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Responsibility to Protect: Clarifying the Nature of State Obligations

Keywords: responsibility to protect, R2P, humanitarian intervention, state obligations, genocide, war crimes, ethnic cleansing, crimes against humanity.

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Abstract

The emergence of the concept of R2P has been characterized as the most dramatic and rapid normative development of our time, a powerful norm of international politics that represents an unprecedented effort to reconceptualise state sovereignty as a responsibility of state towards its people. The clear political appeal to the international community to finally reach a consensus as regards the most abhorrent human rights scourges that transgresses the R2P concept requires some clarity as to the legal nature of this new doctrine and particularly legal obligations it imposes upon states towards their populations. This article will seek to demystify the nature and content of states' obligations triggered by R2P under the 'Three Pillar System' rubric suggested by the Secretary-General Ban Ki-moon in his 2009 report to the General Assembly. The Secretary-General suggested that R2P rests on three concurrent and mutually-reinforcing responsibilities, or 'pillars': 1) the enduring responsibility of a state to protect individuals under its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity; 2) the international community's residual responsibility to assist states to fulfil their R2P; 3) the international responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the host state has manifestly failed to protect its population from the four crimes. In concluding, the article argues that the concept of R2P as it currently stands does not add new obligations for states in the face of humanitarian emergencies but rather clarifies and reinforces duties that states already undertook under international human rights law, international humanitarian law and international criminal law.

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1 Introduction

> "In this world we inhabit - full of cynicism, double standards, crude assertions of national interest, high-level realpolitik, and low-level manoeuvring for political advantage - it is very easy to believe that ideas do not matter very much. But I believe as passionately now as I ever have in my long career […] that ideas matter enormously, for good and for ill. And for all the difficulties of acceptance and application that lie ahead, there are […] not many ideas that have the potential to matter more for good […] than that of the responsibility to protect."[2]

State sovereignty has long been regarded as the principal structural paradigm of international law and the 'essential building block of the nation-State era'.[3] It is recognized in Article 2(1) of the UN Charter as a fundamental principal of the UN. At the same time, the increasing significance of the human rights protection raises the question of how to reconcile the inherent tension between these two realms. In the contemporary international legal order it has been acknowledged that the treatment of individuals within territorial jurisdiction of a state is no more regarded as an exclusively domestic matter but is perceived as an issue of concern to the broader international community.[4] Yet, there is no consensus as to how the international community – represented through the UN, regional organizations, and individual states or state coalitions[5] – is supposed to act when a state commits major human rights violations such as genocide, ethnic cleansing, war crimes or crimes against humanity. When non-forcible means to resolve conflicts such as diplomatic efforts and political or economic sanctions fail, military action in the form of humanitarian intervention is often considered as the last resort.[6] However, the concept of humanitarian intervention is controversial and is often associated with the non-consensual military engagement of the powerful states aimed to impose their political agenda rather than to increase global cooperation in response to humanitarian crises. Moreover, the human cost of humanitarian intervention is considerable and raises the question of whether it is worth at all.

2 Gareth 2008, p. 7.
3 Report of the Secretary-General 2009, p. 5. *See also* Krasner 2004, pp. 1075-1077.
4 *See, e.g.*, Kamminga 1992, p. 2.
5 The ICC and ICRC may also be called upon in relation to the implementation of R2P. Bellamy, Davies and Glanville 2011, pp. 10, 193-216.
6 Payandeh 2010, p. 470.

Nevertheless, the need for some kind of action to be taken, when conscience-shocking mass atrocity crimes are committed, continues to grow dramatically, as "millions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse".[7] The 1990s saw not only disasters of Rwanda and Srebrenica but also the fiasco of the attempted intervention in Somalia in 1993 and the failure of the Security Council (SC) to agree on an action to prevent the killing and ethnic cleansing that broke out in Kosovo in 1999.[8] The other cases include, *inter alia*, Iraq, Haiti, Sierra Leone, East Timor, Burma, Kenya,[9] Sri Lanka, Democratic Republic of Congo, North Korea[10] and, arguably, Syria.[11]

The breakthrough came with the emergence of the concept of the responsibility to protect (R2P in abbreviation) and its subsequent unanimous endorsement by the General Assembly (GA) in 2005. "This turned 'right to intervene' language on its head, focusing not on any rights of the great and powerful to throw their weight around but rather on the responsibility of all states to meet the needs of the utterly powerless".[12] However, the legal status of this new concept is still highly contentious and gives rise to a plethora of political and legal debates.

This article will seek to demystify the nature and content of states' obligations under the doctrine of R2P. It contains two parts. The first is rather descriptive and sheds light on how the concept of R2P emerged and evolved as wells provides for the definition of R2P by referring to three key documents that shaped the scope and limits of this new doctrine.

The second part is analytical and explores the legal role of R2P in the contemporary framework of international law and particularly international human rights law (IHRL). The present article endeavours to unpack the most contentious dynamics of the legal dimension of R2P, namely, the scope and content of state obligations under the 'Three Pillar System' rubric sug-

7 Report of the ICISS 2001, p. 1.
8 Gareth 2008, p. 3.
9 *See generally* Genser, Cotler, Tutu and Havel 2011.
10 *Ibid.*
11 UN advisors invoke 'responsibility to protect' civilians in Syria from mass atrocities – *www.un.org/apps/news/story.asp?NewsID=42235#.UeRWAeD8_BY,* Accessed 6 October July 2014.
12 Gareth 2008, p. 4.

gested by the Secretary-General (S-G) in his 2009 report to the GA. That being said, pillar one of R2P is approached through the prism of a human rights-based perspective. Proponents of this approach argue that R2P does not create new obligations but rather clarifies and reinforces existing duties that states already owe to their people under IHRL and international humanitarian law (IHL). The ideas related to pillars two and three are a result of a liberal reading of law and focus on expanding the existing responsibilities of states within the current legal setting. The most controversial tenet of R2P, pillar three (collective duty to intervene), is evaluated in the light of the recent developments: the effect of R2P and the International Court of Justice's (ICJ) ruling in *Bosnia* v. *Serbia*[13] on the legal responsibilities of the SC to prevent genocide and the parallel characterization of the commitment to prevent genocide as an *erga omnes* obligation; the determination of state responsibilities by the International Law Commission (ILC); the emerging idea that international organizations have legal responsibilities.

As Jennifer Welsh and Maria Banda suggested, R2P sits at the intersection of three different legal regimes: sovereign equality;[14] the use of force and non-intervention;[15] and the protection of civilians.[16] The latter consists of human rights law, humanitarian law, international criminal law and refugee law.[17] This article predominantly covers the third regime, though some relevant issues of the remaining two are also tackled. Such a narrow focus omits some important aspects of R2P. Moreover, since the method employed is strictly legal, the political, sociological and moral sides of the doctrine of R2P are not touched upon at all. Finally, the main bulk of the discourse is directed towards evaluation of the legal content of R2P in terms of obligations it invokes. As a result, the status and nature of R2P as a legal construction - that is, whether it is a legal norm, principle or customary rule - is beyond the scope of a piece of this length.

13 *Genocide* case 2007, p. 43.
14 The core elements of sovereignty were codified in a series of international documents, including the 1933 Montevideo Convention on the Rights and Duties of States (Article 1), UN Charter (Article 2) and UNGA Declaration on Principles of International Law Concerning Friendly Relations among States. ICJ confirmed the essential nature of sovereignty in international relations in *Corfu Channel* case 1949, p. 35.
15 Article 2(4) of the UN Charter expressly prohibits member states from using force against each other.
16 Welsh and Banda 2011, pp. 121-122.
17 *Ibid.*

The legal assessment of R2P is based on the interpretation of the existing legal framework, namely international treaties, resolutions, declarations, codifications of international law, international case law, customary international law and general principles of law. Additionally, the paper examines the relevant legal writings of the prominent international lawyers as well as the related reports of the high-ranking politicians to clarify the content of the former.

In concluding, the paper argues that the concept of R2P as it currently stands does not add new obligations for states in the face of humanitarian emergencies but rather clarifies and reinforces duties that states undertook under IHRL, IHL and international criminal law.

2 From 'The Right to Intervene' to 'The Responsibility to Protect'

> "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 offend every precept of our common humanity?"[18]

Following the Cold War and the revitalization of the UN collective security framework, the concerns relating to the legality and legitimacy of humanitarian intervention gained new momentum. Fierce debate was fuelled by the failure of the SC to authorize intervention to prevent genocide in Rwanda in 1994[19] as well as destabilizing impact of the unilateral intervention of NATO in Kosovo in 1999.[20] By the end of the twentieth century, the world was fragmented into two opposite camps: those who believed humanitarian intervention ('the right to intervene' or *droit d'ingérence* in Bernard Kouchner's influential formulation[21]) to be the only effective means to address massive human rights violations and those who regarded humanitarian intervention as an apologetic euphemism for imperialism and neo-colonialism[22]. The notion of 'R2P' was born to solve this controversy. In short, the R2P doctrine operates on the following principle: where a

18 Millennium Report of the United Nations Secretary-General 2000, p. 48.
19 *See generally* Moghalu 2005.
20 *See generally* Schnabel and Thakur 2000. For a more comprehensive overview of the events that triggered the emergence of R2P, *see* Stockburger 2010, pp. 3-4; Engstrom and Pegram 2011, pp. 4-6.
21 Bettati and Kouchner 1987, p. 300.
22 Payandeh 2010, p. 470.

state fails to protect its people from the most horrendous of atrocities, the residual responsibility falls on the international community. Intervention within this context, thus, is based on a responsibility to protect rather than on a right to intervene.[23]

The emergence of R2P is commonly associated with the report of the International Commission on Intervention and State Sovereignty (ICISS)[24] that was established by Canadian government in respond to a challenge[25] identified by the S-G Kofi Annan at the UN Millennium Summit in 2000, with the task to find a new common ground in the cases of mass atrocities.[26]

However, the biggest achievement in terms of the formal adoption of R2P came with the UN Sixtieth Anniversary World Summit in September 2005 and with the two related major peace and security reports: 'A More Secure World: Our Shared Responsibility' by the UN S-G's High-Level Panel on Threats, Challenges and Change[27] and the 2005 S-G's own report to the summit known as 'In Larger Freedom: Towards Development, Security and Human Rights for All'.[28] Ultimately, the doctrine of R2P came to be recognized as concept or principle in somewhat shorten and modified form in the UN World Summit Outcome Document in September 2005.[29] This final stage is the most authoritative method of endorsement of R2P since it gave the Outcome Document the status of a GA resolution.[30]

23 Stockburger 2010, p. 2.
24 Report of the ICISS 2001, p. 1.
25 Annan referred to two political and moral disasters of the preceding decade: the 1994 Rwandan genocide and the slaughter of civilians in a UN safe heaven in Srebrenica in Bosnia in 1995. He observed the strength of the concept of state sovereignty as a major barrier to action.
26 Gareth 2008, p. 38.
27 Report of the High-Level Panel on Threats, Challenges and Change 2004.
28 Report of the Secretary-General 2005.
29 *See* on the negotiation history of the Summit Outcome Bellamy, Davies and Glanville 2011, pp. 27-33.
30 Amneus 2008, p. 13.

Since the 2005 World Summit, the SC has shown its support of the concept in its resolutions explicitly referring to R2P including resolutions 1674 (POC), 1706 (Darfur), 1894 (POC), 1970 (Libya), 1973 (Libya), 1975 (Cote d'Ivoire), 1996 (South Sudan), 2014 (Yemen), 2016 (Libya), 2040 (Libya), 2085 (Mali) and 2100 (Mali).[31]

More importantly, R2P reaffirmed its position in the international diplomatic agenda when the S-G Ban Ki-moon confronted the UN membership with the challenge of translating its 2005 commitment from 'words to deeds'.[32]

3 Defining the Concept of R2P: Interpretations of the Key International Bodies

The concept of R2P is treated differently in various documents associated with its genesis and evolution. For the purpose of the present paper, the special attention is given to three crucial documents, namely the 2001 ICISS report, the Outcome Document of the 2005 World Summit and the 2009 Report of the S-G.

3.1 R2P in the ICISS Report

> "What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them."[33]

The most comprehensive outline of the scope of the R2P doctrine was provided in the ICISS report. Its main goal was to look into the legal, moral, operational and political questions in the debate on humanitarian inter-

31 SC Res. 1674, 2006; SC Res. 1706, 2006; SC Res. 1894, 2009; SC Res. 1970, 2011; SC Res. 1973, 2011; SC Res. 1975, 2011; SC Res. 1996, 2011; SC Res. 2014, 2011; SC Res. 2016, 2011; SC Res. 2040, 2012; SC Res. 2085, 2012; and SC Res. 2100, 2013. For a more substantial overview of these resolutions, visit UN Security Council Resolutions Referencing R2P – http://www.globalr2p.org/resources/335, Accessed 6 October July 2014.
32 Report of the Secretary-General 2009, p. 5.
33 Report of the ICISS 2001, p. 11.

vention.[34] The Commission tried to distinguish the idea of R2P form the concept of humanitarian intervention and made four main contributions in this respect. The first, and the most valuable politically, was introducing a new way of talking about 'humanitarian intervention', namely the shift from 'the right to intervene' to 'the responsibility to protect' people at grave risk[35] as was demanded by 'our common humanity'.[36]

The second significant conceptual contribution of the ICISS commissioners was to insist upon a new way of talking about sovereignty itself. The central premise is that the Westphalian conception of state sovereignty[37] as unhindered control over a particular territory should give way to a conception of sovereignty as responsibility.[38] Where state fails to shoulder its protection task, through either incapacity or ill will, this responsibility shifts to the international community.[39]

Third, the Commission extended the conceptual parameters of the notion of intervention through the development of a multi-layered doctrine of responsibility, based on a distinction between responsibility to prevent,[40] react and rebuilt.[41] This means that an effective response to mass atrocities requires not only reaction but continuing commitment to prevent conflict and rebuilt after the event.

Ultimately, the fourth conceptual innovation of the Commission was to address the most sensitive question of when military intervention would

34 The Commission was critical of the notion of 'humanitarian intervention'. It believed that the 'humanitarian argument' could be used to disguise motives for an intervention. The Commission also abandoned the term in response to opposition by humanitarian agencies and organizations to the 'militarization' of the word 'humanitarian', which they argued could not be ascribed to any kind of military action. *See* Chesterman 2001.
35 Gareth 2008, pp. 39-42.
36 Report of the ICISS 2001, pp. 2, 11.
37 Stephen Krasner defines Westphalian sovereignty as non-interference in the internal affairs of other states. Krasner 2004, pp. 1075-1077.
38 Eaton 2011, p. 5. *See generally* Jacobsen, Sampford and Thakur 2008.
39 Due to the emphasis on the state's own responsibility to protect its own people, the formulation is politically convenient, both substantively and technically, and is a crucial aspect of R2P's potential role as a bridge builder between North and South on mass atrocity issues. Gareth 2008, p. 42.
40 Prevention is the most important aspect of R2P. The best way to protect populations from mass atrocities is to ensure that they do not occur in the first instance. *See* Rosenberg 2009, pp. 442-477.
41 *See* Report of the ICISS 2001, pp. 19-44.

be appropriate.[42] In order to identify such extraordinary cases, the Commission came up with a set of 'just war' criteria.[43] A 'just cause threshold' must be met, involving the danger of a large-scale loss of life or large-scale ethnic cleansing. Furthermore, 'four precautionary principles' must be fulfilled prior to resorting to forcible measures, which encompass a) a right intention, b) last resort, c) proportional means, and d) reasonable prospects of achieving the intended results.[44] Ultimately, the criteria for 'right authority'[45] stipulates that the "Security Council should be the first port of call on any matter relating to military intervention for humanitarian purposes",[46] but it did not categorically exclude the possibility that R2P might ultimately be discharged by the GA under the Uniting for Peace Resolution,[47] regional organizations[48] or coalitions of states if the SC fails to act.[49] Additionally, to avoid Council paralysis, the ICISS report recommended that the five permanent members of the SC (P-5) agree to a 'code of conduct' for the use of veto in relation to actions needed to stop or avert a significant humanitarian crisis.[50]

3.2 R2P in the World Summit Outcome Document

The 2005 World Summit offered the opportunity to reconsider the proposals of the ICISS on how to bridge the gap between legality and legitimacy in situations of gross and systematic violations of human rights.[51] The final text

42 These criteria relate to legitimacy of the SC action, not to its legality. Gareth 2008, p. 43.
43 Interestingly, these criteria resemble that of Just War Theory, which achieved a significant moral salience. According to this theory, for example, war should be waged only for just cause, with right intention and with proportional means and only after all non-violent alternatives have been exhausted. *See*, for example, Kane 1997.
44 Report of the ICISS 2001, pp. 32-33.
45 *Ibid.*, pp. 32-39.
46 *Ibid.*, p. 47.
47 Adopted in response of the SC's incapability to act to support the Republic of Korea against military aggression from North Korea, this resolution constitutes an attempt to enlarge the role of the GA within the system of collective security. GA Resolution 1950.
48 However, the report highlights that according to the UN Charter, such action can only be taken with authorization of the SC.
49 Stahn 2007, p. 103.
50 Report of the ICISS 2001, pp. xiii and 51.
51 Strauss 2011, p. 28. Details of the methodology and procedure of the Commission are summarized in ICISS 2002, pp. 341-344.

of the Outcome Document is a political compromise aimed to reconcile the different positions[52] without a decisive interpretation.[53] As Edward Luck has argued, it is important to not confuse what we would like the R2P principle to be with what it actually is.[54]

The 'default' responsibility of each state to protect its population was reinforced in the paragraph 138 of the Outcome Document, but the subsidiary external responsibility of the international community was also acknowledged and specified in the paragraph 139.

> "138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[55]

The language of these paragraphs differs from previous formulations of the ICISS. First, the description of the particular mass atrocity crimes of concern is slightly changed.[56] While the ICISS Report applied to 'large-

52 Stahn 2007, p. 103. *See also* Bellamy 2005, pp. 35-36.
53 Eaton 2011, p. 8.
54 Luck *2006/2007*, pp. xxxiii-xliv.
55 GA Res. 2005, paras. 138-139.
56 *See* Gareth 2008, p. 47.

scale loss of life' or 'large-scale ethnic cleansing',[57] the paragraphs refer to already legally defined crimes in international law, such as genocide, ethnic cleansing, war crimes and crimes against humanity.[58] Second, the Outcome Document does not include the criteria or precautionary principles for intervention. Instead, it reaffirms emphasis on the threshold responsibility of states to protect their people. Third, there is no explicit recognition of either specific responsibilities of the SC, or the possibility of unilateral or collective action with the authorization of the GA or outside of the UN framework.[59] Fourth, it is no longer the challenging framework of common humanity, which creates the moral responsibility, but rather the specific political commitment of states to act.[60] Finally, when it comes to reaction, the main focus is placed on reactive measures falling short of military action, while Chapter VII enforcement action is envisaged[61] and has to be evaluated on a case-by-case basis.[62]

Based on existing international law, agreed at the highest level and endorsed by both the GA and the SC, the provisions of paragraphs 138 and 139 of the Summit Outcome define the authoritative framework within which member states, regional arrangements and the UN system and its partners can seek to give a doctrinal, policy and instrumental life to R2P.[63]

3.3 R2P in the 2009 Report of the Secretary-General

Since 2005 R2P has continued to evolve and gain traction. In his 2009 Report to the GA, the S-G Ban Ki-moon defined R2P as having three equally important and non-sequential pillars: 1) the enduring responsibility of a state to protect individuals under its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity and their incitement; 2) the

57 Payandeh 2010, p. 476.
58 The approach most commonly adopted by the UN is to emphasize that R2P is based on well-established principles within existing international law. Bellamy, Davies and Glanville 2011, p. 9.
59 Payandeh 2010, p. 476.
60 Welsh and Banda 2011, p. 131.
61 Gareth 2008, p. 48.
62 *See* Payandeh 2010, p. 476.
63 Report of the Secretary-General 2009, p. 4.

international community's residual responsibility to assist states to fulfil their R2P; 3) the international responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the host state has manifestly failed to protect its population from the four crimes.[64]

This three-pillar definition of R2P is now widely accepted over and above the ICISS Commission's broader 'prevent, react and rebuilt' approach of previous years.

4 R2P: Reinforcing Existing States' Responsibilities or Adding New Ones?

The advancement of R2P as a widely acknowledged and much debated concept of international politics raises the question of its role in international law. While some academic and political circles argue that the R2P concept is firmly anchored in current IHRL and IHL and calls for implementation of existing commitments,[65] others claim that the combination of the R2P doctrine with the ICJ's ruling in 2007[66] and the recent ILC's works on responsibilities of states and international organizations create something approximating a new collective duty to intervene to put an end to the most grievous human rights scourges.

4.1 Pillar One Obligations

> "While R2P in some aspects may reinforce or reiterate existing law, its strength lies in the framework it establishes - unearthing, interpreting, and crystallising the obligation to act in the face of mass atrocity crimes."[67]

The first pillar of R2P stems from well-established rules and principles of customary and treaty IHRL and IHL, and these are universally binding.[68] Thus, the provisions in the Outcome Document constitute their reflection,

64 *Ibid.,* pp. 8-9.
65 Notably, two UN Secretary-Generals, Kofi Annan and Ban Ki-moon, underscored in their reports that R2P does not add anything new to already established states' obligations under international law but rather reinforces existing duties. For a more detailed discussion, *see* Jones 2005, pp. 33-40; Rosenberg 2009, pp. 442-447.
66 *Genocide* case 2007, p. 43.
67 Rosenberg 2009, p. 448.
68 Gierycz 2008, p. 8. *See also* Glanville 2012, p. 3; Rosenberg 2009, pp. 442-447.

not the source of the obligation. A review of the existing human rights framework contributes to a better understanding of the nature of R2P as a means of protection of the person based on universal human rights standards, and not on military doctrine aimed at justifying intervention.[69]

One may draw a parallel between the terms 'the responsibility to protect' and 'the duty to protect' as a well-known concept in IHRL that provides, generally, that states have, apart from a negative duty not to encroach upon individuals' human rights, a positive duty in certain circumstances to prevent private actors from infringing on the rights of other individuals (due diligence).[70] In essence, it requires states to prevent, punish, investigate and redress human rights violations.

IHRL is based on the responsibility of states as the main actors of international stage and bearers of human rights obligations under international law. IHRL applies both in times of peace and war.[71] The 1948 Universal Declaration of Human Rights (UDHR) and two Covenants of 1966 as well as a plethora of human rights treaties of more limited focus have been ratified by most countries of the world. They encompass provisions reflecting customary law and binding treaty obligations. The high number of ratifications of such instruments like the Covenants, Genocide Convention, Convention against Torture (CAT), Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination as well as the universal ratification of the 1949 Geneva Conventions signal about the growing awareness of states about their human rights obligations and the need for their effective implementation. If implemented 'seriously and conscientiously', those instruments could have prevented most of the committed atrocities.[72] In this context, Ramesh Thakur and Thomas Weiss point out that R2P acts as an 'umbrella concept' that strengthens existing legal instruments by filling gaps and encouraging their adoption and implementation.[73]

69 Glanville 2012, p. 3.
70 Buergenthal 1981, pp. 72, 77-78.
71 *See Nuclear Weapons* case 1996, p. 226; *Legal Consequences of the Construction of a Wall* case 2004, p. 136, paras. 102-142.
72 Gierycz 2008, p. 10.
73 Thakur and Weiss 2009, p. 26.

State obligations under above-mentioned instruments are general and specific, the latter being focused on particular groups (women, children, internally displaced persons (IDPs), persons with disabilities) or crimes (genocide, torture, forced disappearances).[74] The UDHR spells out general state obligations to protect and promote human rights of all, without discrimination, including, *inter alia*, the right to life, liberty and security of person and express prohibition of torture, inhumane and degrading treatment and slavery.[75] The two Covenants have given a more precise definition of those commitments and couched them in terms of legal obligations.[76] For instance, the International Covenant on Civil and Political Rights (ICCPR) puts states under obligations to respect and ensure the rights 'to all individuals within its territory and subject to its jurisdiction'; to adopt appropriate legislation; and ensure an effective remedy in cases of violations.[77] Regional human rights instruments, such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights set out even more elaborated human rights regimes in the regions. To illustrate, the European Court of Human Rights (ECtHR) has developed the most extensive case law over the past decade defining positive obligations of states parties to the ECHR in relation to the right to life, prohibition of torture, slavery and enforced disappearances.[78]

Turning to special protection obligations, a number of international treaties address state obligations in relation to IDPs, children and women since they are disproportionately affected by conflicts and atrocities. The 1977 Guiding Principles on Internal Displacement articulate the primary state responsibility to protect IDPs within their territory from arbitrary displacement, genocide, murder, torture, summary executions, enforced disappearances, indiscriminate attacks, starvation, rape, mutilation, forced prostitution, slavery and the like.[79] These crimes fall under the International Criminal

74 Gierycz 2008, p. 10.
75 Universal Declaration on Human Rights, 1948, Preamble, Articles 2-4; ICCPR 1966, Preamble, Articles 1-9.
76 Gierycz 2008, p. 11.
77 ICCPR 1966, Articles 2-3.
78 *See*, *inter alia*, cases *Oneryildiz* v. *Turkey* 2004; *Gorgiev* v. *the Former Yugoslav Republic of Macedonia* 2012; *Osman* v. *United Kingdom* 1998; *Salaman* v. *Turkey* 2000*; Siliadin* v. *France* 2005*; Rantsev* v. *Cyprus and Russia* 2010 *etc*.
79 *Guiding Principles on Internal Displacement* 1998, Principles 3, 6, 10, 11, 13.

Court's (ICC) definitions of genocide, war crimes, ethnic cleansing and crimes against humanity.[80] The 1989 CRC contains state obligations to ensure the right to life, protection from sexual exploitation, abduction, traffic or sale of children, torture, ill-treatment, capital punishment or life sentence and recruitment into armed forces.[81] As regards women and girls, the most comprehensive is the 1993 Declaration on the Elimination of Violence against Women.[82] It is the first international human rights instrument to be adopted by the UN that specifically recognizes women's fundamental human right to live free from violence and urges states to develop comprehensive legal, political, administrative and cultural programmes to prevent physical, sexual and psychological violence against women. Although, the Declaration is not legally binding, some of its provisions constitute international customary law. Other instruments encompass the 1949 Geneva Conventions and the 1977 Additional Protocols; the 1951 Refugee Convention; the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the 1992 General Recommendation 19 on Violence against Women, and the 1999 Optional Protocol; the Rome Statute of the ICC; the SC Resolutions 1325 (2000) and 1820 (2008).[83]

As regards separate crimes, genocide, torture and enforced disappearances are subject to specific international instruments: the 1948 Genocide Convention, the 1984 CAT and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CPED). These conventions impose precise obligations on states to prevent genocide, torture and enforced disappearances, criminalize them and provide redress for the victims. The Statute of the ICC includes these crimes too.[84] Most of their provisions have become a part of international customary law; they fall under universal jurisdiction and involve states' obligations to cooperate.[85]

80 Gierycz 2008, p. 11.
81 Convention on the Rights of the Child 1989, Articles 6, 34, 35, 37, 39. *See also* Optional Protocol on the Involvement of Children in Armed Conflict 2000 and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000.
82 Declaration on the Elimination of Violence against Women 1993.
83 Gierycz 2008, pp. 11-12.
84 Rome Statute of the ICC 1998, Article 8.
85 *See*, among others, the Genocide Convention 1948, Article 1; Geneva Conventions 1949 , common article 1; Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts 1977, article 89; CAT 1984, article 9; and CPED 2006, Articles 14, 15.

Crimes against humanity and ethnic cleansing do not have specialized conventions that clarify their scope and establish a duty to prevent them and punish the perpetrators. The Rome Statute provides the most definitive account of the crimes against humanity[86] and there is a broad consensus that these crimes are not only a part of customary international law but are also of *jus cogens* nature.[87] The crime of 'ethnic cleansing'[88] does not have its own standing in international law but the acts associated with ethnic cleansing (forced displacement of civilians, persecutions) are prohibited as war crimes and crimes against humanity.[89]

The main human rights treaties have associated monitoring bodies (called committees in the UN system and commissions in regional systems) composed of independent experts to oversee their implementation. The nature of their work predisposes them to identify issues and patterns of violations for early-warning use, to prevent further deterioration of the situation, more than providing immediate intervention. With the adoption of the R2P clause, the treaty bodies could be encouraged to generate and analyse the relevant material systematically with the aim to identify threats and suggest preventive measures within their mandates.[90] Moreover, national human rights institutions are core agents of R2P, especially in relation to pillar one.[91]

Such a human rights-based approach to pillar one of R2P, albeit highly warranted given its pragmatic dimension, does not solve the problem of normative fuzziness of the concept of R2P. Indeed, if the existing human rights law already contains all the obligations of states towards their populace together with the appropriate mechanisms of their implementation, does it make any

86 Rome Statute of the ICC 1998, Article 7.
87 Luck 2008, p. 5.
88 For the origin of the term 'ethnic cleansing', *see* Petrovic 1994, pp. 342-359.
89 *See, e.g.*, the ICTY Trial Chamber Judgments in *The Prosecutor* **v**. *Dušco Sikirica* **2001,** paras. 58, 89; *The Prosecutor* v. *Goran Jelisic* 1999, paras. 68, 79; *The Prosecutor* v. *Radislav Krstic* 2001, para. 553; *The Prosecutor* v. *Milomir Stakic* 2003, paras. 518, 519; and *The Prosecutor* v. *Dušco Tadić* 1999, para. 697; as well as the Appeals Chamber Judgment in *The Prosecutor* v. *Dušco Tadić* 1995, para. 305.
90 Gierycz 2008, pp. 13-14.
91 *Ibid.*, pp. 18-22.

difference to come up with a new doctrine fulfilling the same function? On the other hand, R2P's powerful language and narrowly circumscribed scope remind states that the way they treat their nationals is no longer a matter of solely domestic concern.

Thus, while pillar one responsibility is ostensibly firmly embedded in existing obligations under IHRL and IHL, ideas circulating around pillars two and three obligations are more contested and call for progressive interpretation, which is open to debate.

4.2 Pillar Two Obligations

Pillar two of R2P relates to assisting the state to fulfil its primary protection responsibilities. The case law and other authoritative statements on the ICCPR, ICESCR, ECHR, ACHR and CAT show that state's obligations under these treaties may in exceptional circumstances apply extraterritorially, that is, when state is deemed to have 'effective or overall control' over a territory[92] or actions of non-state actors.[93]

The Genocide Convention and IHL in particular place a number of obligations on states to assist others to comply with the law.[94] The most clearly articulated legal obligation to take steps to prevent mass atrocities outside of one's own jurisdiction, is the duty to prevent genocide established in the 1948 Genocide Convention.[95] The ICJ in its *Bosnia* v. *Serbia* ruling[96] found that Article 1 of the Genocide Convention requires that states 'employ all

92 *See, e.g., Legal Consequences of the Construction of a Wall* case 2004, paras. 107-113; General Comment No. 31 2004, para. 10; *Loizidou* v. *Turkey* 1995, para. 62; *Loizidou* v. *Turkey* (Merits) 1996, para. 52; *Cyprus* v. *Turkey* 2001, paras. 75-77; *Bankovic* v. *Belgium* 2001, paras. 70, 75; *Issa* v. *Turkey* 2004, paras. 69-70; Conclusions and Recommendations: United States of America, Committee against Torture 2006, para. 15.

93 *See, e.g.*, General Comment No. 31 2004; *Lopez Burgos* v. *Uruguay* 1981, para. 12.3; *M.* v. *Denmark* 1992, para. 93; *Bankovic* v. *Belgium* 2001, para. 75; *Nicaragua* v. *USA* 1986, p. 14; *The Prosecutor* v. *Dušco Tadić* 1999, para. 697; *The Prosecutor* v. *Predrag Banovic* 2003; *Ocalan* v. *Turkey* 2005, paras. 13-60; *X.* v. *Germany* 1965, p. 168; *X* v. *United Kingdom* 1977; *Drozd and Janousek* v. *France and Spain* 1992; Articles on State Responsibility 2001, Articles 16-18. *See also* Wilde 2007, pp. 503-526; Costa 2012, pp. 12-15, 42-89, 93-108, 255-273.

94 Bellamy, Davies and Glanville 2011, pp. 94-95.

95 Rosenberg 2009, p. 461.

96 Until the 2007 ICJ's judgment, international law concerning the crime of genocide (and crimes against humanity) only addressed individual criminal responsibility and not state responsibility.

means which are reasonably available to them'.[97] The Court argued that whilst states are not obliged to use coercive measures or to actually succeed in preventing genocide, they must be able to show that when supplied with influence and information they have taken the initiative and attempted to prevent genocide.[98] At the very least, therefore, the international community's pillar two responsibility to 'encourage' states to fulfil their R2P includes a *legal* obligation to take positive action to prevent genocide on the part of those who have capacity to do so.[99] This implies emerging jurisprudence defining the scope of duty beyond a legal pillar one duty to prevent.[100] Notably, the obligation, then, would appear to be borne by every state to a greater or lesser degree.[101] Thus, the responsibility invoked by the ICJ is essentially one of due diligence (not control as in human rights treaties):[102] Serbia, a state with intimate ties to the genocidal actors (Bosnian Serb Army), had not taken all measures that were reasonably available to it to prevent genocide.[103] So too, presumably, might be a great power that possesses ability to persuade or compel perpetrators to refrain from committing crimes.[104] If no links or 'capacity to effectively influence' are present, the legal obligation to prevent genocide in another jurisdiction may not be grounded in the Genocide Convention but, arguably, on customary law, in the form of an *erga omnes* obligation.[105] Taking the ICJ's decision further, it is possible to assume that Rwanda has hinted at the possibility of future

97 *Application of the Genocide Convention* 1993, p. 3, para. 52, A(1).
98 Amneus 2008, p. 33.
99 Bellamy, Davies and Glanville 2011, p. 95; Welsh and Banda 2011, pp. 95, 129-130.
100 Bellamy, Davies and Glanville 2011, p. 91.
101 This applies regardless of whether or not a state has ratified the Genocide Convention since the ICJ had earlier declared in the *Congo* case that the prohibition of genocide is a *jus cogens* norm and therefore applicable to all sates. See *Genocide* case 2007, para 161; and *Democratic Republic of Congo* v. *Rwanda* 2005, p. 168, para 64. *See also* Glanville 2012, pp. 18-19.
102 This type of a due diligence obligation arising from Article 1 of the Genocide Convention seems to be similar in nature to the positive obligations of states to secure human rights to persons within their jurisdiction found in human rights treaties. Milanovic 2006, p. 600. The Human Rights Committee has articulated the due diligence standard in its General Comment on Article 2 of the ICCPR.
103 Arbour 2008, pp. 451-452.
104 Glanville 2012, p. 18.
105 *See* Amneus 2008, pp. 35-37. The prohibition of genocide has the character of a *jus cogens* and the duty to prevent it - an *erga omnes* obligation. If a state violates a *jus cogens* or *erga omnes*, any state may invoke the state responsibility of that state, since all states are considered as injured parties when an obligation owed to the international community as a whole is breached. For more detailed discussion, *see* Toope 2000, pp. 187-194.

legal action against France for its alleged material support in 1994 to the radical Hutu regime found responsible for genocide.[106] The same is true for China which has allegedly contributed diplomatically, economically and militarily to keeping the mass atrocities going in Darfur.[107]

As regards other grave crimes, the Court in the same case acknowledged that states may be bound by obligations, other than the prevention of genocide, which 'protect essential humanitarian values, and which may be owed *erga omnes*'.[108] Thus, it can be assumed that the other R2P crimes constitute breaches of *jus cogens* norms, and their prevention may be considered *erga omnes*.[109] While the rules prohibiting war crimes and crimes against humanity are not as clearly established as those prohibiting genocide, there is a 'huge amount of evidence' illustrating their peremptory nature.[110] The same position is taken by the ILC[111].

Concerning IHL, the obligation of states to both abide by the law and to ensure that other do likewise is a core part of the Geneva Conventions. Article 1 of the four Geneva Conventions sets out duties 'to respect and to ensure respect for the present Convention in all circumstances'. While the precise scope of this duty is unclear, legal commentators tend to argue that the Conventions established a duty of states to prevent and halt the commission of war crimes by non-military means, such as private and public diplomacy, state meetings, use of treaty committees and, arguably, more coercive measures such as travel restrictions, sanctions and embargoes.[112] Additionally, it is reasonable to assume that the duty to respect and ensure in IHL could also include assistance to build capacity in form of training and education, cooperation and oversight in multinational operations.[113]

106 Rosenberg 2009, pp. 472-473.
107 E. Reeves, 'Beijing's Propaganda Campaign Can't Obscure Complicity in Darfur Genocide', 5 March 2008 –http://www.sudanreeves.org/2008/03/05/beijings-propaganda-campaign-cant-obscure-complicity-in-darfur-genocide/, Accessed 12 October 2013.
108 *Genocide* case 2007, para. 147.
109 Glanville 2012, p. 26.
110 Tams 2005, pp. 144-145. The ICJ held, that the basic rules of IHL applicable in armed conflict are 'intransgressible', which seem to justify their being treated as peremptory. *Nuclear Weapons* case 1996, p. 226.
111 Articles on State Responsibility 2001, Articles 25, 85, 40, 113.
112 Schindler 2003, p. 175.
113 Bellamy, Davies and Glanville 2011, p. 96.

It is also worth noting that the belief that preventing the most serious crimes is not only a responsibility of individual states but the international community as well underlay the establishment of the ICC. The Rome Statute affirms that perpetrators (including government officials) of genocide, war crimes and crimes against humanity must be held accountable.[114] If national jurisdictions are unable or unwilling to prosecute in good faith those guilty of such crimes, the ICC will step in.[115]

Furthermore, Welsh and Banda argue that extraterritorial responsibility could be derived through three fundamental concepts: *jus cogens*; obligations *erga omnes*; and universal jurisdiction ('universality principle').[116] To date, only a handful of international treaties impose a legal obligation on the member states to exercise universal jurisdiction.[117] No such treaty requirement exists with regard to genocide and crimes against humanity, but the universality principle is increasingly being embraced even in these cases as a matter of customary law or domestic legislation.[118]

4.3 Pillar Three Obligations

> "If there is one thing as bad as using military force when we should not, it is not using military force when we should."[119]

Pillar three is the most contested element of R2P since it implies resort to military action by the international community when a nation-state fails its own protection mission. As Bellamy warns, the R2P principle does not

114 *See* Rome Statute of the ICC 1998, Article 5.

115 However, under current law, the ICC has no role in determining when violation of the R2P principle has taken place. The Rome Statute limits the Court to the prosecution and punishment of those responsible for human rights violations. Determination that the R2P principle has been violated is assigned to the SC. *See also* Herman, The Responsibility to Protect, the International Criminal Court, and Foreign Policy in Focus – http://mrzine.monthlyreview.org/, Accessed 8 June 2013.

116 Under universal jurisdiction, any state's court can prosecute and punish the most serious crimes irrespective of state sovereignty. Bellamy, Davies and Glanville 2011, pp. 125-127. *See also* Gierycz 2008, pp. 17-18.

117 Examples include the Geneva Conventions, CAT, Inter-American Convention on Forced Disappearance of Persons. It is disputed whether the Genocide Convention can be interpreted more broadly to include universal jurisdiction.

118 *E.g.* British House of Lords decision in 1998/9 to extradite General Pinochet and Belgium's conviction of Rwandan nuns in 2001 for complicity in genocide. Spanish courts undertook litigation and sentencing in Spain of an Argentinean citizen for crimes against humanity that had been committed in Argentina. Moreover, the case of Darfur was referred to the ICC by the SC, although Sudan is not a party to the ICC.

119 Gareth 2008, p. 130.

expand the rights of states to interfere coercively in the domestic affairs of other states.[120] The question here is whether the principle creates a *legal obligation* to take coercive measures on the part of those who has authority to do so (the SC). While traditional legal scholarship supports the view that no such duty exists,[121] some recent developments point in another direction.

4.3.1 R2P as a Legal Obligation to Prevent Genocide

Louise Arbour has recently suggested that a combination of the R2P principle and the ICJ's ruling in *Bosnia v. Serbia* paves some way towards establishing a legal duty of the SC to authorize military intervention.[122]

In Article 1 of the Genocide Convention, contracting parties declared genocide to be 'a crime under international law which they undertake to prevent and punish'. Neither ordinary reading of the text nor recourse to the *travaux préparatoires* provided a clear clue whether it amounted to a legal obligation to intervene to halt specific genocides.[123] On the one hand, the US in 1994 avoided characterizing the violence in Rwanda as 'genocide' given the possible obligations linked to that term,[124] and Malaysia claimed that the P-5 of the SC had violated their Genocide Convention obligations by not authorizing enforcement action against the harassments of Bosnia's Muslims.[125] On the other hand, in 2004 the US argued that defining the crisis in Darfur as genocide triggered no specific legal obligations.[126] However, it has been argued by the former UN Commissioner for Human Rights, Louise Arbour, that the 2007 *Bosnia* v. *Serbia* ruling when taken in conjunction with R2P imposes specific responsibilities on the members of the SC.[127] The SC

120 Bellamy, Davies and Glanville 2011, p. 96.
121 The consolidation of the independence of states and the gradual replacement of natural law with positive law from XVII to XIX century saw an increasing reluctance among legal scholars to impose obligations on states to protect those outside of their territories. Glanville 2012, p. 6. More recently, the former US ambassador to the UN, John Bolton, who argued that the responsibility of other countries in the international community is not of the same character as the responsibility of the host and that there is no obligation on the part of the UN (the SC) or individual states to intervene. *See also* Payandeh 2010, pp. 482-484.
122 Arbour 2008, pp. 445-458.
123 Glanville 2012, p. 8.
124 *Ibid.*, p. 3.
125 *See* Schabas 2000, pp. 492-495.
126 Williams and Bellamy 2005, p. 31.
127 Arbour 2008, pp. 445-458.

has the legal authority to authorize armed intervention whenever it identifies a threat to international peace and security. Furthermore, the P-5 of the SC have the military capacity to intervene to halt genocide. Consequently, furnished with the authority and the capacity to intervene, the resort to force to halt genocide might fall well within the scope of 'reasonably available' measures for the P-5 of the SC.[128] This leads to a conclusion that such a combination of R2P and the 2007 case indicates an emerging legal duty to intervene to avert and halt genocide.

Similarly, Stephan Toope claimed that the UN has specifically been granted a mandate to promote international human rights, and genocide is clearly one of the gravest violations of fundamental human rights.[129] Under Article 1 of the UN Charter, the UN is tasked 'to achieve international cooperation […] in promoting and encouraging respect for human rights.' Likewise, Article 55 articulates that the UN 'shall promote […] (c) universal respect for, and observance of human rights and fundamental freedoms for all […].' Arguably, halting genocide falls squarely within the goals of the UN. Yet, fundamental principles of the UN Charter such as sovereign equality, the non-use of force and non-intervention have been invoked to hamper any UN scrutiny, not to mention a more robust action. On the other hand, according to Toope's position, such a state-centric view of the UN has been challenged by the UN practice over the last twenty five years.[130] Similarly concludes Kamminga by claiming that human rights violations is no more regarded as an exclusive domestic matter.[131]

What is more, Toope suggested that the prevention of genocide must fall within the definition of an *erga omnes* obligation[132] - that owed by a state 'towards international community as a whole'.[133] In its *Barcelona Traction* dictum, the ICJ ruled that all states were said to have 'legal interest in the protection' of such 'rights'[134]. Consequently, in the Court's view, *erga omnes*

128 Bellamy, Davies and Glanville 2011, pp. 98-99.
129 Toope 2000, pp. 187-194.
130 *Ibid.*
131 Kamminga 1992, p. 2.
132 Toope 2000, pp. 187-194. *See also* Amneus 2008, pp. 35-37.
133 *Barcelona Traction* case 1970, p. 3, paras. 33, 34.
134 In this case, the ICJ uses the term 'right' as a synonym for obligation insisting that "responsibility is the necessary corollary of a right". *Barcelona Traction* case 1970, p. 3, paras. 33, 34.

obligations presume a collective right to expect performance of these obligations. Individual states are, therefore, burdened with a duty under customary law to enforce such an obligation and cannot waive this through inaction.[135] As Toope warned, this does not, however, give justification for unilateral intervention but have to be dealt with within the UN system.[136]

4.3.2 State Responsibilities According to the ILC's Articles on State Responsibility

The ILC Articles on the Responsibility of States for Internationally Wrongful Acts[137] uphold the idea that certain breaches of international law may be so grave as to trigger not only a right, but also an obligation of states to foster compliance with law (through claims for 'the cessation of the […] wrongful act', reparation or countermeasures.[138]) But the ILC restricted this principle to the violations designated as serious breaches of 'a peremptory norm of general international law'.[139]

Accordingly, the UN S-G's Special Adviser, Edward Luck, claimed that the duty to ensure compliance with IHRL and IHL may be translated into a legal responsibility to take coercive measures by Article 41 of the ILC's Articles on State Responsibility.[140] This article addresses responsibility of states to halt violations of peremptory norms of international law. It insists that "States should cooperate to bring an end through lawful means any serious breach within the meaning of Article 40". Since the prohibition of genocide, war crimes and crimes against humanity have the status of *jus cogens*, it seems that Article 41 applies to them. Nonetheless, it remains contested whether this article establishes a positive obligation of states to cooperate to end the perpetration of the mentioned crimes, including through authorization of force by the SC. To assume that such a duty exists would, according

135 *See also Institute de droit international* 2005.
136 Toope 2000, pp. 187-194.
137 Articles on State Responsibility 2001, Articles 16-18.
138 *Ibid.*, Articles 48(2)(a), (b); 49-53, p. 114.
139 *Ibid.*, Article 40.
140 Luck 2008, p. 5.

to Luck's view, represent an extremely progressive and wide interpretation of international law.[141] Similarly, Monica Hakimi claims that the concept of R2P 'does not reflect a legally operative obligation to protect' for it is inherently unenforceable.[142]

Critically, Article 41 does not elaborate how the cooperation should occur. In its commentary, the ILC observes the possibility of both cooperation under the auspices of the UN and non-institutionalized cooperation.[143] Neither does this article envisage concrete measures that states should take to stop a breach of peremptory rule. The commentary prescribes 'a joint and coordinated effort by all States to counteract the effect of these breaches'.[144] It should be noted, that the ILC acknowledged that Article 41 may mirror the progressive development of international law and is not yet a well-established norm.[145]

Stahn took this idea even further by noting that the World Summit Outcome taken together with the ILC's Articles on Responsibility of States creates positive obligation to 'use diplomatic, humanitarian or other peaceful means' or collective security action to 'help protect populations from atrocities'.[146] This 'maximalist' position is shared by Vanlandingham who views pillar three of R2P as a 'legal requirement', not a political commitment.[147]

4.3.3 Responsibilities of International Organizations

Taking as model its earlier work on state responsibilities, the ILC also commenced codifying draft articles on the responsibilities of international organizations.[148] In these articles, the Commission has suggested the collective obligation to prevent genocide.[149] Among those is draft Article 8 that regulates a violation of an international obligation. The third report on this issue

141 *Ibid.*
142 Hakimi 2010, p. 363.
143 Articles on State Responsibility 2001, section 2 of commentary on Article 41, p. 114.
144 *Ibid.*
145 *Ibid.*
146 Stahn 2007, p. 116.
147 Vanlandingham sees the third tenet of R2P as a customary rule based on *opinio juris*. The proof of the existence of such *opinio juris* she finds in the 2005 Summit Outcome and the numerous legal developments regarding human rights over the last half century. Vanlandingham 2012, pp. 101-123.
148 Draft Articles on the Responsibility of International Organizations 2011.
149 Glanville 2012, pp. 21-22.

argued that international organizations, similarly to states, should be held liable for international wrongful acts. Moreover, it claimed that if it was assumed that international law requires states and other entities to prevent genocide, and that the UN had been in position to prevent the Rwandan disaster, failure to act could be interpreted as a breach of the legal obligation.[150] It is well-known that the UN recognized its failure to prevent the Rwandan genocide. Consequently, according to the ILC's draft articles, this failure may have been legal in nature, albeit one recognized international lawyer charged the ILC with making 'huge leaps of judgment' which are not supported by behaviour of states or international entities[151] and labelled the ILC's position as 'absurdly premature and not likely to be affirmed by state practice'.[152] Alvarez submitted that it is not clear how international organisations such as the UN can be bound the rule of law since 'the institutional practice of these organizations, unlike the internal rules of states, are often a constitutive part of international law'.[153] While the ILC in its draft articles expressed the view that international organizations can commit an internationally wrongful act akin to states, who cannot invoke their domestic law to justify the violations of an international norm, the latter rule, according to Alvarez, is difficult to apply to international organisations since their rules may be both internal and international.[154] Equally important, the idea of imposing the responsibility on the UN means that states could be relinquished from their responsibilities when they act collectively.

The ICJ seems to support the position of the ILC. The Court held that organizations are subjects of international law and, 'as such, are bound by any obligation incumbent upon them under general rules of international law'.[155] In the same vein, Howland claimed that the economic and political resources available to international actors such as the SC may actually lead to a significant obligation to protect.[156] Likewise, Peters suggested that the SC is not completely free in assessing whether to qualify an R2P situation as a threat to the peace in terms of Chapter VII or not. It does enjoy

150 Gaja 2011, para. 10.
151 Alvarez 2006, p. 7.
152 Alvarez 2008, pp. 275-284.
153 Alvarez 2007, p. 282.
154 Ibid.
155 *Interpretation of the Agreement* case 1980, p. 73, para. 37.
156 Howland 2006, pp. 3-4.

a margin of appreciation, but this is within limits. An ongoing genocide, for instance, must be labelled as a threat to the peace by the SC, and failure to do so would trigger the international responsibility of the UN and the Council members.[157] This means that the concept of R2P could give rise to an obligation on the SC to intervene in R2P situations.

What adds to complication is the persistent unclarity on the possibility of the SC's decisions to be subject to judicial scrutiny.[158] The ICJ has not yet pronounced on this issue directly.[159] The ECtHR refused to engage in an analysis of the behaviour of the SC: scrutinizing the Council 'would interfere with the fulfilment of the UN's key mission' in the area of peace and security.[160] While some circles of scholarly community argue that SC resolutions can be subject to judicial review,[161] it is less clear whether the failure of the SC to pass a resolution may be reviewable by courts.

Considering the complications in constructing a theory of accountability of the SC, a number of proponents of the R2P concept have focused on the potential legal responsibilities of the SC's member states and especially the P-5.[162] Arbour, for instance, has speculated why the exercise of veto blocking an initiative to stop genocide would not constitute a violation of the P-5's duties under the Genocide Convention.[163] Similarly, Peters insisted that the resort to a veto 'under special circumstances constitute an *abuse de droit* by a permanent member.'[164] In response to such claims, some quarters of international community argued that to suggest that the exercise of veto may in some cases be illegal is to misunderstand the political nature of the SC.[165] Indeed, states tend to create international organisations in order to

157 Peters 2011, pp. 19-21.
158 For a detailed analysis on the topic of the responsibility of international organizations, *see* Klabbers 2009, pp. 271-293.
159 Akande 1997, p. 309.
160 *Behrami* v. *France* and *Saramati* v. *France et al.* 2007, para. 149.
161 *See, e.g.*, Akande 1997, p. 309.
162 Glanville 2012, p. 23.
163 Arbour 2008, pp. 445-454.
164 Peters 2009, pp. 560-565.
165 White 2009, p. 547.

undertake actions which they would not do on their own and the unaccountability of international organisations is the price to pay for the promotion of global values, otherwise lying at the periphery of individual state interests.

Nevertheless, it is important to bear in mind that although the P-5 are not required to justify their veto, this does not diminish their obligations under other treaties, such as the Genocide Convention.[166] Importantly, the ICJ in its advisory opinion of as early as 1948 insisted that "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter".[167] The International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed this view in the *Tadic* decision.[168] It is also worth mentioning the *M. & Co.* v. *Germany* case, where the ECtHR ruled that the member states cannot, by transferring powers to an international institution, evade their own responsibility under the ECHR and their answerability towards the ECtHR.[169]

5 Conclusion

The concept of R2P has been characterized as the 'most dramatic normative development of our time'[170] and 'the most significant adjustment to sovereignty in 360 years'.[171] Regardless its short lifespan, R2P has rapidly developed from a 'conceptual embryo'[172] to a powerful norm in world politics.[173] Taking into account the pillar three possibility and, arguably, even duty of military force, this 'securitization of human rights violations'[174] challenges principles of sovereignty and non-interference as the core paradigms

166 Glanville 2012, p. 23.
167 *Membership Conditions* case 1948, pp. 57-64.
168 *The Prosecutor* v. *Dušco Tadić* 1995, paras. 26-28.
169 *M. & Co.* v. *Federal Republic of Germany* 1990.
170 Thakur and Weiss 2009, pp. 22-53.
171 Gilbert 2007.
172 Stockburger 2010, p. 3.
173 Thomas Weiss notes that "with the possible exception of the prevention of genocide after World War II, no idea has moved faster or farther in the international normative arena than the Responsibility to Protect". Weiss 2006, p. 741.
174 Engstrom and Pegram 2011, p. 2.

of the UN Charter. Remarkably, the SC has embraced the R2P principle, recognizing a link between mass violations of IHL and threats to international peace and security, which was illustrated in a number of resolutions mentioned in this article.

Notwithstanding these important developments, R2P remains a highly ambivalent doctrine due to its indeterminacy[175] and the lack of consensus as to the precise legal content of the concept. R2P's three pillars have different legal qualities. Pillar one - primary state responsibility to protect its citizens from violence - is well-documented and firmly rooted in IHRL and IHL and, according to Bellamy and Reike, is a peremptory norm of international law. Although the role of R2P under pillar one seems to be superfluous given the comprehensive protective framework of human rights regime, it is, nonetheless, important to acknowledge the value of the doctrine in emphasising the growing interest of international community in how governments exercise their sovereignty domestically. There is also an emerging consensus that pillar two - duty to assist states to fulfil their obligations - has a solid basis in existing legal framework, though the precise scope of this duty is vague. Here R2P amplifies the fact that states may have obligations under international law irrespective of their consent, even though it is difficult to discern any distinctive role of R2P in this respect considering the overarching scope of *jus cogens*, obligations *erga omnes* and the principle of universal jurisdiction. Less clear remains the legal quality of pillar three - the responsibility of the international community to assist states through coercive means. While the majority of scholarly community denies such a wide-ranging duty due to the ambiguous legal status of the international documents codifying the concept of R2P as well as inconsistent state practice, the recent developments spearheaded by the ILC and the ICJ may see the evolution of a legal duty to respond decisively to mass atrocities. It is clear from the 2007 judgment of the ICJ that every state capable of exerting influence over *génocidaires* is under an obligation to take preventive action as soon as there is a real risk of the commission of genocide. Equally important, where a peremptory norm of international law is breached within the meaning of Article 40 of ILC's articles on state responsibility, all states are

175 *See* Bellamy, Davies and Glanville 2011, p. 220.

considered under an obligation to act to halt such a violation. Finally, international organisations can be held responsible for the failure to act in the face of abhorrent humanitarian crises. In short, as Peters submitted, R2P is an established hard norm with regard to the host state, and an emerging legal norm with regard to other states and the UN.[176]

Thus, the R2P doctrine generates contradictory sentiments: while for some it is a radical departure on the part of the international community from the paradigm of permissive, decentralized and ad hoc inter-state system, where states are free to treat their citizens as they see fit, to a multilateral post-Westphalian system, where the international community is prepared to take action should individual states abuse their sovereignty by committing the most serious breaches of human rights; for others it is 'essentially a repackaging of existing norms into a framework that is potentially valuable but so far not followed by practice'.[177]

In sum, while it is too premature to discern any new legal duty of the international community, established by the R2P doctrine of itself, to employ robust measures in cases of genocide, war crimes, ethnic cleansing and crimes against humanity, it is consistent with evolving state practice since the 1990s and accumulated weight of *opinio juris*, both from opponents and advocates of R2P, towards enhanced cooperation in such situations. The R2P is therefore a new political commitment similar to soft law, whose bindedness is yet to be crystallized. For now, it is possible to acknowledge that the primary function of R2P is to remind all states of the obligations they owe both to their people and nationals of other states.

176 Peters 2011, p. 12.
177 Marks and Cooper 2010, p. 130.

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