.1: Cycle of Contestation on Right Authority from t_1 to t_2



4.3.2. Kosovo: A Bold Attempt of Unauthorized Humanitarian Intervention

International reactions against the civilian conflicts erupted in Kosovo began relatively early. The Security Council issued a resolution (SC Res. 1160) under Chapter VII on 31 March 1998, condemning the conflict and calling for a negotiation between the parties, as well as imposing an arms embargo on both of the conflicting parties. The first threats of the use of force against the crisis by NATO came in an implicit demonstration with the NATO aircrafts conducting a military exercise in a location close to Serbian border in 16 June 1998. (Morris, 2004, 112) Neither the efforts of the UN nor the threats of NATO could prevent the deterioration of events. In 23 September 1998, UNSC adopted another resolution (SC Res. 1199) under Chapter VII, recognizing that the escalating events “constitutes a threat to peace and security in the region”, and called for the cessation of hostilities and a ceasefire. The resolution demanded Former Republic of Yugoslavia (FRY) to resolve problems by political means, stop actions of the security forces effecting the civilian populations, and enable effective international monitoring in the field. The resolution also stated that the Security Council “decides, should the concrete measures demanded in this resolution and Resolution 1160 (1998) not be taken, to consider further

action and additional measures to maintain or restore peace and stability in the region.” (SC Res. 1199) Resolution 1199, despite its rather hard tone, and an implicit warning about further measures, does not make any reference for the authorization of use of force.

NATO threats became more tangible as the tension in the region was not decreased, and no progress has been seen in the fulfillment of UN demands. In 13 October 1998, NATO Council gave activation order for air operations in Kosovo (which are suspended later on), meaning the issue has now been in the hands of the military staff of the NATO force without a need for a further Council meeting. Same day NATO Secretary General Javier Solana justified this decision on legal grounds, with a reference to the SC Res. 1199, saying that “the allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force.” (NATO Press Conference, 13 October 1998) Likewise in 15 October 1999, Solana reiterated this threat in his visit to Belgrade, declaring that NATO “will remain ready and willing to act if (*the*) obligations (*of the UNSCR 1199*) are not met.” (NATO press release 15 October 1998) This grounding of NATO’s justifications on the legitimacy of threats as driven from a Security Council resolution is a form of legal justification. Upon the 15 and 16 October 1998 agreements between FRY and OSCE, and FRY and NATO, the Security Council adopted a new resolution (SC Res. 1203) acting under Chapter VII, demanding their full implementation by the FRY, as well as its compliance with resolutions 1160 and 1199. It is worth noting that the SC Res. 1203, coming amidst an international atmosphere where the NATO’s military action was hanging in the air, emphasized “that, under the Charter of the United Nations, primary responsibility for the maintenance of international peace and security is conferred on the Security Council.” (SC Res. 1203).

Upon reiterated NATO threats of air strikes at the end of January, the FRY requested an emergency meeting of the Council about NATO threats, making an argument against NATO’s action solely on legal grounds, arguing that such threats “represent an open and clear threat of aggression against the FRY as a sovereign and independent member state [sic] of the United Nations.” (Simma, 1999, 9) On 22 March 1999, NATO with a press release declared that the NATO Secretary General has been completing his consultations

with the Allies on the operations. (NATO Press Release, 22 March 1999) The next day, on 23 March 1999 NATO initiated its air operations which were to be last 78 days until the FRY agreed to withdraw its armed forces from Kosovo, and the establishment of an UN administrative mission.

The objectors of an unauthorized NATO intervention primarily FRY itself, along with Russia and India have embraced a clear legal attitude. The letter by the *chargé de affaires a.i.* of the permanent mission of Yugoslavia to the UN addressing to the President of the Security Council given on the first day of the military operations, accused the operation to be in “violation of the basic principles of the Charter of the United Nations and in direct contravention of Article 53, paragraph 1, in which it is stated that ‘no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council’.” (S/1999/322) So from the first moment on, the arguments against the operation, were constructed along legal lines, advocating the illegality of the operations with references to existing legal provisions. This adherence to the legal means of contestation has not been different in the Security Council deliberations on the matter. In the Council meeting convened upon Russian request on 24 March, Yugoslavia, Russia, China as well as India and Belarus constructed their objections upon unlawfulness of use of force against a sovereign state without a Security Council decision. All of the objecting countries referred to the violation of the UN Charter and the subversion of the norms of international law, through the intervention to the internal matters of a sovereign country without a Security Council decision. (S/PV 3988) They stressed their concerns on the possible detrimental effects of such a unilateral violation of international norms on the international system. When they counter the humanitarian necessity claims of the supporters of the operation they resort to international law again arguing that justifying the operation as such is not acceptable as it is “in no way based on the Charter or other generally recognized norms of international law.” (Russia in S/PV 3988)

The nature of counter argumentation by the supporters of NATO draws a more mixed picture, still with a visible legal character. Although the emphasis on the “humanitarian necessities” and exhaustion of other alternatives constituted important non-legal pillars

of the pro-intervention case²⁸, there are also reiterated references to the three Security Council resolutions that had been taken under Chapter VII, representing a legal mentality. “The actions that have been decided upon are a response to the violation by Belgrade of its international obligations, which stem from the Security Council resolutions adopted under Chapter VII of the UN Charter.” (France in S/PV 3988) Trying to justify the action with reference to documents of a legal nature is an attempt to make a legal justification and points to an intention to play the game on a legal ground, regardless of the fact that the referred documents never included a legal permission to use force. Apart from this, NATO intervention has also been justified by claims to its legality in statements like “The action being taken is legal (...) as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.” (UK in S/PV 3988)

Two days after the air operations had begun, Russia with the support of Belarus and India, issued a draft resolution for the cessation of the use of force by NATO, based on the claim of its violation of international law, as “such unilateral use of force constitutes a flagrant violation of the United Nations Charter, in particular Articles 2 (4), 24 and 53.” (S/1999/328) The Security Council convened the same day for the discussion of the draft resolution. The justifications given by the NATO supporters for voting against the resolution was primarily based on the necessity of action born out of the previous resolutions 1160, 1199 and 1203 under Chapter VII, and Belgrade’s non-compliance with them. This justification is concretized in the words of the Netherlands’ representative aside from various references by all of the other NATO supporters: “The NATO action in which we are participating follows directly from resolution 1203 (1998), in conjunction with the flagrant non-compliance on the part of the FRY.” (Netherlands in S/PV 3989) UK also preferred to put it forth in an explicitly legal manner saying that “the actions decided upon respond to Belgrade’s violation of its international obligations under the resolutions which the SC has adopted under Chapter VII of the UN Charter.” (UK in S/PV

²⁸ “We have begun today’s action to avert this humanitarian catastrophe and to deter further aggression and repression in Kosovo.” (US in S/PV.3988, 4); “...all diplomatic means have been exhausted and military action in the Federal Republic of Yugoslavia has become inevitable” (Slovenia in S/PV.3988, 6); “we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster.” (France in S/PV.3988, 5)

3989) In terms of the operationalization of process legality as expressed before, this kind of a justification based on the alleged duty that is born out of SC resolutions is a legal justification. Likewise, Russia referred to the “lawlessness” of the NATO action more than 5 times in its address to the Security Council, framing the voting on its draft resolution as a matter of choice between “law and lawlessness.” (Russia in S/PV.3989) and its illegality being a threat to the whole international system.

It should be noted once again that this rather legal means of contesting is mixed with political/moral argumentations as well. The references to the gravity of the humanitarian catastrophe and the requirement to stop it, as well as the exceptionality of the circumstances are other frequently repeated arguments that are in non-legal nature. In the Statement on Kosovo by heads of state and governments taken in the 23-24 April NATO Summit in Washington, the rhetoric that NATO and NATO member countries use in justifying their intervention was of a non-legal character. “NATO's military action against the Federal Republic of Yugoslavia (FRY) supports the political aims of the international community.” One of the two primary justifications advocating the military action is the gravity of the humanitarian conditions in the field. “As long as Belgrade fails to meet the legitimate demands of the international community and continues to inflict immense human suffering, Alliance air operations against the Yugoslav war machine will continue.” US President Clinton, making no reference to law or international legal requirements emphasizes the humanitarian necessities “Mr. Milosevic forces burn and loot homes and murder innocent people. Our forces deliver food and shelter and hope to the displaced.” (Statement by the President of the US, 23 April 1999) In his statement Canadian Prime Minister describes the situation in Kosovo as “a threat to the common values that brought (*NATO states*) together fifty years ago.”²⁹ (Statement by the Prime Minister of Canada, 23 April 1999) Same emphasis on values prevails in the Statement of the German Chancellor as well: “I am more than convinced that people will increasingly realize why we had to intervene militarily in Kosovo, simply because there

²⁹ Translated from the French original: “Voilà l'esprit qui nous habitait en 1949, lorsque nous avons choisi de protéger la démocratie et les droits de la personne en Europe. Voilà l'esprit qui nous habite toujours en 1999 alors que nous faisons face à une nouvelle situation qui menace les valeurs communes qui nous ont rassemblés il y a cinquante ans.” (Statement by the Prime Minister of Canada, 23 March 1999)

were no other means left in order to defend the values of a civilized Western world.” (Statement of the Chancellor of Germany, 23 April 1999) Such justification on western values that NATO is established to protect, are more of a political nature, than a legal one as there is no provision of international law that calls for unilateral military actions in cases where such civilizational values are at stake. On the other hand, the linkage established the humanitarian situation and its threat to “destabilize the surrounding region.” (Statement on Kosovo, 23 April 1999) has an apparent legal logic, invoking the Chapter VII responsibilities. UK Prime Minister Blair, makes arguably a legal case by referring to the events in Kosovo as genocide: “We cannot and we will not stand by and allow a policy of genocide to succeed.” (Opening Remarks by UK Prime Minister, 23 April 1999).

Overall, despite such political justifications the process of contestation can be evaluated to have a predominantly legal nature, defined by references to relevant Security Council resolutions on the one hand, and consistent objections based on UN Charter provisions and international legal principles of sovereignty and non-intervention on the other hand. Examination of Council meetings from September 1998 to May 1999, where the NATO intervention was the top topic of the Kosovo agenda, a statistical weight of the legal argumentations can be observed with 73 statements against 37 statements involving non-legal logic and argumentation (see appendix). Legal process was also prominent with the inclusion of international courts to the contestation with FRY applying to the ICJ against ten NATO member states for illegal use of force.

The contestation on right authority that started with Kosovo, evolved into a process of norm development thanks to this legal nature of the contestation based on the right implementation of international legal principles and standard setting precedents of 1990s. Had the contestation on NATO’s intervention in Kosovo been conducted around political claims and accusations such as imperialistic ambitions or abuse of humanitarian pretexts, the norm of human protection could have been faded away amidst the unproductive political polarizations. However, the fact that the contestation was handled upon the shared ground of international law, and right interpretation/application of humanitarian

intervention led to a productive period of norm-development, which itself has a legal character in process, and ended with the creation of the R2P framework five years later.

4.3.3. Contestation on Right Authority Continues: The Responsibility to Protect from ICISS to SOD

Contestation that unfolded around the issue of NATO's unilateral decision to use force in Kosovo was between one side arguing that it is unacceptable because it is not legal, and the other side arguing that although it might not be legal, it is still legitimate as it was solidly necessary for this particular case and it was implied in the Security Council resolutions. At this point, there were not one but two elephants in the room: which humanitarian crises were drastic enough to make an unlawful reply justifiable? And if there are situations that deserve a humanitarian intervention why cannot the world do it in a legal way?

It was the UN Secretary General to point out the elephants in his speech at the beginning of the new millennium. In his 20 September 1999 speech addressing the General Assembly, he called the international community to do something about the dilemma between the inaction in Rwanda and the unauthorized action in Kosovo. "Just as we have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples." (Annan, General Assembly, 20 September 1999)³⁰. For the interventions to have this legitimate basis according to him, an international consensus has to be reached on "ways of deciding what action is necessary, and when, and by whom." ("Two Concepts of Sovereignty", 1999) On the question of authorization, he points to the Security Council, saying that "In cases where forceful intervention does become necessary, the Security Council—the body charged with authorizing the use of force under international

³⁰ "We the Peoples" millennium report quote: "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that affect every precept of our common humanity?" (Annan, 2000, p. 48)

law—must be able to rise to the challenge. The choice must not be between council unity and inaction in the face of genocide—as in the case of Rwanda—and council division, but regional action, as in the case of Kosovo. In both cases, the UN should have been able to find common ground in upholding the principles of the charter, and acting in defense of our common humanity.” (“Two Concepts of Sovereignty”, 1999)

The reply to the call of the Secretary General came in 2000 as a Canada-sponsored international commission under the name of International Commission on Intervention and State Sovereignty (ICISS) that came together to find an answer to “the question of when, if ever, it is appropriate for states to take coercive – and in particular military-action against another state for the purpose of protecting people at risk in that other state.” (ICISS, 2001 *The Responsibility to Protect Report*, p. vii) The Commission, composed of commissioners from both global north and global south, brought out its final report “The Responsibility to Protect” in December 2001³¹.

Regional consultation meetings held during the workings of the committee give signs of the upcoming discussion positions in the aftermath of the report. In general, the representatives from the global north were in the opinion that Security Council authorization is not a must for humanitarian interventions. In the Geneva roundtable meeting, with the participation of western NGOs and representatives of the EU and UN, the joint position was for the intervention to be decided multilaterally. However, it was emphasized that the Security Council was not the only institution to give such an authorization, nor lack of its authorization should be an absolute impediment. (ICISS, 2001b, 356) In the Washington roundtable, it was suggested by the participants that Security Council authorization is preferable, but when it is unattainable, intervention by others would also be legitimate. (ICISS, 2001b, 367) French foreign minister in Paris roundtable implicitly accepted the legitimacy of unauthorized interventions over the example of Kosovo, however with a strong emphasis on making such cases exceptions rather than the rule, saying that it was juridically justifiable. (379) For this reason he

³¹ For a detailed assessment of the report see Welsh 2005.

suggested the “code of conduct” about the self-restrictions of the use of veto by the permanent members, increasing the effectiveness of the security council in humanitarian emergencies.

On the other side of the authorization contestation, we observe more process legality in the building up of arguments. In the Roundtable in New Delhi, the emphasis was on the lack of a legal basis for humanitarian intervention and related decision making was made by stating that the “international society still lacks an international framework of laws and an authoritative, objective decision maker to adjudicate the applicability of intervention.” (ICISS 2001b, 388) In Beijing, the Chinese view was put forth as a complete opposition to humanitarian intervention based predominantly on legal grounds. They argued that a doctrine of humanitarian intervention “lacks a legal basis” as there is no provision in the UN Charter that makes it permissible. (392) On the other hand, they also opposed the creation of such a legal basis, arguing that this would be counterproductive as it would be abused for the interests of the interveners. (392) Apart from their categorical opposition to intervention, on the issue of authorization they opposed any humanitarian action short of military intervention, without the Security Council authorization saying that it would be a “breach of the UN Charter even with the target of protecting human rights.” (Emphasis added, 393) In the St. Petersburg roundtable, even if slow changes in the traditional negative views of Russia on intervention was pointed out and the idea of humanitarian intervention was not categorically ruled out like China did, it was still stated that “the recent interventions are based largely on imaginative interpretations of (...) the UN Charter.” (396) Thereby they made an implicit rejection of the unauthorized interventions based on legal grounds.

In the aftermath of the release of the ICISS report, reactions from the objectors’ side came quickly. The legality in the way they oppose the idea of intervention under any name is quite explicit in the outcome statement of the 13th summit conference of Heads of State or Government of the Non-Aligned Movement in 2003. The concept has been rejected explicitly and with an openly legal mentality stating that “The Heads of State or Government reiterated the rejection by the Non-Aligned Movement of the so-called “right” of humanitarian intervention, which has no basis either in United Nations Charter

or in international law.” (A/57/759–S/2003/332, Annex 1) They also put forth their concerns for the implications of an intervention norm on the existing legal principles such as non-intervention and territorial sovereignty.

R2P report of ICISS (2001) was rather revolutionary for some, while it was inapplicable for the others. It can be deemed revolutionary with the complete framework change of the international protection of people from atrocities from a right of the intervener states to a responsibility of whole international community towards the victims. The report emphasized that the primary responsibility to protect its people from defined atrocities belongs to the state itself. In cases of the state to be unable or unwilling to protect its people or maybe itself is the perpetrator, the responsibility to protect shifts to the international community. On the contested point of right authority, it expressed that the primary responsibility of decision making belongs to the Security Council as it is accepted to be the most appropriate institution for such a multilateral task. However, the report also recognized that effective operation of the Security Council might not be possible in its existing institutional structure, and proposed alternatives such as a voluntary restriction of veto power, taking decisions in the General Assembly under the Uniting for Peace Resolution, or taking action through regional organizations under Chapter VIII of the Charter. Even after all the institutional alternatives to a council authorization, the report accepted that in face of the urgency of the situations, states may still decide to act themselves “to discharge its responsibility to protect in conscience shocking situations crying out for action” (ICISS, 2001 p.55).

In this sense, the approach of the R2P Report to the issue of authorization is a very broad one³². It suggests an operationalization of the responsibility to protect that is as encompassing as possible for a potential intervention. Had the R2P been accepted as it was proposed in the R2P report, the norm of human protection would be a very broad

³² Although interestingly numerous analysts evaluate it to be rather SC-oriented. For example, in the final report of the Civil Society Meeting on the Responsibility to Protect, the report is criticized for putting too much emphasis on the SC “without fully addressing the question what should happen if the Council fails to act.” (Civil society meeting, Ottawa 2003) It seems to me however that this report has the broadest list of alternatives to a SC decision, among other documents prepared in the international fora.

one. Although the report does not reject that Security Council authorization would be the most appropriate way for a legitimate use of force and that it “should in all cases be sought prior to any military intervention” (ICISS, 2011, XII), it also accepts alternative tracks to make an intervention legal, even when the Council is unable to authorize. This interpretation of intervention for humanitarian purposes is much broader compared to the interpretation at the end of 1990s, and it is also broader than what will eventually be accepted in 2005. A narrowing down of this initially proposed broad R2P was a requirement to reach a settlement with wide global acceptance.

The high level panel report “A More Secure World” released in 2004, endorsed the “emerging norm” of a “collective international responsibility to protect” and accepted it to be of “growing recognition”. On the issue of right authority, however the interpretation became visibly narrower compared to the original version of ICISS. The report limited the decision making for intervention to the Security Council and only to the Security Council by stating that the “collective responsibility to protect” is “exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.” (A More Secure World, 66) With the emphasis on the determinative adjective “collective”, unilateral initiatives by states are ruled out from the framework of responsibility to protect.

The High Level Panel report is followed by a UN reform proposal by the Secretary General in 2005. Responsibility to protect made its way to the 2005 World Summit through this report, “In Larger Freedom”, which according to Bellamy (2009) was critical in putting it in the agenda. Annan in his report, “urged” states “to embrace ‘the responsibility to protect’ as a basis for collective action against genocide, ethnic cleansing and crimes against humanity” (UNGA, 2005, In Larger Freedom, 59) This was a narrower framework compared to the “large scale loss of life” formulation that took place both in the ICISS report and in the High Level Panel report; however, it also was a more precise one. Following the lead of the rather narrow interpretation of the High Level Panel report, Secretary General’s report too did not suggest any alternatives to the Security

Council for a legal intervention on humanitarian grounds, and suggested that if all methods to prevent a humanitarian crisis and protect the civilian population falls insufficient “the Security Council may out of necessity decide to take action under the Charter, including enforcement action.” (UNGA, 2005, In Larger Freedom, 59) Further narrowing down the interpretation of the authorization dimension, the French proposals for the self-restriction of the use of veto completely disappeared in the report.

The process towards the UN World Summit in September 2005 gave the norm of human protection framed under the R2P its final form in this cycle. In terms of the right authority the debate was mostly over by the time of the summit negotiations. All the drafts beginning with the very first 8 June version, to the final Summit Outcome Document (SOD), accepted that should peaceful means be inadequate it will be the Security Council to take further measures. No party, even including the leading supporters of broad mandates like UK or Canada, made an explicit claim for unauthorized or unilateral interventions throughout the negotiations on the drafts. In this sense it can be said that the 2005 agreement solidly set that the right authority for a decision to intervene belonged only to the Security Council.

The process towards the SOD was not so smooth in other respects. NAM countries, Russia, China and Cuba³³ made clear objections to the inclusion of the R2P concept in the SOD. Egypt and NAM countries (and Russia although in a milder way) emphasized the already existing norms of the international system that makes interference against threats of international peace and security possible through the Security Council, and implied that a new framework under the R2P wider than the existing one would be unnecessary (Russia Statement, 21 June 2005) or would not be shared. (Statement, undated; NAM Proposed Amendments, 1 Sept 2005) China, India and Cuba also opposed the inclusion of the concept to the SOD altogether, claiming the “differences of views” (China Statement, 21 June 2005) or the “highly controversial and undefined” (Iran Statement, 21 June 2005) nature of the principle. The backbone for the objections by

³³ Among the countries whose statements on the draft summit outcome documents could be found available online: by EU, UK, Russia, NAM, China, US, Iran, France, Egypt, Cuba, South Africa.

NAM, China and Egypt was the contradiction of the concept with sovereignty and non-intervention as principles of international law protected by the provisions of the UN Charter. (NAM Statements, 21 June 2005; 1 August 2005; China Statement, 21 June 2005; Egypt Statement, 19 April 2005) (Cuba as an exception makes the same argument for the risk of abuse, but does not refer to international law.) NAM countries while expressing their complete rejection of a right to humanitarian intervention, demonstrated a more moderate approach to responsibility to protect although conveying legally-framed concerns for “its implications on the basis of the principles of non-interference and non-intervention as well as the respect for territorial integrity and national sovereignty of states, bearing in mind the provisions of the Charter of the United Nations, international law and international humanitarian law.” (NAM Statement, 21 June 2005) In their proposed amendments to the draft outcome document they suggested to add this emphasis on legality to the text, as “we also stress the importance of the adherence to the principle of legality in the exercise of the functions of the Security Council.” (NAM Proposed Amendments, 1 Sept 2005) In its statement on the high level panel report Egypt asserted that “the responsibility to protect conflicts directly with such well-established principles enshrined in the Charter.” (Egypt Statement, 19 April 2005) These rejections evidently were not enough for the evasion of the concept of R2P from the SOD, however they are no doubt part of the process towards the narrower interpretation and weaker language in the final document. The preference for a rather broad (also vaguer) interpretation was evident both for the UK, the EU and the US. In their statements on the draft documents, they made reference to “large scale violations of human rights” (UK Statement, 21 June 2005), “other gross violations of international humanitarian law and human rights” (UK Statement on behalf of the EU, 28 July-2 August 2005) and “other large scale atrocities” (US Statement, 22 June 2005; US Revisions on 5 August draft, 17 August 2005) next to genocide, war crimes, ethnic cleansing and crimes against humanity.

Overall in the final analysis, the process of the establishment of R2P as a globally accepted doctrine witnessed clashes of opposing views iterated and argued on legal grounds. This process has ended up with an agreement on an R2P framework which reflects a balance between broad interpretations and complete rejections. This could only be achieved through a trade-off between different dimensions of norm strength; limited

content and restrictive scope for a broad level of global acceptance. Process legality functioned as the facilitator of such a constructive outcome.

4.3.4. Norm of Humanitarian Protection at t_2 : 2005 Summit Outcome Document

The consensual agreement on the final SOD which included the paragraphs 138 and 139 on R2P, regardless of how vague, tightly defined and toothless they are, represents a new *status-quo* for the norm of human protection. At the end, all the states in the UN summit, including the ones who are completely against such a norm like China and Cuba, or who are very unwilling and skeptical like Russia, India or the NAM states have agreed to the text and thereby accepted a norm of responsibility to protect. Needless to say that their interpretations of the norm are most probably very different, as well as their intentions for the future practice of this norm. No doubt that in the negotiation process, they had balanced their interests with other issues in the agenda with higher weight to them, and their signature to the final document does not necessarily represent a full belief in and commitment to the norm of responsibility to protect (Pollentine, 2012). However, in any case, the responsibility to protect was now formulated in a (arguably) soft law document that was adopted with consensus in a UN World Summit and this constituted an expansion of the geographical reach, as well as the precision and authoritative power of the norm, hence an increase in norm strength.

Although the content and scope of R2P as accepted in SOD was much narrower compared to the initial proposal of ICISS in 2001, comparing the norm of human protection right before Kosovo (t_1) and right after the acceptance of R2P (t_2) we see considerable strengthening in several dimensions. R2P was unanimously accepted, even by the most ardent opponents, so the norm's global reach was wider than humanitarian intervention of 1990s. In terms of authoritative power, having a soft law document agreed with consensus in a high profile UN Summit presents a potential of strengthening for the norm, despite the deliberately weak language of the Summit Document refraining from suggesting strong legal obligations to act. Moreover, during the contestation process, apart from some exceptions, all states accepted again and again that humanitarian necessities do call for international action. Actors arguing for or against a non-SC-

authorized intervention all implicitly or explicitly agreed on this basic point. The discussions taking place around right authority without questioning the legitimacy of international action for human protection purposes proves descriptive legitimacy, hence authoritative power for the norm of human protection. On the applicatory scope dimension, the issue of right authority remained unchanged in terms of the mandatory Security Council authorization, as it had been implicitly accepted as such before Kosovo. However, as the acceptance of the Council authorization requirement became explicit with the SOD, the norm became more precise. The norm was also more precise compared to t_0 as the just cause thresholds are restricted to the four big crimes of genocide, war crimes, ethnic cleansing and crimes against humanity. This specification of relevant crimes strengthens the norm compared to t_0 when the framework was completely unclear about what kind of humanitarian crisis would be enough to constitute a threat to international peace and therefore induce military mobilization by the Security Council.

Table 4.2: Change of Norm Strength t_1 - t_2

NORM STRENGTH AT t_2		Change ($t_1 - t_2$)
Authoritative Power	- A soft law document recognizing an international responsibility (not right) to use force in certain circumstances - Explicit or implicit acceptance by all states of international action for human protection	↑
Global Reach	Global consensus	↑
Meaning	<i>Precision</i>	↑
	<i>Scope</i>	↓
	<i>Content</i>	↔

4.4. Second Cycle of Contestation: Contestation on Implementation Limits and Libya/Syria Conflicts

The period between 2005 to 2011 was a period of slow entrenchment for the R2P doctrine. On the one hand the institutionalization of the norm continued with the establishment of a joint office for the Special Adviser for the Prevention of Genocide and Special Adviser on the Responsibility to Protect, annual informal interactive dialogues on R2P, and also the Secretary General reports on the implementation³⁴. From a norms life cycle logic such institutionalization would mean an irreversible entrenchment of the norm in the international system, of whose strengthening is a matter of internalization by the actors. Being optimistic, such claims for internalization could be made looking at the reflections of the R2P in the policies. On the practical field, beginning with the direct reference to the Articles 138 and 139 of the SOD in the resolution on Darfur (SC Res. 1706) R2P was referred in 68 resolutions by the SC³⁵. Most prominently, in the case of Kenya, the use of the second pillar diplomatic efforts for a peaceful solution in Kenya was generally praised as the first prominent success of the R2P doctrine and used as exemplary (Kenya, globalr2p.org). The occasions where the R2P has been raised by some actors but rejected due to inadmissibility (such as French efforts in Nargis Cyclone in Burma in 2008 or Russian efforts in Georgia 2008) have contributed to the evolution of the norm, further demarcating its limits. These experiences of implementation and non-implementation were no doubt strengthening the norm in terms of its precision, as well as the authoritative power.

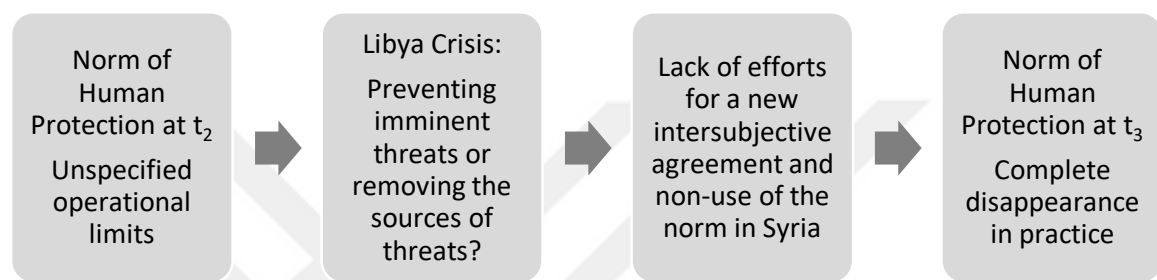
The tentative *status-quo* that the norm of human protection has acquired in 2005 has come to a challenging test of implementation in Libya, 2011. The implementation of the Security Council mandate to protect civilians in Libyan civil war revealed the different interpretations of the operational limits of such a responsibility in a striking manner, and

³⁴ Especially important is the 2009 report which brought the three pillar structure of (I) responsibility of each state to protect their people, (II) responsibility of the international community to help protect through peaceful means, and (III) responsibility of the international community to protect using coercive means (Report of the Secretary General, Implementing the Responsibility to Protect, A/63/677, 12 January 2009)

³⁵ “UN Security Council Resolutions and Presidential Statements Referencing R2P” in Global Center For the Responsibility to Protect, <http://www.globalr2p.org/resources/335>, last update: 31 Jan 2018, last access: 5.4.2018

thereby initiated a new cycle of contestation on the limits of the international responsibility. The case of Libya, which in the beginning was a candidate to be a very important step in this evolutionary development of R2P, turned out to be an important question mark for the future of the norm. The non-use of the doctrine in the case of Syria later on fueled the evaluations by some commentators, for the doctrine to be practically dead. (Rieff, 2011; Nuruzzaman, 2013)

Figure 4.2: Cycle of contestation on Operational Limits from t_2 to t_3



4.4.1. Libya: Crisis and the End of Contested Compliance

Fast accumulation of reactions to the escalating use of violence in Libya brought together both international (UN High Commissioner for Human Rights, Special advisors for Genocide and R2P, The Human Rights Council, the SC) and regional actors (League of Arab States, Organization of Islamic Cooperation, Peace and Security Council of the African Union, Gulf Cooperation Council). International warnings and demands for a ceasefire and a mediated solution to the disputes in early 2011 fell into deaf ears on the Libyan side. On February 26, the Security Council has adopted Resolution 1970 unanimously, reminding the Libyan state its responsibility to protect its population, demanding an end to the conflict, respect to human rights, and imposing measures short of use of force. (SC Res. 1970) Lack of change in the situation, led to a second resolution 20 days later. In SC Res. 1973, Security Council has reiterated Libya's responsibility to protect, and stated its concerns that the "widespread and systematic attacks (...) may amount to crimes against humanity." Based on these it authorized the international community to take "all necessary measures (...) to protect civilians and civilian protected

areas” as well the establishment of a no fly zone to be enforced through “all necessary measures”. (SC Res. 1973) The operations by the military coalition began immediately after the acceptance of the resolution. Benghazi, the city where the rebels had been explicitly threatened by Gaddafi calling them “cockroaches” to be traced “house by house” (Libya Protests, bbc.com) was saved from the imminent risk within weeks. Such effective and swift mobilization of the international community is met with praise and optimism for the R2P doctrine. It was the first time in its history that the UN was mandating use of force against the will of a sovereign state, with the aim of protecting the civilians, and it was doing it under the rubric of the responsibility to protect. This was a prominent success for the norm of human protection and the young doctrine of R2P. Secretary General Ban Ki-Moon celebrated the “coming of age” of the doctrine after Libya (UN Press Release, 2012b).³⁶

This optimism however gave way to doubts, soon after the operations began. The already weak international agreement on the use of the third pillar (i.e. responsibility of the international community to protect using coercive measures) has collapsed into a period of contestation that concerns not only the Libya operation, but also the overall position of the human protection norm as framed under R2P.

The contestation erupted short after the NATO operations had begun. For some, the main purpose of the mission mandated in resolution 1973 was to halt the imminent threat of government assaults in Benghazi based on the explicit threats of Gaddafi. (Brockmeier, Stunkel and Tourinho, 2016, 120; Adler-Nissen and Pouliot, 2014, 13) NATO, on the other hand, was determined that the mandate would not reach its purpose as long as Gaddafi regime, continuing its violations around the country, stays in power. This was a broad reading of the R2P in general and the SC Res. 1973 in particular. This policy of continuing the air strikes and the open support given to the rebel groups by NATO (including the supply of arms violating the UN arms embargo) until Gaddafi is killed and his regime is over thrown drew reactions from both sceptics and the supporters of the R2P

³⁶ Also see: Evans, G. “End of the Argument: How We Won the Debate over Stopping Genocide.” 28 November 2011. in Foreign Policy <http://foreignpolicy.com/2011/11/28/end-of-the-argument/> last access: 5.4.2018; Bellamy, A. 2011, “Libya and the Responsibility to Protect: The Exception and the Norm.” *Ethics and International Affairs*, Fall 2011, 263-269.

doctrine. Even the ardent supporters of the doctrine like Gareth Evans and Ramesh Thakur, who argued after resolution 1973 that Libya was a text book case for the R2P, declared that they were not sure whether it stayed that way for its duration. (Thakur and Pape, 2013)³⁷

The countries that have casted abstention votes for resolution 1973, were vocal in the Security Council in their criticisms towards the expanded mission of NATO, reflecting a contrasting interpretation of R2P from US, UK and France. Overall, all members of the SC, (which at the time included all BRICS countries therefore reflected a rather balanced geographical and political distribution) were of the same opinion for the need of an international action for the “protection of civilians”. However, the limits of military measures to serve this purpose were of concern for the BRICS countries, primarily for the reasons of effectiveness and far reaching consequences. Different from their counterparts advocates of the extended NATO mission had a broader interpretation of what the civilian protection mandate in the resolutions really meant. Such broad understanding of civilian protection is reflected in the 14 April 2011 NATO Statement on Libya where the objectives of the mission are given as: "1-All attacks and threats of attack against civilians and civilian-populated areas have ended; 2- The regime has verifiably withdrawn to bases all military forces, including snipers, mercenaries and other para-military forces, including from all populated areas they have forcibly entered, occupied or besieged throughout all of Libya (...); 3-The regime must permit immediate, full, safe

³⁷ Also see Thakur, R. 2013, “R2P After Libya and Syria: Engaging Emerging Powers.” *The Washington Quarterly*. Vol: 36:2, 61-76, p. 61: “Libya proved to be almost a textbook illustration justifying R2P principles, but its implementation also demonstrated the need for legitimacy criteria to guide decisions on authorizing and overseeing international military intervention. Although successful, the Libyan operation proved particularly controversial among the emerging powers, and the price of exceeding the mandate there has been paid by Syrians.”; Evans, G. “The Responsibility to Protect: After Libya and Syria.” Presentation to Directors Seminar, Belfer Center, Harvard Kennedy School of Government, 12 November 2015. <http://www.gevans.org/speeches/speech585.htm> last access: 5.4.2018: “Looking at the present catastrophe in Syria, where R2P gained no traction at all, and the horrible aftermath of the initially successful R2P-based military intervention in Libya, it would be easy to be cynical -as many critics are- and say that the whole enterprise has been a complete waste of time, or worse.” For criticisms from the more R2P-sceptic side of academia see: de Waal, A. 2013. “My Fears, Alas, Were Not Unfounded: Africa’s Responses to the Libya Conflict.” In Aidan Hehir and Robert Murray (eds.) *Libya, The Responsibility to Protect and the Future of Humanitarian Intervention* Hampshire: Palgrave Macmillan. p. 78: “However, the approach of an inclusive negotiated settlement (*in Libya*) was not given a serious chance. It was killed by France, Britain and the United States.”

and unhindered humanitarian access to all the people in Libya in need of assistance." (NATO statement, 14 April 2011)

The early contestation on the expanded mission in Libya had a mixed nature, where legal argumentation came together with political logic. On the one hand, the discussion in the Security Council following the March 2011 mandate to use force mainly revolved around the Chapter VII Resolution 1973 and what it has authorized or not. On the other hand, subjective political preferences of states are frequently revealed in the discussions. The opponents of NATO mission made various claims for the over-passing of the limits and intentions of the mandate as defined in the resolution. All BRICS members of the Council emphasized that carrying out the military operations in Libya should be in strict compliance with resolution 1973, which has not been the case (Russia in S/PV 6528; S/PV6620). China and South Africa emphasized the necessity to refrain from "arbitrary interpretations" of the mandate (China in S/PV6528) and compliance with resolution "in its entirety in letter and spirit." (South Africa in S/PV 6566; S/PV 6595). The right implementation of the mandate was defined by the objecting states with references to the Charter and international legal principles of sovereignty, territorial integrity and non-intervention. (China in S/PV 6528; India in S/PV 6531; South Africa in S/PV 6531). In that sense their opposition had a legal reasoning, based on the right interpretation of the Security Council resolution. NATO allies also referred to the Security Council resolution in justifying the extended mission. The way the operations are handled was defended as being "in accordance with resolution 1973" and "legal basis" of action being taken from the resolution's "explicit authorization" (UK in S/PV 6531). With this respect, the early phases of the Libya contestation represented a legal logic, at least as it took place within the Security Council.

However, the predominance of process legality is hindered with a significant non-legal tone that revealed itself within and outside of the council meeting room. What is seen in Putin's statements or in Russian UN ambassador Churkin's explanations was that the main pillar of the objections to an extended mission in Libya was the western abuse of humanitarian excuses for imperialistic purposes. This non-legal logic of accusations and opposing political preferences were also embodied in references to the "unacceptability"

of disproportionate use of force (Russia in S/PV 6528); abuse of civilian protection to resolve “unrelated issues” (Russia in S/PV 6531); “deterioration of the situation” due to elongated use of force (South Africa, S/PV 6566); the need for “political rather than military solution for durable peace in Libya” (South Africa in S/PV 6566); and risks that resolution provisions “could potentially open the door to large-scale military intervention” (S/PV 6498).

Such explicit non-legal argumentations based on political preferences and perceived necessities were also evident in the statements of NATO allies. US claimed that Gaddafi has lost legitimacy to lead Libya (US in S/PV 6528) and the necessity of the international community to stand united for the protection of civilians (US in S/PV 6528; S/PV 6531). France stressed the humanitarian costs on the field and the importance of “preventing a massacre” and “ending the suffering of Libyan people.” (France in S/PV6650) NATO members have accepted that regime change was not part of the mandate given by the Security Council resolution. However, they opted for a broad understanding of “protection” that would not be fulfilled as long as the regime is intact. In an open joint letter by Obama, Cameron and Sarkozy, it is stated that “Our duty and our mandate under UN Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Gaddafi by force. But it is impossible to imagine a future for Libya with Gaddafi in power. The International Criminal Court is rightly investigating the crimes committed against civilians and the grievous violations of international law. It is unthinkable that someone who has tried to massacre his own people can play a part in their future government. (...) However, so long as Gaddafi is in power, NATO and its coalition partners must maintain their operations so that civilians remain protected and the pressure on the regime builds. Then a genuine transition from dictatorship to an inclusive constitutional process can really begin, led by a new generation of leaders. For that transition to succeed, Colonel Gaddafi must go, and go for good. ” (“Libya Letter”, 2011)

Referencing Security Council resolutions is a legal form of argument making. However, the logic of justifications in these references does matter in understanding the true nature of argumentation. The legal argumentation logic was significantly intermeshed with

political or moral claims made on the “abuse” of humanitarian arguments, “preference” for political solutions, “unacceptability” of broad interpretations, or harm to UN impartiality that reflect a non-legal rationale. In that sense, the contestation around the Libya mission reflected a mixed nature despite the references to international norms like sovereignty and non-intervention showing a certain degree of process legality. For both parties of the contestation the predominance of political preferences dilutes the legality of process, and defines a non-legal contestation process.

In the continuing phases of the contestation process that has peaked in debates on Syrian civil war, the legality of process disappears almost completely.

4.4.2. Syria: R2P Dead or Fainted?

Events in Syria had already been broken out in times of R2P optimism was in the air for Libya. The demonstrations and protests of February 2011 escalated and expanded to a national level by March after being harshly suppressed by the Syrian regime. Defections from the army, and organization of the defecting groups as Free Syrian Army, turned the situation to a full-fledged civil war, by summer 2011.³⁸ Those days were the early signs of a long and violent civil war which according to Amnesty International “caused the deaths of more than 400,000 people and displaced more than 11 million people within and outside Syria” by the end of 2017 (Syria 2017/2018, amnesty.org). Throughout the years, numerous reports, including the ones by UN Human Rights Council, UN High Commissioner for Human Rights, UN Committee Against Torture and many NGOs like the Global Center for the Responsibility to Protect, Human Rights Watch and Amnesty International have been prepared, each showing the intensity of the conflict and the human rights violations by the government forces raising to the point of crimes against humanity. In its February 2012 report, the Independent International Commission of Inquiry on Syria stated that “the Government has manifestly failed in its responsibility to protect the population; its forces have committed widespread, systematic and gross human rights violations, amounting to crimes against humanity, with the apparent

³⁸ United Nations, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/S-17/2/Add.1, 27 October 2011.

knowledge and consent of the highest levels of the State.” (HRC, 2012, 22) References to crimes against humanity and calls for respect to R2P, including the use of its third pillar by the international community, were made in several statements by the UN Special Advisors on Genocide and on Responsibility to Protect.³⁹ However, Security Council was incapable of taking a meaningful unified position against the situation in Syria, demonstrating dire contrast with the Libya case.

The Security Council issued an unanimously agreed presidential statement on 3 August 2011, condemning “the widespread violations of human rights and the use of force against civilians by the Syrian authorities” and calling for an urgent end to violence. (S/PRST/2011/16) This broad agreement and unified action, however could hardly be seen again; definitely not in the form of any hard documents involving sanctions, or in any manner following the Libyan example on R2P use.

The paralysis of the Security Council was primarily due to the obstructions of the two permanent members Russia and China. The first time the conflict in Syria has been brought to the Council table was in October 2011, with a draft resolution sponsored by France, Germany, Portugal and UK (S/2011/612). The draft resolution was reiterating the primary responsibility of the Syrian authorities to protect their people, demanding the

³⁹ United Nations, Press Release: Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the situation in Syria, 2 June 2011, online: UN Office of the Special Adviser on the Prevention of Genocide <<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG%20statement%20Syria%202%20June%202011%20FINAL%20ENGLISH.pdf>>;

United Nations, Press Release: Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the situation in Syria, 21 July 2011, online: UN Office of the Special Adviser on the Prevention of Genocide <<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG%20statement%20Syria%2022%20July%202011%20FINAL.pdf>>;

United Nations, Press Release: The UN Secretary-General's Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, urge immediate action to end violence in Syria, 10 February 2012, online: UN Office of the Special Adviser on the Prevention of Genocide

<<http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG%20statement%20Syria%2022%20July%202011%20FINAL.pdf>>;

United Nations, Press Release: Special Advisers on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, release statement marking a full year of violent suppression of anti-government protests in Syria, 15 March 2012, online: UN Office of the Special Adviser on the Prevention of Genocide

<<http://www.un.org/en/preventgenocide/adviser/pdf/Statement%20on%20Syria%2015%20March%20FINAL%20EN.pdf>>

cessation of the use of force against civilians and violations of human rights, and was expressing intentions to consider other measures in the future. The draft however was rejected by the vetoes of Russia and China, in a voting where Brazil, India, South Africa and Lebanon have abstained.

At the basis of the objectors' position was lying their opposition to a foreign military operation. This was as a matter of political choice, rather than a legal principle. Russian objection to the draft as stated by the Russian representative in the Council was to its confrontational philosophy, which did not explicitly reject the possibility of a foreign military intervention, whereas Russia was aiming for a "peaceful settlement of the crisis on the basis of a full Syrian national dialogue." (Russia in S/PV6627) This was a position embraced by all objectors of the draft resolution. Similarly, China and India opposed the threats of sanctions as such a path would be counter-productive to create a political solution in Syria. (S/PV 6627) South Africa, also unwilling to initiate a slippery slope towards an international intervention, justified its abstention with the language of the draft that keeps this possibility open. The determinacy especially in Russia and China not to consider or give way to any possible international intervention, despite their condemnations for the violence used by all parties to the conflict, might have various motivations. However, their justifications for their cautious position towards even a lightly-worded draft resolution which does not propose any sanctions or possibility of the use of force, were based on the abusive way the humanitarian intervention mandate was used by the west in Libya. Maybe what is even more important than these allegations, is the absence, in the western rhetoric, of a defensive argument for the broad interpretation in Libya, nor a confession for the wrong implementation of an otherwise valuable norm.

The central pillar of Russia's (and other BRICS's) objection to any decision regarding Syria was the accusations of abuse of humanitarian situations for political agendas. This central pillar was giving the dominant political character to the way contestation process proceeds. Russia in its statement justified its 4 October 2011 veto mainly by making a connection to Libya, stating that they see western approach to Syria as another "attempt at violent regime change." (S/PV 6627) The major objection of Russia was about the damage of the expanded mission in Libya, which has not ameliorated but worsened the

situation. “The demand for a quick ceasefire turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. (...) Today the tragedy of Benghazi has spread to other western Libyan towns. These types of models should be excluded from global practices once and for all.” (S/PV 6627) In justifying its veto for another draft resolution in 19 July 2012, Russia used an even clearer political tone, parallel to the arguments for the abuse of humanitarian military interventions “calculations (*of the western members of the Security Council*) to use the Security Council of the United Nations to further their plans of imposing their own designs on sovereign States will not prevail.” (S/PV 6810) Russia has not changed its argumentative position in this regard throughout the conflict in Syria.

Arguably pointing to a tacit acceptance (or at least unwillingness/inability to defend) of the expansion of the humanitarian protection mission in Libya, the reply given to these criticisms by the lead supporters of intervention both in Libya and in Syria were not in defense of the implementation in Libya. Rather, they based their replies on the difference of the Libyan and Syrian cases, and the lack of military intentions. On the SC meeting discussing the Arab League’s draft resolution on Syria, US representative stated that “I know that some members here may be concerned that the Security Council could be headed towards another Libya. That is a false analogy.” (S/PV 6710) Similarly France stated that “some have drawn an analogy with the conflict in Libya. That is a pretext.” (S/PV 6710)

Pointing to a clear non-legal contestation process all along, all the involved states defended their positions on Syria, based on subjective political preferences asserted in subjective forms such as: “We reiterate that any solution to the Syrian crisis should be Syrian-led,” (South Africa in S/PV 6710; S/PV 6810); “China maintains that under the current circumstances, ... to impose any solution will not help resolve the Syrian issue” (China, S/PV 6711); or “China has always maintained that the destiny of Syria must be decided by the Syrian people themselves” (China in S/PV 6810). There is a dominance of a subjective and non-legal rhetoric of “unacceptability” of unilateral action and foreign military intervention (Russia in S/PV 6627); or “firm belief” that dialogue being the only productive way forward (India in S/PV 6627; Brazil in S/PV 6627). Other pressing

argumentations in the Security Council discussions on Syria were claims for “moral obligations” (France in S/PV 6826; UK in S/PV 6847; US in S/PV 6627); asserted concerns for worsening humanitarian situation in case of an international involvement (Russia in S/PV 6627; S/PV 6636; S/PV 6734; India in S/PV 6826; South Africa in S/PV 6710); or concerns for a worsening situation in the absence of a swift Council action (France in S/PV 6706; S/PV 6841).

It is necessary to note that, once again this non-legal nature of the contestation process was mixed with a certain degree of legal logic. China’s emphasis on the required compliance of Security Council action with the international law had a legal nature: “Most important, (*the Security Council action*) should depend upon whether it complies with the Charter of the United Nations and the principle of non-interference in the internal affairs of States.” (S/PV 6627) and that they “firmly oppose the use of force to resolve the Syrian issue, as well as practices, such as forcible pushing for regime change that violate the purposes and principles of the United Nations Charter and the basic norms that govern international relations.” (S/PV 6710) There are also references to the international legal principles of sovereignty and non-intervention especially by China (China in S/PV 6627; 6710; 6711; 6734; 6826; 6847; Russia in S/PV 6627; 6826). More interventionist parties of the contestation also consult to legal logic from time to time, primarily with references to the charter-based founding principles of the Security Council. (France in S/PV 6627; 6734; UK in S/PV 6636; 6906) Without disregarding the legal aspects of the contestation processes, overall non-legal features and elements of the contestation process, especially in the Syrian cycle, outweigh the legal rationale enough to evaluate its nature as a predominantly non-legal one. In all the Security Council meetings on Syria from 4 October 2011 to 23 July 2013, the number of political statements by P5 and BRICS outweighs the statements with legal logic by 57 to 31. (see Appendix)

The discussions over the right course of action in the Syrian conflict represent a new phase of contestation on the norm of human protection. Compared to the Libya discussions, this time the contestation had significantly less references to the responsibilities of the international community for the protection of civilians, even by the proponents of action, like US, UK and France. Their reference to R2P and any

international responsibility about the humanitarian condition in Syria was weak and dim, comprised of inconsistent and unsystematic references to crimes against humanity (UK in S/PV 6627; France in S/PV 6710) and more indirectly with references to human rights violations (US and France in S/PV 6627; UK in S/PV 6636; 6710; France in S/PV 6711; US in S/PV 6826). This suggests a weakening for the R2P framework if not for the human protection norm in general. The erosion in the R2P framework can be seen in the comparison between the Security Council meeting records on the day of the Resolution 1973 for Libya (17 March 2011, S/PV 6498) and on 4 October 2011, the day of the first rejected draft resolution on Syria (S/PV 6627). In the Libya resolution meeting, attending states made in total 25 references to protection of civilian populations. 20 of these references were directly about the protection of civilians internationally; implicitly reflecting an acceptance of an international responsibility (not necessarily of a legal sort)⁴⁰. In the day of the draft resolution on Syria, “protection” of civilians has been referred 7 times in total during the Security Council meeting (S/PV 6627). None of these references were made by the western supporters of the draft, 3 of the references were for the state’s responsibility to protect civilian populations/human life (India, Colombia and Bosnia), and 4 of the references were by Russia and Syria criticizing protection of civilians for being used as a pretext. This simple discursive exercise surely does not do a representative job for the importance given to civilian protection. However, it is demonstrative of the disappearance of responsibility to protect rubric from the table, even with its less problematic first and second pillars.⁴¹

⁴⁰ This is the number of the word “protect” used in the context of civilian populations, either as a responsibility of the state (R2P Pillar I; FR, India, Brazil, Colombia); as a purpose of the resolution and the given mandate of the use of force (pillar III; by France, Lebanon, UK, US, Colombia, Russia, Portugal, Nigeria and South Africa); or as a subject of international diplomacy and dialogue (pillar II; by Brazil) S/PV6498, 17 March 2011 is a document of 10 pages in total.

⁴¹ It is very important to note that protection of civilians and responsibility to protect are different concepts., although they seem to merge in certain SC resolutions where R2P is recognized as relevant for protection of civilians. Protection of civilians is a legal concept embedded in international humanitarian law, and is valid for the cases of armed conflicts. Whereas responsibility to protect, although aims to protect civilian populations from atrocities, it is only relevant for the cases of specified four atrocity crimes. While an armed conflict does not necessarily involve the four atrocity crimes, cases of these four atrocity crimes do not necessarily happen within an armed conflict situation. Therefore, references to protection of civilians, and references to responsibility to protect should not be confused. See (Hoffmann, 2015, p. 19.) However, in this case, the comparison makes sense in respect of the R2P as well, because it is representative of a willingness to take forceful action in face of the humanitarian situation in Syria. (pillar III)

Of the total 23 Security Council resolutions that have been accepted related to Syria⁴², only 7 refers to the responsibility to protect, and solely to its pillar I, reaffirming the “primary responsibility of the Syrian authorities to protect its population”. Of the 8 resolutions that have been rejected due to Russian vetoes, only the first one dated 4 October 2011 makes a reference to responsibility to protect, again only reaffirming Syrian authorities’ responsibility to protect their populations. It is also worth noting that the legally very dubious unilateral air strikes by the US-UK-France coalition against Syria in April 2018 made no justificatory reference to protection of Syrian population from atrocities, or their responsibility to protect⁴³, but justified their attack as being against the use of chemical weapons by Assad regime. Considering that there is no provision in international law, including the Chemical Weapons Convention that permits unilateral use of force to ensure non-use of chemical weapons, this justification has very weak legal grounds. Therefore, the preference not to use any reference to a framework covering use of force for humanitarian purposes such as civilian protection or the R2P is particularly striking.

The lack of R2P language in the statements of the anti-Assad countries that are trying to mobilize a unified international reaction, might be explained by tactical purposes, trying to convince Russia and China not to obstruct these initiatives. However, what is important for the purposes of norm strength analysis, is not the genuine commitments of states to international norms. It is the use of norms as parts of the rhetoric in supporting or opposing a position, justifying or explaining an action. Determining the right course of action against a domestic conflict where crimes against humanity are allegedly being committed is certainly one of those situations that the norm of human protection or the doctrine of R2P would have the upper hand. Therefore, lack of such references is telling for the diminishing strength of the norm.

⁴²<http://www.securitycouncilreport.org/26>

⁴³ Except for the UK: “Syria Air Strikes: Theresa May Says ‘Action Moral and Legal’” BBCNews, 17 April 2018, in <http://www.bbc.com/news/uk-politics-43775728> last access: 24.4.2018

4.4.3. Post-Syria

The hesitancy about R2P that has been enforced with the Libyan intervention was not a temporary phase that effected only Syria. To the contrary, the examination of the R2P trajectory over the UN documents point to a new tentative *status-quo* for the norm. In this new phase, the apparent decline of the R2P's prominence in international crisis is irrefutable. After the case of Libya, the Security Council never authorizes enforced measures in any crisis on the basis of R2P. Even in the cases such as Myanmar, where accusations of genocide attempts have been made (Adams, 2019) and allegations of mass atrocities have been reiterated numerous times in Security Council meetings there has been no reference to international community's responsibility to protect; not even by the former proponents. In none of the cases that has come to the Council's attention (as an individual topic) after 2011 (Mali, Myanmar, Yemen and South Sudan) the Council has taken an action based on R2P, nor it has made any reference to it in its resolutions apart from a habitual repetition of state's pillar I responsibility to protect. In the Security Council meetings on these crises, there has not been any reference to the international community's responsibility to protect for pillar II or III.

Rohingya crisis in Myanmar that has erupted in 2016 is one of the most drastic demonstrations for the demise of R2P pillar III. The Human Rights Council led fact-finding mission has stated in its report that crimes against humanity and war crimes are being conducted in several places of the country. They also pointed to a "genocidal intent" (HRC, 2018). It is doubtful if this report has rung the alarm bells in the international community that would have rung prior to the Libya fracture in the history of the R2P. The responsibility of the Burmese state to protect its people and their human rights without any discrimination has been reiterated again and again in every Security Council meeting on the issue. However, no responsibility of the international community had been mentioned towards the Rohingya people suffering the said atrocities. No resolution is drafted on the issue. Despite the emphasis on the atrocities that Rohingya people suffer, and warnings about the Burmese state to fulfilling the calls of the international community to protect its people, Security Council does not make any attempts to take this responsibility for the protection of civilians from such atrocities at its own hands.

Explicative of the fate of R2P, some countries do acknowledge the perpetration of R2P-related atrocity crimes in statements such as “there is no denying that these atrocities, including ethnic cleansing have taken place” (US in S/PV8133), however these are never considered under an R2P framework. UK states that “The Council is charged by the international community with the primary responsibility for the maintenance of international peace and security. Crimes against humanity, such as those detailed in the Fact-Finding Mission’s report, threaten international peace. They threaten international security.” (UK in S/PV 8333) This is very interesting and telling in the sense that even the pioneering proponents of the R2P framework, accept a crisis situation to be crimes against humanity, or ethnic cleansing, yet instead of referencing R2P and calling for international action under its pillar III, choses to use the Chapter VII framework, referring to the responsibilities of the Security Council to protect international peace and security. This points to important weakening on the part of the responsibility to protect framework, not only with its pillar III, but as a complete discourse.

Despite this disappearance of the R2P framework at the practical level, at the normative level R2P continues to hold a solid place in UN’s agenda. The rhetorical support at the normative level as we see in the annual reports of the Secretary General and regular General Assembly informal interactive dialogues on R2P (which in 2018 turned into a formal agenda matter), may seem to be an anomaly, but actually it is not. An examination of the country statements in General Assembly informal interactive dialogues reveals that none of the P5 has ever touched upon the pillar III responsibilities of international protection.⁴⁴ When countries talk about R2P, emphasize its importance and their commitment to it, their reference is almost uniquely on the each state’s responsibility to protect its own people from atrocities. States in general declare acceptance of the international responsibility to assist these countries, as well. However, there have been remarkably few references to an international responsibility to protect in these informal dialogues between 2013 and 2017. The situation is not much different in the Secretary General reports on R2P, which would expectedly be broader and more progressive.

⁴⁴ General Assembly Informal Interactive Dialogues 2013, 2014, 2015, 2016, 2017 country statements for P5 retrieved from: Global Center for the Responsibility to Protect, <https://www.globalr2p.org/resources/>

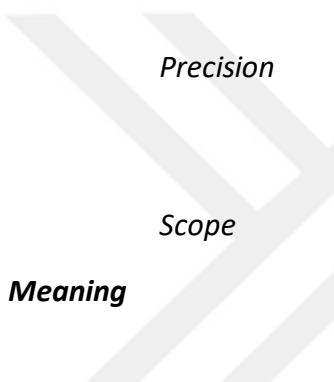
However, the only Secretary General Report that deals with collective response action is the report of 2016. (Report of the Secretary General on R2P, 2016) This watered-down interpretation of R2P as reflected on the normative documents especially after 2013 is evaluated as a co-optation of the norm and led to criticisms that designates it as a “hollow norm”. (Hehir, 2019)

4.4.4. Norm of Human Protection at t_3 : By 2018

If we accept the post-Syria situation as a new tentative *status-quo* for the norm of human protection an evaluation of weakening can be made for most of the multiple dimensions of norm strength.

It seems like the extension of the international mission in Libya to the point of regime change opened a door of skepticism (or opened it further for the already sceptics) for the abuse of the concept of human protection by the powerful states/western states to follow through their political agendas under the humanitarian pretexts. Libya as the first time international community was using its responsibility to protect civilians using military means could have been an experience that strengthen the norm with the constructive power of a precedent of successful practice. However, for the practice to be successful for everyone, without creating deep controversies on this already very delicate subject, the military action should have been taken with utmost caution. The vagueness of the doctrine of R2P, coming together with the indeterminacy of the Resolution 1973 in the operational limits of its mandate created an overly large legal ground to play around. However, the contestation that followed through after the usage of this ground to the full, created the opposite effect and risked the legality and legitimacy of the third pillar of the doctrine.

Table 4.3: Change of Norm Strength t_2 - t_3

NORM STRENGTH AT t_3		Change ($t_2 - t_3$)
Authoritative Power	• Legitimacy of international protective actions questioned with arguments of abuse • Less references to the norm for justifying actions • No mentioning of the norm for responding relevant crisis.	↓
Global Reach	• Global consensus weakened with the rising accusations of abuse and resistance to implementation	↓
 Meaning	<i>Precision</i> • Still vague and based on case by case application • Ongoing disagreement on operational limits	↔
	<i>Scope</i> • Explicit requirement of SC authorization • Existence of four stated atrocity crimes is not enough to trigger action under R2P framework.	↓
	<i>Content</i> • Use of force to end the humanitarian atrocities; protect people from imminent threats or annihilate the source of threat is not agreed on. • Decreased support to broad interpretations of operational limits	↓

Decreased authoritative power of the norm of human protection can be observed in the disappearance of the R2P framework from the repertoire of action after Syria. In terms of the death tolls attributed to the government violence and also the drastic numbers of displaced and emigrated people, Syria, Myanmar or Yemen cases were rather easy cases to give a moral or legal international decision. After all, the Security Council in the year 2011 had precedents at hand that it could use its Chapter VII tools, both for such an immense migration situation and such deadly internal conflicts. The calls for using the doctrine of responsibility to protect with its third pillar of intervention have been made by the civil society and independent actors, and these calls were supported by the reports

reflecting data from the field. The authoritative power of the norm of human protection as it is integrated within the R2P doctrine however, was not powerful enough (at least after Libya experience) to overcome the barriers put forth by opposing states. Later on, it ceased to be a seriously debated option in the Security Council, not being called upon even by the proponents. The argumentative (if not necessarily causal) link between the way the norm is implemented in Libya, its avoidance in Syria and its disappearance in post-Syria is clearly seen in the Russia's (and other objectors') justifications for their refusal of action as have been demonstrated within the chapter. (S/PV 6627; S/PV 6711)

In terms of global reach, a decrease can also be pointed out, as the consensus behind the two R2P paragraphs of the 2005 SOD has been disappeared after Libya with the unresolved contestation on interpreting the implementation limits of the norm. A number of countries, led by the BRICS, which were not the most ardent supporters of the norm from the beginning, withdrew their rhetorical support to the norm, once the implementation of the norm reflected a broader interpretation than theirs. Norm of human protection with the proposed broad interpretation turned for them into a means of political abuse.

On the dimension of precision, the contestation on implementation limits no doubt reflects a significant deficiency. However, this non-precision was a characteristic of the norm as it has been globally accepted in 2005 (t_2). Therefore, it can only be said that the norm is as vague as it has been before. Only after a new shared understanding on the norm, be it an agreement to disagree on the operational limits (which would make the precision dimension weaker) or a tacit if not textual agreement on certain guidelines of implementation (which would make the precision dimension stronger) an arrow can be drawn in this segment.

For the interpretative norm strength dimension of applicatory scope, an argument of weakening can also be put forth. Examination of the Security Council meeting minutes on the vetoed draft resolutions on Syria, shows that the objectors of a Security Council action, do not argue for the lack of a humanitarian crisis in Syria. To the contrary they do accept the existence of a humanitarian crisis and join the calls for an end to that; "the

bloodshed and violence in Syria must be immediately ended.” (Russia in S/PV 6711) However, they nevertheless show an outright objection to any resolution that might lead to sanctions (let alone military intervention) on Syria. From a normative evaluation, this represents not only a weakening in the authoritative power of the R2P, but also a narrowing down of its applicatory scope. The thresholds that were once (in the SCR1973 on Libya) adequate to take a decision to use force, do not seem to be adequate anymore for a similar decision on Syria, as well as post-Syria events, although the humanitarian scene is no less drastic.

The content of the norm also shows a downward arrow. The question on the operational limits of R2P missions that lies at the core of Libya discussion is unanswered and it seems like there is no willingness to clarify it with further deliberation on the protective responsibilities of the international community. The rhetorical analysis of the contestation process documents reveals that the broader interpretation that we have seen in action in the case of Libya, disappears in the discussions on Syria. The absence of decisive calls for the fulfillment of international responsibilities in atrocity situations in the Security Council meetings demonstrates that the R2P framework seems to be narrowed down to its pillar I state responsibility, and to a limited extent pillar II international responsibility to assist. However, pillar III responsibility of the international community to protect seems to be almost completely disappeared from the practical field after Libya and Syria. Therefore, in terms of the content of the norm of human protection, the current scene demonstrates the obstruction of legitimate channels for the international community to take non-consensual action against perpetrating states.

4.5. Conclusion

The analysis of the change in the different dimensions of norm strength, both for the first and the second cycles of contestation that have been examined, demonstrates that legal nature of contestation processes does have a positive effect on norm strength. We have also seen that it is not possible to talk about strengthening or weakening of norms as a solid concept. Different dimensions of norm strength are not affected from contestation

processes similarly. To the contrary, most of the time, these different dimensions are in a balancing relationship with each other.

In the first cycle of contestation on Kosovo, the increasing precision and widening acceptance of the norm is accompanied with a narrower content, and a narrower applicatory scope that has limited the acceptable use of force to a high threshold of four atrocity crimes and a Security Council decision. Defining the conditions for the international human protection actions under the R2P framework, contributes considerably to the increased precision hence increased strength of the norm. The examination of the debates in the discussion processes especially in the norm making moments like the UN World Summit reveals that the narrowing down of applicatory scope also contributes to the widening of global reach by convincing more actors to give support. Therefore, in the first cycle of contestation, the behavioral dimensions of norm strength, i.e. authoritative power and global reach, arguably gain strength at the expense of interpretative dimension, i.e. a narrower scope and limited content. An evaluation for the positive direction of the evolution of the norm can be made in this period looking at the arrows of all constituents of norm strength (Table 4.2).

At the point of Libyan intervention in early 2011 however this trend seems to come to an end, and has even been reversed. The norm as it has been generally agreed turns into international action for the first time. This experience of norm application revealed the different interpretations regarding the content of the norm. The signals of the difference of interpretations were already there in the time of the resolution 1973 on Libya, where five members of the Security Council including the permanent members Russia and China casted abstention votes instead of giving a full acceptance to the mandate. In this sense these states' compliance with the R2P (more precisely its pillar III) was a "contested compliance" (Wiener, 2004) and already bearing in itself the seeds of an evolutionary change. The implementation of the norm in Libya by NATO and its allies in line with the broad interpretation of content (in this case, the operational limits) brought an end to this contested agreement. This breaking down of the shared understanding that become evident in the consistent resistance of Russia and China in the case of Syria and its aftermath, is an indicator for a narrowing down in the global reach aspect of norm strength

after 2011. An even more important part of the norm's weakening in the process after Libya, which seems to be valid even for the actors whose allegiance to norm still continues, is the decrease in the references made to the norm in justifying actions or arguing for decisions. These rhetorical references, no matter if they are founded on sincere motivations or are sugar-coating for political interests, are indicators of "descriptive legitimacy" hence of the authoritative power of the norm as perceived by the actors. Therefore, a weakening on the behavioral dimensions of norm strength can be observed after Libya both in terms of the number of actors that the norm is accepted by, and the strength of this acceptance.

The new tentative *status-quo* on the meaning dimension of norm strength represents a significant shrinking of the norm of human protection with the practical disappearance of the pillar III of R2P. Lack of a strong retrospective defense of the broad interpretation of operational limits in Syria discussions signals that the broader interpretation of content is losing relevance. Moreover, the almost complete disappearance of references to international responsibilities for enforced protection actions since 2013, reduces the R2P framework to a "hollow norm" that is incapable of inducing action to meaningfully protect people from violence. In this sense there is an evident weakening in the content aspect, with an erosion for the doctrine at least for its third pillar.

There is strong contrast between how norm strength has changed after the first cycle of contestation following Kosovo as compared to how it has changed in the second cycle of contestation following Libya. The contestation process following the Kosovo intervention gave way to a long period of norm development efforts, which very productively led to a better-defined and more widely-accepted norm. Contestation process began with Libya intervention on the other hand, led to a period where meaningful international implementations and advocacy of R2P has been gradually disappeared. Analysis in this chapter have demonstrated that this difference in norm evolution trajectories overlaps with the existence/non-existence of process legality in the contestation processes (hypothesis 2). In the first contestation cycle over Kosovo, where argumentation was more heavily relied on legal reasoning and discourse the narrowing down of the meaning dimension was balanced out with an increased acceptance of the

norm (global reach) and increased precision, thanks to a period of norm development efforts. In other words, process legality in this first cycle of contestation have created the suitable environment for a revised intersubjective agreement on a re-constructed norm of human protection. On the other hand, the second contestation cycle where the core of the debate was the ‘accusations of abuse’ reflecting a political rationale, seems to have a detrimental effect on the norm. When the contestation on a norm is held through a process of clashing political positions and state interests, it does not help the formation of a constructive basis to solve the contradictions within the framework of the norm leading to a revised consensus. On the other hand, legality in the contestation process sets a more suitable basis for developing a new and better consensus on the norm, strengthening its compatibility with the international legal system.

On the relation between formal legality and process legality (hypothesis 1), the use of argumentations with legal discourse, references to provisions of international law as well as to the right interpretation of legal documents especially in the first contestation cycle demonstrate that process legality can exist in the absence of formal legality. The analysis of a non-legal norm has shown that process legality in the contestation processes is the link between norms be them legal or not, and the strengthening power of law. Therefore, the real value-added of legality for norm evolution, is not necessarily in formal legalization of the norm; but in the processes that use legal channels and connections. Process legality does not ensure the prevalence of the progressive interpretation of norm’s content. The narrower or restrictive interpretations might be agreed on at the end of the contestation processes. However even when this is the case, we observe an increase in norm strength through reinforcement in the other dimensions of norm strength, including a broader global diffusion of the norm, increased precision or an increased authoritative power. One possible mechanism of this connection can be the bond that process legality establishes with the existing international legal system and the intersubjective conventions of the international society. This intersubjective ground of legality brings in a particular culture of problem solving, and provides common references for the parties to work on the controversy constructively. When contestation is on political grounds, subjective evaluations, national interests, and alliance strategies become the sole

reference points hindering productive outcomes. More detailed analysis will be made in the next chapter, discussing the findings of the two case studies comparatively.



CHAPTER 5

DISCUSSION: LEGALITY, CONTESTATION AND NORM STRENGTH

5.1. Introduction

Reading the case studies for the norm of *non-refoulement* and norm of human protection together reveals two major points in support of the two main propositions of this dissertation. First, there is no automatic link between formal legality and process legality (hypothesis 1). Neither formal legality of the norm is a guarantee for process legality in contestations with all the available legal means involved, nor the lack of formal legality prevents process legality to prevail. Contrary to mainstream expectations, formal legal nature of the norm or its entrenchment in international law does not ensure an uncontested implementation, nor does this legality prevent continuous evolution of the norm. Similarly, lack of formal legality does not prevent process legality to unfold in the contestations regarding the meaning and implementation of the norm. This does not mean that there is no relation between the two. Process legality is easier if not more likely when a norm enjoys formal legality mainly because formal legality keeps the links with existing legal system ready at hand for the contesting actors. However, these links, such as references to international legal documents, to legal rules, shared principles or to legal precedents can be used as part of a deliberate strategy, for non-legal norms as well. Legal discourse and rationale can be utilized even for non-legal norms, as international law is a broad, multilayered system of shared, intersubjective principles and procedures, that underlies all the international and transnational interaction to some degree. (Bower, 2017)

Second major point of the study (hypothesis 2) is that the legal nature of the contestation processes has the potential to contribute to the protection of norm strength. Use of legal institutions, argumentative logic and discourse, frames the contested issue in a particular way, where certain rationales prevail over others and legal legitimacy claims gain an upper hand. The intersubjective understandings and agreements, as well as the shared

argumentative rationale built-in to existing international legal system (through path-dependency of past concessions and logic of legal argument-making) forces the parties to create a new consensus on the norm, hence contribute to the norm's evolved resilience. Therefore, the findings of this study suggest that for the preservation of norm strength, it is important to insist on the legal argumentative logic and primacy of the legal legitimacy against alternative legitimacy claims. The power of process legality that constitutes a constructive ground for revised consensus on norms, carries the potential for the evolution of norms to adopt to the challenges of changing international realities. The real impact of international law in international relations does not come from its teeth that formally obliges states with threats of sanctions, or from conventions undersigned by the most number of states; but from its power to entrap international actors within a self-recreating system of norms through infusion of legal logic in international practice.

Findings of the two case studies demonstrate the analytical value of the two innovations introduced to norm contestation literature in this dissertation; the concept of process legality and multi-dimensional norm strength conceptualization. Process legality in contestations plays a constructive role on norm evolution and resilience, demonstrating the value-added of law in contestation processes. Multidimensional norm strength analysis reveals the interaction between different aspects of norm strength, and shows how norms that are drastically challenged and degraded in one aspect may still preserve their overall strength and resilience. In this chapter, each hypothesis will be evaluated through a comparative analysis of four subcases, and the implications of the hypothesized relationship for our understanding of law in international processes and norm evolution will be discussed.

5.2. Hypothesis 1: Formal Legality and Process Legality

In order to see the relationship between formal legality and process legality, I chose one legal and one non-legal norm as my case studies. Both of the two case studies and their four subcases supported the proposition for the relative independence of legality in contestation processes from formal legal characteristics of the contested norm.

Contestation processes showed legal, moral or political characteristics in all of the subcases, regardless of the formal legality of the norms.

In subcase 1, the contestation process over Italian interception practices between 2009 and 2012 of the legal norm of *non-refoulement* had a clear legal nature. Interception practices in the Mediterranean that are intensified after the Arab Spring's turmoil led to a process of contestation on the geographical limits and conditions of *non-refoulement* responsibility. The contestation had a dominantly legal character from the very beginning with references to international maritime law, international human rights law, or to agreements that had been previously made among involved actors. Building the discussion on the legal grounds engaged legal institutions, most critically the ECtHR and its case law. Framing of the issue as a human rights problem constituted the critical move for norm development. Discussing *non-refoulement* as part of the human rights law under ECHR Art. 3 rendered the ECtHR involvement possible, and opened up the progressive case law on state jurisdiction for the interpretation of *non-refoulement* in interception practices. Although formal legality of the norm of *non-refoulement* as integrated in various human rights and refugee rights conventions served to this process, the choice and efforts of actors for this particular framing of the contestation brought in the value-added of process legality to the maximum. This process of legal contestation ended with the incorporation of the broad state jurisdiction concept of human rights law in interpretation of *non-refoulement* cases, thereby widened limits of state responsibility in cases risking *refoulement*.

In the second contestation cycle of *non-refoulement* over safe country concepts (subcase 2) once again contestation had a predominantly legal nature, however this time to a lesser extent compared to the first case. Slow evolution of safe country concepts as they are accepted in consecutive Asylum Procedures Directives are examined. The contestation over safe country concepts were not on their categorical acceptability, but on the details of their implementation. From the first APD draft on, UNHCR and ECRE challenged European Commission for more strongly regulated safe country applications, with an emphasis on individual assessments and safety standards of safe countries, implying a broader interpretation of *non-refoulement*. The nature of contestations was essentially

legal, although without full utilization of legal means to create more pressure on each other. In the reports and evaluations, the criticisms of UNHCR and ECRE, as well as the proposals of the European Parliament were constructed on the standards set in the UN Refugee Convention and to a lesser degree in European human rights legislation. On the other hand, the legal logic of argumentation and discourse was weaker in Commission replies, of which justifications for stronger safe country concepts –hence restricted *non-refoulement* interpretations- were based principally on efficiency, cost-effectiveness, political necessities, fair burden among member states and prevention of abuses. The intermesh of the references to refugee law with explicit concerns for efficiency and state control on their borders prevented the use of all means of process legality to the full.

Counterfactually, a more aggressive case could have been built along the lines of human rights by UNHCR and ECRE, especially based on EU Charter of Fundamental Rights. International legal principles that are indisputable in the EU legislative context such as non-discrimination, respect to human dignity, or freedom from torture could have been used for invoking a discussion on the suitability of broad implementation of safe country principles to the EU Treaties and EU Charter of Fundamental rights as required by the Lisbon treaty. This mixed nature of contestation, with limited resort to available legal means and institutions, supports the hypothesis that formal legality is not a guarantee for process legality. Once again, the degree to which law and legality will be integrated to the logic of argumentation and to the nature of discussions had been a choice made by the involved actors.

The possible detachment of formal legality and process legality is even more clear in the examination of the non-legal norm of human protection. In subcase 3, the contestation process around Kosovo intervention and following course towards the acceptance of R2P, process legality prevailed in the nature of contestations. Although legal arguments that are based on former Security Council decisions and Chapter VII responsibilities were mixed with arguments on moral necessities on part of NATO and its allies, their counterparts had a uniquely legal approach, framing the discussion as law vs lawlessness, referencing to the UN Charter, international legal documents and general principles of international law, as well as adjudication in ICJ. Framing the controversies around

Kosovo intervention as an authorization problem brought in process legality through references to the UN Charter, principle of non-intervention, prohibition of the use of force, and right interpretation of Council resolutions, as well as by the involvement of ICJ. Such a contestation process imposed a solution through norm development within the legal framework even though neither humanitarian intervention nor responsibility to protect themselves are formally legal norms. Despite the clearly non-legal character of human protection norm, the contestation process after Kosovo in subcase 3 was conducted in a strongly legal course.

On the other hand, in subcase 4 (Libya/Syria) process legality was completely lacking in the discourses of both contesting sides. Alleged over-extension of the use of force authorized under R2P in Libya created a critical juncture in the evolution of human protection norm. While fast and effective action taken under international responsibility to protect by the Security Council against Libya was at first welcomed as the peak of norm establishment (UN Press Release, 18 January 2012; Thakur, 2011) it soon turned into the biggest challenge against it. The contestation between the members of the coalition that conducted the operation in Libya and sceptics led by Russia and other BRICS, on the right implementation of R2P mandates continued into the Syrian crisis. The discussions in Libya/Syria process demonstrated an observable absence of process legality, and a reliance on security discourse, strategic preferences and alliance politics, principally shaped around accusations for the abuse of humanitarian reasons.

Seeing process legality in Kosovo contestation but not in Libya/Syria is especially interesting and telling for hypothesis 1. This is because the humanitarian intervention framework during Kosovo contestation had relatively less formal legal characteristics compared to the R2P framework contested in Libya/Syria. If we accept formal legality to be a continuum as has been suggested by Abbott et al. (2000) R2P has relatively higher legality than humanitarian intervention due to its global acceptance in a UN Summit Outcome Document, its higher precision and (a degree of) delegation with special rapporteurs under UN. Accordingly, had formal legality had a mandatory connection with process legality, we would expect to see more process legality in the contestations on R2P

(Subcase 4) compared to subcase 3 (Kosovo), however supporting the hypothesis of their possible detachment the real case was the opposite.

It is not surprising to see that process legality prevails in both subcases of *non-refoulement* as a legal norm. Formal legality of the norm and its direct entrenchment in the international legal system within a binding document, or existence of a body delegated for dispute settlement creates a terrain of instruments for legal contestation. This might make it easier and sometimes more convenient for the contesting actors to make their case and build their argumentation on legal grounds. It also makes it more likely that a legal history of norm development exists, to which new contestation cycles may refer for precedents, analogies, and persuasive arguments. However, as the case studies show, alternative channels of argument making and legitimacy claims always exist alongside the legal route.

5.2.1. *Legality as a Political Choice*

Choice for process legality is essentially a political strategy by the contesting actors that is driven by political preferences or logic of appropriateness (March and Olsen, 1998), as well as the facts of the situation that renders legal framing a convenient instrument in the given circumstances. This starting point does not necessarily assume a rational actor with fixed interests all along. Preferences may indeed be reconstructed throughout the contestations. Supporting the axiom “law is political”, process legality in the examined contestations is essentially a political position and a political strategy, however with constitutive and constraining effects on the flow of the contestation process, preferences of actors, and the evolution of the norm. The fact that Russia, that has categorically opposed Kosovo intervention on clear legal grounds did not resort to legality discussions in Libya/Syria suggests that legal contestation is a volatile decision based on situation-specific factors. What Hoffman and Weiss (2018) concludes for R2P can be broadened for legal argumentation in general: when politics is wrong, it wouldn’t be applied, but when politics is right, it is good that the principle is there. However, this is not a one-way street. Politics may influence the recourse to law, but the overreaching outcomes of

legality construct politics through constructing actor identities and preferences, as well as the intersubjective environment that practice acquires meaning.

Suggesting that process legality does not require formal legality and formal legality does not guarantee legal process does not mean that the difference between social and legal norms have no bearing at all. Established instruments of the international legal system may make legal norm a more convenient subject to be handled through process legality. However, although non-legal norms lack the legal instruments that directly regulate them, the density of the international legal network in terms of overlapping legal regimes and principles that cover almost all aspects of transnational relations provides endless opportunities for creating linkages with the existing legal institutions and structures. In the final analysis, not the formal legal character but its actualization in legal processes constitutes the value-added of law for international actors.

Contrary to classical legal idea of law's autonomy and independence from politics (Bix, 2005) this value-added of law that distinguishes process legality from political processes or moral deliberations is not devoid of politics. Any norm is constructed and reconstructed through rhetorical and practical international interaction, is context-dependent and is always tentative until the next contestation cycle. This flexibility and indeterminacy of law constitutes an important part of its politicalness. (Koskenniemi, 2005) Norm contestation processes are in no way immune to structural value hierarchies and power relations, even when they are legal in character. Process legality does not level the international field for every actor, with a value-free justice that boost the best argument; it does not give the "right" answer, but provides a set of intersubjective understandings and argumentative standards for the construction of an acceptable compromise among contesting actors. This means that process legality is not free from the effect of power imbalances (some actors and some arguments are structurally in a better position), but with its constructive and constraining role it is not under the monopoly of power either. Its difference from political processes in this sense, is the difference of argumentative rationale, principled reasoning and inherent logic for justifications where arguments cannot be made on particularistic, self-serving grounds, but need to be embedded in the intersubjective international system of legal institutions, articulate norms, background

acceptations and legal legitimacy claims. “Politics take a distinctive form when conducted within the realm of legal reasoning and practice.” (Reus-Smit, 2004, 14) “Within the legal realm, law structures politics in a variety of ways, depending both on the nature of the relevant rules and on the facts of the situation. (...) When international law is indeterminate or when situations arise that were not anticipated when the rules were formulated (*i.e. in contestation situations*) international law serves as a discursive medium in which states are able to make, address and assess claims.” (Reus-Smit, 2004, 5; italics added) As such, legal contestation becomes a principled process with its own constitutive (although definitely not determinative) role for actor preferences and arguments, as well as on the outcomes.

Political as it is, law is distinct as a discursive process, and legality is not epiphenomenal as ascribed in the “politicalness” criticisms of realists, but it is consequential. Process legality does not decisively determine the outcome of contestations, nevertheless it effects them. What a norm means is not readily available in its text, but is constructed and reconstructed in international interactions. As Brunnée and Toope suggests “social interaction and international legal practices are central in making and giving effect to international law.” (Brunnée and Toope, 2012, 129; emphasis added). Therefore, norms legal or not, are indeterminate and are only constituted through interactional processes of rhetorical and practical actions, and neither legal institutions nor legal argumentation in a contestation can give one correct legal solution that is already out there. “Law is no objective solution to contradictions, and ‘at every level, legal decisions involve value and policy choices.’” (Bianchi, 2016, 137 quoting Oetken, 1991) Following Koskenniemi and other critical legal scholars, opposing legal claims can be made with equal legitimacy, so it is possible to legally defend/justify any position and legal rules themselves cannot be determinative. (Bianchi, 2016, 136; Koskenniemi, 2005) Rather, the outcome is constituted as common, correct and legal during the contestation processes, and thereby becomes part of the intersubjective foundation to influence actor identities and preferences, as well as the terms of the next contestation. The outcome of norm contestation, which I describe as a tentative *status-quo*, might be a more authoritative interpretation of the contested norm, with a more comprehensive content and wider support base; or the contestation process may fail to create a renewed agreement, break

down the global support base, hence lead to norm erosion. Legality of the contestation processes and the intersubjective realm of argumentation it brings about prevent the eroding effects of contestations, and positively influence norm strength.

5.3. Hypothesis 2: Process Legality and Multidimensional Norm Strength

My second hypothesis on the positive relationship between process legality and change of norm strength in contestations also found support in the two case studies.

The contestation around interception at sea practices (subcase 1) which was strongly legal in nature, is ended with a clear strengthening of the norm of *non-refoulement*. Comparing the meaning-in-use that it is attempted to be instituted by interception practices in late 2000s to the meaning-in-use established by the Hirsi judgement of ECtHR in 2012, we see a much broader scope of *non-refoulement* responsibility. Interlinking the issue of interception with the more progressive and highly established segments of international law through ECtHR and its broad understanding of state jurisdiction played the ultimate role in the reinterpretation of *non-refoulement* and reinstatement of the limits of state responsibility based on extra-territorial jurisdiction. This does not mean that ECtHR or other legal institutions would choose the broadest and most progressive interpretation at all times. However, in the examined case the European Court's position has clearly strengthened the broader interpretation for limits of state responsibility in the high seas.

For subcase 2, the contestation on safe country concepts and the substance of *non-refoulement* responsibility, the outcome is not yet determined. In other words, a new tentative *status-quo* regarding the minimum safety standards of safe countries is yet to be achieved. However, the latest version of asylum procedures as has been proposed by the Commission in 2016 as a draft Asylum Procedures Regulation reflects points of strengthening for *non-refoulement* in safe country implementations. According to this, content of *non-refoulement* norm come to include the access to social services as well as means to maintain an adequate standard of living, which represents norm-strengthening compared to previous interpretation limited to protection of life, liberty and freedom from torture.

Especially in the last two decades of rising xenophobia and anti-migration sentiments, European asylum policies and implementation is far from satisfactory from the refugee protection point of view. The broad picture is rather bleak. On the one hand developments around the world create more and more displaced people seeking refuge in foreign European countries. On the other hand, European states seem to live no difficulty finding new instruments and loopholes to free themselves from their established responsibilities vis-a-vis refugees and asylum seekers. Among such instruments are the safe country practices of which place is getting broader in refugee policies, and which are utilized to transfer all responsibility to other states, mostly to developing countries around Europe, ostensibly without a violation of the international law.

However, when we look at the evolution of *non-refoulement* through contestations over its different aspects and using a multi-dimensional norm strength conceptualization, we find reasons for optimism. Although statist, control-oriented approaches continue to thrive in the interpretation of *non-refoulement*, the challenges by the refugee community manage to push changes in the EU legislation, some are of critical importance others less so. Broadened state jurisdiction understanding that gives extra-territorial responsibilities to states under refugee and human rights laws is one of such important leaps. Today non-entrée policies are more difficult to implement, and European states had to shift their deterrence policies to no touch strategies. (Gammeltoft and Tan, 2017) Required standards of protection for lawful *refoulement* also seem to represent a widening, although there still is an ongoing gap between standards envisioned in European and international human rights law and standards recognized for refugees. However, minor improvements are still improvements. Although these small changes are not enough to turn the existing restricted interpretation of *non-refoulement* upside down, they pull it closer to the broader interpretation one bit at a time. In other words, contrary to the pessimistic picture drawn in many European state practices in recent years, the norm of *non-refoulement* is still on a strengthening evolutionary trend. This is thanks to the relentless contestation by the refugee rights community, using the refugee and human rights law as a leverage against the state-centric safe country concepts.

Second case study on norm of human protection tells the story of a norm first getting more authoritative, more precise and more widely accepted, and then just when it was thought to have been “come of age” (UN Press Release, 18 January 2012) lost its legitimacy and practicability almost to the point of disappearance. This sharp rise and fall in the evolutionary line of human protection norm permits the examination of the effects of different contestation characteristics that precedes these changes. In subcase 3, the legal contestations around Kosovo intervention is followed by a period of norm development primarily by the efforts of norm entrepreneurs like ICISS, and ended up with a stronger norm. In the 5 years following the Kosovo intervention, the idea of a doctrine of responsibility to protect is discussed globally, and through the supportive position of the Secretary General Annan, it managed to find a place in the 2005 Summit Outcome Document. The fact that Kosovo discussions were held around unacceptability of the intervention due to its illegality and legitimacy of it due to its necessity created the suitable environment for the norm entrepreneurs to push through. The development of R2P was neither the outcome of Kosovo crisis alone, nor it was made possible only by the legality of the contestation process. The underlying theoretical ideas such as “sovereignty as responsibility” (Deng et. al 1996) had been laying the foundations since before Kosovo intervention. There also were strong entrepreneurial efforts for its formation and acceptance as a doctrine led especially by Canada, and also by the Secretary General himself. However, the crisis unfolded around Kosovo intervention constituted a critical juncture that created the ground that the efforts could re-coalesce. Without the shared references of legality in the contestation process, the norm of human protection could have been completely faded with the humanitarian intervention doctrine, amidst unproductive political polarizations.

Human protection under the new R2P framework was much more precise with better determined applicatory conditions and decision mechanisms, more generally accepted with a global consensus at least on the paper, and had higher authoritative power thanks to the descriptive legitimacy it acquired as a globally accepted and institutionally supported new framework of international action. Therefore, increased norm strength compared to end of 1990s was clear.

In stark contrast to Kosovo, in Libya/Syria (subcase 4) lack of legality in contestation processes led to a deadlock in norm development, and followed by a disappearance of R2P pillar III in later crisis situations. In the humanitarian crises after Syria, R2P pillar III has never been proposed as a basis of action, despite the occurrence of significant events arguably reaching to ethnic cleansing such as Rohingya.

R2P doctrine has not been disappeared from the international agenda as thematic reports and regular informal interactive dialogues in the General Assembly are still being conducted. However, pillar III is seldom referred in these reports and dialogues, suggesting a narrowing down of R2P to its first and second pillars of consensual action. Due to the political nature of the contestations and the uncompromising sphere of state interests and alliance politics, no basis could be established for a constructive discussion to revive the consensus on the norm of human protection by redefining it in line with current concerns and requirements. With the disappearance of pillar III, R2P doctrine has been co-opted as some argued (Hehir, 2019) and this has costed the norm of human protection a legal and practicable framework.

Just like the process legality in Kosovo contestation was not the ‘reason’ of the creation of R2P, lack of process legality in Libya/Syria contestation is not the sole reason for the disappearance of pillar III. The consensus on R2P had been a conditional one from the very start and compliance has always been contested for pillar III. In other words, the applicatory conditions, limits and procedures of enforced military action on R2P grounds had always been different for different actors. Libya and Syria crisis were not creating the controversies, but revealing them. However, at such a critical juncture, contestations could have been utilized constructively as an opportunity to reinvigorate a consensus around a redefined norm, similar to post-Kosovo process. Lack of process legality in Libya/Syria contestation, as opposed to the legal nature of the Kosovo contestation, played a determinative role in the absence of suitable conditions for norm development, leading to its demise.

The mechanism that connects process legality of contestations to norm strength lies at the theories on the power of discourse and argumentation that goes back to ideas of

poststructuralists like Derrida on the constructive power of language, or critical thinkers like Habermas whose theory of communicative action has informed constructivist international relations studies considerably through the works of scholars like Kratochwil, Risse or Schimmelfennig. Applying the constitutive power of discourse to the ideas of law suggests that process legality, offers its particular reasoning with its own peculiar system for “persuasive weight of claims” (Kratochwil, 1989, 12). This particular reasoning process constitutes part of the constructive basis for renewing the consensus on the contested norm. Process legality, “informs the respective decision-makers about the nature of the interaction and determines who is an actor; sets the range of permissible goals which the actors can pursue; it specifies the steps necessary to insure the validity of their official acts and assigns weight and priority to different claims.” (Kratochwil, 1989, 251) Therefore it helps the formation of a “reasoned consensus” (Risse, 2000, 2) by determining and delimiting the rules and conditions of making persuasive arguments, and reaching a compromise. “It matters to international actors whether a problem or issue defined as political or legal, and while power and self-interest are at play in the politics of definition, the framework of existing legal norms and the modes of argument that enliven them discipline that play. Once it has been commonly acknowledged that a problem or issue is legal, in the sense of being governed by a pre-existing set of norms, the narrowly defined politics of power and self-interest is delegitimized and communicative action is empowered. (...) Because international law is a normative order, casting claims in the language of law associates interests and strategies with the norms of international society, conscripting the power of social opinion to one’s cause.” (Reus-Smit, 2004, 38) Legal reasoning entraps contesting actors in a “collective communicative process” (Risse, 2004, 7) that leads to norm development. It practically obliges the contesting parties to deliberate on the contested norm, which likely lead to a revised agreement on norm interpretation, or a revised agreement to disagree. In both of the scenarios, norm becomes either more widely accepted, most probably accompanied with a narrowed down meaning, or more precise and authoritative although with less global reach. Intersubjective understandings and principled argumentations brought about through legal process is similar to a limited “common lifeworld” in Habermasian terms (1981; 1996), which “provides arguing actors with a repertoire of collective understandings to which they can refer when making truth claims.” (Risse, 2000, 10-11)

Process legality therefore functions as the common language, history and culture required for the shared platform of intersubjective understandings. It frames the contestations within the intersubjective normativity of international legal system “which allow people to pursue goals, share meanings, communicate with each other, criticize assertions, and justify claims.” (Sinclair, 2010, 19 quoting from Kratochwil, 1989, 11)

Legal reasoning, due to its defining characteristics is strictly connected to past agreements, acts, decisions and constructed analogies. Therefore, it is path-dependent to a significant extent. (Sinclair, 2010, 28; Kratochwil, 1989 238-243) Process legality in contestations, brings in this path dependency as a force that reinforce the existing norm’s resilience. In other words, legal reasoning and rhetoric by definition is built on the pre-established agreement on the norm and the intersubjective legal context that it takes part. Thereby it contributes to the norms’ intrinsic power to persist and survive through contestations. Process legality serves to create a common, concrete basis for contesting parties to build upon for the further evolution of the norm. It anchors the norm to the existing body of international law, invoking the shared consciousness and intersubjective understanding of argumentative relevance embedded to it, even when the norm itself lacks formal legal characteristics. Process legality, i.e. legal argumentative logic and discourse, functions as an institution that dictates its own rationale, morality, politics and instruments within the confines of law, thereby protecting the normativity (if not necessarily the substance of the norm) during contestations.

5.3.1. Multi-Dimensional Norm Strength: Weakening yet Strong

Apart from the general direction of change in norm strength, when the four subcases are examined all together we see certain patterns on the disintegrated norm strength dimensions of authoritative power, global reach and meaning (Table 5.1). Norms’ authoritative power increases in every case there is process legality, and it decreases in the absence of it. Authoritative power is the urge of states to follow or appear to follow the norm. It is conceptualized in this study as descriptive legitimacy, which is operationalized as the frequency of references to the norm. Authoritative power, under

different names is a widely used indicator of norm strength throughout the literature. (Hurd, 2014; Clark et al., 2018; Deitelhoff and Zimmermann, 2019)

Table 5.1: Comparison of Subcases

Subcase 1	Legal norm	Non-Refoulement: Applicatory limits (interception at sea)	Process legality	Authoritative power + Reach o Precision + Scope + Content o	↑
Subcase 2	Legal norm	Non-Refoulement: Substance (safe country concepts)	(Less) Process legality	Authoritative power + Reach o Precision + Scope + Content +	↑
Subcase 3	Non-legal norm	Human Protection: Right Authority (Kosovo)	Process legality	Authoritative power + Reach + Precision + Scope - Content o	↑
Subcase 4	Non-legal norm	Human Protection: Implementation limits (Libya/Syria)	No process legality	Authoritative power - Reach - Precision o Scope - Content -	↓

The link between process legality and authoritative power might arguably be through the inherent strength of law as a legitimacy claim. Here I make an argument for process legality creating a perception of higher legal authority on part of the norm, which in turn increases discursive use of the norm as a justificatory or accusatory claim⁴⁵. When contestation on any kind of norm is made on legal grounds, this process legality creates a perception of legality with a “compliance pull” (Franck, 1990) with superior legitimacy claims. As the legal contestation process results with a re-interpretation of the norm, this new interpretation is implicitly accepted to be an enhanced fit into the existing legal

⁴⁵ This is an argument that requires further elaboration in another study.

system, and a requirement thereof as perceived by the contesting actors. In other words, process legality by definition grounds the contestation into the existing international legal network, therefore, at the end of the contestation process the new form of the norm that contesting actors agreed on automatically becomes (accepted as) a legally appropriate interpretation with the power of law. This perception of legality, arguably increase the perception of legitimacy, therefore increase descriptive legitimacy; authoritative power. For example, when discussions on the interception at sea is conducted on the legal appropriateness of the practice, the consensus that is created at the end of the contestation process became the new legal interpretation; in this case extra-territorial jurisdiction at interception practices. This has renewed the agreement on the legality of norm's meaning-in-use and increased the perception of its legal authority, leading to its more frequent use as a basis of argument, i.e. authoritative power.

In the case of human protection, legal contestation after Kosovo (subcase 3) increased the perceived legality of the norm not only through a redefinition of its applicatory limits and conditions (i.e. mandatory SC authorization and limitation to four atrocity crimes) but also through creation of a new doctrine entrenched to the UN system. This has increased the authoritative power of the human protection norm, through more frequent and direct references by both state and non-state actors to the idea of militarily intervening to humanitarian crises under the R2P framework. To the contrary after the Libya/Syria contestation (subcase 4), descriptive legitimacy of the norm of human protection decreased to the point of disappearance as it is seldom referred in relevant crisis situations, because without process legality no ground could be established for a constructive dialogue on repairing the damaged perception of legal appropriateness of R2P pillar III.

Global reach, or the number of state actors that accept the norm at least rhetorically, is the second dimension of norm strength. Expansion or retraction of the reach of the contested norm's global acceptance cannot be seen in the first case study of *non-refoulement* as it is limited to EU for manageability reasons. The examination of the human protection norm on the other hand suggests a positive relation with process legality and global reach. When contestation process has a legal nature, as was the case in Kosovo (subcase 3) the norm is more widely accepted at the new tentative *status-quo*. On the

other hand, in Libya/Syria (subcase 4) contestation which lacked process legality, global reach retracts. This relation between process legality and global acceptance in the examined cases is due to the inclusiveness of the R2P creation process that has involved as many states as possible, and strategically prioritized the widening of the support base at the expense of substantive rigidity. To the contrary in subcase 4 (Libya/Syria) alliance politics and interest-based logic of argumentation dissolved the basis of consensus.

In the meaning dimension, comparison of the four subcases shows that existence of process legality may or may not be associated with stronger meaning, i.e. higher precision, broader scope and more comprehensive content. Legal nature of contestation processes does not necessarily guarantee that more progressive interpretation of the norm will win over narrower interpretations. While the debates on the *non-refoulement* at Italy's interception practices (subcase 1) have resulted in favor of the broader interpretation of *non-refoulement* responsibility, the contestations on the safe country rules in Asylum Procedures Directives (subcase 2) did not satisfy the demands of more progressive and right-oriented parties. Post-Kosovo (subcase 3) norm development of human protection ended up with a narrower scope with restrictive application conditions in more limited number of cases, although accompanied with increased precision of the norm. Post-Libya contestations (subcase 4) decreased the scope and decisiveness of R2P pillar III as well as breaking down the shared agreement on the norm. Therefore, it is concluded that the norm strengthening role of process legality does not necessarily reflect in terms of a broader interpretation of norm's meaning and implementation. However, it sets the necessary conditions for a dialogue where a renewed balance between width, depth and meaning of the norm could be possible.

The descriptive legitimacy of the norm covered in the authoritative power dimension and level of acceptance under the global reach dimension together reflect the behavioral aspect of norm strength. They show the depth and width of norm's acceptance by international actors. This behavioral aspect of norm strength cannot be analyzed independent from the interpretive aspect or the meaning dimension of norm strength for they almost always balance each other out in the evolutionary processes. It is more difficult for states to accept a norm and internalize its authority if its meaning is more

precise, comprehensive and demanding. To the contrary, if the norm covers only a small number of cases, not expecting much behavior change and living large margin of appreciation to states then it is easier to declare allegiance to the norm, and comply with it (Van Kersbergen and Verbeek 2007; Krook and True 2010). Therefore, different dimensions of norm strength are in a balancing relationship, where rise in one is a trade-off for decline in the other. A complete analysis of the contestation process and their outcome on norm evolution can only be possible with the examination of these interrelationships and the balance between behavioral and meaning dimensions. Process legality of contestations sets the necessary conditions for a dialogue where recalibration of meaning is turned into an asset for wider and deeper support to the norm.

Case studies demonstrate the flexibility of norms' meaning. This flexibility and ease of change of meaning is the greatest strength of international norms in the face of challenges. Norms' adoptability at different normative and political settings has been shown to be an asset in their successful diffusion. (Acharya 2004; Zwingel, 2012) The case studies in this thesis have shown that flexibility of meaning is also an asset in maintaining resilience of norms through contestation cycles, by permitting renewed agreements through mutual compromise among contesting parties. The norm of human protection and its evolution from humanitarian intervention into R2P pillar III is demonstrative of this mechanism. Examination of opposing country positions on humanitarian intervention and the objections of Russia, China and NAM states show that the narrowing down of the norm's scope into four atrocity crimes, obligating Security Council authorization, as well the higher precision that the norm acquired under the new doctrine was the necessary conditions for the norm of human protection to survive the challenge it faced in Kosovo. In other words, the global acceptance of the R2P doctrine was a result of the strategic trade-off between restricted interpretation of meaning and wider global expansion. Process legality in the contestations is a facilitating condition for a constructive dialogue on norm development, where such trade-offs can be negotiated.

The opposite directions that different dimensions of norm strength can take is a significant manifestation of the analytical importance of multi-dimensional norm strength analysis. It has the potential not only to study the interaction and interdependence of different

dimensions with each other, but also provides a more nuanced understanding of norm change, which most of the time is more complicated than a simple judgement on strengthening or weakening. As seen in table 5.1, case studies solidly demonstrate that looking only at authoritative power would lead to completely opposite conclusions about the direction of norm evolution compared to looking only at norm diffusion or meaning. The direction of norm evolution is an outcome of the total change in different dimensions. A difficult question that this study leaves out is the weighing of different dimensions in determining the total change. It should be contemplated as an individual study in the future.

Multidimensionality of norm strength has been generally accepted in the literature. Apart from certain studies that equate norm strength with compliant practice or discursive acceptance of legitimacy, norm strength is generally conceptualized as a combination of compliant state practice and justificatory state rhetoric. (Deitelhoff and Zimmermann, 2019) Incorporation of meaning as a dimension of norm strength conceptualization is a novelty this study brings to the literature. Meaning of a norm is the interpretation of its content and scope. Interpretation is a subjective enterprise and it changes both from actor to actor, and from time to time. Change in norm meaning does not require a change in the text of mutually agreed documents or even a new verbal agreement. The practice of international actors together with their rhetorical use of the norm demonstrates the “meaning-in-use” of the norm for a particular actor at a particular time. Norm may appear to be unchanged in terms of global diffusion or degree of legal entrenchment, however the way its content and scope is interpreted and turned into action by international actors might be considerably different. Such changes in the meaning-in-use are determinative of what the norm really entails, in what kind of situations, for which actors. Democracy is stronger in the modern era when its meaning comprises every individual rather than only free, wealthy men as was the case in antiquity. International legal principle of self-defense would be stronger in its content if it is to be valid in cases of non-state attacks as opposed to existing limitation to attacks by state actors. Humanitarian intervention became stronger when its scope shifted from intervening for the protection of kin as was the case in early 20th century, to the protection of every stranger human being after 1990s. Norm against torture would have been much weaker if its content had been restricted to

“physical pain amounted to organ failure or death” (emphasis added, Bybee Memo) and it is stronger with the acceptance of psychological pain. All these examples show that changes in the precision, scope and content of norm’s meaning have a direct bearing on the potential influence of the norm on international relations. Therefore, norm strength should not be analyzed independent from norm’s meaning.

The significance of meaning as part of norm strength is seen in the two case studies on *non-refoulement* and human protection. Norm change examined in the case studies point out the relevance of meaning for norm strength analysis, and the results show its relation with the rest of the norm strength dimensions. Without incorporation of meaning as a dimension of norm strength, the framework shift from the ‘right’ of the international community for humanitarian intervention to the ‘responsibility’ to intervene would be excluded from norm strength analysis, although it is an important facet of strengthening with the acceptance of R2P doctrine in 2005. Likewise, sudden disappearance of the R2P pillar III after Libya/Syria crises both from the agenda of SC and from R2P documents is not only norm weakening in terms of less state practice and less rhetorical support, but also a narrowing down in norm’s content and scope. Existing accounts of norm strength are incapable of pointing out such changes in meaning throughout the evolution of norms. Therefore, they fall short of fully capturing strengthening or weakening trends in a single norm’s evolutionary cycle.

5.4. Conclusion

Law is political in the sense that value hierarchies and power relations are inherent to its meaning and implementation. They are constituted through intersubjective processes hence norms are constructions of international politics. Concept of process legality and its relative independence from formal legality shows another dimension of law’s politicalness as a discourse and argumentative rationale, use of which is ultimately a choice by actors. However, politicalness as such does not make law epiphenomenal, for the particular lifeworld it creates based on intersubjective understandings, argumentative techniques, practices of justifications, path dependency of existing agreements,

precedents and analogies have a bearing on actor behaviors, decisions, interests and identities.

Law as process has a constructive as well as constraining influence on international affairs, independent from the political strategies of actors that instrumentalize it. The relation between process legality in contestations and the change of norm strength is one aspect of law's consequentialism. Multidimensional norm strength analysis in the empirical studies have demonstrated that legality of contestation processes provides the necessary ground for constructive discussions and revised consensus on norms, through trade-offs between different dimensions of norm strength.

Neither the constitutive power of discourse and argumentation, nor law as a rhetorical process with its own constitutive power are new ideas, but have long been developed in international law and international relations literatures. However, in this study these are brought together under norm contestation framework for the first time, and are analyzed to understand the relationship between nature of contestations and consequent change in norm strength.

In this sense, two novel concepts this dissertation has introduced to norm contestation literature; process legality and multidimensional norm strength conceptualization have proved their analytical importance for understanding the role of law and legality in contestation processes and for the evolution of norms through contestations. Separating formal legality and process legality demonstrated that the functioning of law and its value-added in international processes is not in the prescriptions or proscriptions formulated in a formal format, but in the common lifeworld created through legal process and distinctive legal rationale. According to this, any research on the functioning and influence of international law should primarily concentrate on the process of legality rather than the rules and norms formally categorized as law. Law's explanatory power for a political science point of view cannot be seen with a formalistic understanding of law as rules, but as a constitutive rhetorical practice.

Multidimensional norm strength conceptualization enabled a more nuanced analysis of norm strength as an outcome of dynamic interactions between different dimensions. Incorporation of meaning as one of these dimensions for the first time, not only demonstrated the flexibility and adoptability of norms, but also showed the trade-off between behavioral and interpretative aspects. As such multidimensional norm strength draws a more accurate picture of norm evolution. Reading the interpretative changes of norm's meaning at a tentative *status-quo* in an interactive relation with the width (global reach) and depth (authoritative power) of its acceptance provides a new window to understand the puzzle of persistent resilience of international norms.



CHAPTER 6

CONCLUSION

In this dissertation I have examined the relationship between legality, contestation and norm strength. Through a comparative analysis of *non-refoulement* and human protection norms I tried to give an answer to the question how does legality influence norm strength in contestation processes. Using a novel conceptualization of legality defined as the use of legal means, discourse and reasoning, I have shown that legality of the contestation processes has a positive influence on norm strength, irrespective of the norm's legal nature. Multidimensional conceptualization of norm strength allowed us to make a segmented analysis of norm change, and thereby acquire a more nuanced understanding of norm strength alterations, simultaneously increasing in some dimensions and decreasing in others.

6.1. Contributions to the Norm Contestation Literature

This study made several contributions to the norm contestation literature, both conceptually and methodologically. At the conceptual level, process legality and multidimensional norm strength that this study proposed have expanded the analytical tools available in the literature and provided a better-tuned understanding for norm change through contestation, in terms of the role of legality, and the variance in the sub-dimensions of norm strength. The explanatory power of process legality shed a new light onto the evolutionary trajectories of both *non-refoulement* and human protection norms, which have puzzling ups and downs that could not be fully grasped in the existing literature dominated by a “common sense idea of law” (Sinclair, 2010) and a unidimensional understanding of norm strength.

Firstly, informed by previous constructivist studies, the process school of international law and critical legal school, the conceptualization of process legality developed in this study has provided a new perspective to the role of legality in norm contestation

processes. This understanding of law as process revealed the value added of law as a common language and rationale, as opposed to an objectively enforceable prescription. According to this, legality provides a shared ground of interaction based on existing intersubjective concepts and conventions, path-dependencies, and a common scheme for making and assessing claims. This shared ground of unique language and argumentative rationale proved to be the necessary condition for maintaining the overall strength of the examined norms in the face of challenges. The case studies have shown that process legality, for whatever strategic/political reason it is opted by the contesting actors, provides the necessary conditions for a constructive process of norm reinterpretation where a new intersubjective agreement on the norm can be established. In the Kosovo contestation, this constructive process has led to the reframing of human protection norm under the new R2P framework. In the contestation on interception practices, framing the issue under human rights law and the involvement of international courts led to an expansion of applicatory limits. In the contestation around safe country concepts it helped resistance of protectionist elements against pressing state interests. In stark contrast to these, the absence of legal process in Libya/Syria conflict hindered the reinvigoration of human protection in a renewed intersubjective agreement.

Secondly, conceptualizing and evaluating norm strength as a multi-component concept highlighted the variety of ways that different dimensions of it are effected from contestations. It showed that norm strength is not a unitary concept that can be understood parsimoniously, but is a complex concept of which multiple dimensions are affected differently. Such a conceptualization permits us to see how strengthening and weakening actually takes place simultaneously in norm evolution processes. It also sheds light on the interaction between different dimensions of norm strength that balance each other out and maintain norm's resilience against challenges. This is most clearly seen in the process of framework shift from humanitarian intervention to R2P through which human protection norm has retracted in terms of its content and applicatory limits, yet became relatively more precise, more authoritative and more widely accepted.

Thirdly, the incorporation of meaning as a component of norm strength is another original contribution of this study, which for the first time brought together the behavioral and

interpretative aspects of norm dynamism together under a single norm strength conceptualization. Although meaning-in-use is accepted in the critical constructivist literature to be a source of ongoing dynamism, it had never been considered as part of norm strength operationalization. This study has put forth the importance of meaning for norm strength analysis by demonstrating that behavioral aspects of global reach and authoritative power are not adequate to fully understand the multidimensional nature of norm dynamism. Even when the behavioral aspects of norm strength stay intact, contestations might lead to more or less precise and more or less comprehensive norm interpretations, and as a result we may end up with a weaker or stronger norm. Examined case studies have shown that behavioral elements of norm strength; authoritative power and global reach are in a counterbalancing relationship with interpretative dimension of meaning. The strengthening of *non-refoulement* with the expanded applicatory limits after the Hirsi case cannot be detected with norm strength models based on state behavior and discourse. Similarly, the norm weakening effect of limiting human protection to cases of four specified atrocity crimes and explicit Security Council authorization, or the strengthening effect of increased precision could not be seen without considering the details of norm meaning as part of norm strength. This flexibility of norm's meaning and its balancing with other dimensions of norm strength constitute the core of norm resilience against challenges, and process legality constitutes the constructive ground that this balancing mechanism works out.

Fourthly, in terms of methodology, this study has enriched the relatively limited comparative literature on norm contestation processes and their effects. Comparative design permits us to observe the similarities and differences in multiple cases and develop an understanding of the causal relationship between examined variables. It gives the opportunity to analyze the thick descriptions of the case studies together and reach a synthesis. The nature of the subject does not permit the construction of a perfect comparative design. Nevertheless, both the contrast between the legality of *non-refoulement* and non-legality of human protection norms, and the contrasting outcomes we see in the subcases under each case study provided inferences to deepen our understanding on norm contestation processes. The analysis of individual cases and

synthesis of the findings have supported my propositions on the relationships between legality, contestation and norm strength.

The cycles of contestation framework borrowed from Sandholtz and Stiles 2009, allowed the reconstruction of the narratives on the historical evolution of the examined norms through a dialectic of progressive and conservative interpretations which create an unrelenting tension and sequences of contestation cycles. The examination of normative developments within this narrative, reading norm evolution as an endless series of contestation cycles reveals, contrary to the perception of mainstream norm studies, that norm evolution is neither unidirectional nor linear, but fluctuates in overlapping circular paths, going up and down between contradicting poles. Concentrating on separate cycles of contestations, by narrowing down the point of attention to a single aspect of the norm makes research and analysis manageable and focused. As norms are complex social ontologies with various aspects, such segmentation of norm change analysis permits a more intensive examination of the contestations and a sharper observation of resultant changes.

Finally, this study contributed to the dialogue between international law and international relations. Deepened engagement with international legal theories and analysis of their explanatory powers in international political processes contribute to the developing IL/IR literature both with the insights of the constructivist analysis of norm dynamism and an informed theorization of international legality.

Apart from what the findings of this study say, we need to underline certain points that they do not intend to say. First of all, arguing that legality of contestation processes has a positive influence on norm strength does not mean that the norm will strengthen in all its dimensions. Nor does it mean that a legal contestation process will favor the more progressive or expansionary interpretations against the conservative/restrictive challenges. As the case studies have demonstrated a more restrictive and limited interpretation of norm's content and scope may become the new meaning-in-use as a result of the contestations (as was the case in Kosovo contestation), or the restrictive pressures might be so powerful that they cannot be overruled by the more progressive

interpretations (as was the case in safe country concepts). However even when it is the case, the strengthening in other dimensions might mean an overall strengthening of the norm through higher authoritative power or wider global acceptance. Stronger norm does not necessarily mean a more progressive norm, nor does it necessarily mean a “win” for one side of the contestants.

Second, as it is reiterated before, the possibility of process legality for contestations of non-legal norms and absence of process legality for the contestation of formally legal norms do not mean that formal legality and process legality are completely unrelated. Formal legality of the norm means that the norm is entrenched in the international legal system to a certain extent. For norms of high formal legality there may be binding legal instruments or a body delegated for dispute settlement. These create a terrain of tools for legal contestation, which may make it easier and more convenient for the contesting actors to make their case and build their argumentation on legal grounds. It also makes it more likely that a legal history of norm development exists, to which new contestation cycles may refer for precedents, analogies and persuasive arguments. However, as the case studies show, legality of the norm and existence of legal channels does not guarantee their utilization in contestation processes. Similarly, the density of the network of international legal system with overlapping regimes provides the possibility of process legality even for completely non-legal social or moral norms.

A third point is about the meaning dimension of norm strength, which entails inevitable difficulties for operationalization and measurement. I accept that meaning cannot be measured in the same way as authoritative power which is operationalized as the frequency of norm references by relevant actors, or global reach operationalized as the number of norm accepting states. Therefore, the assessments of the constituents of meaning do not intend to give absolute labels as strong or weak (which would be a subjective endeavor of the interpreter) but relative judgements as stronger or weaker. Assessment of the interpretive variable of meaning (i.e. the level of precision, scope or content) becomes meaningful and suggestive in the positivist sense, when it is evaluated relative to an alternative version. In other words, an objective evaluation of norm's meaning can be made by comparing its precision, scope and content to hypothetical

alternatives or to past/future versions of the same norm. In that sense, although the multidimensional norm strength conceptualization proposed here is not a good fit to assign an absolute value to norm strength or compare and contrast different norms with each other, it is capable of relative assessments suggesting strengthening or weakening.

Fourthly, this study both theoretically and empirically focuses solely on norm contestation processes. Therefore, although the concepts of process legality and multidimensional norm strength might have a potential analytical worth beyond norm contestations, the argument of this study for the influence of process legality can only be claimed for norm change through contestation. I do not make an argument for increasing state compliance to international law through process legality. Arguments for the influence of process legality for changing state behavior or for generating compliance, or its role during other international processes cannot be made based only on this research, although it may be examined in further studies. In that regard, I am of the conviction that constructive power of process legality is determinative on international decision-making, on international rule of law, on norm advocacy and various other issues, hence its exploration as an independent variable would yield fruitful results for a better understanding of international normative developments.

6.2. Limitations of this Study and Suggestions for Further Research

The research design and data analysis of this dissertation had some methodological difficulties as well as certain limitations hindering generalizability of the hypotheses.

A methodological difficulty of data analysis was the coding of statements as legal or political as sometimes they are confusingly intermeshed⁴⁶. In order to maintain validity

⁴⁶ The following statement of the UK's Security Council representative can be an example for this complexity: "Today, as I understand it, we all agree around this table that the Security Council has a role to play. We all want a peaceful political solution that ensures the stability, sovereignty and territorial integrity of Syria. We all agree that this process should be led by the people of Syria themselves, with the support of their region and the international community. We all agree that the rights of minorities in Syria must be safeguarded and respected. (...) So, based on agreeing on all those things, now we must have the will to match such agreement by being able to agree on a draft resolution." (UK in SC Res. 6710, see appendix) This quote has many legal key words such as the sovereignty and territorial integrity of Syria, or

in data gathering and assessment, I tried to stick with the pre-defined conditions of legality that I have established in Chapter 2. For the Security Council dataset of Chapter 4 I have repeated the codification twice to ensure reliability, and for transparency I have also attached an appendix showing these codifications. However still, I accept that there is an inevitable degree of subjectivity in deciding whether a particular statement is legal or political in nature.

Another methodological difficulty I encountered is the determination of tentative status quo movements for the examined norms, or the beginning and end point of contestation cycles. Accepting that norms gain their practical meaning only through interpretation means that they are by definition contested at any point in time. Therefore, at which exact time and place you take the snapshots of pre- and post-contestation form of norms can potentially influence the results for norm strength change. In order to overcome this difficulty, I have limited the examinations to specific aspects of norms and to specific places/actors. For example, for *non-refoulement* I concentrated on the contestations on geographical applicatory limits and protection requirements in the European context, although the norm has various other aspects that are subject to intense disagreements. Limiting the focus of attention to a specific aspect of norm and to specific places/actors as such made it easier to see when an issue rises to become the subject of an active discussion, and when it falls off the agenda with or without an agreement. In the human protection case, R2P might itself be a contested norm in various aspects, but its acceptance has ended the discussions on the right authority for military interventions, hence constituted the end of the contestation cycle that I concentrated on. The pre- and post-contestation snapshots of norms constitute a tentative status-quo only for the specific issue of contestation and only within the examined scope. The norm might still be contested in other respects or in other places, but these moments can be considered as status quo for the specific focus of examination.

the rights of minorities, which could require coding it as a legal statement. However, none of these references are actually made to give a legal justification to the claimed necessity of the draft resolution, which is rather justified on the basis of “agreement” on these issues.

Although the two case studies and the inferences of the in-case comparisons of subcases supported my initial propositions, this study by itself is not adequate to claim generalizability. Further research is required to actually prove the hypotheses on the relation of formal legality and process legality, and on the norm strengthening role of process legality. First of all, more cases of non-legal norms need to be studied for the possibility of process legality in handling thereof in the absence of formal legality. Secondly, examination of two cases proved useful for theory building, however more case studies need to be conducted to test the proposed relation between process legality and norm strength. Particularly, studies on norms that have completely demised or partially eroded through time would be critical cases to test whether norm weakening has a direct link with lack of legality in the processes bringing about norm demise. My comparative design primarily aimed to see the difference in contestation processes for formally legal and non-legal norms. The influence of process legality or of its absence is observed through the subcases. In order to acquire further support to the hypothesis for norm strengthening role of process legality, comparative designs between a norm with a clear strengthening trajectory and a norm with a clear weakening trajectory, such as the norm on wartime plunder or norm of targeted killings would be highly contributory.

One issue that I consciously left out in this research is the relative weights of multiple norm strength dimensions. When assessing the overall direction of norm strength change, I have assumed equal weights of all dimensions of norm strength (authoritative power, global reach, meaning), including the three constituents of meaning dimension (precision, applicatory scope, content). Such a choice serves well to the purposes of this study and provides analytical clarity, however it is insensitive to the nuances in norm change and its evolutionary trajectory. Different dimensions of norm strength might be of different importance and have more or less determinative roles for the overall evolution of a particular norm. Likewise, the interaction among different dimensions of norm strength and their separate relations with legality is hinted but left underdeveloped in this study. In that sense a separate study is required for a more detailed theorization of the multidimensional norm strength, its internal dynamics, and its assessment for normative evolution. Such a study would better illustrate how norms remain strong even when they are weakening, hence can make important contribution to the norm resilience literature.

Another aspect that the conceptual framework of this study can be expanded is the evaluation of legality as a continuous variable. Although I opted for such an assumption in this study, neither formal legality nor process legality are either/or conditions. The degree of formal legality for a vague soft law provision is not the same with a well-specified and monitored legal provision that has been established in multiple legal documents and international regimes. Similarly, norm contestation processes might reflect high process legality with the consistent use of legal argumentation by all parties, and the involvement of judicial institutions and designated bodies of legal interpretation. On the other hand, there may be referral to legal argumentations by some of the involved parties but the available legal means and institutions might be foregone throughout the contestation process, reflecting low process legality. Different degrees of formal and process legalities might have varying effects on the contestation outcomes. This sensitivity of contestation processes is seen in the first case study on *non-refoulement*, where high process legality in the first contestation cycle (interception practices) has led to a clear norm strengthening, whereas low process legality in the second contestation cycle (safe country concepts) led only to a relative increase of norm strength. This finding can be more deeply examined in another study focusing on the use of different means and degrees of legal process.

One other point that could be better developed in a separate study is the proposed theoretical mechanisms through which process legality leads to constructive efforts for reaching a new normative agreement, and induces counterbalancing among different dimensions of norm strength. My study probes the idea of the possible detachment between formal legality and process legality and the norm protective power of legal process. Although the empirical analysis in this study solidly demonstrates the correlation between process legality and positive change in norm strength, I did not deeply engage with the causal mechanism that process legality has this effect. Therefore, within the limits of this study, I cannot give a solid answer to under what exact conditions process legality would lead to norm strengthening. The mechanisms for legal contestation leading to renewed agreement on the norm should be scrutinized with more detail as part of a theory testing project with different cases using smaller units of analysis and appropriate methods such as interviews with key decision makers.

Yet another interesting question that is difficult to answer within the limits of this research is the situations of norm clash, where two opposing norms may both be legally supported at the expense of the other. Non-refoulement and human protection case studies concentrate on crises where an apparent tentative agreement on a norm is contested with alternative interpretations by actors that generally accept the norm. What would happen in cases of clash of norms, where one norm is contested by an alternative norm that is justified and promoted on legal grounds through legal means? Such a question would also require a wider understanding of the conditions of norm strengthening, and further research on which arguments are in a better position to “win” the contestations. In this study, nature of contestation processes is evaluated in a consolidated fashion without scrutinizing which arguments or norm interpretations are accepted to be more persuasive and more prone to become the new tentative status-quo.

Finally, although the research of the four contestation cycles in the case studies was revealing of the proposed relations between formal legality and process legality, and process legality and norm strength, they may be expanded beyond the limits of this study to give more holistic pictures of the norms of *non-refoulement* and human protection. In the first case study on *non-refoulement*, apart from safe country concepts an equally important instrument of responsibility transfer is the readmission agreements. Although they are left out in this study, the interpretation and implementation of readmission agreements with third countries have a direct bearing on the way *non-refoulement* is interpreted. Therefore, a separate study on the assessment of *non-refoulement* perception in Europe can be expanded to include the development and evolution of readmission agreements. Likewise, the second case study on the norm of human protection might be expanded with an examination of the protection of civilians paradigm. Protection of civilians under humanitarian law shares the same founding idea with R2P (i.e. protecting people from humanitarian atrocities), although under very different conditions and within a completely different legal and operational framework. Protection of civilians and R2P have developed parallel to each other as two different facets of the same human protection norm. While R2P pillar III is accepted as a legitimate basis for non-consensual measures to be taken against a state that is incapable or unwilling to fulfil its protection responsibilities, protection of civilians developed within the framework of UN

peacekeeping operations, functioning primarily with the consent of the state, to protect civilians in an armed conflict. Consent, impartiality and non-use of force except for self-defense are the three basic principles of classical peacekeeping operations. However, in the last decade we witness a slow widening in the peacekeeping mandates towards a new de-facto formulation where consent is not always a must, impartiality may be untenable and offensive use of force might be necessary in order to protect civilians under threat⁴⁷. In that sense examining R2P and protection of civilians under the umbrella of human protection norm might shed a new light to the evolution of human protection which continues after the demise of R2P.

International normative order that has been established along liberal lines after WW2 seems to be under multiple challenges, not only with the structural shift from western liberal powers to new illiberal great powers like Russia and China, but also with the illiberalization of the west itself due to rising populism. One prominent example is the US shift to unilateralism with Trump administration, and its hostile attitude towards international law concretized with the withdrawal from Paris Agreement and from UN Human Rights Council, as well as policies that vocally question principles regarding racial non-discrimination, refugee rights and the prohibition of use of force. On the other side of the Atlantic, European states have given a bad test in the face of refugee crisis that peaked with the Syrian civil war, controversially disregarding the very principles of human and refugee rights in their rather restrictive and conservative reactions. Authoritarianism proved persistent with the high profile examples like Russia, China, Turkey and Hungary. Foreign policy ramifications of illiberal authoritarianism are most strikingly seen in Russia's violation of the foundational principles of sovereignty and non-intervention in its annexation of Crimea and intervention to eastern Ukraine. These trends raise new and pressing concerns not only regarding the role of normativity in international affairs and the future of the liberal world order, but also the fate of international law. The framework offered in this study provides a perspective to assess the ongoing developments, by emphasizing the nature of contestations for understanding the nature of

⁴⁷ See for example the deployment of an "intervention brigade" in DRC in 2013 along with the peacekeeping mission, or the assertions of 2015 High Level Independent Panel on Peacekeeping Operations that impartiality, consent and limited use of force should not be an excuse for failure to protect civilians.

the transition in international norms. According to this, a determinative question for the pace and degree of norm change in the new world order would be whether there will be a general change in the way contestations are conducted. If new challenges to existing norms and defensive reactions to these challenges are legal in nature, we may expect more resilience of the contested norms. On the other hand, less multilateral character of the new world order may bring an increase in the political, moral or value-based argumentations at the expense of legality as a basis of normative discussion. Such a shift in the nature of norm contestations would make norm decay more likely.

The indeterminacy of international law as accepted in the theoretical framework ties the substance of law to international politics and systemic characteristics. Therefore, process legality in norm contestations cannot protect the liberal substance of norms without active efforts of actors to use law for that purpose. Apparent systemic shift away from liberal values might reflect as a waning voice in defense of the more liberal interpretations of norms in the face of conservative and statist challenges. Even with legally framed contestations that are more likely to prevent complete norm decay, this would mean a hollowing out of liberal substance, weakening the meaning dimension of various human rights, environmental or democratic norms. In such a scenario, created void would be filled with new interpretations and new norms in line with the political architecture of the new world order. Despite the risks it bears for the globalization of authoritarianism and loss of liberal gains of the past half century, on the positive side it may suggest more pluralism and inclusiveness in global governance. If the predominance of process legality prevails in the new contestations, the rule of law would remain strong, because the basis of legitimacy for the new norms would continue to be international law. Process legality would reinforce the perceived primacy of legal legitimacy over alternative legitimacy claims, and protect the intersubjective agreement for the ongoing significance of international legality. In the absence of legal logic and argumentation, a new agreement on even compromised and hollowed-out versions of norms would be more difficult, hence a faster and more visible decay of individual norms would be possible. More importantly, if not repudiated and reiterated, such disregard to international law and legal way of settling disputes may turn into a spiral where international rule of law loses its face value as the intersubjectively agreed method of conducting international relations. Continued

legality in international processes has a self-reinforcing power that strengthen the rule of law, disruption of which may cause a less stable, conflict-prone world order, where the only loss will not be the liberal gains of the post-WW2 order.

This dissertation provides an optimistic prospect for international norms and normativity, by attributing a self-induced power to legal argument-making, and a source of resilience to international norms. The findings of this study points to a new direction for the pro-norm state and non-state actors where they should keep the ranks closed on the international rule of law. According to this, it is important to insist on the legal argumentative logic and primacy of the legal legitimacy against alternative legitimacy claims. The power of process legality that constitutes a constructive ground for revised consensus on norms, carries the potential for the positive evolution of norms compatible with the new international realities without completely losing their liberal character. This may be the way to preserve not only individual norms, but also the basic founding stones of the post 20th century international normative order, such as peaceful settlement of disputes or the rule-based global governance. Legality in process is a political choice of interacting actors rather than a direct consequence of formal legal nature of the norm. Therefore, strategical allocation of limited resources should concentrate on creating a pressure for this choice and increasing the channels of legal process in handling the norm, rather than trying to strengthen a norm through more binding provisions. The real impact of international law in international relations does not come from its teeth that formally obliges states with threats of sanctions, or from conventions undersigned by the most number of states; but from its power to entrap international actors within a self-recreating system of norms through infusion of legal logic in international practice.

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APPENDIX

Security Council Meeting Minutes on Kosovo, Libya and Syria

Security Council Meetings on Kosovo (23.09.1998-26.03.1999)

Ref S/PV; Date; Country	Political (37)	Legal (73)
3930; 23.09.1998; Russia	The basic provisions of the draft resolution correspond to the fundamental stance taken by the Russian Federation which favours settlement of the conflict in Kosovo exclusively through peaceful and political means on the basis of granting broad autonomy to Kosovo, with strict respect for the territorial integrity of the Federal Republic of Yugoslavia. We are convinced that there is no reasonable alternative to such an approach. In particular, the use of unilateral measures of force in order to settle this conflict is fraught with the risk of destabilizing the Balkan region and of all of Europe and would have long-term adverse consequences for the international system, which relies on the central role of the United Nations.	
3930; 23.09.1998; US	Planning at the North Atlantic Treaty Organization for military operations if these efforts do not succeed is nearing completion. The international community will not stand idly by as the situation in Kosovo deteriorates.	
3937; 24.10.1998; Costa Rica		We believe that any Security Council resolution must be strictly in keeping with international law and with a sound political concept. The adoption of any measure which implies the use of force or military troops must meet all the legal, political and strategic requirements of the Charter and be based on practical experience. Any action which implies the use of force — with the very limited exception of the right of legitimate defence — thus requires clear authorization by the Security Council for each specific case.

3937; 24.10.1998; Costa Rica		We believe these principles to be implicit in the primary responsibility of the Security Council with respect to the maintenance of international peace and security and in the absolute prohibition of the use of force in international relations. The Security Council cannot, nor should it, transfer to others or set aside its primary responsibility for the maintenance of international peace and security.
3937; 24.10.1998; Slovenia		Furthermore, the conflict in Kosovo constitutes a serious threat to international peace and security and can have a dangerous spillover effect in the region. As such, it cannot be considered as an internal affair of the Federal Republic of Yugoslavia
3937; 24.10.1998; Brazil		According to the Charter, non-universal organisms may resort to force only on the basis either of the right to legitimate self-defence, as stipulated in Article 51, or through the procedures of Chapter VIII, in particular Article 53, which imposes on them the obligation of seeking Security Council authorization beforehand and abiding by the Council's decision. Tertius non datus. There is no third way.
3937; 24.10.1998; Russia		Enforcement elements have been excluded from the draft resolution, and there are no provisions in it that would directly or indirectly sanction the automatic use of force, which would be to the detriment of the prerogatives of the Security Council under the Charter.
3937; 24.10.1998; China	However, very regrettably, almost at the same time as those agreements were being concluded, a regional organization concerned made the decision to take military actions against the Federal Republic of Yugoslavia and interfere in its internal affairs. More disturbingly, that decision was made unilaterally, without consulting the Security Council or seeking its authorization. Such an irresponsible act is not conducive to the creation of a peaceful atmosphere for dealing with the question of Kosovo and will not help resolve the issue.	Furthermore, it has violated the purposes, principles and relevant provisions of the United Nations Charter, as well as international law and widely acknowledged norms governing relations between States. It is a disparagement of and a challenge to the authority of the United Nations and the Security Council and has created an extremely dangerous precedent in international relations. China is gravely concerned about this.
3937; 24.10.1998; China		Maintaining the sovereignty and territorial integrity of the Federal Republic of Yugoslavia conforms to the provisions and requirements of the United Nations Charter and is also a

		shared commitment of the international community
3937; 24.10.1998; US	The NATO allies, in agreeing on 13 October to the use of force, made it clear that they had the authority, the will and the means to resolve this issue. We retain that authority. We will not tolerate the continued violence that has resulted in nearly a quarter of a million refugees and displaced persons and thousands of deaths, and has jeopardized the prospects for peace in the wider Balkans	
3988; 24.03.1999; Russia	Russian Government strongly proclaimed its categorical rejection of the use of force in contravention of decisions of the Security Council and issued repeated warnings about the long-term harmful consequences of this action not only for the prospects of a settlement of the Kosovo situation and for safeguarding security in the Balkans, but also for the stability of the entire modern multi-polar system of international relations.	Those who are involved in this unilateral use of force against the sovereign Federal Republic of Yugoslavia — carried out in violation of the Charter of the United Nations and without the authorization of the Security Council — must realize the heavy responsibility they bear for subverting the Charter and other norms of international law and for attempting to establish in the world, de facto, the primacy of force and unilateral diktat
3988; 24.03.1999; Russia	NATO's decision to use military force is particularly unacceptable from any point of view because the potential of political and diplomatic methods to yield a settlement in Kosovo has certainly not been exhausted.	The members of NATO are not entitled to decide the fate of other sovereign and independent States. They must not forget that they are not only members of their alliance, but also Members of the United Nations, and that it is their obligation to be guided by the United Nations Charter, in particular its Article 103, which clearly establishes the absolute priority for Members of the Organization of Charter obligations over any other international obligations.
3988; 24.03.1999; Russia		Attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences. Moreover, by the terms of the definition of aggression adopted by the General Assembly in 1974, "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". (General Assembly resolution 3314 (XXIX), annex, article 5, para. 1)

3988; 24.03.1999; Russia		it is possible to combat violations of the law only with clean hands and only on the solid basis of the law. Otherwise lawlessness would spawn lawlessness. It would be unthinkable for a national court in a civilized democratic country to uphold illegal methods to combat crime. Attempts to apply a different standard to international law and to disregard its basic norms and principles create a dangerous precedent that could cause acute destabilization and chaos on the regional and global level
3988; 24.03.1999; Russia		Only the Security Council can decide on what measures, including the use of force, should be taken to maintain or restore international peace and security. The Security Council did not take such decisions with regard to Yugoslavia. Not only the Charter of the United Nations has been violated; the Founding Act on Mutual Relations, Cooperation and Security Between NATO and The Russian Federation has been violated as well
3988; 24.03.1999; US	we believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo — all of which foreshadow a humanitarian catastrophe of immense proportions.	The continuing offensive by the Federal Republic of Yugoslavia is generating refugees and creating pressures on neighboring countries, threatening the stability of the region
3988; 24.03.1999; US	In this context, we believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster	Security Council resolutions 1199 (1998) and 1203 (1998) recognized that the situation in Kosovo constitutes a threat to peace and security in the region and invoked Chapter VII of the Charter. In resolution 1199 (1998), the Council demanded that Serbian forces take immediate steps to improve the humanitarian situation and avert the impending humanitarian catastrophe.
3988; 24.03.1999; US		Belgrade's actions in Kosovo cannot be dismissed as an internal matter
3988; 24.03.1999; Canada	NATO's objectives are to avert an ever-widening humanitarian crisis	

3988; 24.03.1999; Canada	Humanitarian considerations underpin our action. We cannot simply stand by while innocents are murdered, an entire population is displaced, villages are burned and looted, and a population is denied its basic rights merely because the people concerned do not belong to the “right” ethnic group	
3988; 24.03.1999; Slovenia		This situation represents a case of massive violation of the relevant Security Council resolutions, in particular resolution 1199 (1998) of 23 September 1998, which called for an immediate end to all military activity against the civilian population. The threat to international peace and security in the region is looming large.
3988; 24.03.1999; Slovenia		We regret the fact that not all permanent members were willing to act in accordance with their special responsibility for the maintenance of international peace and security under the United Nations Charter. Their apparent absence of support has prevented the Council from using its powers to the full extent and from authorizing the action which is necessary to put an end to the violations of its resolutions
3988; 24.03.1999; Slovenia		It is our expectation and belief that the action which is being undertaken will be carried out strictly within the substantive parameters established by the relevant Security Council resolutions.
3988; 24.03.1999; Gambia	we cannot remain indifferent to the plight of the murdered people of Kosovo.	regional arrangements have responsibility for the maintenance of peace and security in their areas. The Security Council, however, has the primary responsibility for the maintenance of international peace and security, as clearly stated in the Charter of the United Nations.
3988; 24.03.1999; Gambia		We therefore call on those with whom the responsibility lies to take the necessary action to prevent a continuation of this action before it is too late.
3988; 24.03.1999; Netherlands	We have participated in and assumed responsibility for the North Atlantic Treaty Organization (NATO) decision because there was no other solution	If, however, due to one or two permanent members’ rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and

		what we have available in this case is more than adequate.
3988; 24.03.1999; France		What is at stake today is peace, peace in Europe — but human rights are also at stake.
3988; 24.03.1999; France		The actions that have been decided upon are a response to the violation by Belgrade of its international obligations, which stem in particular from the Security Council resolutions adopted under Chapter VII of the United Nations Charter.
3988; 24.03.1999; Malaysia	In any case, the international community cannot afford to stand idly by, given the dimension of the violence on the ground and the worsening humanitarian conditions in Kosovo in the wake of the repressive military actions carried out by the Serbian and Yugoslav authorities	As a matter of principle, my delegation is not in favour of the use or threat of use of force to resolve any conflict situation, regardless of where it occurs. If the use of force is at all necessary, it should be a recourse of last resort, to be sanctioned by the Security Council, which has been vested with primary responsibility for the maintenance of international peace and security. The ongoing conflict in Kosovo could indeed — and will — have international repercussions, given the still volatile situation in some of the neighbouring countries
3988; 24.03.1999; Malaysia	We regret that in the absence of Council action on this issue it has been necessary for action to be taken outside of the Council.	
3988; 24.03.1999; Namibia	My delegation wishes to underscore that military action against the Federal Republic of Yugoslavia may not be the solution. Furthermore, the implications of this action may go beyond the Federal Republic of Yugoslavia, thereby posing a serious threat to peace and security in the region.	
3988; 24.03.1999; Argentina	Since the peaceful settlement of disputes is one of the guiding principles of our foreign policy, we regret that the intransigence of the Belgrade Government has led to this result, which no member of this Council desires.	the responsibility lies with the Belgrade Government, since the objective of the military action is to avert a humanitarian catastrophe in Kosovo
3988; 24.03.1999; France	NATO has been forced to take military action because all other means of preventing a humanitarian catastrophe have been frustrated by Serb behaviour.	The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe
3988; 24.03.1999; France		Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.

3988; 24.03.1999; China		This act amounts to a blatant violation of the United Nations Charter and of the accepted norms of international law. The Chinese Government strongly opposes this act.
3988; 24.03.1999; China		Settlement of the Kosovo issue should be based on respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and on guaranteeing the legitimate rights and interests of all ethnic groups in the Kosovo region.
3988; 24.03.1999; China		It has always been our position that under the Charter it is the Security Council that bears primary responsibility for the maintenance of international peace and security. And it is only the Security Council that can determine whether a given situation threatens international peace and security and can take appropriate action.
3988; 24.03.1999; Russia		. In any case, the assertion that the traditional basis for the use of force lies beyond the confines of the United Nations Charter is something that I cannot take seriously
3988; 24.03.1999; FRY		The decision to attack an independent country has been taken outside the Security Council, the sole body responsible, under the Charter of the United Nations, for maintaining international peace and security. This blatant aggression is a flagrant violation of the basic principles of the Charter of the United Nations and is in direct contravention of its Article 53, paragraph 1
3988; 24.03.1999; FRY		Today, NATO was unmasked. It ceased to be a defensive military alliance and became an aggressive military alliance, disregarding its own statute, the Charter of the United Nations, and the Paris Charter of the Organization for Security and Cooperation in Europe (OSCE), as well as the system of international relations based on respect for the sovereignty and territorial integrity of States
3988; 24.03.1999; FRY		By committing the aggression against the Federal Republic of Yugoslavia, NATO has trampled upon international law and the fundamental principles of international relations by endangering peace and security in the world in the most irresponsible and criminal way

3988; 24.03.1999; Belarus	Ignoring the primary and principal body for collective decision-making on maintaining international peace and security — and, in fact, the system itself, which was created and nurtured as a result of the Second World War — means obstructing the system, signing it off and effectively destroying it, thereby ignoring the lessons of the bloodiest-ever war, which the leaders of the Member countries, and above all the permanent members of the Security Council, a generation ago vowed to respect	Belarus stresses that the use of military force against Yugoslavia without a proper decision of the only competent international body, which is undoubtedly the United Nations Security Council, as well as any introduction of foreign military contingents against the wish of the Government of Yugoslavia, qualify as an act of aggression, with all ensuing responsibility for its humanitarian, military and political consequences.
3988; 24.03.1999; India	Quite apart from being a violation of Article 2, paragraph 7, of the Charter, a peacekeeping operation forced upon a reluctant Government or population stands little chance of success.	. It recalls its statement of 9 October 1998 and reiterates that the sovereignty and territorial integrity of the international border of the Federal Republic of Yugoslavia is inviolable. That must be fully respected by all States
3988; 24.03.1999; India		The attacks against the Federal Republic of Yugoslavia that started a few hours ago are in clear violation of Article 53 of the Charter.
3988; 24.03.1999; India		Under the application of Article 2, paragraph 7, the United Nations has no role in the settlement of the domestic political problems of the Federal Republic. The only exception laid down by Article 2, paragraph 7, would be the “application of enforcement measures under Chapter VII”. The attacks now taking place against the Federal Republic of Yugoslavia have not been authorized by the Council, acting under Chapter VII, and are therefore completely illegal.
3988; 24.03.1999; Germany	On the threshold of the 21st century, Europe cannot tolerate a humanitarian catastrophe in its midst. It cannot be permitted that, in the middle of Europe, the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. We, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behaviour and violence, which became tangible in the massacre of Racak in January 1999, are not repeated	We are ultimately responsible for securing peace and cooperation in the region which will guarantee the respect of our basic European values, i.e., the respect of human and minority rights, international law, democratic institutions and the inviolability of borders
3988; 24.03.1999; Albania	The Republic of Albania totally supports the military action by the North Atlantic Treaty Organization, and we consider it an action in support of peace and stability in the region.	the international community did achieve the first step towards peace, security in the region and the reestablishment of human values and of the principles that are so well expressed in the Charter of the United Nations — principles in which we all believe

3988; 24.03.1999; Albania		No country that tried to bury the basic Charter principles of peace, security and cooperation, and that committed genocide and crimes against humanity, can expect to receive the protection of the United Nations and the Security Council.
3988; 24.03.1999; Bosnia Herzegovina		international community steps in to prevent further ethnic cleansing and genocide. A country that has most recently engaged in aggression and military intervention against its own neighbours, that has committed genocidal acts against its own population and others, that has refused to adhere to international law and numerous Security Council resolutions or to cooperate with the Tribunal for the former Yugoslavia cannot now credibly plead for the protection of international law. This indeed turns on their head morality, legality and the principles for which this institution, the United Nations, stands.
3988; 24.03.1999; Slovenia	. It is true that sometimes force is used without an explicit basis in Security Council resolutions. This is not a new phenomenon. It may be different from the kind of perfect world which we would all like to have, but it is a part of reality	resolutions 1199 (1998) and 1203 (1998), which are applicable law in the case discussed today. The situation in Kosovo is defined by the Security Council as a threat to international peace and security in the region. This defines that situation as something other than a matter which is essentially within the domestic jurisdiction of a State. In other words, Article 2, paragraph 7, of the Charter clearly does not apply.
3989; 26.03.1999; Slovenia		The draft resolution ignores the fact that several months ago the Security Council declared the situation in Kosovo to be one constituting a threat to peace and security in the region.
3989; 26.03.1999; Slovenia		Furthermore, the draft resolution ignores the fact that the Security Council has already spelled out the requirements for the removal of that threat and the fact that those requirements were flagrantly violated by the Federal Republic of Yugoslavia (
3989; 26.03.1999; Slovenia		the requirement of consistency in the interpretation and application of the principles and norms of the United Nations Charter demands at least some indication as to the specific justification for the approach proposed by the draft resolution in the present case. S

3989; 26.03.1999; Slovenia		, it is important to be aware that, according to the Charter, the Security Council has the primary but not exclusive responsibility for the maintenance of international peace and security.
3989; 26.03.1999; Netherlands	Russia has somehow succeeded in making the pressure less credible, so that in the end NATO had no choice but to make good on its threat, which was initially meant to bring about a peaceful solution to the Kosovo crisis	The NATO action, in which we are participating, follows directly from resolution 1203 (1998), in conjunction with the flagrant non-compliance on the part of the Federal Republic of Yugoslavia
3989; 26.03.1999; US	NATO's actions are completely justified. They are necessary to stop the violence and to prevent a further deterioration of peace and stability in the region.	By rejecting a peace settlement and escalating its assault on the people of Kosovo — in violation of numerous Security Council resolutions — Belgrade chose the path of war.
3989; 26.03.1999; US		Large refugee flows out of Kosovo into neighbouring countries could have a serious and destabilizing effect. The stability of Albania, of Bosnia and Herzegovina, of the former Yugoslav Republic of Macedonia and of the rest of the region is at stake. These developments justify sustained military action to limit Belgrade's ability to threaten and harm innocent civilians in Kosovo.
3989; 26.03.1999; US		In resolutions 1199 (1998) and 1203 (1998) the Security Council laid out the steps Belgrade must take to resolve this crisis. Belgrade, however, has chosen to defy repeatedly the will of the international community.
3989; 26.03.1999; Russia	The continuing military action, undertaken under the pretext of preventing a humanitarian catastrophe, has already caused severe humanitarian consequences and done serious damage to the efforts to find a political settlement in Kosovo.	The attempts, repeated today, to justify this lawlessness cannot be taken seriously
3989; 26.03.1999; Russia	The Security Council cannot and should not remain passive in this situation, which, we are profoundly convinced, runs counter to the fundamental interests of the overwhelming majority of States. A	The aggressive military action unleashed by NATO against a sovereign State without the authorization and in circumvention of the Security Council is a real threat to international peace and security and a gross violation of the United Nations Charter and other basic norms of international law.
3989; 26.03.1999; Russia		The illegal use of force by NATO not only destabilizes significantly the situation in the Balkans and in Europe as a whole, but it also directly undermines the fundamental bases of the entire modern system of international relations, which is based on the primacy of the United Nations Charter.

3989; 26.03.1999; Russia		What is in the balance now is the question of law and lawlessness. It is a question of either reaffirming the commitment of one's country and people to the basic principles and values of the United Nations Charter, or of tolerating a situation in which gross force dictates realpolitik
3989; 26.03.1999; UK	military intervention is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe.	As recognized in Security Council resolutions 1199 (1998) and 1203 (1998), it is Belgrade's policies with regard to Kosovo that have caused the threat to peace and security in the region, not the actions of the North Atlantic Treaty Organization (NATO).
3989; 26.03.1999; France		These obligations have not been respected by Belgrade. Meanwhile, tension, confrontation and the threat of violent repression have increased. The actions decided upon respond to Belgrade's violation of its international obligations under the resolutions which the Security Council has adopted under Chapter VII of the United Nations Charter.
3989; 26.03.1999; Argentina		Argentina also wishes to stress that the fulfilment of the legal norms of international humanitarian law and human rights is a response to universally recognized and accepted values and commitments. The obligation to protect and ensure respect for these rights falls to everyone and cannot and must not be debated.
3989; 26.03.1999; Malaysia	The present action by Serb forces against the Kosovar Albanians is certainly creating an immense humanitarian catastrophe. Such a tragic situation calls for appropriate and prompt action by the international community	The Charter confers upon the Security Council the primary responsibility for the maintenance of international peace and security. ... Force, if at all necessary, should be a recourse of last resort and it should be sanctioned by the Security Council.
3989; 26.03.1999; China	The continued military strikes against the Federal Republic of Yugoslavia by the North Atlantic Treaty Organization, with the United States at the lead, has already resulted in severe casualties and damage, and the situation in the Balkan region has seriously deteriorated.	The Chinese Government strongly opposes such an act, which constitutes a blatant violation of the principles of the Charter of the United Nations and of international law, as well as a challenge to the authority of the Security Council
3989; 26.03.1999; China		The Kosovo issue should be settled on the basis of respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and of a guarantee of the legitimate rights and interests of all the ethnic groups in the Kosovo area.

3989; 26.03.1999; Ukraine		Adhering to the norms and principles enshrined in the United Nations Charter, Ukraine considers as inadmissible the use of military force against a sovereign State without the authorization of the United Nations Security Council — the only body entrusted to take such decisions in order to maintain international peace and security.
3989; 26.03.1999; FRY	By attacking Yugoslavia, NATO has not solved the alleged humanitarian catastrophe in Kosovo and Metohija, which they so maliciously presented as a casus belli; on the contrary, they themselves are creating a catastrophe of enormous proportions for all citizens of Yugoslavia and for peace and stability in the region and beyond	Trampling upon each and every principle of international relations, defying the authority of the Security Council of the United Nations and its resolutions and outperforming even the Nazis in its animosity towards and hatred of the Serbian and Montenegrin people, NATO, led by the United States of America, has engaged in a mad orgy of destruction and havoc against one small and peace-loving country.
3989; 26.03.1999; FRY		Their aggression is unjust, illegal, indecent and unscrupulous. The aggressor displays arrogant contempt for the United Nations and its Charter and arrogates the prerogatives of the Security Council as the only organ in charge of maintaining international peace and security
3989; 26.03.1999; Belarus	In view of the continuing massive military strikes against a sovereign State, in view of the civilian casualties and in view of all the destruction, it is scarcely possible to accept the arguments put forward by representatives of NATO about the alliance resolving the humanitarian crisis	the violation of basic principles of international law that make no provision for military intervention for humanitarian purposes.
3989; 26.03.1999; Cuba		This has thus led to a violation of the norms and principles of international law
3989; 26.03.1999; Cuba		“The ridiculous attempt to impose solutions by force is incompatible with any civilized reasoning and with the essential principles of international law
3989; 26.03.1999; Cuba		We are living in a shameful time in which international legality is being violated.
3989; 26.03.1999; Bosnia Herzegovina	military force sometimes is the only alternative left.	

3989; 26.03.1999; Bosnia Herzegovina	Do the supporters of this draft resolution believe that a unilateral end to NATO's action would produce anything positive for Kosovo, for Bosnia and Herzegovina or for the region as a whole? The Belgrade authorities would only then claim a victory, the victory of a brave fighter standing up to the mightiest military force on earth	
3989; 26.03.1999; India		It is natural to be revolted by violence and to want to put an end to human suffering. However, between nations as within them, populations can be protected, the law upheld and those who break it punished only through legal means. The cure otherwise is as bad as the disease. It is also very rarely effective and often makes things worse. Those who take the law into their hands have never improved civic peace within nations; neither will they help in international relations.
4003; 14.05.1999; China	Over the past 52 days, this war, conducted in the name of humanitarianism, has created the largest humanitarian disaster since the Second World War.	
4003; 14.05.1999; China	An immediate cessation of NATO's bombing campaign against the Federal Republic of Yugoslavia should be the prerequisite for any political solution to the Kosovo issue and also the minimum condition for alleviating the humanitarian crisis in the Balkans.	
4003; 14.05.1999; Russia		The tragic course of events in Yugoslavia since 24 March last has shown convincingly that it is precisely the military action against that sovereign country — which is being conducted by the North Atlantic Treaty Organization (NATO) in circumvention of the Security Council and in violation of the Charter of the United Nations and other generally recognized norms of international law — that has caused this humanitarian catastrophe and has created a real emergency situation in the Balkans region.
4003; 14.05.1999; Russia		Unfortunately, because of the well-known position of a number of its members, the Council was unable to take a stand on NATO's illegal military action and to demand an immediate halt to the bombing and the return of the Kosovo crisis to the track of a peaceful political settlement

4003; 14.05.1999; FRY	NATO's campaign of terror and devastation targets civilians, infrastructure and the economy, inflicting a humanitarian catastrophe	The aggression of the North Atlantic Treaty Organization against the Federal Republic of Yugoslavia, now in its fifty-first day, is continuing, expanding and intensifying. It is a gross violation of the Charter of the United Nations and the basic principles of international relations.
4003; 14.05.1999; Netherlands	One day the Serbian people will have to understand that our intervention on account of the atrocities committed by the Serbian security forces and the Yugoslav army in Kosovo would probably not have been possible if it had not been preceded by almost eight years of ethnic cleansing, carried out in the name of the 11 Security Council 4003rd meeting Fifty-fourth year 14 May 1999 Serbian nation, first in the Krajina in East Slavonia, then in Bosnia and finally in its ultimate form in Kosovo.	
4003; 14.05.1999; Belarus		we continue to believe that the major reason for the worsening humanitarian situation and the massive influx of refugees was the North Atlantic Treaty Organization (NATO) military action undertaken, outside the Security Council and in violation of generally accepted norms of international law, against the Federal Republic of Yugoslavia
Total:	37	73
%	33,64	66,36

Security Council Meeting Minutes on Libya (04.05.2011-09.10.2011)

Ref S/PV; Date; Country	Political (14)	Legal (15)
6528; 4.05.2011; Russia		"Unfortunately, it must be noted that actions by the NATO-led coalition forces are also resulting in civilian casualties, as was seen in particular during recent bombings in Tripoli. We emphasize once again that any use of force by the coalition in Libya should be carried out in strict compliance with resolution 1973 (2011). <u>Any act going beyond the mandate established by that resolution in any way or any disproportionate use of force is unacceptable.</u>"
6528; 4.05.2011; China		"China calls for the complete and strict implementation of the relevant resolutions of the Security Council. <u>The international community must respect the sovereignty, independence, unity and territorial integrity of Libya.</u> The internal affairs and fate of Libya must be left up to the Libyan people to decide. We are not in favour of any <u>arbitrary interpretation</u> of the Council's resolutions or of any actions going beyond those mandated by the Council."

6528; 4.05.2011; SA		"Finally, a number of delegations have asked questions about the implementation of resolution 1970 (2011). In particular, questions have been asked about whether the actions of the implementing States have been consistent with the letter and the spirit of resolution 1970 (2011). We are aware that paragraph 6 of the resolution establishes a caveat designed to exclude the jurisdiction of the Court (ICC) in such cases. Nonetheless, we would recall that the caveat in paragraph 6 is limited to actions established or authorized by the Security Council. Therefore, <u>any actions that fall outside the scope of resolution 1973 (2011) should not benefit from the protection offered by the caveat. It is our sincere hope that, in considering the evidence, the Office of the Prosecutor will also consider any actions that may have been committed in the purported implementation of resolution 1973 (2011).</u>
6528; 4.05.2011; US	"New reports make clear that the Al-Qadhafi regime continues to directly target civilians, so the need for justice and accountability persists. Those reports further underscore the message, which we have repeated in our statements and in our diplomatic efforts, that Al-Qadhafi has lost any and all legitimacy to lead Libya"	
6528; 4.05.2011; US	" it is important that the international community remain united in its commitment to protecting civilians and civilian populated areas under the threat of attack, to ending violence against the Libyan people, and to defending the universal rights that all of us share. "	
6528; 4.05.2011; France		"When a Government attacks civilian populations instead of protecting them; when the atrocities committed sear the human conscience; and when the stability of an entire region is affected, the international community has a responsibility to intervene and to protect civilians. That is what we done in Libya. "

6566; 27.06.2011; SA	"This meeting is taking place exactly 100 days after the start of the NATO aerial bombardment in Libya. Despite that military action, there has not been a solution to the Libyan crisis. In fact, the situation has deteriorated, with more loss of civilian life and massive destruction of infrastructure. "	This is emphasized in paragraph 2 of resolution 1973 (2011), which stresses the need to intensify efforts aimed at a political outcome. It is for that reason that we strongly feel that resolution 1973 (2011) should be implemented in its entirety in letter and spirit" (Ref to res. but with a non-legal justification)
6566; 27.06.2011;SA	"Since the beginning of the Libyan crisis, South Africa has continued to call on the international community, including the Security Council, to focus its energies on finding a political solution, and not a military one. To date, we still maintain that the political, rather than the military, solution is the only way in which durable peace can be achieved in Libya.	
6566; 27.06.2011;SA	"When South Africa voted in favour of resolution 1973 (2011), (...) Our intention was never regime change; nor was it the targeting of individuals. The future of Libya should be decided by the Libyans themselves, and not by outsiders."	
6595; 28.07.2011; SA	"It has been over four months since the adoption of resolution 1973 (2011) and the start of the military campaign in Libya. We should remind ourselves that the intention of resolution 1973 (2011) was to ensure the protection of civilians, and not regime change or the targeting of individuals. Clearly, action focused on the military solution has not had its intended purpose. Instead, it has worked to destabilize the country even further, and therefore the long-term security and stability of Libya remain uncertain as the situation deteriorates, with more loss of civilian lives and massive destruction of infrastructure." (Ref to resolution but not with legal justification)	"What is required is a commitment to full compliance with resolutions 1970 (2011) and 1973 (2011) in their entirety, in letter and spirit. This will include focusing our energies on finding a political solution to the crisis, as emphasized in paragraph 2 of resolution 1973 (2011), which stresses the need to intensify efforts aimed at a political outcome. "
6595; 28.07.2011; SA	"South Africa remains concerned about the implementation of resolutions 1970 (2011) and 1973 (2011). <u>Taking sides in any internal conflict situation in an effort to institute regime change in Libya sets a dangerous precedent that will surely damage the credibility of the Council and its resolutions.</u> "	
6620; 16.09.2011; Russia	"Now, in view of the new realities on the ground and in the air, maintaining the no-fly zone no longer makes sense. The lifting of that ban must be included among the international community's efforts to normalize the situation and address the aftermath of the Libyan crisis. "	"Unfortunately, the Council's mandate for conducting the operation in Libya was disregarded, resulting in air strikes that also targeted civilian facilities and killed civilians. "

6647; 2.11.2011; UK		"The international community has also played its role, including by protecting civilians and supporting humanitarian aid, in accordance with the resolutions of the Council."
6647; 2.11.2011; Russia	The number of civilian casualties and the scale of the destruction of civilian sites as a result of the actions of all parties to the conflict in Libya is very great. Unfortunately, civilian casualties were also caused by the actions of known NATO coalition forces.	
6531; 10.05.2011; China		"the protection of civilians in armed conflict involves the development and evolution of the norms of international humanitarian law, which should be discussed in depth by the wider membership of the United Nations in order to reach consensus. Conflict situations vary, and there must be no one-size-fits-all approach to the protection of civilians. Various parties still hold divergent views on the responsibility to protect, and the General Assembly should continue its discussion on this matter."
6531; 10.05.2011; India		"When applied as a basis for Security Council action, efforts to protect civilians must respect the fundamental aspects of the United Nations Charter, including the sovereignty and integrity of Member States. Any decision to intervene that is associated with political motives detracts from that noble principle and needs to be avoided. Also, the response of the international community must be proportional to the threat, involve the use of appropriate methods and make adequate resources available."
6531; 10.05.2011; Russia	<u>"The noble goal of protecting civilians should not be compromised by attempts to resolve in parallel any unrelated issues.</u> In that regard, we share the concern expressed today by Ms. Amos with regard to the situation in Libya."	

6531; 10.05.2011; SA		"However, <u>we are concerned that the implementation of these resolutions appears to go beyond their letter and spirit</u> . It is important that, as international actors and external organizations provide constructive assistance, they should nonetheless <u>comply with the provisions of the United Nations Charter, fully respect the will, sovereignty and territorial integrity of the country concerned</u> , and refrain from advancing political agendas that go beyond the protection of civilian mandates, including regime change."
6531; 10.05.2011; UK		"The United Kingdom has been consistently clear that the action being undertaken by the coalition forces is to protect the civilian population on the ground in Libya. Security Council resolution 1973 (2011) provided a legal basis for that action, expressly authorizing the use of force to protect civilians. We are ensuring carefully that our actions accord with the Security Council resolutions and our other international obligations and that they are designed precisely to protect civilians and to minimize civilian casualties."
6531; 10.05.2011; US		" <u>The international community must remain united in the commitment to protecting civilians and civilian-populated areas under threat of attack, to ending violence against the Libyan people and to defending the universal rights we all share</u> . The NATO coalition operates within the mandate of resolution 1973 (2011) to enforce the arms embargo and the no-fly zone and to conduct a civilian protection mission.
6650; 09.10.2011; France	"When civilians die, to think about how to protect them is good, but to protect them is much better. That is why in the case of Libya the Council first adopted a wide range of sanctions. Later it authorized the coalition forces to protect civilians being bombed on the order of their own leaders. By permitting strikes on Qadhafi's forces at the entrance to Benghazi, the Security Council was able to prevent a massacre. "	

6650; 09.10.2011; France	"To abstain would have been to turn our eyes away from the suffering of the Libyan people."	
6650; 09.10.2011; France		"My country has suffered too much from war to lightly involve ourselves in military action, but there are exceptional times in history where <u>respect for international law gives us a clear choice</u> between, on the one hand, the comfort of words and a good conscience and, on the other, the difficult decision to assume our responsibilities. That is what France did in Libya"
6650; 09.10.2011; Russia	"Attempts to manipulate Council mandates are unacceptable, even when proclaiming the noblest of goals. Not only do such acts discredit the very purpose of protecting civilians. Above all, such a policy undermines the prestige of those who carry it out. It also places the Security Council in an ambiguous position and undermines the potential for joint action by the international community in similar situations."	
6650; 09.10.2011; SA	"my delegation has expressed its condemnation of recent NATO activities in Libya, which went far beyond the letter and spirit of resolution 1973 (2011). Abusing the authorization granted by the Council to advance a political regime-change agenda does not bode well for the future action of the Council in advancing the protection of civilians agenda. That could lead to a permanent state of paralysis within the Council in addressing similar situations in the future. Such actions could undermine the Council's credibility in protecting civilians. " (refers to res but not with legal justifications)	
6650; 09.10.2011; US		"The United States is proud to have taken part in the NATO-led coalition that was authorized, without any opposition, by the Council under resolution 1973 (2011). This was necessary and appropriate, given that Al-Qadhafi's forces continued to unleash brutal attacks on civilians and civilian-populated areas and hindered the delivery of humanitarian assistance.
Total:	14	15
%	48,27	51,72

Security Council Meeting Minutes on Syria (04.10.2011-23.07.2013)

Ref S/PV; Date; Country	Political (57)	Legal (31)
6627; 4.10.2011; Russia	"Today's rejected draft was based on a very different philosophy — the philosophy of confrontation. <u>We cannot agree with this unilateral, accusatory bent against Damascus.</u> We deem unacceptable the threat of an ultimatum and sanctions against the Syrian authorities."	"Of vital importance is the fact that at the heart of the Russian and Chinese draft was the logic of respect for the <u>national sovereignty and territorial integrity of Syria</u> as well as <u>the principle of non-intervention</u> , including military, in its affairs; the principle of the unity of the Syrian people; refraining from confrontation; and inviting all to an even-handed and comprehensive dialogue aimed at achieving civil peace and national agreement by reforming the socioeconomic and political life of the country."
6627; 4.10.2011; Russia	"Our proposals for wording on the <u>non-acceptability of foreign military intervention</u> were not taken into account."	
6627; 4.10.2011; Russia	"Given the basis of statements by some Western politicians on President Al-Assad's loss of legitimacy, such an approach <u>could trigger a full-fledged conflict in Syria and destabilization in the region</u> as a whole. The collapse of Syria as a result of a civil war would have a very destructive impact on the situation in the entire Middle East. "	
6627; 4.10.2011; Russia	"The situation in Syria <u>cannot be considered in the Council separately from the Libyan experience.</u> " "The demand for a quick ceasefire turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a blockade of humanitarian goods. Today the tragedy of Benghazi has spread to other western Libyan towns — Sirte and Bani Walid. These types of models should be excluded from global practices once and for all. "	

6627; 4.10.2011; China	" China <u>believes</u> that, under the current circumstances, sanctions or the threat thereof does not help to resolve the question of Syria and, instead, <u>may further complicate the situation</u> the draft resolution focuses solely on exerting pressure on Syria, even threatening to impose sanctions. It does not help to facilitate the easing of the situation in Syria. China therefore voted against it."	"The international community should provide constructive assistance to facilitate the achievement of the objectives I have mentioned. In the meantime, it should fully <u>respect Syria's sovereignty, independence and territorial integrity</u> Most important, it should depend upon whether it <u>complies with the Charter of the United Nations</u> and the principle of non-interference in the internal affairs of States"
6627; 4.10.2011; India	"Given the complexity of ground realities in Syria, we believe that engaging Syria in a collaborative and constructive dialogue and partnership is the only pragmatic and productive way forward....." "We <u>firmly believe</u> that the actions of the international community should facilitate engagement of the Syrian Government and the opposition in a Syrian-led inclusive political process"	
6627; 4.10.2011; UK		"The regime continues to brutally repress its people. It has killed almost three thousand civilians. It has used disproportionate force and has arbitrarily detained many thousands of people. Its actions may amount to crimes against humanity"
6627; 4.10.2011; US	"The United States is outraged that this Council has utterly failed to address <u>an urgent moral challenge</u> and a growing threat to regional peace and security. Several members have sought for weeks to weaken and strip bare any texts that would have <u>defended the lives of innocent civilians from Assad's brutality</u> . Today, two members have vetoed a vastly watered-down text that does not even mention sanctions. "	"The Al-Assad regime flatly <u>refuses to meet its international obligations</u> , including those laid out in the Council's 3 August presidential statement (S/PRST/2011/16). The international community must bring real consequences to bear."
6627; 4.10.2011; US	"During this season of change, the people of the Middle East can now see clearly which nations have chosen to ignore their calls for democracy and instead prop up desperate, cruel dictators. Those who oppose this draft resolution and give cover to a brutal regime will have to answer to the Syrian people and, indeed, to people across the region who are pursuing the same universal aspirations. "	

6627; 4.10.2011; US	"Others claim that strong Security Council action on Syria would merely be a pretext for military intervention. Let there be no doubt: this is not about military intervention; this is not about Libya. That is a cheap ruse by those who would rather sell arms to the Syrian regime than stand with the Syrian people. "	
6627; 4.10.2011; US	"For more than six months, the Al-Assad regime has <u>deliberately unleashed violence, torture and persecution against peaceful protesters, human rights defenders and their families. The High Commissioner for Human Rights has already warned that the Syrian Government's appalling actions might amount to crimes against humanity.</u> The Al-Assad regime's critics have joined the chorus of condemnation from the region, including the Gulf Cooperation Council, which demanded an immediate end to what it called Assad's "killing machine". But the Security Council has not yet passed even a hortatory resolution to counter the Al-Assad regime's brutal oppression."	
6627; 4.10.2011; France	"Our objective was simple and remains so: <u>to stop the brutal crackdown by the Syrian regime against its own people</u> , who are legitimately demanding to exercise their most fundamental rights. This would create an atmosphere free of violence and intimidation and thus allow for the emergence of an inclusive political process led by and for the Syrian people"	" Faced with the extreme violence being brought against a population demanding to exercise their rights; faced with the deafness of the Syrian authorities; and confronted with the risk of regional instability, a united response from the international community was, and continues to be, necessary. <u>The Security Council, which has the primary responsibility of maintaining peace and security,</u> is therefore the natural spokesperson for the international community"
6627; 4.10.2011; France		"Only an effective response to those aspirations can restore stability to that country, on which depends the stability of a fragile region. The international community and the Council in particular, given its mandate, cannot escape its obligation to ensure that this happens, and we regret that that was not the case tonight."

6627; 4.10.2011; SA	"A holistic political solution must be found, one that will respect democracy, political reform, justice and human rights, as well as the socio-economic development needs of the people of Syria, in order to ensure long-term peace and stability. This solution must also preserve the unity, sovereignty and territorial integrity of Syria." "Any action on the part of the international community on Syria, therefore, including action by the Security Council, should be cognizant of the regional implications."	
6627; 4.10.2011; SA	"We have seen recently that Security Council <u>resolutions have been abused</u>, and that their implementation has gone far beyond the mandate of what was intended. With the regard to the draft resolution (S/2011/612) before us, South Africa was concerned about the sponsors' intention to impose punitive measures that would have pre-judged the resolution's implementation. We believe that these were designed as a prelude to further actions. We are concerned that this draft resolution not be part of a <u>hidden agenda</u> aimed at once again instituting regime change, which has been an objective clearly stated by some."	
6627; 4.10.2011; Brazil	"Brazil <u>firmly believes</u> that meaningful and inclusive national dialogue, leading to effective political reform, is the only way out of the current crisis in Syria"	
6636; 24.10.2011; Russia	" It is clear that the strategy of certain members of the international community with respect to Syria, consisting of threats and pressure that <u>worsen the situation in the country through sanctions, does not work.</u>"	
6636; 24.10.2011; UK	"We are therefore deeply disappointed that, owing to the use of the veto by two members, the Security Council was incapable earlier this month of appropriately censuring the Syrian regime, <u>which continues to kill, brutalize and torture its people</u> at the same rate that it has been doing for the past seven months. "	" It is time that members of the Security Council assume their responsibilities and take the strong collective action that is required if there is to be any hope of deterring the Syrian regime from its violent course."
6636; 24.10.2011; France	"Repression must end so that Syrian can engage in the peaceful transition sought by the Syrian people. That is the only way to restore stability to Syria and preserve stability in the region"	

6706; 24.01.2012; US	"The United States has been very clear in our approach to the crisis in Syria. <u>We have long said that Al-Assad, who has shunned all opportunities to institute real reforms that address basic human rights issues, needs to step aside and let a peaceful transition in Syria occur.</u> (...) It is long past time that the Council adopt a strong resolution that supports the Arab League's efforts to end the crisis and restore peace to Syria. "	
6706; 24.01.2012; France	"The Syrian regime is <u>dragging its people into chaos</u> , and the entire region is threatened"	
6706; 24.01.2012; SA	" <u>We reiterate that any solution to the Syrian crisis should be Syrian-led</u> , based on genuine national dialogue, devoid of any form of intimidation and free of interference from outside"	
6710; 31.02.2012; US	"I know that some members here may be concerned that the Security Council <u>could be headed towards another Libya. That is a false analogy.</u> Syria is a unique situation that requires its own approach, tailored to the specific circumstances occurring there. That is exactly what the Arab League has proposed —a path to a political transition that would preserve Syria's unity and institutions. This may not be exactly the plan that any of us ourselves would have designed. I know that many nations feel that way. But it represents the best efforts of Syria's neighbours to chart a way forward, and it deserves a chance to work. "	
6710; 31.02.2012; France	"Some have drawn an analogy with the conflict in Libya. That is a pretext. It is alleged that there is a plan for a military intervention in Syria. That is a myth." "The tragedy of the Syrian people is sufficient justification for our action.... We have no intention of imposing a political regime from the outside. "	"We meet today so that the Security Council can shoulder its responsibility towards a people that is suffering, in a region where peace is threatened by the bloody downward spiral of a regime gasping its last. The months-long silence of the Council is no longer acceptable. To its credit, the League of Arab States is here today to urge the Council to return to its responsibilities. France solemnly calls on the Council to <u>live up to the mission entrusted to it by the United Nations Charter</u> , by coming to the aid of a people and a region that want nothing more than peace and respect for their dignity"
6710; 31.02.2012; France		"Every State has the responsibility to protect its civilian population. Not content with not protecting its civilians, the Syrian regime shamefully massacres them without restraint. That behaviour has <u>direct consequences on international peace and security</u> . Thousands of refugees are fleeing the violence; the

		sovereignty of neighbouring States is being violated; inter-community tensions are on the rise — all of which has a <u>direct impact on the stability of an already fragile region</u> . <u>Even without reference to the responsibility to protect, those regional consequences are enough to establish the Council's responsibility.</u> "
6710; 31.02.2012; France		"I have long called some of the regime's actions <u>crimes against humanity</u> What level of horror must be reached for the Council to enforce a stop to human rights violations and ensure free access to humanitarian assistance?"
6710; 31.02.2012; UK	"Today, as I understand it, we all agree around this table that the Security Council has a role to play. We all want a peaceful political solution that ensures the stability, sovereignty and territorial integrity of Syria. We all agree that this process should be led by the people of Syria themselves, with the support of their region and the international community. We all agree that the rights of minorities in Syria must be safeguarded and respected. We all agree that military action would not be an appropriate response to the complex situation in Syria, something this draft resolution makes absolutely clear. We all welcome the work of the Arab League. So, based on agreeing on all those things, now we must have the will to match such agreement by being able to agree on a draft resolution."	
6710; 31.02.2012; UK	"Even as we meet, the <u>gravest of crimes are being committed</u> in Syria. Responsibility for those crimes lies overwhelmingly at the door of the Syrian authorities. But if the Council cannot agree to adopt a resolution condemning the violence, backing the Arab League and enabling a peaceful resolution, then that failure of the Council will be judged by the people of Syria and of their region."	
6710; 31.02.2012; Russia	" <u>We are convinced that</u> at a time of extreme internal political crisis, the role of the international community should not be to exacerbate conflict or meddle by using economic sanctions or military force. Instead, <u>it should foster dialogue</u> to seek an optimally effective and smooth resolution"	"The Council cannot impose parameters for an internal political settlement. The <u>Charter</u> gives it no such authority. The sides must be encouraged to engage in dialogue rather than be intimidated into doing so. "

6710; 31.02.2012; China		"China has repeatedly stressed that the actions of the Security Council on the Syrian issue should <u>comply with the purposes and principles of the Charter of the United Nations</u> ,.... <u>We firmly oppose the use of force to resolve the Syrian issue, as well as practices, such as forcibly pushing for regime change, that violate the purposes and principles of the United Nations Charter and the basic norms that govern international relations.</u> "
6710; 31.02.2012; SA	" <u>We reiterate that any solution to the Syrian crisis should be Syrian-led</u> , based on genuine national dialogue, devoid of any form of intimidation and free of interference from outside. "	
6710; 31.02.2012; SA	"Military intervention to resolve political conflicts, as we have seen in other parts of the world — most recently in the Libyan situation — has unintended consequences not only for the country in question but for the wider region. That is something the Middle East can ill afford. "	
6711; 4.02.2012; China	" Like many Council members, China maintains that under the current circumstances, to put undue emphasis on pressuring the Syrian Government for a prejudged result of the dialogue or to impose any solution will not help resolve the Syrian issue. Instead, that may further complicate the situation. "	"The actions of the Security Council on the Syrian issue should comply with the <u>purposes and principles of the Charter of the United Nations</u> and help ease the tensions, help promote political dialogue and diffuse disputes, and help maintain peace and stability in the Middle East region, rather than complicate the issue. "
6711; 4.02.2012; SA		"Fundamentally, no foreign or external parties should interfere in Syria as its people engage in the critical decision-making process on the future of their country. Any solution must preserve the unity, sovereignty and territorial integrity of Syria. We are also satisfied that the final draft resolution (S/2012/77) was not aimed at imposing regime change on Syria, which would be against the purposes and principles of the United Nations Charter."

6711; 4.02.2012; Russia	"In the Security Council, we have actively tried to reach a decision for an objective solution that would truly help to put a prompt end to violence and start a political process in Syria. The decision of the Security Council should be just that, but from the very beginning of the Syrian crisis some influential members of the international community, including some sitting at this table, have undermined any possibility of a political settlement, calling for regime change, encouraging the opposition towards power, indulging in provocation and nurturing the armed struggle"	
6711; 4.02.2012; Russia	"The sponsors of the draft resolution did not take into account our proposed amendments to the draft resolution to the effect that the Syrian opposition must distance itself from extremist groups that are committing acts of violence, and calling on States and all those with any relevant opportunity to use their influence to stop those groups committing acts of violence.....Under these conditions, the Russian delegation voted against the draft resolution submitted"	
6711; 4.02.2012; France	"Above and beyond the thousands of dead, wounded, tortured and imprisoned since the repression began almost a year ago, history has compounded our shame"	
6711; 4.02.2012; US	"the Syrian Government has waged and intensified an especially horrific campaign in Homs to murder hundreds, including women and children, with artillery, tanks and other indiscriminate violence. Syrian forces continue to prevent hundreds of innocent and injured civilians from seeking medical help. The international community must protect the Syrian people from that abhorrent brutality. But a couple of members of this Council remain steadfast in their willingness to sell out the Syrian people and to shield a craven tyrant. The United States, by contrast, stands fully and irrevocably with the long-suffering people of Syria. "	
6711; 4.02.2012; UK	"Those who blocked Council action today must ask themselves how many more deaths they are prepared to tolerate before they support even modest and measured action."	

6734; 12.03.2012; France		"The Council has a historic responsibility for the crisis in Syria. We have the obligation to put an end to the gross violations of human rights and the downward spiral that threatens the peace in Lebanon and the region. By failing to act, we are abandoning the oppressed to their oppressors and the Syrian people to violence and brutality. Every day we fail to act, we are letting civil war gain yet more ground over a peaceful solution. To be a member of the Council is to be firmly engaged in the cause of world peace and security. It is also to place the common good above all other considerations. It is our responsibility to act — and to act now — to finally put an end to the martyrdom of the Syrian people and allow them to regain control of their own future"
6734; 12.03.2012; Russia	"Making hasty demands for regime change, imposing unilateral sanctions designed to trigger economic difficulties and social tensions in the country, inducing the opposition to continue its confrontation with authorities instead of promoting dialogue, and calling for support of armed confrontation and even for foreign military intervention are all risky recipes for geopolitical engineering that can only result in the spread of conflict"	
6734; 12.03.2012; US	"We must support calls from within the region to strengthen each of the building blocks of stable, thriving societies: a responsive, accountable Government, an energetic, effective economy and a vibrant civil society....Where countries are making gradual reforms, we should offer our support and everywhere we must safeguard, in word and action, the basic principles of democracy and universal human rights. "	"we do not believe that <u>sovereignty</u> demands that the Council stand silent when Governments massacre their own people, threatening regional peace and security in the process"
6734; 12.03.2012; China		" China adheres to the <u>purposes and principles of the Charter of the United Nations and respects Syrian's sovereignty</u> and the choices of the Syrian people. No external parties should engage in military intervention in Syria or push for regime change. "
6810; 19.07.2012; China	"I wish to emphasize that D30. The Syrian question can only be resolved through political means. "	

6810; 19.07.2012; UK		" It has ignored the decisions of the Council enshrined in resolutions 2042 (2012) and 2043 (2012). Instead, it has intensified its brutal repression, killed almost 20,000 Syrians and detained, tortured, raped and abused innocent men, women and children. The regime continues the indiscriminate and disproportionate use of heavy weapons, in violation of international law, resolutions 2042 (2012) and 2043 (2012), the six-point plan and its own commitments.
6810; 19.07.2012; SA	"South Africa reiterates its position that the only hope for the people of Syria is a Syrian-led dialogue, aimed at a peaceful political transition that reflects the will of the people. The only way forward is the six-point plan as proposed by Joint Special Envoy Kofi Annan. Again, we call on the parties to stop the fighting and violence and to immediately begin negotiations. Failing to start negotiations immediately will result in the already dire situation further spiralling out of control. "	
6826; 30.08.2012; US	"It is a political crisis caused by the cruelty and callousness of the Al-Assad regime. No amount of humanitarian assistance will end the bloodshed and suffering. That day will come only once Al-Assad has departed and a peaceful, Syrian-led transition to democracy has begun. This remains our goal and should be the goal of all nations of goodwill."	
6826; 30.08.2012; Russia	"The humanitarian situation in Syria has been negatively impacted by unilateral economic sanctions and restrictions imposed by individual countries and regional associations. We fundamentally oppose such practices. The sanctions imposed in circumvention of the Security Council have nothing in common with genuine efforts to assist in settling the Syrian crisis. They simply complicate the life of common citizens and deny them the opportunity to meet their basic needs and fully enjoy basic human rights"	

6826; 30.08.2012; SA	"South Africa reiterates that the situation in Syria cannot be solved by military means or by helping one side, militarily or otherwise, to defeat the other. Perhaps it is appropriate, given the allegations being made that some are arming the opposition, to ask whether arming the opposition in Syria is not indirect military intervention. <u>We contend that</u> a military approach may be convenient in the short term, but it will surely expose the country's fault lines and result in unending civil strife, as we have witnessed in other situations where solutions of this nature were pursued without taking internal political dynamics and contexts into account."	"While today's meeting is focused on the humanitarian situation, it is essential that we remain fully engaged in pursuing a sustainable political solution in Syria. Divisions within the Council have rendered it irrelevant and unable to play a constructive role in <u>fulfilling its Charter-mandated responsibilities to promote peace</u> in the Syrian Arab Republic"
6826; 30.08.2012; SA		"We recall that the United Nations Charter states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
6826; 30.08.2012; SA	"We hope that humanitarian and protection-of civilians pretexts will not be used to effect regime change in Syria, at least not in the name of the Security Council."	
6826; 30.08.2012; India	"Under the prevailing circumstances in Syria, there is <u>an urgent need for the international community to close ranks and send a united message</u> to the Syrian parties to renounce their military approach and resolve the crisis through an inclusive, Syrian-led political process. <u>There is no other way</u> to bring about a sustained cessation of violence in all its forms by all parties. That is also the only way to end human rights violations and create an atmosphere conducive to the safe and unhindered delivery of urgently needed humanitarian assistance."	
6826; 30.08.2012; India	"Any further militarization of the conflict will not only make it more difficult to reach a political solution, but also <u>exacerbate the humanitarian situation</u> . In that connection, any militarization of the humanitarian situation <u>will worsen the security situation and the humanitarian conditions</u> for millions of Syrians; it must therefore be avoided. In order to assist "	

6826; 30.08.2012; China	"We should especially guard against and oppose any act of interference in Syria's internal affairs or military intervention under the pretext of humanitarianism. Only with the trust and support of the Syrian people can our actions be successful"	"First, efforts to ease the humanitarian situation in Syria must be guided by the <u>humanitarian principles of neutrality, impartiality and respect for Syria's sovereignty, independence, unity and territorial integrity</u> . The politicization of humanitarian issues must be avoided. Humanitarian relief efforts should never be militarized."
6826; 30.08.2012; China		"We support a political settlement of the issue in accordance with the purposes and principles of the Charter of the United Nations and the basic norms governing international relations. "
6826; 30.08.2012; France	"Bearing witness and responding is what we are doing — <u>a moral obligation in the face of the raging violence</u> . It is also <u>a duty of solidarity</u> vis-à-vis the suffering of Syrians and of the people hosting them....And it is a <u>necessity with regard to security</u> , given the risk of destabilization for the entire region. "	"Allow me to turn, for a moment, to the Syrian authorities represented here to remind them of their obligations stemming from international law and international humanitarian law. The use of heavy artillery against one's own people constitutes a crime, as do extrajudicial executions, arbitrary arrests, forced disappearances, torture and violence against medical personnel. It would appear that Mr. Al-Assad is perpetrating them all. Those crimes should not go unpunished. Many of us believe that the <u>International Criminal Court</u> should consider this matter so that those responsible can be tried."
6826; 30.08.2012; UK	"It is right that the Security Council show leadership in addressing the consequences of the conflict. But we cannot forget that we have so far failed in the Council in our responsibility to address the causes of the conflict."	
6841; 26.09.2012; France	"Security Council of the United Nations, have so far been unable to ensure the unity and security of these nations. I will not point a finger, but it is shocking that so far the Council has been unable to act. I would like to emphasize two risks, which are not mutually exclusive, in the Syrian crisis. If the situation continues, there is <u>a very high risk that Syria will explode</u> ,"	
6841; 26.09.2012; US	"Yet the atrocities mount while the Security Council remains paralysed. I would urge that we try once again to find a path forward that can bring the Security Council together on the urgent business of both ending the violence in Syria and <u>preventing the consequences</u> that all of us around this table fear"	

6847; 15.10.2012; China	<u>China is against any external imposition of a settlement on Syria</u> and any efforts towards so-called regime change. A political settlement is the sole viable way of defusing the crisis in Syria; military means would only lead to more pressure and greater conflict	"Any solution to the question of Syria should be based on <u>observation of the purposes and principles of the Charter</u> and on the basic standards governing international relations. It should also be based on respect for Syria's <u>sovereignty and territorial integrity and on continuing implementation of the relevant Security Council resolutions</u> "
6847; 15.10.2012; UK	" the Council has a moral imperative to work to address the causes of the conflict."	
6906; 23.01.2013; France		"In that context, the Council's inability to take action is scandalous. That is why with 58 other States we have called on the Security Council to refer the situation in Syria to the <u>International Criminal Court</u> . We must not let the silence draw a veil across the <u>war crimes and crimes against humanity</u> that are being perpetrated in Syria today"
6906; 23.01.2013; UK		" Terrible acts have been committed across Syria, and that is why we are supporting the call for the situation in Syria to be referred to the <u>International Criminal Court</u> ."
6906; 23.01.2013; UK		"We want <u>the Council to play the role that it was established to fulfil</u> . Its failure to do so, so far is a stain on its reputation. We are ready to work with Mr. Brahimi and to resume efforts in the Council to come together behind the steps that are necessary to secure a peaceful political transition."
6906; 23.01.2013; China	"China is gravely concerned about the continuing tension in Syria. A political settlement is the only feasible solution to the Syrian issue and reflects the common understanding of the international community as a whole."	
6906; 23.01.2013; Brazil	"All parties must fulfil their obligations to halt violence and respect international humanitarian law, as well as actively engage in finding a peaceful solution to the conflict. The international consensus is that there is no military solution to the conflict. The only path forward is through an inclusive Syrian-led political process"	
6906; 23.01.2013; SA	South Africa continues to maintain that the only solution to the Syrian crisis is an all-inclusive process of national dialogue, free from any form of intimidation, violence or outside interference aimed at regime change. Syria requires a political transition that reflects the will of its people.	

6950; 24.04.2013; France	"The question therefore arises as to when the Security Council is going to take the measures necessary to put an end to the suffering."	"The first of them would be to refer the issue to the <u>International Criminal Court</u> in order to put on trial the war crimes and crimes against humanity that have been perpetrated in Syria, for which the responsibility falls first and foremost on the Bashar Al-Assad regime."
24.04.2013; China	"The international community should also step up mediation efforts in order to play a positive and constructive role in the just, peaceful and proper settlement of the Syrian issue."	
24.04.2013; India	"A Syrian-led political process that meets the legitimate aspirations of all sectors of Syrian society is the only way to resolve the crisis and must be seriously pursued by all parties concerned."	
7007; 23.07.2013; Russia		"It is well known that such a solution must be political and be achieved solely in the framework of a comprehensive intra-Syrian dialogue based on unconditional <u>respect for the sovereignty, independence, national unity and territorial integrity of the Syrian Arab Republic, as stated in the Geneva communiqué (S/2012/523, annex)</u> of 30 June 2012"
7007; 23.07.2013; France	"We call upon the international community to support the only approach capable of leading to a political transition."	"It is high time for the Council to take the measures necessary to put an end to the suffering of the Syrian people, the primary and overwhelming responsibility for which lies with the Al-Assad regime. Those measures are familiar to all: first, a <u>referral to the International Criminal Court to prosecute war crimes and crimes against humanity</u> committed by all parties in Syria; secondly, increased humanitarian action to enable unimpeded access to all populations who need it."
7007; 23.07.2013; UK		"War crimes, crimes against humanity and gross human rights violations continue at a frightening rate. We remain at the forefront of the international community in calling for full accountability for all those responsible for human rights violations and abuses. The Council should refer the situation in Syria to the <u>International Criminal Court</u> without delay"
Total:	57	31
%	64,77	35,23