# 1. Introduction

In late 2008, the United Nations Security Council (UNSC) authorized the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC, later MONUSCO) to provide support to 'operations led and jointly planned with' the Congolese Armed Forces (FARDC).[1] A few months later FARDC – with logistical and fire assistance from MONUC – launched an operation Kimia II against Rwandan Hutu rebels operating in the eastern provinces of the Democratic Republic of the Congo (DRC), the Kivus.[2] Soon thereafter, with evidence of serious human rights and international humanitarian law violations committed by the FARDC mounting, concerns emerged about a possible legal exposure to responsibility of the United Nations (UN) for its involvement in the operation.[3] These were further magnified after it became known that UN troops had participated in combat maneuvers led by Bosco Ntaganda, a Congolese commander, at the time when he was wanted by the International Criminal Court (ICC) on war crime charges,[4] and subject to targeted UNSC sanctions.[5] All these developments have brought to the fore the question: is the UN internationally responsible for its assistance in the atrocities?

Following the advice from the UN Office of Legal Affairs, the UN Secretary-General withdrew support from the incriminated FARDC unit, prompting MONUC personnel to prepare a policy conditioning further assis-

1 UNSC Res 1856 (22 December 2008) UN Doc S/RES/1856 para 3(g).

2 For factual overview of the conflict, see 'Democratic Republic of the Congo, Conflict in the Kivus', *International Committee of the Red Cross online casebook*, https://casebook.icrc.org/case-study/democratic-republic-congo-conflict-kivus accessed 1 September 2019.

3 Jérémie Labbé and Arthur Boutellis, 'Peace operations by proxy: implications for humanitarian action of UN peacekeeping partnerships with non-UN security forces' (2013) 95 *IRRC* 539, 554.

4 Ntaganda's first warrant of arrest was issued under seal on 22 August 2006, and was unsealed on 28 April 2008; see *Prosecutor v Bosco Ntaganda* (Case Information Sheet) ICC-01/04-02/06 (8 July 2019).

5 UN Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo, List of Individuals and Entities Subject to the Measures Imposed by paragraphs 13 and 15 of SC Res 1596 (2005), as renewed by paras 9, 11 and 14 of resolution 1807 (2008) https://www.un.org/sc/suborg/en/sanctions/1533 accessed 1 September 2019.

tance to FARDC on its continuous respect of international human rights and humanitarian law.[6] In 2011, this constitutionality policy was institutionalized and extended to the entire UN system in the form of the Human Rights Due Diligence Policy on UN Support to non-UN Security Forces (UN HRDDP).[7] Responses to the Policy were mixed. Some commentators applauded the adoption of the Policy as 'a faithful implementation of existing legal obligation of the UN, in particular in the light of the rules on complicity in the law of international responsibility'.[8] Others condemned the HRDDP as serving a 'limited purpose of shielding the UN mission from accusations of complicity in war crimes'.[9]

While opinions on the Policy may vary, UN experiences in the DRC and legal risks arising therefrom reinvigorated attention to the issue of the international legal responsibility of international organizations (IOs), a thorny topic the International Law Commission (ILC) was codifying and progressively developing at the time in the form of Articles on the Responsibility of International Organizations (ARIO).[10] In fact, the 2009 MONUC support to FARDC constitutes the sole practical example referred to in the official ILC commentary to ARIO, Article 14 regulating the responsibility for aid or assistance in the realm of IO responsibility.[11] At first glance, however, a substantial discrepancy seems to exist between the HRDDP, and ARIO, Article 14. The HRDDP is based on the premise that:

> [UN] support cannot be provided where there are *substantial grounds for believing* that there is a *real risk* of the receiving entities committing grave violations of

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[6] For the significance of that decision, see Scott Sheeran, 'A constitutional moment?: United Nations peacekeeping in the Democratic Republic of Congo' (2011) 8 *IOLR* 55, 90.

[7] 'Identical letters dated 25 February 2013 from the Secretary-General addressed to the president of the General Assembly and to the president of the Security Council' (5 March 2013) UN Doc A/67/775-S/2013/110.

[8] Helmut P Aust, 'The UN Human Rights Due Diligence Policy: an effective mechanism against complicity of peacekeeping forces?' (2015) 20 *Journal of Conflict and Security Law* 61, 63.

[9] Thierry Vircoulon, 'After MONUC, should MONUSCO continue to support Congolese military campaigns?' (*Blog of the International Crisis Group*, 19 July 2010) https://www.crisisgroup.org/africa/central-africa/chad/after-monuc-should-monusco-continue-support-congolese-military-campaigns accessed 1 September 2019; along similar lines, albeit less critically, see Labbé and Boutellis, *supra* note 3, 555.

[10] ILC, 'Draft articles on the responsibility of international organizations, with commentaries, as adopted by the International Law Commission at its sixty-third session, in 2011, submitted to the General Assembly as a part of the Commission's report covering the work of that session' (4 July–12 August 2011) UN Doc A/66/10.

[11] ARIO Commentary, Article 14, 37, para 6.

> international humanitarian law, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures. (emphasis added)[12]

In turn, under ARIO, Article 14 and the accompanying ILC commentary, an IO providing aid or assistance in the commission of an internationally wrongful act is internationally responsible for doing so if it was aware of the circumstances of the internationally wrongful act assisted and intended to facilitate its occurrence.[13] Controversies regarding what the assistance provider has to know to bear responsibility for complicity under international law are hardly new; a widespread debate on that very issue has already taken place in international criminal law (ICL),[14] and is arguably still ongoing in the law of State responsibility.[15] In the realm of IOs' responsibility, however, the issue of responsibility for aid or assistance – often referred to as complicity, albeit without the criminal law connotation the term often has in domestic laws – has not yet received much attention.[16]

Cooperation with national and regional authorities in the midst of ongoing hostilities, despite being complicity-prone, is likely to remain a feature of UN peace operations for the foreseeable future.[17] In fact, contemporary devel-

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[12] UN HRDDP, para 1.

[13] ARIO Commentary, Article 14, 37, para 4.

[14] Among abundant literature, see in particular Marina Aksenova, *Complicity in International Criminal Law* (Hart 2016); Miles Jackson, *Complicity in International Law* (OUP 2015).

[15] For an argument in support of intent as a relevant criterion, see in particular, James Crawford, *State Responsibility: The General Part* (CUP 2013) 40; Helmut Philipp Aust, *Complicity in the Law of State Responsibility* (CUP 2011) 230–49. For a position in favor of a more lenient standard, see Jackson, *supra* note 14, 159–62; Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016) 164, 222.

[16] Unlike responsibility for joint commission and accountability of IOs in general, both of which have already generated thoughtful analysis. See, respectively Moritz P Moelle, *The International Responsibility of International Organizations: Cooperation in Peacekeeping Operations* (CUP 2017); and Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (OUP 2017).

[17] António Guterres, 'Secretary-General's remarks at Security Council High-Level Open Debate on Peacekeeping Operations Regarding the Reform of UN Peacekeeping: Implementation and follow up' (20 September 2017) https://www.un.org/sg/en/content/sg/speeches/2017-09-20/sgs-reform-un-peacekeeping-remarks accessed 1 September 2019; see also Joint United Nations-African Union Framework for Enhanced Partnership (19 April 2017) https://unoau.unmissions.org/sites/default/files/jount_un-au_framework_for_an_enhanced_partnership_in_peace_and_security.pdf accessed 1 September 2019.

opments in the Sahel region – in particular the evolving mandate of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA)[18] and the establishment of a joint cross-border counter-terrorist force by Burkina Faso, Chad, Mali, Mauritania and Niger (Group of Five for the Sahel, G5S)[19] – suggest such cooperation between States and IOs will become increasingly intricate. In early 2018, the partnership between MINUSMA and the Malian armed forces – already involving 'coordinated operations, operational and logistical support, mentoring and strengthened information sharing'[20] – has been further augmented after the conclusion of a 'technical agreement' between the European Commission, the UN and the G5S.[21] The agreement concerns the provision of 'specified operational and logistical support through MINUSMA to the G5S [Joint Force]' which 'should be subject to full financial reimbursement to the UN through an EU-coordinated mechanism ...'.[22] Despite the applicability of the UN HRDDP and the requirement for a 'robust' human rights and international humanitarian law (IHL) compliance framework underlying the UN-EU-G5 tripartite cooperation,[23] it took only a few months for the first reports of summary executions of civilians by members of the Malian armed forces operating under the G5S Joint Force to emerge.[24] It is thus of vital importance to determine when the provision of support, often necessary for operational reasons, might engage international responsibility of the UN. This study explores the delicate balance between the duty of the UN not to contribute to international law violations, and the need to discharge the mandated tasks in a highly volatile environment.

## 1.A RESEARCH QUESTION

This is a book about complicity and the law of IOs, with a special focus on the responsibility of the UN in the context of peacekeeping. Its main objective is to clarify whether, and if so under what conditions, the UN, as an IO, can be

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[18] UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100 establishing MINUSMA, with the 2019 mandate renewal UNSC Res 2480 (28 June 2019) UN Doc S/RES/2480.

[19] The establishment of the G5S Joint Force has been authorized by the African Union and welcomed by the UNSC in UNSC Res 2359 (21 June 2017) UN Doc S/RES/2359.

[20] UNSC Res 2364 (29 June 2017) UN Doc S/RES/2364, para 21.

[21] EU Commission Communiqué by the co-chairs on the International High-level Conference on the Sahel (23 February 2018) https://europa.eu/rapid/press-release_STATEMENT-18-1166_en.htm accessed 1 September 2019.

[22] UNSC Res 2359 (8 December 2017) UN Doc S/RES/2391 para 13.

[23] *Ibid*, para 21.

[24] Report of the Secretary-General, 'Situation in Mali' (2018) UN Doc S/2018/866 para 51.

held internationally responsible for peacekeepers furnishing assistance in the commission of serious human rights or IHL violations. The search for a comprehensive answer to this overarching query yields several ancillary questions, namely:

- How did the UN peacekeeping operations, traditionally premised on the principle of impartiality, evolve into its current complicity-prone model?
- Under what conditions can the UN, as an IO, be internationally responsible for the conduct of UN peacekeepers?
- What are the constitutive elements of the UN's responsibility for aiding and assisting human rights and IHL violations?
- Whether and how the concept of due diligence can be integrated into the regime of IOs' responsibility for complicity in general, and UN's responsibility in particular?
- Can the peacekeepers' aiding or assisting conduct entail responsibility of both the UN and the troop contributing countries?

## 1.B RESEARCH DESIGN

The following chapters of this book address each of these questions in turn. Chapter 2 concentrates on the specific problem of a gradual shift from traditional impartial UN peacekeeping missions to complicity-prone 'offensive and stabilization' operations tasked with extending State authority in the midst of hostilities. Having traced the evolution of UN peacekeeping using the risk of UN operations engaging in conduct aiding or assisting human rights or IHL violations as a determinant yardstick, the chapter closes with a typology of complicity scenarios which might lead to UN responsibility.

Chapter 3 provides an overview of the responsibility of IOs and identifies salient legal junctions – such as rules of attribution and the concept of derivative responsibility – as a way to set the scene for a further, more detailed analysis conducted in ensuing chapters. Given the core subject of the book, the issues are discussed with reference to the UN whenever possible and practicable.

Chapter 4, which constitutes the core of the study, sheds light on what exactly the concept of the responsibility for aiding or assisting denotes in the law of international responsibility, and how it is relevant to UN peace operations. Much attention is given to the ARIO bifurcated complicity regime, composed of:

1. a general complicity rule under Articles 14 and 58, prohibiting aid or assistance in the commission of all internationally wrongful acts, and
2. an obligation of non-assistance in maintenance of a situation created by serious breaches of peremptory norms, encapsulated in Article 42(2).

Having identified a conceptual discrepancy regarding assistance in the commission of serious breaches of peremptory norms, the analysis proceeds with putting forward a normative claim that an 'aggravated complicity rule' – distinct from the ILC bifurcated complicity regime – has emerged in international law. Two classic methods of ascertaining customary international norms, induction and deduction, are subsequently used to determine the precise scope of the aggravated complicity rule, and its constituent elements.

Chapter 5 recognizes that the conditions of the aggravated complicity regime are conceptually close to the notion of 'due diligence', and after analyzing the interactions between the two concepts in public international law finds that the standard of due diligence can be incorporated into the responsibility for complicity.

Chapter 6, in turn, focuses on the question of how the concurrent responsibility of multiple actors can materialize in situations when UN peacekeepers provide aid or assistance in the commission of serious human rights and IHL violations and identifies a range of consequences the actors attributed with responsibility for aid or assistance might incur.

The final chapter, Chapter 7, draws these threats together by summarizing the main findings and offering some final remarks on the wider policy implications of the UN peacekeepers engaging in complicity-prone activities.

## 1.C METHODOLOGY

To provide a critical and systematic analysis of the UN's responsibility for complicity in the peacekeeping context and conceptualize it within the broader regime of the responsibility of IOs, this book brings together three discrete streams of scholarship regarding: (1) the evolution of UN peace operations; (2) the notion of complicity in public international law; and (3) the responsibility of IOs.

To account for the peculiarities of complicity in public international law, the analysis does not follow a recent comparative trend in scholarship aiming at transcending the boundary between complicity in the law of international responsibility (of States and IOs) and in ICL.[25] While recognizing that 'there

[25] The comparative approach was primarily employed in Jackson, *supra* note 14, and Erik Kok, 'The principle of complicity under international law – its application to states and individuals in cases involving genocide, crimes against humanity and war crimes' in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Brill 2012) 557–90. On the other hand, one of the recent monographs on complicity in ICL also included a separate chapter on the comparative analysis, see Aksenova, *supra* note 14, 178–202.

are good reasons to compare complicity in these two domains',[26] this work does not reach out to ICL for elucidation on the threshold of the subjective element of the responsibility for complicity due to the significant structural and normative differences between the two fields. In particular, this book follows the objective conception of the law of international responsibility pursuant to which the mental state of the individuals acting in the name of a State/IO is in principle irrelevant,[27] making any analogies to the ICL's *mens rea* requirements implausible. The following analysis does, however, where warranted, benefit from the conceptual distinctions and concepts developed in the ICL jurisprudence, in particular with regard to the standard of manifestly illegal orders and its reverberations for the UN chain of command.[28]

Limiting the discussion to public international law has two important methodological consequences. First, despite the book's focus on the responsibility of the UN as an IO, equal attention is devoted to State practice and *opinio juris* in the field of the provision of support in human rights and IHL violations. To not be misconstrued as a loss of focus on the responsibility of IOs, such maneuver requires some explanation. The responsibility of IOs, while a discrete field of international law, is foremost customary; in other words, customary international law (CIL) is the primary legal source of the principles of the responsibility of IOs.[29] Traditionally, the making of CIL has been an exclusive province of States, and the issue whether the practice and *opinio juris* of non-State actors can contribute to the formation of CIL remains vexed.[30] In Conclusions on the 'Identification of Customary Law' finalized in 2018,[31] the ILC asserted that 'in certain cases, the practice of IOs also contributes to the formation, or expression, of rules of customary international law',[32] but reaffirmed that it is the practice of States which is of primary importance.[33] Contentious as the

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[26] As recognized by Aust in his review of Jackson's monograph on complicity, see Helmut Philipp Aust, 'A path towards the moral sophistication of international law? Some remarks on Miles Jackson's "Complicity in International Law"' (*EJIL: Talk!*, 13 April 2017) https://www.ejiltalk.org/a-path-towards-the-moral-sophistication-of-international-law-some-remarks-on-miles-jacksons-complicity-in-international-law/ accessed 1 September 2019.

[27] Part 3.C.

[28] Section 6.B.1.

[29] Part 3.C.

[30] For a synopsis of various positions, see ILC, 'Fifth report on identification of customary international law' (14 March 2018) UN Doc A/CN.4/717 paras 35–40.

[31] ILC, '2018 Draft conclusions on identification of customary international law, with commentaries, Report of the ILC work during its 70th session' (2 July–10 August 2018) UN Doc A/73/10.

[32] *Ibid*, Conclusion 4(2).

[33] *Ibid*, Conclusion 4(1).

concept of 'certain cases' as set forth by the ILC is,[34] this study takes a position that in the identification of a customary rule binding on both States and IOs, the practice of the latter generally accepted over time by its Member States should also be taken into account.[35] Consequently, Chapter 4 – putting forward a normative claim that an aggravated complicity rule prohibiting assistance in serious human rights and IHL has emerged in international law – examines the relevant practice and *opinio juris* of both States and IOs.

On a second and related note, in the ascertainment of the customary status of relevant norms, the present study uses two main methods for the identification of CIL: induction and deduction, as understood by Georg Schwarzenberger and Wilfred Jenks,[36] and employed by the International Court of Justice (ICJ).[37] The inductive method is, therefore, understood as inference of a general rule from a pattern of empirically observable individual instances of State practice and *opinio juris*, and the deductive one as inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle.

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[34] Niels Blokker, 'International organizations and customary international law: is the International Law Commission taking international organizations seriously?' (2017) 14 *International Organizations Review* 1; Sean D Murphy, 'Identification of customary international law and other topics: the sixty-seventh session of the International Law Commission' (2015) 104 *AJIL* 822.

[35] For a more detailed analysis of this aspect, see Magdalena Pacholska, 'New kids on the block: international organizations as customary rules creators' (2019) 21 *ICLR* 325; compare, however, an argument in favor of broader IO participation in international law making in N Voulgaris, 'International organizations as autonomous actors in the formation of customary international law' in S Droubi and J d'Aspremont (eds), *Perspectives on International Organisations and Formation of Customary International Law* (MUP forthcoming).

[36] Wilfred Jenks, *The Prospects of International Adjudication* (Stevens 1964) 617–62; Georg Schwarzenberger, *The Inductive Approach to International Law* (Stevens 1965) 115–64. Compare Anthony D'Amato, 'The inductive approach revisited' (1966) 6 *Indian Journal of International Law* 509.

[37] Thus, for example, in the recent jurisprudence of the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) [2002] ICJ Rep 3, is regarded as a prime example of deductive method, while *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Merits) [2012] ICJ Rep 99 is an example of inductive reasoning. On the two methods generally, see Alberto Alvarez-Jiménez, 'Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000–2009' (2011) 60 *ICLQ* 681; Duncan B Hollis, 'Sources in interpretation theories: an interdependent relationship' in Jean d'Aspremont and Samantha Besson (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017); Jörg Kammerhofer, 'Uncertainty in the formal sources of international law: customary international law and some of its problems' (2004) 15 *EJIL* 523.

Both methods are employed in the analysis, which also factors in major issues often overlooked in subject-specific international legal scholarship and dealt with solely in the realm of legal theory, such as the relevance of the fundamental principle of consent,[38] and the extent to which the ICJ decisions can be treated as a self-standing source of international obligations.[39]

## 1.D CLARIFICATIONS AND LIMITATIONS

As this is a book about the UN's responsibility for aid or assistance in the context of peacekeeping, it does not address the responsibility arising in cases when peacekeepers themselves commit human rights or IHL violations, including the allegations of sexual exploitation and abuse.[40] Neither does it deal with corporate complicity and corporate-related human rights abuses, even when they entail some IO involvement.[41]

What is more, the responsibility of IOs for supporting the commission of human rights and IHL violations discussed in this work, should not be conflated with the 'support-based theory'[42] often employed to determine whether

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[38] Among voluminous literature in favor of maintaining the classical insistence on state consent, see J Shand Watson, 'State consent and the sources of international obligation' (1992) 86 *ASIL* 108; more broadly on the link between legitimacy and consent Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990). Among more contemporary discourse, compare the critical account on consent as the foundation of international law, see Andrew Guzman, 'The consent problem in international law, Berkeley Program in Law and Economics' (2011) *Working Paper Series* 2.

[39] This question is less than settled in the doctrine. Among the voices favorable to treating ICJ decisions as *de facto* sources of international law, see in particular Christian J Tams, 'The development of international law by the International Court of Justice', *Gaetano Morelli Lectures 2015 – 2nd Edition: Decisions of the ICJ as sources of International Law?* https://www.scienzegiuridiche.uniroma1.it/GML accessed 1 September 2019; for a different stand compare Alain Pellet, 'Decisions of the ICJ as sources of international law?', in the same volume.

[40] For more on this problem and the UN response thereof, see Magdalena Pacholska, 'Analysis, United Nations Security Council Resolution 2272 (2016)', 7 June 2016, Oxford Reports on International Law, OXIO 76.

[41] As is for instance the case of *Jam v International Finance Corp,* 586 US __ (2019); see also ongoing litigation in *Juana Doe et al. v IFC* before the US District Court for the District of Delaware https://earthrights.org/case/juana-doe-et-al-v-ifc/#documentsff69-1a905f26-f4b6 accessed 1 September 2019.

[42] Tristan Ferraro, 'The applicability and application of international humanitarian law to multinational forces' (2013) 891/892 *IRRC* 561; and Tristan Ferraro, 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict' (2015) 900 *IRRC* 1227.

the support provided to a party to a pre-existing non-international armed conflict rendered the assistance provider a party thereof.[43]

Furthermore, while the UN is by no means the only IO against which accusations of complicity have been leveled,[44] nor the only IO involved in peacekeeping,[45] this book focuses on UN peacekeeping in the sense of operations under UN command and control.[46] Due to that focus, this study addresses the responsibility of States in relation to UN peacekeeping only to the extent that such responsibility influences the legal exposure of the UN. By no means are all circumstances under which States might incur responsibility in connection with the decisions of the UNSC, or vetoing thereof, covered in the ensuing analysis.[47]

Last but not least, the term complicity is not meant to imply criminal liability. It is used in a purely empirical, descriptive manner, as a synonym to 'aid or assistance'. 'Complicit conduct', therefore, denotes an action or omission, which aided or assisted the commission of an internationally wrongful act. Consequently, reference to 'complicit conduct' does not necessarily mean that any IO or State to which the conduct is attributable bears any responsibility. The following discussion thus distinguishes between 'complicity', and responsibility for complicity.

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[43] Which does not mean there is no overlap between the two issues, in particular with regard to the very question of applicability of IHL to the assistance provider. For more on that aspect, see Section 3.C.1.

[44] Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (CUP 2016) 80–5.

[45] For peacekeeping operations under the aegis of the European Union and the African Union, see respectively Niklas I M Nováky, 'The credibility of European Union military operations' deterrence postures' (2018) 25 *International Peacekeeping* 191; and Cedric de Coning, 'Peace enforcement in Africa: doctrinal distinctions between the African Union and United Nations' (2017) 38 *Contemporary Security Policy* 145.

[46] For the UN own stance on the distinction between, on the one hand, 'United Nations operations conducted under United Nations command and control', and on the other, 'United Nations-authorized operations conducted under national or regional command and control', see ILC, Responsibility of International Organizations, Comments and Observations Received from the United Nations, UN Doc A/CN.4/637/Add.1, 14 February 2011, 10, para 2.

[47] For an argument that the repeated use of the veto by Russia could make it 'complicit in facilitating the commission of atrocity crimes', see Jennifer Trahan, 'The narrow case for the legality of strikes in Syria and Russia's illegitimate veto' (*Opinio Juris*, 23 April 2018) http://opiniojuris.org/2018/04/23/the-narrow-case-for-the-legality-of-strikes-in-syria-and-russias-illegitimate-veto/ accessed 1 September 2019.