Responsibility to protect and the prevention of genocide

A RIGHT TO HUMANITARIAN INTERVENTION?

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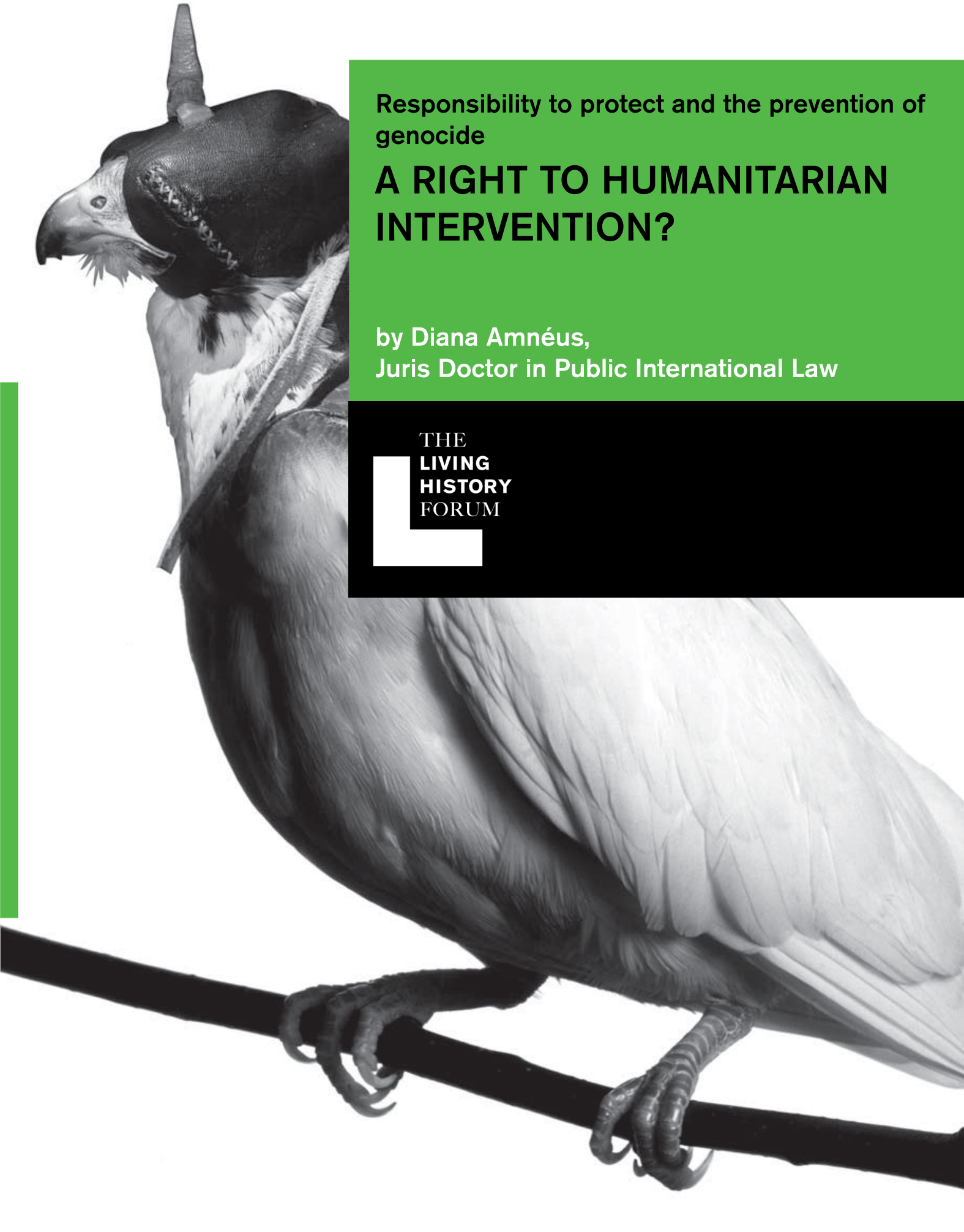

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1. INTRODUCTION

1.1. Introduction

This article analyses the Security Council's external 'responsibility to protect' (R2P) populations from grave crimes in international law, such as genocide, war crimes, crimes against humanity and ethnic cleansing, and the international legal rules applicable with respect to military protection authorised under Chapter VII. It focuses in particular on the prevention of the crime of genocide through humanitarian intervention and on the extent to which the emerging norm on R2P finds support for such preventive and protective action in international law. In addition, the recent case from the International Court of Justice (ICJ), Bosnia v. Serbia (2007),[1] is discussed with regard to the legal rights of states and the UN to use military force within a state to prevent genocide, and the legal limitations in this respect that are contained in the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) and in customary law.[2]

Chapter 2 presents an account of the development of the R2P doctrine and provides the reader with a brief introduction to its contents and controversial aspects. The R2P was launched in the report of the International Commission on Intervention and State Sovereignty (ICISS),[3] and was endorsed by states at the 2005 UN World Summit in New York.[4] The possible interpretations of the R2P doctrine are discussed below. The reception of the concept among member states at the United Nations General Assembly and the Security Council, and their responses to it are also discussed.

Chapter 3 analyses the criteria of the R2P doctrine and the principles for military intervention that are relevant to an external responsibility to protect in cases where a state is unable or unwilling to protect its own population from serious crimes and thus fails to do so. The Right Authority of the Security Council as the main actor to hold such an external responsibility is examined, as is its application of the relevant criteria. The Council practice of authorising humanitarian interventions during the 1990s is thereafter commented on from an international law perspective. I moreover discuss whether this extensive and evolutionary interpretation of the UN Charter supports an external R2P for the Council, including with military means.

The final chapter deals with the specific crime of genocide and international law vis-à-vis the emerging norm of R2P. The relevant provisions of the Genocide Convention are analysed in relation to an external R2P by military means, and are examined together with the findings of the International Court of Justice in the case of Bosnia v. Serbia and customary law in order to find an answer to the question of whether international law supports an external responsibility for states and the UN to protect people from genocide by military means.

This article will begin however by contextualising the R2P by means of a specific case study of the situation in Darfur. The response to the humanitarian crisis in Darfur has been viewed as the first 'test case' for the application of the R2P principle – constituting either an illustration of the fact that Sudan and the international community have failed in their responsibility to protect, or evidence of the fact that the doctrine itself is flawed.

The chapters constitute different parts of my doctoral thesis '*The Responsibility to Protect by Military Means – Emerging Norms on Humanitarian Intervention?*' which is being defended at Stockholm University on 19 December 2008.[5]

1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February 2007, ICJ Reports, 2007, p. 1.

2 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277,.

3 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Research Centre, Ottawa, 2001.

4 World Summit Outcome, GA Res. 60/1, 15 September 2005, UN Doc A/RES/60/1, 2005.

5 Amnéus, Diana, *The Responsibility to Protect by Military Means - Emerging norms on Humanitarian Intervention?*, Juridicum, Stockholm University, Stockholm, 2008. The texts have been partly modified for this manuscript and the number of footnotes reduced.

1.2. The R2P in the case of Darfur

Despite more than 20 resolutions having been passed by the Security Council on Darfur since the beginning of the crisis in 2003, the international community has not been able to efficiently protect civilians and stop the war crimes and crimes against humanity being committed in Darfur. Some, including UN officials, have emphasised the environmental and resource-related aspects of the conflict, while others stress its ethnic basis and claim genocidal intent on the part of the Arab Janjaweed militia and the Sudanese Government in their attacks on the African tribes.[6] The armed conflict between the Janjaweed militia and the African rebel groups from the Fur and Zaghawa communities in Darfur broke out in February 2003.[7] The genocide debate that arose in 2004 became an obstacle to, rather than an incentive for, urgent and robust action. The Sudanese President Omar Al Bashir, has until now ignored the calls of the Security Council for Sudan to disarm the militia, stop the attacks, and protect its population from these crimes. The African Union (AU) sent a small monitoring mission, the African Union Mission in Sudan (AMIS), to Darfur in June 2004, which was gradually expanded into a peace-keeping mission of 7,000 troops.[8] The failure of the AMIS to protect civilians put pressure on the UN and the international community to assume their responsibility to protect. The situation in Darfur has been seen as a test case in relation to the question of how far the emerging norm of R2P has evolved.[9]

A multiplicity of factors have delayed a robust and forceful international reaction to stop the atrocities in Darfur. These include the obstructionist policy of the Sudanese Government and its lack of consent to UN interference; Chinese support to the Sudanese based on large economic interests in the oil industry of Sudan and its trade in military products to Sudan;[10] the US prioritisation of co-operation with the Sudanese Government to combat terrorism in Sudan;[11] the EU policy of "African solutions to African problems" allowing the AU to take the lead;[12] the international community's prioritisation of the peace process in the North-South conflict within Sudan;[13] scepticism towards a Western humanitarianism and the R2P doctrine owing to the abuse of the language in the Iraq intervention of 2003;[14] and the US prioritisation of the war against terrorism in Iraq and Afghanistan. All these factors are often mentioned as reasons for this failure.

On 31 July 2007, the Security Council established, with the consent of Sudan, an AU/UN hybrid force made up of 26,000 military and civilian personnel with a mandate to protect civilians in Darfur.[15] At the time of writing, the force had not been fully deployed owing to further obstructions by Khartoum. It is mainly made up of the AMIS troops, and still unable to halt the attacks. The grave humanitarian crisis in Darfur has not been resolved and the humanitarian situation has substantially worsened. In early 2008 it reached the UN-defined emergency levels for the first time since 2004.[16] Between 200,000 and 400,000 persons have died and approximately two and a half million people have been displaced.[17] Rape and sexual violence are widespread and persistent. The people there are still waiting and hoping for the international community to provide security and protection five years after the crisis began – in the face of the repeated "never again".

In late 2003 and early 2004, the USA was the only member of the Security Council keen on pressing the Government in Khartoum to take action in order to protect its own people. From mid-2004, Darfur received increased attention in the form of visits to the wary-torn region by high-level politicians and officials. Once Colin

6 Cohen, Roberta, Sudan Tribune (Publ.), *Darfur Debated*, "http://www.sudantribune.com/spip.php?page=imprimable&id_article=25030", (2007-12-12), p. 3.

7 For an introduction to the conflict in Darfur, see Ibrahim, Fouad, *Introduction to the Conflict in Darfur/West Sudan*, Explaining Darfur. Four Lectures on the Ongoing Genocide by Agnes van Ardenne / Mohamed Salih / Nick Grono / Juan Méndez, Vossiuspers UvA, Amsterdam, 2006.

8 Grono, Nick, *Darfur: The International Community's Failure to Protect*, Explaining Darfur. Four Lectures on the Ongoing Genocide by Agnes van Ardenne / Mohamed Salih / Nick Grono /Juan Méndez, Vossiuspers UvA, Amsterdam, 2006, pp. 41-42.

9 Anonymous, *Ensuring A Responsibility to Protect: Lessons From Darfur*, Human Rights Brief, vol 14, 2, 2007, pp. 26-33.

10 Not only China, but also Russia and the Arab League are shielding Sudan from robust international action, see Cohen, Sudan Tribune (Publ.), *Darfur Debated*.

11 Williams, Paul D., Bellamy, Alex J., *The Responsibility to Protect and the Crisis in Darfur*, Security Dialogue, vol 36, 1, 2005, pp. 27-47 pp. 34-35.

12 *Ibid*. pp. 34-35.

13 House of Commons International Development Committee, *Darfur, Sudan: The Responsibility to Protect. Fifth Report of Session 2004-5. Volume I*, The House of Commons, London, 2005, pp. 36-38. The report states that the prioritisation of the Comprehensive Peace Agreement was misguided and that a more holistic approach to the conflict in Sudan would have been possible, and in terms of likely impact, preferable.

14 Williams and Bellamy, *The Responsibility to Protect and the Crisis in Darfur*, p. 36.

15 SC Res. 1769, 31 July 2007, UN Doc S/RES/1769, 2007.

16 Bergholm, Linnea, *Att skydda människoliv i Darfur - ett omöjligt uppdrag?*, Internationella studier, våren, 2007, pp. 39-47, p. 1.

17 Patten, Chris, International Crisis Group (Publ.), *"Sudan's Crimes against Humanity Need Real EU Action, Not Empty Words", 28 March 2007*, "http://www.crisisgroup.org/home/index.cfm?id=4744&1=1", (2007-03-30). The UN statistics point to 200,000, Amnesty International and the House of Commons to 300,000 while the Save Darfur Coalition estimates 400,000 killed. The Government of Sudan has claimed that only 9,000 have died. Cohen, Sudan Tribune (Publ.), *Darfur Debated*; The House of Commons, *Darfur, Sudan: The Responsibility to Protect. Fifth Report of Session 2004-5. Volume I* (2005), p. 3.

Powell had declared, on 9 July 2004, that genocide was being committed in Darfur and the US Congress had confirmed this in its passing of resolution 467, media coverage exploded.[18]

Since the spring of 2004, the question of whether genocide was, and is, being committed in Darfur has been the subject of worldwide debate. All of the UN resolutions on Sudan have avoided the term 'genocide'.[19] While Amnesty International (AI) and Human Rights Watch (HRW) have also generally refrained from using the term, other NGOs, such as Physicians for Human Rights, have found direct evidence of genocidal intent. The EU has described the situation as being "tantamount to genocide".[20] In later years, many lawyers have referred to the ICJ ruling of 2007 in the Bosnia v. Serbia Case and the complexity of the legal issues surrounding the term, in particular when the perpetrators are not under direct governmental control and direction.

Another argument complicating the assessment is that the armed conflict is not only raging between the Arabic Janjaweed and military on the one hand, and African rebel groups on the other, but also between fragmented rebel groups of mixed ethnic backgrounds. Such mixed engagements, as well as banditry, have been spreading – with the violence spilling over into Chad, further increasing tensions between Chad and Sudan. But it has been argued that the existence of widespread and systematic rape may provide evidence of genocide in Darfur, particularly since the case law of ICTR has expanded the concept to include rape where genocidal intent is present.[21] The question has been partly answered by the application for an arrest warrant by the Prosecutor of the International Criminal Court in relation to the Sudanese President Omar Al-Bashir on 14 July 2008 for an indictment on the charges of genocide, crimes against humanity, and war crimes in Darfur.[22] This is the first time that the ICC Prosecutor has ever requested an arrest warrant on a sitting statesman for genocide.

On 30 July 2004, the Security Council determined in resolution 1556 that the situation in Sudan constituted a threat to 'international peace and to stability in the region' under Article 39 of the UN Charter.[23] Factors of concern for the Council's determination were the violations of human rights and humanitarian law, the urgent humanitarian needs for assistance by more than one million people, the situation of the 200,000 refugees in neighbouring Chad, and cross-border incursions by Janjaweed militias into Chad.[24] The Council made explicitly clear its "determination to do everything to halt a humanitarian catastrophe, including by taking further action if required". In the same resolution the Council also underscored that the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory. This was the first time that the language of the responsibility to protect was injected into the Security Council debate on Darfur.[25]

The US, the UK, the Philippines, Germany, Chile and Spain invoked the language of the responsibility to protect during the Council debate referring to the internal R2P of Sudan and the external R2P of the AU should Sudan fail in its responsibilities.[26] The Security Council also welcomed the leadership role and engagement of the AU in Darfur, expressed full support for these efforts and endorsed the deployment of its protection force AMIS.[27] The protection provided by the AMIS operation proved to be limited owing to scarce resources and a weak mandate. The AMIS deployment was considered chaotic and characterised by poor logistical planning, a lack of trained personnel, funds and experience in intervening to protect civilians. Despite the presence of 7,000 troops in 2006, the force has been unable to prevent or halt any major atrocities.

In the summer of 2004, the member states of the Security Council were unable to reach any agreement on whether the Security Council had an external responsibility to protect by military force in Darfur, and there was a debate as to whether it was the AU or the UN who

18 Grono, *Darfur: The International Community's Failure to Protect*, p. 39.

19 Gammarra, Yolanda, Vicente, Alejandra, *Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan*, The Global Community Yearbook of International Law and Jurisprudence, vol 4, 1, 2004, pp. 195-224, p. 206.

20 Cohen, Sudan Tribune (Publ.), *Darfur Debated*, p. 2.

21 Battiste, Leilani F., *The Case for Intervention in the Humanitarian Crisis in the Sudan*, Annual Survey of International and Comparative Law, vol 11, 2005, pp. 49-70, p. 70.

22 The genocide is directed against the Fur, Masalit and Zaghawa ethnic groups. Norris, John, Sullivan, David, Prendergast, John ENOUGH, The project to end genocide and crimes against humanity (Publ.), *The Merits of Justice*, "http://www.enoughproject.org/node/974#ftn.id03", (2008-07-15).

23 SC Res. 1556, 30 June 2004, UN Doc S/RES/1556, 2004, preambular para. 21. China and Pakistan abstained, while Russia and Algeria ultimately supported it while expressing the view that the Sudanese Government should be given more time.

24 *Ibid*., preambular paras. 10, 15-16, and 20. See also the assessment by Gammarra and Vicente, *Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan*. The situation in the region of the border between the Sudan, Chad and the Central African Republic was determined by the Security Council to constitute a threat to international peace and security on 25 September 2007. The Council established a multidimensional peace-keeping operation through resolution 1778 (2007) in Chad and the Central African Republic in consultation with the authorities of these states.

25 Bellamy, Alex J., *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, Ethics and International Affairs, vol 19, 31, 2005, pp. 31-53, p. 42.s

26 S/PV.5051, 30 July 2004, UN Doc S/PV.5051, 2004.

27 The Security Council did not authorise the mandate of AMIS, and the mission was legally based upon the AU Charter's prior consent to humanitarian intervention (article 4 (h)) and the consent of Sudan.

had the responsibility to protect. Pakistan, China, Sudan, Brazil and Russia rejected talks on UN intervention. On 18 September 2004, the Council requested the Secretary-General to establish an international Commission of Inquiry in order to immediately investigate reports of violations of international humanitarian and human rights law in Darfur by all parties, in order to determine whether or not acts of genocide had occurred. The Commission focused on incidents occurring between February 2003 and mid-January 2005. It was also charged with the task of identifying the perpetrators of any such violations with a view to ensuring their accountability.[28]

By the end of 2004 the Secretary-General Kofi Annan stated that there were strong indications that war crimes and crimes against humanity were being committed in Darfur.[29] This was confirmed by the Commission of Inquiry, which reported:

> [T]he Government of Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.[30]

Most of the victims of these violations were identified as belonging to the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called 'African tribes'. Those responsible were found to consist of individual perpetrators, including officials of the Government of Sudan, members of militia forces, rebel groups, and certain foreign army officers acting in a personal capacity. Nonetheless, the Commission, chaired by Antonio Cassese, concluded that genocide had not been committed at that particular time in Darfur. Although the *actus reus* had been committed (killing and causing serious bodily harm) against protected groups (the African tribes, according to their own subjective identification), the third crucial element, genocidal intent, appeared to be missing "at least by the central government authorities". It stated:

> Rather, it would seem that those who planned and organised attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.[31]

The Commission, however, added that the Government may be held responsible for persecution as a crime against humanity, including murder as a crime against humanity, but that this should not be taken as mitigating the gravity of the crimes perpetrated: "[d]epending on the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide".[32] Moreover, it added that one should not rule out the possibility that in some instances the ingredient of genocidal intent might have been present in certain individuals, including government officials. Taking note of the report of the Commission of Inquiry, and with a vote of 11 in favour with four abstentions (Algeria, Brazil, China, and the United States), the Security Council referred the situation in Darfur to the International Criminal Court (ICC) on 31 March 2005.[33] At the time of writing, several cases involving war crimes and crimes against humanity were being investigated by the court.

In the spring of 2005, two years after the crisis erupted, the international community was still failing to protect the people of Darfur. Two-and-a-half million people were at that time in need of humanitarian assistance.[34] Many human rights and R2P advocates, such as HRW, the International Crisis Group (ICG), and the Aegis Trust, turned to the responsibility to protect framework as a basis for calling for further international action in relation to Darfur.[35] The ICG has repeatedly proposed that the international community needed to take more robust action, and more specifically to pursue three objectives in Darfur: civilian protection; the implementation of accountability through targeted sanctions at Sudan's oil industry; and building further on the Darfur peace process.[36] Achieving these objectives has proved to be very difficult.

On 24 March 2005 a peace-enforcement corps of 10,000 troops, the UN Mission in Sudan (UNMIS), was established by the Security Council to implement the Comprehensive Peace Agreement in the North-South

28 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004, S/2005/60, Geneva, 25 January, 2005.

29 Grono, *Darfur: The International Community's Failure to Protect*, p. 39.

30 Report of the International Commission of Inquiry on Darfur (2005), p. 3.

31 *Ibid*., p. 132.

32 *Ibid*., p. 132.

33 SC Res. 1593, 31 March 2005, UN Doc S/RES/1593, 2005.

34 The House of Commons, *Darfur, Sudan: The Responsibility to Protect. Fifth Report of Session 2004-5. Volume I* (2005), p. 3.

35 Pace, William R., Deller, Nicole, *Preventing Future Genocides: An International Responsibility to Protect*, World Order, vol 36, 4, 2005, pp. 15-32, p. 22.

36 Grono, *Darfur: The International Community's Failure to Protect*, pp. 47-48.

conflict in Sudan.[37] UNMIS was also requested to closely and continuously liaise and coordinate at all levels with AMIS, with a view to expeditiously reinforcing the effort to foster peace in the region. But the means of support for AMIS were to be further worked out by the Secretary-General. Resolution 1556 did not pronounce on whether UNMIS would be deployed to Darfur, but invited the Secretary-General to investigate the types of assistance that UNMIS could offer to AMIS. Co-operation between UNMIS and AMIS in tackling the situation in Darfur did not meet with success.

The security situation deteriorated again in the summer of 2006, in spite of the Darfur Peace Agreement (DPA), which was signed in May 2006 by the Government of Sudan and three of the rebel factions. Efforts and plans to deploy a UN peace-keeping force in Darfur have consistently been derailed by the Government of Sudan, which has resisted giving its consent. In defiance of this reluctance, the Security Council decided in resolution 1706 (31 August 2006) to increase UNMIS to 17,300 troops and to deploy the mission in Darfur. It was given an expanded mandate under Chapter VII[38] for the purpose of taking over AMIS's responsibilities to support the implementation of the 5 May 2006 DPA by the end of 2006. The Council authorised UNMIS to use all necessary means to protect civilians in Darfur in resolution 1706:

> 12. (a) Decides that UNMIS is authorised to use all necessary means, in the areas of deployment of its forces and as it deems within its capabilities:
>
> – to protect United Nations personnel, facilities, installations and equipment, to ensure the security and freedom of movement of United Nations personnel, humanitarian workers, assessment and evaluation commission personnel, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups, without prejudice to the responsibility of the Government of the Sudan, to protect civilians under threat of physical violence,
>
> – in order to support early and effective implementation of the Darfur Peace Agreement, to prevent attacks and threats against civilians.

The resolution was adopted, with three states abstaining: China, Qatar and Russia. The major concern for these states was the absence of full, voluntary consent by the Government in Khartoum to the deployment of an enlarged UNMIS to Darfur.[39] China supported the idea of replacing AMIS with UNMIS, while Qatar preferred to continue supporting AMIS financially. Russia had no objections in principle to the contents of the resolution besides the lack of consent.

It was a Chapter VII enforcement mission with the well-needed protection mandate for civilians that everyone was waiting for – a humanitarian intervention to protect human rights in Darfur. Unfortunately, the UNMIS mission in Darfur failed completely and was never deployed there for several reasons. Forceful interventions under Chapter VII are generally not dependent on the consent of the state targeted by the intervention, but in this case no troop contributions for the mission were offered owing to lack of consent by the Government in Khartoum. The large area of the territory of Darfur, and the risk of becoming involved in an armed conflict with the large Sudanese army (of over 100,000 troops), have both been mentioned as deterrent factors. Instead, the AU had to extend AMIS's mandate until the end of 2007, when it was replaced by the AU/UN hybrid force in Darfur (UNAMID), and UNMIS reverted to its peace-keeping mandate as specified in resolution 1590.[40]

In the Security Council discussion held on 11 September 2006 when the Secretary-General's report on Darfur was considered, resolution 1706 was debated.[41] Sudan declared that the Council had chosen a confrontational approach by adopting resolution 1706, and that it had deliberately taken hasty measures without preparing the political context with all the involved parties, and in particular the Sudanese Government. This was counter-argued by, among others, the UK who stated that

> We were open to discussions with representatives of the Government of the Sudan, and those were not forthcoming. The net result was that we moved on to adopt Security Council resolution 1706 (2006). We did that so that two simple goals could be achieved: first, that the African Mission in Sudan (AMIS) could be reinforced — and we provided for that — and secondly, that the United Nations Mission in Sudan (UNMIS) could be deployed into Darfur to provide the security that the Darfur Peace Agreement envisages. The protestations that this infringes national sovereignty, when UNMIS has been in the south

37 SC Res. 1590, 24 March 2005, UN Doc S/RES/1590, 2005, op. paras. 1-4. The Council authorised UNMIS under Chapter VII to use force in order to *i.a.* protect civilians, *ibid.* op. para. 16 (i).

38 It was also given an extensive mandate under Chapter VI, including a protection mandate for civilians, in order to satisfy Chinese and Sudanese demands for voluntariness and for co-operation between the force and the Government. SC Res. 1706, 31 August 2006, UN Doc S/RES/1706, 2006, op. paras. 8-9. Chapter VII regulates non-military and military enforcement action with respect to threats to the peace, breaches of the peace, and acts of aggression. Chapter VI deals with the peaceful settlement of disputes and is based on consensual measures.

39 S/PV.5519, 31 August 2006, UN Doc S/PV.5519, 2006, China p. 5, Qatar, p. 6, and Russia p. 9.

40 S/RES/1769 (2007), op. paras. 2, and 12.

41 S/PV.5520, 11 September, UN Doc S/PV.5520, 2006.

working to consolidate the Comprehensive Peace Agreement, ring very hollow. […] We have made it clear that the terms of the resolution reflect what was said to us in Khartoum and separately. We have put forward the most conciliatory resolution possible. That is why we ought to do everything possible now to ensure that the resolution is implemented.[42]

It took a further year of diplomatic, economic and political efforts and pressure to attain the consent of Sudan for a robust military force in Darfur. The pressure on Sudan from the international community increased, in particular when the US called for additional sanctions against Sudan in February 2007.[43] On 12 June 2007, AU officials hailed the announcement that Sudan had agreed to a joint UN and AU force of nearly 20,000 peace-keepers as a breakthrough.[44] One condition of Sudan's consent was that the forces would be exclusively African. UNAMID was created by resolution 1769 on 31 July 2007, containing both a Chapter VI and Chapter VII mandate.[45] The resolution was adopted without abstentions. The set up of the force was indeed dependent on the consent of Sudan, whose co-operation laid the foundation for its existence. The consensus reached by the UN, AU, and Sudan in the tripartite dialogue mechanism on the hybrid operation constituted the political prerequisite for the resolution and the basis on which it was then adopted. Despite this achievement, US politicians have criticised the resolution for not going far enough and for lacking sufficient sanctions.[46]

The Chapter VI mandate of UNAMID in resolution 1769 is based upon the proposed mandate in Articles 54 and 55 of the *Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur*, and draws on the DPA, the AMIS mandate, the Secretary-General's report on Darfur (2006) and relevant communiqués of the African Union Peace and Security Council, as well as Security Council resolutions.[47] The Chapter VII mandate of UNAMID in the same resolution includes the authorisation to "take the necessary action, in the areas of deployment of its forces and as it deems within its capabilities" in order to among other things:

(ii) support early and effective implementation of the Darfur Peace agreement, prevent the disruption of its implementation and armed attacks, and protect civilians, without prejudice to the responsibility of the Government of Sudan.[48]

UNAMID was to consist of a total of 26,000 personnel and would incorporate the AMIS troops through a seamless transfer of authority. Despite the decision to make UNAMID militarily operational by October 2007, at the end of January 2008 UNAMID consisted of only 1,400 police officers, and 7,000 troops.[49] By the end of 2007, the 7,000 AMIS peace-keepers had swapped their green AU helmets for the blue UN headgear and raised both the AU and UN flags.

The presence of the Sudanese consent to the establishment of UNAMID was not fully sustained in the deployment of the force, with the result once again being that of keeping troop-contributing states away. The obstructiveness of the Sudanese Government in accepting only African troops and another failure of member states to contribute troops substantially derailed and delayed the deployment and expansion of UNAMID, and led to the withdrawal of Swedish and Norwegian pledges to add troops in January 2008.[50] Khartoum also resisted such things as granting land and water access rights to UNAMID, night flying rights, and landing rights for air

42 *Ibid*., pp. 8-9.

43 The US revealed plans to block increased financial transactions of Sudanese citizens and companies if Sudan continued to resist UN peace-keepers from entering Darfur.

44 The agreement was reached after two days of tripartite negotiations in Addis Ababa between the UN, the AU and Sudan. Polgreen, Lydia, Hoge, Warren, The New York Times (Publ.), *Sudan Relents on Peacekeepers in Darfur, 13 June 2007*, "http://www.nytimes.com/2007/06/13/world/africa/13darfur.html?_", (2007-06-14).

45 S/RES/1769 (2007), see op. paras. 1 and 15.

46 Democratic Senator Russ Feingold, who chaired the Senate Foreign Relations subcommittee on Africa, called the resolution overdue, and was disappointed that the resolution had been unacceptably weakened by the removal of the threat of sanctions. Barrall, Alison, Responsibility to Protect - Civil Society (Publ.), *Special Edition: Security Council Adopts Resolution 176*, 2 August 2007, Digest Number 322 .

47 See S/RES/1769 (2007), op. para. 1. The Report was attached in the Letter dated 5 June 2007 from the Secretary-General to the President of the Security Council, S/2007/307/Rev.1, 5 June 2007, UN Doc S/2007/307/Rev.1, 2007. It includes the mandate in para. 54 (b) "To contribute to the protection of civilian populations under imminent threat of physical violence and prevent attacks against civilians, within its capability and areas of deployment, without prejudice to the responsibility of the Government of Sudan", "55 (vi) To contribute to the creation of the necessary security conditions for the provision of humanitarian assistance and to facilitate the voluntary and sustainable return of refugees and internally displaced persons to their homes. […] 55 (vii) In the areas of deployment of its forces and within its capabilities, to protect the hybrid operation's personnel, facilities, installations and equip-ment, to ensure the security and freedom of movement of United Nations-African Union personnel, humanitarian workers and Assessment and Evaluation Commission personnel, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups and, without prejudice to the responsibility of the Government of the Sudan, to protect civilians under immi-nent threat of physical violence and prevent attacks and threats against civilians."

48 S/RES/1769 (2007), op. para. 15.

49 Africa Action (Publ.), Africa Action Report. An Overview of Conflict in Sudan and the International Failure to Protect. August 2007 - Janu-ary 2008, "http://www.africaaction.org/resources/page.php?op=read&documentid=2750&type=6&issues=1024", (2008-02-08), p. 5.

50 Ibid., p. 5. Negotiations of the Status of Forces agreement began in December 2007.

transport. The international community was at the same time criticised for failing in its responsibility to contribute with transport helicopters. One reason put forward for this was that the Status of Forces Agreement (SOFA) had not yet been signed by Sudan, which was necessary to provide the ultimate command and control of UNAMID by the UN. In an interview in February 2008, President Bush defended his decision not to send troops to Darfur, despite the genocide. He explained that it was a "seminal decision" not to intervene with force, taken partly out of the desire not to send US troops into another Muslim country.[51]

As attacks on civilians and humanitarian aid workers continued, relief agencies were forced to scale down their operations during the autumn of 2007. Hostilities escalated in November 2007 between Chadian rebels near the Sudanese borders, and the Governments of Sudan and Chad began making accusations of interference in each other's internal affairs.[52]

Many if not all members of the international community were convinced that the crimes and violations committed in Darfur amounted to genocide, or at least that such widespread and systematic violations of human rights and humanitarian law constituted war crimes and crimes against humanity, as assessed by the Commission of Inquiry. Grono from the ICG, the HRW and others, have all argued that a process of ethnic cleansing was taking place.[53] In any case, it is obvious that the R2P threshold has been satisfied in Darfur.[54] The state is manifestly failing to protect its population from grave crimes against international law.

The case of Darfur represents an example of a case where it is not only the Government of Sudan that has manifestly failed in its responsibility to protect civilians from grave offences such as crimes against humanity, war crimes and possibly genocide, but the international community as well – despite Security Council authorisation of military enforcement measures to protect. The necessary Security Council authorisations and mandates to protect are present, but the military and political factors needed for their realisation are not. The AMIS, UNMIS and UNAMID missions to protect people in Darfur from grave crimes when the state itself manifestly fails to protect, have thus failed so far. Several of the reasons for this have already been mentioned. A lack of consent from the Sudanese Government to the deployment of an 'international' (not only with African troop contribution) peace-enforcement operation in Darfur constitutes the main challenge to the efforts to implement the external R2P there. The paradox is that such forceful Chapter VII measures are not supposed to be dependent on state consent. The difficulty in implementing the external R2P by military means is apparent in situations where there is a strong military power involved, and at the same time an unwillingness to protect its own population. An unwillingness to comply with the internal responsibility has major implications for the implementation of the external R2P when a government is militarily strong. The external R2P by military means is arguably easier to carry out in a situation where the government is willing, but unable for various reasons, to protect – or if unwilling, does not pose a strong military threat to an enforcement operation.

The situation is obviously far from resembling one involving a fragile or failed state where the government is (non-existent or) unable to provide protection for its population – here the situation is the reverse. The fact is that the Government of Sudan is not only unwilling to protect its own population, but actually assents to and is even the perpetrator of many of the crimes.[55] Unless the international community decides to exert such pressure on Sudan that it has no choice other than to change its policy in Darfur and co-operate, then the situation will persist. It may appear easier to try to convince and force the Sudanese Government to change its policy and comply with its primary responsibility to protect, than to make the international community support a military intervention providing external protection in this situation. The security-related, economic and political reasons and rationales behind the decisions of the great powers and other states not to take robust measures to pressure Sudan into this position, represent a failure of the international community to comply with its moral and political responsibility to protect, as endorsed at the UN World Summit in New York in 2005. The slogan "African solutions to African problems" does not relieve Western and non-African states from their moral and political responsibility to protect. Nor have the possibilities for supporting African actors and states been exhausted. If no one is considered fit to do the job, the job will not be done. This dilemma has come in new light as a result of

51 See Frei, Matt, BBC News (Publ.), *Bush defends US record on Darfur, 14 February 2008*, "http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/7245002.stm", (2008-02-15).

52 Bergholm, *Att skydda människoliv i Darfur - ett omöjligt uppdrag?*, p, 3.

53 Grono, *Darfur: The International Community's Failure to Protect*, p. 39; Gammarra and Vicente, *Securing Protection to Civilian Population: The Doubtful United Nations Response in Sudan*, p. 207.

54 Grono, *Darfur: The International Community's Failure to Protect*, p. 46; Williams and Bellamy, *The Responsibility to Protect and the Crisis in Darfur*, p. 28.

55 UN reports show that the Sudanese Government has incorporated the militia into regular military and police forces, and it is by now a well-known fact that the janjaweed militias that have terrorised and decimated Darfur have been directed by the Sudanese Government. The militias were financed by the Government, and received direct battlefield support from the Sudanese military. See Norris, Sullivan and Prendergast, ENOUGH, The project to end genocide and crimes against humanity (Publ.), *The Merits of Justice*.

the ICC Prosecutor's the request for an arrest warrant against President Omar Al-Bashir on charges of genocide, crimes against humanity, and war crimes in Darfur.

Whether the problems of implementing the internal and external responsibilities to protect depend on deficiencies inherent in the concept of R2P, or are based in political reality and power structures, is an issue of disagreement. An anonymous writer with experience of humanitarian work in Darfur argues that this case illustrates the embryonic features of R2P as a doctrine that is by no means self-executing, and that at present lacks the dexterity to overcome real world politics, but that should nevertheless not be seen as a failure.[56] With time, the doctrine will evolve as diplomats and politicians learn how to operationalise the doctrine. According to this anonymous author, the shortcomings do not lie within the doctrine itself but in the failure to implement it. I agree in that the weak link lies in the lack of political will rather than in the doctrine (See the discussion on the enabling, triggering or inhibiting impact of the R2P doctrine in Chapter 3.2.)

Williams and Bellamy assert that the case of Darfur illustrates that armed intervention in response to a supreme humanitarian emergency is only likely when a state, or a group of states or regional organisations become so animated that they are prepared to incur significant political and material risks to ease the plight of suffering strangers and to secure international legitimacy for their actions.[57] Furthermore, the Darfur Case suggests that Western states are not prepared to invest the requisite political resources to conduct effective humanitarian interventions and to match their bold words on the responsibility to protect with concomitant action.[58] The scholars do not believe that this gap between words and deeds is immutable, however, and argue that advocates of R2P should find ways to convince these states to live up to their statements of intent, accept the costs, and take the necessary risks to save strangers.

56 Anonymous, *Ensuring A Responsibility to Protect: Lessons From Darfur*.

57 Williams and Bellamy, *The Responsibility to Protect and the Crisis in Darfur*, p. 42.

58 *Ibid*., p. 44.

2. THE RESPONSIBILITY TO PROTECT

2.1. Background

The concept of 'responsibility to protect' is commonly associated with the ICISS Commission's report published in December 2001,[59] but the concept was also endorsed by states at the UN Summit in New York in 2005,[60] and has been further elaborated in various subsequent reports and documents. But many of its inherent ideas and elements can be traced to earlier works and international reports, paving the way for this new doctrine.[61]

In 1993 Francis M. Deng wrote of international responsibility for protecting internally displaced persons, involving the need to force access to provide protection and assistance in the most extreme situations,[62] and in 1996 Deng *et al.* developed the idea of 'sovereignty as responsibility', basing their arguments on limitations of sovereignty in international law, legal doctrine and state practice since the end of the Second World War.[63]

In the article *Two Concepts of Sovereignty* in the Economist, the UN Secretary-General Kofi Annan expressed a broadened view of sovereignty by highlighting the sovereignty of individuals to counterbalance that of states.[64] He stated:

> To avoid repeating such tragedies in the next century, I believe it is essential that the international community reach consensus – not only on the principle that massive and systematic violations of human rights must be checked, whenever they take place, but also on the ways of deciding what action is necessary, and when and by whom.[65]

After NATO´s intervention in Kosovo, the UN Secretary-General Kofi Annan made compelling appeals, in his speech at the General Assembly (1999) and in his report to the Millennium Summit (2000), to the international community to once and for all find an international consensus for resolving the dilemma of humanitarian intervention.[66]

The report from the Independent International Commission on Kosovo, which assessed the legality of the NATO intervention in 1999, contained language on 'duties and responsibilities' for the international community. It recommended, among other things, a framework of principles for humanitarian intervention, and moreover, the formal adoption of such a framework by the General Assembly of the United Nations in the form of a 'Declaration on the Right and Responsibility of Humanitarian Intervention', and that the UN Charter be adapted to this Declaration either by appropriate amendments or by a case-by-case approach in the Security Council.[67]

A series of government-commissioned reports elaborating on the topic of humanitarian intervention emerged in the aftermath of the Kosovo intervention. The UK issued guidelines for humanitarian intervention that were circulated to the other permanent members of the Security Council in late 1999 and 2000.[68] They had sought to formalise agreement within the Security Council on guidelines along these lines in a Presidential statement of the Council. The initiative was supported by the Dutch, but resisted by Russia, which would only accept such a formula provided that it must always have the express authorisation of the Security Council – an unacceptable compromise. Instead, the UK wanted to leave the possibility of Western action outside the UN Charter framework unresolved and open. The Danish DUPI report (1999) and the Dutch AIV/CAVV report (2000) discussed the legality and legitimacy of humanitarian interventions, proposing assessment frameworks

59 ICISS, *The Responsibility to Protect*.

60 World Summit Outcome Document, 15 September 2005.

61 The present French Minister for Foreign Affairs, Bernard Kouchner, has been portrayed as one of the very first supporters of a moral 'responsibility to protect' by hiring a boat in 1979 to rescue Vietnamese boat people fleeing from the Ho Chi Minh communist regime, see Cohen, Nick, *We must do our moral duty in Burma: The French foreign minister has a history of standing up for human rights against ideologues. Now he's taking on the UN,* Guardian Weekly, 16 May 2008.

62 Deng, Francis M., *Protecting the Dispossessed. A Challenge for the International Community*, The Brookings Institution, Washington D.C., 1993, pp. 134-135, 138-139.

63 Deng, Francis M., Kimaro, Sadikiel, Lyons, Terrence, Rothchild, Donald, Zartman, William I., *Sovereignty as Responsibility. Conflict Management in Africa*, The Brookings Institution, Washington D.C., 1996, see in particular pp. 2-19, 27-33.

64 Annan argued that 'individual sovereignty' must also enter the calculations and not merely state sovereignty, Annan, Kofi, *Two Concepts of Sovereignty,* The Economist, 18 September 1999.

65 *Ibid.*

66 See Annan, Kofi, *Two Concepts of Sovereignty*, New York, 20 September 1999, United Nations, (Ed.), The Question of Intervention. Statements by the Secretary-General, United Nations Department of Public Information, New York, 1999, pp. 37-44 and Annan, Secretary-General Kofi, *We the peoples: the role of the United Nations in the 21st century*, Department of Public Information, United Nations, New York, 2000, pp. 47-48.

67 Independent International Commission on Kosovo, *Kosovo Report. Conflict, International Response, Lessons Learned*, Oxford University Press, New York, 2000, p. 187. The Kosovo Commission's framework for humanitarian intervention, see pp. 10, 192–197.

68 Foreign Secretary Robin Cook articulated these guidelines or understandings for humanitarian intervention on various occasions and developed them from six principles into 10 elements of a framework to guide the international community, see Cook, Robin, *Speech 19 July 2000, Humanitarian Intervention, United Kingdom Materials on International Law*, Marston, Geoffrey (Ed.), British Yearbook of International Law, Oxford University Press, Oxford, 2000; *UK Paper on International Action in Response to Humanitarian Crises*, British Yearbook of International Law, Oxford University Press, Oxford, 2001.

with similar sets of criteria for future interventions.[69] This was not the first time criteria were developed for the purpose of justifying or legitimising humanitarian intervention but these reports marked the beginning of a new movement among certain liberal states to press for an international consensus on humanitarian intervention.[70]

In response to the Secretary-General's challenge and call for consensus, the Canadian Government, on the initiative of Foreign Minister Lloyd Axworthy, established the ICISS Commission in the autumn of 2000. Given this background, it appears clear that the ICISS Commission picked up already existing ideas and trends, developed them further and wisely packaged them neatly into a doctrine on a 'responsibility to protect'. Weiss affirms that the ICISS report is neither a forerunner nor pacesetter, but rather stakes out a helpful middle ground.[71] According to Newman, the reports of the Dutch AIV/CAVV, DUPI, the Kosovo Commission and the ICISS Commission all find a consensus in the broadening of the notion of threats to international peace and security, and by this reaffirm political liberalism and the doctrine that human welfare ultimately underpins the stability of political institutions.[72]

The ICISS ideas of R2P were further integrated in the Secretary-General's Action Plan to Prevent Genocide, which was launched in April 2004 and is viewed as a serious attempt to provide guidelines to identify and respond to genocide and other extreme cases.[73] The concept was furthermore endorsed and developed in the High-Level Panel report *A More Secure World* (2004), and in the UN Secretary-General's report *In Larger Freedom* (2005).[74] Finally, the concept of R2P came to be recognised as a concept or principle in a distilled short version and somewhat modified form in the UN Summit Outcome Document in September, 2005. The 2005 endorsement by states of R2P is the most authoritative and the Outcome Document has the status of a General Assembly resolution that may contribute to an emerging norm of R2P in international law.

69 Danish Institute of International Affairs, *Humanitarian Intervention. Legal and Political Aspects*, DUPI, Copenhagen, 1999, pp. 106-111; Advisory Council on International Affairs & Advisory Committee on Issues of Public International Law, *Humanitarian Intervention*, The Hague, 2000, pp. 28-32.

70 For example, a serious effort to develop a doctrine on humanitarian intervention and a preliminary list of criteria among lawyers was made in the 1970s in the International Law Association, and has been continually discussed and debated in the legal doctrine for many centuries.

71 Weiss, Thomas G., *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*, Security Dialogue, vol 35, 2, 2004, pp. 135-155, p. 140.

72 Newman, Edward, *Humanitarian Intervention, Legality and Legitimacy*, International Journal of Human Rights, vol 6, 4, Autumn, 2002, pp. 102-120, p. 117.

73 Annan, Kofi, Preventgenocideinternational (Publ.), *UN Secretary-General Kofi Annan's Action Plan to Prevent Genocide. April 7, 2004, SG/SM/9197 AFR/893*, "http://www.preventgenocide.org/prevent/UNdocs/KofiAnnansActionPlantoPreventGenocide7Apr2004.htm", (2004-11-15).

74 The United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, United Nations Publications, New York, 2004; Annan, Kofi, *In Larger Freedom. Towards Development, Security and Human Rights for All. Report of the Secretary-General*, United Nations Publications, New York, 2005.

2.2. The ICISS report – 'The Responsibility to Protect' (2001)

The ICISS Commission constituted a response to the call by the UN Secretary-General to the international community to find a new consensus on how to approach and respond to situations of massive violations of human rights and humanitarian law within a state. Its main aim was to look into the legal, moral, operational and political questions in the debate on humanitarian intervention. The Commission was chaired by former Australian Foreign Minister Gareth Evans and the seasoned UN diplomat Mohamed Sahnoun, and was financed by Canada and the Carnegie and McArthur Foundations. The report, which was released in New York in December 2001, is based upon extensive research, wide and global consultations and on more than ten regional roundtable conferences. Although the Commission purported to develop a truly global product, the report has still been criticised as being confined to liberal international discourse.[75]

The report was published in the aftermath of September 11, and was pushed quickly into the shadows of the international security agenda. Weiss states "when the dust from the World Trade Center and the Pentagon settled, humanitarian intervention became a tertiary issue".[76] Although the impact of the report was not immediate, it later came to shape the developing agenda and reformulations of a doctrine on humanitarian intervention and the responsibility to protect. Since the humanitarian crisis loomed in Darfur in 2003, the concept of R2P became revitalised and was widely discussed, debated and analysed, and finally also recognised and endorsed 2005. The ICISS report has met with much approval and praise from many Western and liberal states, but with concern from certain non-Western states. Among other things, there has been concern over the prospect of consistency in real world applications and over the risk of its serving as a justification or pretext for inappropriate interventions.

75 MacFarlane, Neil S., Thielking, Carolin J., Weiss, Thomas G., *The Responsibility to protect: is anyone interested in humanitarian intervention?*, Third World Quarterly, vol 25, 5, 2004, pp. 977-992, p. 981.

76 Weiss, *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*, p. 136.

The report's ideas however are perceived to be innovative in several ways.[77] The concept of R2P is based upon the concept of human security, and consequently manages to merge two fields – the need for a broader security perspective and the need for the international community to make humanitarian interventions under certain circumstances to protect people's security. It furthermore introduces a change of terminology, away from the highly controversial right to humanitarian intervention to a responsibility to protect.

The first of the report's basic principles provides that 'state sovereignty implies responsibility', and the primary responsibility to protect lies in each individual state with respect to the population. The second basic principle of R2P is formulated as follows:

> [T]he primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[78]

Thus, the primary, (internal) responsibility to protect falls on each and every state vis-à-vis its own population, and is directed towards both the citizens and the international community through the UN, according to the ICISS report. The internal responsibility of a state to protect addresses 'the safety and lives of citizens and promotion of their welfare'. More specifically, the report mentions 'internal war, insurgency, repression, and state failure' as examples of situations where a population may suffer serious harm, against which a state should protect them.[79]

Obligations to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity are derived from a state's obligations under human rights, humanitarian law and international criminal law, both through treaty and customary law.[80] Some of these norms, or aspects of them, have also attained the status of *jus cogens* (peremptory norms which are non-derogable), such as the prohibition on torture, which is included as an act that could constitute a war crime and a crime against humanity. Certain of these obligations can be argued to be owed to the international community as a whole as *erga omnes* obligations (norms owed towards everyone), for example, the prohibition on genocide and torture. The legal obligations of each state to protect are owed towards other states through their commitments in different treaties and customary law, but the rights holders or subjects of protection are the individuals on the state territory.

But there is also an apparent lack of a normative basis for the protection of people within a state. One problem area is the absence of international legal obligations to protect the human security of IDPs from grave violations of human rights and humanitarian law that do not amount to genocide, war crimes, ethnic cleansing or crimes against humanity. But in general, the main bulk of the internal and primary responsibility of states to protect their populations is part of *lex lata*, that is, 'law as it is'.

The Commission also proposes an external, subsidiary responsibility for the international community of states, if a state is unwilling or unable to protect its own population. The new terminology focuses attention where it

77 See Weiss, Thomas G., *Cosmopolitan force and the responsibility to protect*, International Relations, vol 19, 2, 2005, pp. 233-237, p. 234.

78 ICISS, *The Responsibility to Protect*., p. XI.

79 *Ibid*., p. XI, (1). B.

80 Obligations to prevent certain acts exist in a number of treaties, including most human rights conventions, as well as conventions protecting against certain crimes, Milanovi , Marko, *State Responsibility for Genocide: A Follow-Up,* European Journal of International Law, vol 18, 4, 2007, pp. 669-694, p. 684; See International Covenant on Civil and Political Rights,16 December 1966, 999 UNTS 171, ; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, General Assembly resolution 2200A (XXI) of 16 December 1966, ; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, ; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, ; Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13, ; Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, ; First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 302, ; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, ; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, ; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, ;Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, ; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, ; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, ; Hague Convention IV Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, AJIL Supp. 90-117 (1908), ; Rome Statute of the International Criminal Court, 17 July 1998, 37 ILM 999, ; With regard to the prevention of genocide in particular see Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgement*, p. 699; Bosnia v. Serbia Case (2007), para. 429.

should be most concentrated – on the human needs of those seeking protection or assistance.[81] The responsibility encompasses more than humanitarian intervention, suggesting an integral approach where prevention and rebuilding are included. Thus the concept of responsibility to protect, as proposed by the ICISS report, embraces three elements: the responsibility to prevent, react, and rebuild, and thus not just the military aspects of humanitarian intervention. Protection by military means is only one aspect among several different means available in the second element of the responsibility to react, which also includes reaction by diplomatic, political, juridical and economic means. The responsibility to protect is the single most important element of R2P, and it is argued that the international community needs to change its basic mindset from a culture of reaction to one of prevention. However, until this is done, it has been argued that "we need to forge a consensus on the issue of intervention."[82] I shall, as stated earlier, deal only with the military aspect of the element of a responsibility to react – a very small portion of the concept, but nonetheless one which carries major implications.[83]

Vesting the primary responsibility for the protection of humanitarian standards in the state itself is natural but not unproblematic. With it follow the major concerns associated with failed and weak states, which constitute one of the greatest sources of international instability.[84] The decision to intervene by military means to protect people when a state is unable or unwilling to discharge its primary responsibility, is suggested to be limited to extreme cases that genuinely "shock the conscience of mankind", or situations that present such an obvious and imminent danger to international security that they call for coercive military intervention. In order to identify such exceptional cases, the Commission proposed a set of criteria that must be fulfilled before a decision to intervene is taken. A *just cause threshold* must be met, involving the danger of a large-scale loss of life or large-scale ethnic cleansing. These circumstances can be either actual or apprehended (imminent), so that an intervention can be undertaken either to halt or avert such a situation. Consequently, the ICISS formula for humanitarian intervention legitimises anticipatory measures in response to clear evidence of probable large-scale killing, as explained in the report, in order to "avoid the morally untenable position of having to await the beginning of a genocide before being able to stop it".[85] Four precautionary principles for military intervention are also included in the criteria, which demand a) a right intention, b) last resort, c) proportional means, and d) reasonable prospects of achieving the intended results.[86]

The ICISS idea of a "right authority" for those authorising or carrying out the intervention is wider than that found in the subsequent reports dealing with the concept of R2P. The ICISS report acknowledges that the Security Council is the appropriate body to authorise military interventions, but if the Security Council rejects a proposal or fails to deal with it within a reasonable time, the Commission proposes alternative options. The matter could in such situations be considered in the General Assembly under the 'Uniting for Peace' procedure, or if that fails, by a regional organisation, subject to its seeking a Security Council authorisation under Chapter VIII of the UN Charter. The Commission furthermore warns that if the Security Council *fails* to discharge its responsibility to protect in 'conscience-shocking situations crying out for action', the Council should take into account that it is unrealistic to expect concerned states to rule out other means or forms of action to meet the security emergency.[87] Thus the possibility of coalitions of those willing to take action doing so under the R2P doctrine is not exactly recommended, but it is explicitly not ruled out in situations where all other responsible actors fail to.

Lewitt argues that the ICISS solution to the problem of Security Council inaction does not create a dam of protection but rather a conceptual quagmire. If countries within regions are perceived to be more sensitive and best suited to enforcing peace by having a greater stake, then he argues that they should be the most qualified to make informed decisions on intervention instead of having to seek prior authorisation from the General Assembly under the Uniting for Peace procedure.[88] He claims that the state practice and treaty developments in Africa illustrate the need to find consensus on a set of proposals for military intervention that acknowledge the validity of interventions not authorised by the Security Council or the General Assembly. But the ICISS proposition that the Security Council is the only right authority is undermined according to him by the contradictory suggestion of a doctrine of *ex post facto* authorisation.

81 ICISS, *The Responsibility to Protect*, p. 15.

82 See Levitt, Jeremy I., *Book Review. The Responsibility to Protect: A Beaver Without a Dam?*, Michigan Journal of International Law, vol 25, 2003-2004, pp. 153-177, p. 165.

83 It should be pointed out, however, that this author agrees with the claim that prevention is the single most important dimension of R2P.

84 Welsh, Jennifer, Thielking, Carolin, MacFarlane, Neil S., *The Responsibility to Protect. Assessing the Report of the International Commission on Intervention and State Sovereignty*, International Journal, vol 57, 4, Autumn, 2002, pp. 489-512, p. 497.

85 ICISS, *The Responsibility to Protect*, pp. 32-33.

86 *Ibid*., pp. XII-III, 31–37.

87 At the same time the Commission stresses that the credibility of the UN may suffer as a result, and that the task is not to find alternatives to the Security Council but to make it work much better than it does at present. *Ibid*., p. XIII, 49, 55.

88 Levitt, *Book Review. The Responsibility to Protect: A Beaver Without a Dam?*, pp. 171-172.

He claims therefore that the ICISS approach to protect populations at risk creates a swamp rather than a dam of protection, and argues that both the Uniting for Peace procedure and the Chapter VIII *ex post facto* approach are legally ambiguous and weak.

After the launch of the report, Commission members and other R2P proponents and advocators dedicated significant time to spreading its ideas with a view to reaching some form of international consensus on the doctrine. The next step for the authors of the report was to induce the UN General Assembly and the Security Council to adopt resolutions affirming the just cause criteria and the four precautionary principles. This was achieved at the General Assembly Special Session of the UN World Summit in 2005 when the Outcome was adopted, endorsing the R2P. The Security Council has also adopted several resolutions reiterating R2P.[89]

2.3. The R2P in the Outcome Document of the UN World Summit (2005)

The world's Heads of state endorsed the UN reform agenda at the World Summit in New York on 15 September 2005. After many long and strenuous negotiations, the member states managed to agree on the formulation of a principle of responsibility to protect in the Outcome Document.[90] This provision has been hailed as one of the few true successes of the Summit. The primary responsibility of each state to protect its population was reinforced in the Outcome Document (paragraph 138), but the subsidiary external responsibility of the international community was also acknowledged and specified. The states also recognised the concept of human security and committed themselves to discussing and defining it further in the General Assembly.[91] A failure of agreement in the Document, however, is the absence of language that called on permanent members of the Security Council to refrain from using the veto in cases of genocide, war crimes, ethnic cleansing and crimes against humanity.[92]

According to Bellamy, disagreements on the responsibility to protect were centred on two main issues: firstly, whether the Security Council alone would have the authority to authorise humanitarian intervention, and secondly, whether to accept criteria or guiding principles for decisions on the use of force.[93] In paragraphs 138 and 139, in the chapter on human rights and the rule of law, the responsibility to protect was formulated:

> 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 to 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 organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing 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.

The differences between this approach to R2P and the one in the ICISS report are several. The Outcome Document does not affirm that R2P is an emerging

89 See *e.g.* S/RES/1556 (2004); SC Res. 1674 (2006), 28 April 2006, UN Doc S/RES/1674, 2006; S/RES/1706 (2006); SC Res. 1755, 30 April 2007, UN Doc S/RES/1755, 2007; and S/RES/1769 (2007).

90 World Summit Outcome Document, 15 September 2005.

91 *Ibid.*, p. 31, para. 143.

92 Bannon, Alicia L., *The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism*, Yale Law Journal, vol 115, 2006, pp. 1157-1165, p. 1160. Bannon explains that it was largely due to US pressure that the final Summit agreement removed this proposed language, and she argues that this gap leaves permanent members with a powerful negotiation tool, permitting bad faith vetoes in the face of clear atrocities.

93 Bellamy, Alex J., *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, Ethics and International Affairs, vol 20, 2, 2006, pp. 143-169, p. 164.

norm that spans a continuum of prevention, reaction, and rebuilding.[94] Neither does it include the criteria or precautionary principles for intervention, mainly due to the strong opposition from the United States, China and Russia. The United States did not want criteria to limit its freedom of action or to reinforce R2P's prescriptive component. China and Russia opposed criteria for fear of abuse, while other governments expressed concern during the General Assembly debates that the criteria would be applied arbitrarily or subjectively.[95] The criteria for R2P have instead been suggested to be further discussed in the General Assembly. Instead, paragraph 139 refers to already legally defined crimes in international law, namely genocide, ethnic cleansing, war crimes and crimes against humanity, in order to frame the humanitarian situation that should be at hand. The same approach was taken in the High-Level Panel Report. Whether these more legal, rather than political, criteria will help to bring states into consensus on whether and when to take collective measures to protect people within states is difficult to know. Byers finds this set of crimes to constitute a negative and unwarranted limitation upon the Council's ability to act on the responsibility to protect doctrine, especially since it has acted both to prevent other humanitarian emergencies, such as mass starvation in Somalia, and to restore democracy in Haiti.[96] Hilpold similarly sees the criteria as being equivalent to a very soft self–regulation.[97] On the other hand, the risk of the Council becoming active in fewer rather than more humanitarian cases might not be too great. As Byers points out, the Security Council will not in the end be bound by non-binding guidelines and in reality it will continue to have all means available to it under the UN Charter and international law to make decisions on military interventions.

The paragraph endorsing a principle on responsibility to protect stipulates a set of elements or criteria that are discussed briefly below. The analysis on the external responsibility to protect may be separated into two parts – one dealing with the non-military measures to protect human security, and the other establishing when military intervention may be considered. Both aspects of the principle of R2P in the Outcome Document could be regarded as a moral and political commitment by states with binding effects for international states, but not yet a legal responsibility in the form of legal duties. However, certain aspects of the commitment to protect by non-military means reflect international law proper, in particular the obligation to prevent genocide, the enforcement of international humanitarian law, and the duty to co-operate for the promotion and respect of human rights.[98]

Firstly, it is established that it is the international community, through the United Nations, that assumes responsibility for helping to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility is to be exercised through the use of appropriate diplomatic, humanitarian and other peaceful means (in accordance with Chapters VI and VIII of the Charter). These 'non-forceful' measures shall, according to the formulation, be channelled through the UN, but should also for natural reasons be possible to undertake individually by states when such measures are not in violation of international law.[99]

Secondly, when considering military enforcement measures as a means of carrying out the responsibility to protect, the states express that they are *prepared* to carry out this responsibility through the Security Council, not that there is a an obligation to do so. It is notable that this part of the principle is not formulated with obligatory language in the form of a duty, but by simply stating a preparedness to act collectively in a timely and decisive manner. Thus the states are in the position of indicating that they may use force to protect, but that this shall be achieved collectively through Security Council authorisation under certain circumstances and on a case-by-case basis. The Outcome Document confirms a legal right on the part of the Council to protect by military means, but not a legal obligation to protect in all cases alike. Paragraph 139 furthermore establishes a moral and political responsibility for the Security Council to consider the protection of populations by military means when certain circumstances prevail.

The military aspect of the principle to protect in the Outcome Document is connected to several criteria in order for such a forceful measure to be considered. Firstly,

94 Pace and Deller, *Preventing Future Genocides: An International Responsibility to Protect*, p. 27. They confirm that the final text on R2P of the Outcome Document is weaker than in the High-Level Panel or the Secretary-General's report.

95 *Ibid*., p. 28.

96 Byers, Michael, *High ground lost on UN's responsibility to protect*, Winnipeg Free Press, September 19, 2005.

97 Hilpold, *The Duty to Protect and the Reform of the United Nations - A New Step in the Development of International Law*, Bogdandy, Armin von, Wolfrum, Rüdiger, Philipp, Christian (Eds.), Max Planck Yearbook of United Nations Law, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 55.

98 See Articles I and VIII of the Genocide Convention (1948) Article 1 of the four Geneva Conventions (1949) on humanitarian law, and Articles 55-56 of the UN Charter together with principle four in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970); GA Res. 2625 (XXV), 1970.

99 The prohibition on genocide, for example, is an *erga omnes* obligation that all states have a legal interest in protecting and upholding, and the Genocide Convention also imposes legal obligations individually on states to prevent and punish genocide. These obligations, however, do not explicitly include the right to use military force without Security Council authorisation.

the forceful action must be made "in accordance with the UN Charter, including Chapter VII". This phrase can apparently be read in different ways. One way, which the majority of states would submit to, is that enforcement action must be in accordance with Chapter VII. Hence only Security Council authorised military action to protect was accepted by states. The Outcome Document is generally considered to have placed the external responsibility to protect by military means squarely under the auspices of the Security Council by focusing primarily on collective action through the Security Council and Chapter VII.

Paragraph 139 also mentions co-operation with regional organisations 'as appropriate'. Even though the paragraph includes a reference to Chapter VIII, it is not made in relation to the phrase indicating co-operation between the Security Council and regional organisations. It is therefore unclear in what way this co-operation may take form, and whether this open spot allows for *ex post facto* or implied legitimisation of unauthorised humanitarian interventions by regional organisations.[100] However, the paragraph completely leaves out any explicit statement on the possibilities open for either regional organisations or coalitions of the willing to make unauthorised humanitarian interventions. The topic was far too controversial to be considered in the intergovernmental debates leading to the Summit, and its main focus was on improving, reforming and strengthening the UN system rather than considering alternative ways of operating outside the UN.[101] A supportive factor for this interpretation is the placing of the R2P paragraph under Chapter IV of the Outcome Document, dealing with human rights and the rule of law, separate from the section on the use of force. One may argue that the Global Centre for the Responsibility to Protect also supports this interpretation by its official homepage statement that the World Summit Outcome consensus on R2P was silent on the question of what would happen if the Security Council fails to act. The Centre appears to support the opinion that even in a situation where peaceful means are inadequate and the precautionary principles are satisfied, it would be illegal for states to take military action in the absence of a Security Council resolution (or a General Assembly resolution under "Uniting for Peace").[102]

The debates at the UN Summit also support this interpretation. There was no state that officially made explicit statements in support of unauthorised humanitarian intervention, and even the strongest proponents in the EU and Africa stated that the use of force to protect was a measure only of last resort and exceptional circumstances. The view expressed by Russia in declaring that the UN was already capable of responding to crises under current situations supported the interpretation that the Security Council already has the power and legal right to carry out its external responsibility to protect.[103]

The other alternative interpretation, which some commentators propose, is that military action may also be taken separately from the Security Council, as long as it is done in accordance with the UN Charter. This interpretation, however, is based upon reinterpretations of the UN Charter with regard to unauthorised humanitarian interventions, which have not yet been accepted by the majority of states. Bellamy and Stahn claim that the key phrase in paragraph 139 that "we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter", could be read as suggesting that concerned states may choose to work with the Security Council, but also through alternative arrangements, justifying their action on R2P language.[104] Bellamy believes that this small window of opportunity was reinforced in the section on the use of force. As a result states would be able to make unauthorised interventions aimed at either upholding the UN's humanitarian principles outlined in Article 1 of the UN Charter or acting on 'implied authorisation'. He is arguing that the UN Charter's purpose of promoting human rights (Article 1 (3)) together with a restrictive interpretation of the prohibition on the use of force (Article 2 (4)), would allow for unauthorised military

100 It has been argued *de lege ferenda* that in exceptional cases, the doctrine on implied authority would be conceivable for unauthorised interventions under very specific and limited circumstances; 1) if the Security Council resolution language points towards implied authority, 2) the resolution is passed with a concurring vote of the five permanent members and the majority of all Council members, and 3) it is clear to the members of the Council that their action will be taken as an implicit authorization. When it comes to the application of the doctrine of *ex post facto* authorisation, it is up to the Security Council to evaluate and determine the presence of exceptional circumstances for a subsequent authorisation legalising the action. It could, however, only be applied to situations where prior authorisation would not and could not have changed the course of action. In both cases the application of the doctrines must be based on 1) a need for urgent action, 2) the unanimity of the permanent Security Council members, and 3) sufficient evidence for tacit Council approval of the action. See Ress/Bröhmer, *Article 53*, Simma, Bruno (Ed.), The Charter of the United Nations. A Commentary, 2nd edition, Oxford University Press, Oxford, 2002, p. 866, para. 25.

101 Pace and Deller, *Preventing Future Genocides: An International Responsibility to Protect*, p. 29.

102 See Global Centre for the Responsibility to Protect (Publ.), *Frequently Asked Questions*, "http://globalr2p.org/pdf/FAQ.pdf", (2008-07-17), see under the question "What happens if the Security Council fails to act?"

103 Responsibility to Protect - Civil Society (Publ.), *State-by-State Positions on the Responsibility to Protect, 11 August 2005*, "http://www.responsibilitytoprotect.org/index.php/civil_society_statements/294", (2005-10-11).

104 Bellamy, Alex J., *Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect after the 2005 World Summit*, Policy Brief no.1 of the initiative Ethics in a Violent World: What Can Institutions Do?, Carnegie Council, 2006, p. 5; Stahn, Carsten, *Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?*, American Journal of International Law, vol 101, 1, 2007, pp. 99-120, p. 109.

intervention for humanitarian purposes if it does not threaten the territorial integrity or political independence of a state. Similarly, regional action would not violate the UN Charter (Article 53) if implied legitimisation of the Council is sought. This interpretation, however, conflicts with the express wording "through the Security Council", and should therefore not be given too much weight, but rather be seen as a *lege ferenda* argument (how the law should be) for further action when the Security Council fails to take action.

In the section on the rules on the use of force in the Outcome Document, the member states reiterate the obligation to "refrain from the threat or use of force, in any manner inconsistent with the Charter".[105] No criteria or guidelines for intervention are included in this passage. The states furthermore pledge themselves to be determined to

> take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations that might lead to a breach of the peace.[106]

This passage has been interpreted by some scholars as leaving the door open for unilateral humanitarian intervention.[107] I disagree with this conclusion. It seems somewhat overly optimistic and leaves out a contextual interpretation of the Document. Two paragraphs below this passage, the Document makes clear the impossibility of unauthorised unilateral humanitarian interventions:

> We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.[108]

It is therefore reasonable to assert that the Outcome Document neither advances the question of how to deal with unauthorised interventions nor sets it back.[109] At the most, one could concede that the paragraph leaves the door open for interpretation, but that it lacks express and explicit acknowledgment of the rights or responsibilities of regional organisations or a coalition of willing states to protect by military means.

A second criterion for military action, is that the Security Council is to consider the responsibility to protect on a case-by-case basis. This clearly shows that member states have agreed to limit responsibility to that of a permissive right rather than a duty to be carried out in all cases alike. The decision to take military action will be based upon a political assessment by the Council in the individual case. This element reflects and takes into account the political reality and existing power structures in the Council and the world order.

Thirdly, the decision to protect people by military means is a question of last resort. The criterion stating that "should peaceful means be inadequate" can be interpreted in different ways. Some commentators interpret the phrase as being a requirement that peaceful means must have been exhausted. Another more convincing interpretation is that peaceful means must be considered to have had no impact on, or were unable to change, the security situation. Thus it could be argued that it should be given the same interpretation as that of the same phrase in Article 42 of the UN Charter. There it means that not all forms of peaceful means must have been employed and failed, but that the Security Council believes that such means would be inadequate to address the security situation in question.

Fourthly, the state has to 'manifestly fail' to protect its population from genocide, war crimes, ethnic cleansing or crimes against humanity, rather than just be unwilling or unable to protect its population from mass atrocities, in order for the responsibility to fall to the international community. The wording "national authorities are manifestly failing to protect their populations" increases the threshold (cf. in the ICISS report) for the UN to take action to protect. It furthermore delays early assessment and action, and excludes the possibility of forceful preventive action. Precisely what 'manifestly fails' entails is difficult to ascertain and the future of Council practice will have to show where the threshold lies. Anti-interventionists have argued for non-intervention by the UN with arguments referring to the primary responsibility of the state and that the UN does not as yet have a responsibility to protect. Stahn

105 World Summit Outcome Document, 15 September 2005, p. 21, para. 77.

106 *Ibid*., p. 21, para. 77.

107 Byers, Michael, *War law. Understanding international law and armed conflicts*, Grove Press cop., New York, 2005, pp. 40-50; Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, pp. 166-167.

108 World Summit Outcome Document, 15 September 2005, p. 22, para. 79.

109 Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, p. 168.

argues that the terminology is unclear in the Outcome Document and could thus be invoked in order to prevent UN action (as in the case of Darfur on genocide).[110] Some commentators have argued that this formulation does not provide for the Security Council to act on the basis of neglect and obstruction of a state to provide security for its population.

However, in the immediate aftermath of the humanitarian crisis in Burma after the Nargis cyclone in May 2008, France's Foreign Minister Bernard Kouchner suggested invoking the 'responsibility to protect' in the UN Security Council as a legal means to prise open Burma's borders to outside help.[111] The call, however, was later retracted by Kouchner as being inappropriate in a non-conflict situation, and came to generate an intense debate in policy, advocacy and media circles. Edward Luck, the Secretary General's Special Adviser on R2P argued, for example, that "linking the 'responsibility to protect' to the situation in Burma is a misapplication of the doctrine".[112] The Secretary-General also rejected the application of the R2P and stated:

> Our conception of RtoP, then, is narrow but deep. Its scope is narrow, focused solely on the four crimes and violations agreed by the world leaders in 2005. Extending the principle to cover other calamities, such as HIV/AIDS, climate change or response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.[113]

The omission of protection, unwillingness to protect, or even obstructing the protection of the state's own population all appear to be insufficient for the Security Council's external 'responsibility to protect' by military means to be activated according to present state practice and the application of the norm that has existed since 2005.[114] What distinguishes the case of Burma from others where the Council has authorised humanitarian intervention is the lack of the ingredient of armed conflict as an element contributing to the Council's determination of a 'threat to the peace' under Article 39 of the UN Charter. The Council has determined other situations short of armed conflict to constitute at threat to the peace, for example in Haiti, but the situation in Burma would have required a new interpretation and a further widening of the Council's notion of 'a threat to the peace' so as to also encompass natural catastrophes where the state concerned manifestly fails to protect its population.

However, Gareth Evans and other commentators have argued that in the case of Burma the refusal to co-operate with the external humanitarian relief agencies could in itself be considered a crime against humanity.[115] The Canadian-sponsored commission report that initiated the R2P concept in fact anticipated just this situation in identifying one possible case for the application of military force as 'overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.'

Deliberate omission to protect a population from natural disasters, starvation and disease are not encompassed as such by the crimes listed in the Outcome Document, but it could be argued that a policy of malign neglect and the blocking of external humanitarian aid to a suffering population has widespread security consequences. The systematic causing of great suffering in such circumstances should be regarded on an equal footing with an 'attack against civilians' and 'as other inhuman acts' and thus as constituting a 'crime against humanity'.[116] Apparently this argumentation was not persuasive in this case. Even if the negligence and deliberate obstruction by the regime in Burma were to be considered a 'crime against humanity', the Security Council would still have had to find that this crime and the humanitarian situation constituted a 'threat to the peace' under Article 39 in order to decide whether or not to take enforcement measures under Chapter VII. The humanitarian situation in Burma was never determined to constitute such a threat.

Lastly, any military action is to be undertaken in order to protect people from genocide, war crimes, ethnic cleansing or crimes against humanity. The ICISS just cause threshold for military action was dropped in the Outcome Document, but it could be claimed that any of these listed grave crimes more or less constitute a substitute for the threshold. The formulation does not appear to allow for preventive action, since the state has to be

110 Stahn, *Responsibility to Protect: Political Rhetoric of Emerging Legal Norm?*, p. 115; see also same opinion in Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, p. 33.

111 Thakur, Ramesh, e-International Relations (Publ.), *Burma and the responsibility to protect: first, do more good than harm, 20 June 2008*, "http://www.e-ir.info/?p=493", (2008-07-09); Cohen, *We must do our moral duty in Burma: The French foreign minister has a history of standing up for human rights against ideologues. Now he's taking on the UN*, Guardian Weekly, 16 May 2008.

112 Chatpar, Sapna, Responsibility to Protect-Civil Society (Publ.), *Responsibility to Protect and Burma/Myanmar*, 9 May 2008, Digest Number 350 .

113 Secretary-General Ban Ki-moon, UN Department of Public Information (Publ.), *On 'Responsible Sovereignty: International Cooperation for a Changed World', 16 July 2008*, "http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm", (2008-07-26).

114 Thakur, e-International Relations (Publ.), *Burma and the responsibility to protect: first, do more good than harm*.

115 Evans, Gareth, *Facing Up to Our Responsibilities,* The Guardian 12 May 2008.

116 On the definition of crimes against humanity that would apply to this situation, see Article 7 (1)(k) of the ICC Statute: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

already seen to be manifestly failing to protect when the appropriate responsibility is to be transferred to the international community. Bellamy explains that both Russia and China rejected this possibility, which means that the ICISS and the High-Level Panel's recommendations that action may also be taken in anticipation in order to prevent a humanitarian catastrophe, were dropped in the Outcome Document.[117]

On the question of the potential impact of R2P in the Outcome Document, Brunnée and Toope state that it might only have been intended as a rhetorical shell by some states:

> It could be argued that the inclusion of the responsibility to protect in the Outcome Document was simply the result of a trade-off, in which some states agreed to the articulation of the concept because they gained other benefits. Primary amongst these benefits would be the inclusion of many references to development assistance as a core responsibility of the United Nations and of wealthy member states. Bargaining might also have resulted in the exclusion of certain proposals, such as a definition of terrorism and details related to the new Human Rights Council, with the responsibility to protect being included because it was actually less worrisome to some member states than were other proposals. They might have been willing to go along with a rhetorical shell.[118]

However, the scholars assert that it is difficult to dismiss the Outcome Document's endorsement of the R2P as mere 'cheap talk'. But they point out the failure to design a role for the new UN Peacebuilding Commission in relation to the responsibility to protect, despite the obvious interconnections between humanitarian crises and peace-building. In particular, the idea that the Commission would fill an early warning function was rejected, which undermines the emphasis previously placed on prevention as a central aspect of the responsibility to protect. The Summit also failed to locate the responsibility to protect in any UN structures apart from the Security Council, and this choice increases the pressure on the Security Council to meet the burden of the world's expectations for action in humanitarian crises. According to Brunnée and Toope, one reason for the opposition to adopting principles or criteria against which the Council's decision to use force in defence of suffering populations should be justified was that these would also become a test against which Security Council inaction could be measured, which would open up the way for alternative action.

Despite the critique raised with regard to the Outcome of the Summit, Kirgis believes that paragraph 139 could be viewed as a legally-significant interpretation of the scope of Security Council authority in situations of mass violence within a single state.[119] He bases this assessment, however, on a standpoint which assumes a rather narrow position on the Security Council powers to act under Chapter VII: At the same time he states that the Security Council's authority to use force under Chapter VII remaines somewhat controversial if the mass violence in question were to take place entirely 'within' a state. The general view among scholars on the Council's powers to authorise humanitarian interventions is broad, and it could be argued that this right is already part of *lex lata* and is confirmed by the Council's practice of humanitarian interventions during the 1990's.[120] It could be added that some authoritative commentators make restrictive interpretations of this practice and come to the conclusion that it is qualified to humanitarian situations emanating from internal armed conflicts.[121]

Other scholars have come to the conclusion, in particular after the Darfur case, that paragraph 139 would not have made any difference if it had existed during the humanitarian crisis in Rwanda or Bosnia.[122] Bellamy contends that the paragraph permits the view that the Security Council's responsibility is different from that of the host state, and the formulation does not solve the problem of which actor should shoulder responsibility. He maintains that R2P as formulated in the Outcome Document is unable to avoid the two most important pitfalls: 1) that of becoming a phraseology for justifying inaction or 2) that of becoming associated with the abuse of humanitarian justifications. Bellamy argues that the Darfur and Iraq Cases have in fact shown that 'responsibility to protect' language can be mobilised to legitimise opposition to intervention in humanitarian emergencies as well as to support it in other less emerging situations and can thus be abused as a grounds for justification.

Many lawyers have been slow in reacting and analysing R2P in international law, or have shown reluctance towards adopting the concept as such. A heavy critique and resistance towards it was delivered in a speech by

117 Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, p. 165.

118 Brunnée, Jutta, Toope, Stephen, *Norms, Institutions and UN Reform: The Responsibility to Protect,* Journal of International Law and International Relations, vol 2, 1, 2006, pp. 121-137, p. 132.

119 Kirgis, Frederic L., ASIL Insights (Publ.), *International Law Aspect of the 2005 World Summit Outcome Document*, "www.asil.org/insights/2005/10/insights051004.html", (2006-03-28).

120 The practice concerns the interventions in Somalia, Bosnia, Rwanda, Haiti, and East Timor.

121 Frowein/Krisch, *Article 39*, Simma (Ed.), The Charter of the United Nations. A Commentary, pp. 723-724, para. 18.

122 Bellamy, *Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect after the 2005 World Summit*, p. 8.

José E. Alvarez, the President of American Society of International Law, at the 2007 Hague Joint Conference on Contemporary Issues of International Law, 30 June 2007.[123] Alvarez states that old-fashioned notions of unimpeachable sovereignty and non-intervention against overweening power retain their traditional appeal in the war against terrorism after 9/11, and that now is not the time for such a fundamental reinterpretation of the UN Charter or other fundamental norms of international law. He states that R2P reflects a post-Cold War but pre-9/11 view of sovereignty that treats it as more of a hindrance than a protection, and argues that this view is counter-productive at a time when the largest military and economic power seems all too ready to deploy a "preventive" use of force anywhere and everywhere. The post-9/11 effects on sovereignty have arguably made it more porous, for which reason he argues that its traditional interpretation should be upheld.

Although the Outcome Document formulation on the R2P is not legally binding, it is not without some legal significance. It should first and foremost be regarded as a moral and political declaration by the international community representing the positions of states. But secondly, it may be argued that the Document is a written statement *in abstracto* for all states, which could be said to possess value of evidence of *opinio juris* (an opinion of law)[124] that may contribute to a customary process on emerging norms on R2P. The value of this statement with regard to the external R2P by military means, however, is limited to the external responsibility of the Security Council, and would therefore carry little value as evidence supporting such a forceful, external R2P on the part of other actors.

Resolutions of IGOs can, if making an implicit or explicit pronouncement on customary law, be either declaratory of existing customary law or contribute to its creation.[125] The same principles apply to the resolutions of international conferences of a universal character, *mutatis mutandis* (the necessary changes having been made), as apply to General Assembly resolutions.[126] The connection between General Assembly resolutions and *opinio juris* was confirmed by the ICJ in the Nicaragua Case,[127] and General Assembly resolutions may "in some instances constitute evidence of the existence of customary law; help to crystallise emerging customary law; or contribute to the formation of new customary law".[128] In this case it could even be discussed whether the formulation explicitly or implicitly enunciates binding rules on R2P by military means in the form of a legal pronouncement.

But the phrase "we are prepared to take collective action" most likely only indicates a political and moral commitment or duty and not a form of legal commitment in the form of a legal duty. The emerging norms on R2P by military means are concerned with legal rights and not legal duties to protect by military means. This, however, does not preclude the possibility that the Outcome Document declaration of commitment to take collective action to protect populations may in certain circumstances constitute a legal pronouncement of already existing legal duties to undertake non-military measures to protect.

123 Alvarez, José E., ASIL (Publ.), *The Schizophrenias of R2P. Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague, the Netherlands, June 30, 2007*, "www.asil.org/pdfs/r2pPanel.pdf", (2007-10-25), pp. 4-5.

124 *Opinio juris* represents a belief among states that an action was carried out because it was a legal obligation.

125 Jennings, Sir Robert, Watts, Sir Arthur (Eds.), *Oppenheim's International Law. Vol 1, Peace. Introduction and Part 1*, 9th edition, Pearson Education Limited, Edinburgh, 1992, pp. 48-49.

126 International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, Final Report of the Committee, London Conference, 2000, p. 65 *et seq*.

127 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports, 1986, p. 14.

128 ILA, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000), p. 55; Brownlie, Ian, *Principles of Public International Law*, 6th edition, Oxford University Press, Oxford, 2003, pp. 14-15.

3. SECURITY COUNCIL AUTHORISED HUMANITARIAN INTERVENTIONS

3.1. The Right Authority of the Security Council

The ICISS report acknowledges the Security Council as the main authority under the UN Charter that holds the primary responsibility to maintain international peace and security, but also states that there is no better or more appropriate body than the Security Council to deal with military interventions for humanitarian purposes.[129] It is the Council that has the authority to authorise interventions for the purpose of the protection of human security, and such authorisation must always be sought for before an intervention. It has also suggested that the P-5 should not exercise their veto powers unless their vital interests are threatened. The report states on the issue of Right Authority:

> Right Authority
>
> A. There is no better or more appropriate body than the United Nations *Security Council* to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.
>
> B. *Security Council authorisation* should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorisation, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.
>
> C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.
>
> D. The Permanent Five members of the Security Council should agree *not to apply their veto power*, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support.[130]

The Supplementary volume also mentions the Security Council practice of the 1990s as a watershed in which the Security Council became active in humanitarian aspects of conflicts, and that there appear to be no theoretical limits to the ever-widening interpretation of a 'threat to the peace' under Article 39 of the UN Charter.[131]

At the World Summit of 2005, the primary responsibility of the Security Council for the maintenance of international peace and security was also endorsed with respect to the external R2P by military means. No other alternative actor was explicitly mentioned to hold a subsidiary right or role to use such force. Regional organisations were mentioned but in connection with appropriate co-operation with the Security Council in paragraph 139. The issue of a reformed veto application was also omitted from the Outcome Document. The relevant parts of this paragraph that touch upon the issue of right authority with respect to military means have been emphasised below with italics:

> *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 to 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 co-operation with relevant regional organisations as appropriate*, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[132]

States thus agreed at the 2005 World Summit that they may take collective action through the Security Council, in accordance with the UN Charter including Chapter VII, and in co-operation with regional organisations, on a case-by-case basis in order to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity – should peaceful means be inadequate and the state itself manifestly fails to protect its population. This paragraph speaks quite clearly in that R2P action should be channelled through the United Nations, and

129 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*, International Research Centre, Ottawa, 2001, p 49.

130 ICISS, *The Responsibility to Protect*, pp. XII-XIII.

131 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect. Research, Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa, 2001, pp. 158-159.

132 Excerpt from paragraph 139, World Summit Outcome Document, 15 September 2005.

in particular the Security Council, albeit in co-operation with relevant regional organisations when appropriate. The Document points out the primary right authority to be the Security Council, but also mentions regional organisations as possible co-actors in the area of R2P. The formulation on co-operation leaves it unclear whether this requires a Chapter VIII authorisation or accepts *ex post facto* or implied legitimisation.

3.2. The R2P threshold for military intervention

The original proposal by the ICISS that the 'just cause threshold' (large-scale loss of life or large-scale ethnic cleansing) *must* be met for the responsibility to protect to be carried out by the Council appears to limit the authority and powers of the Council in its determination of what constitutes a 'threat to the peace' under Article 39 of the UN Charter. A must, obligation or duty for the Council to execute its responsibility to protect when the R2P threshold or criteria are met, arguably does not conform with *lex lata* and neither could it develop into such a legal duty.[133] There are many situations in the world where such crimes occur, and it would be neither politically nor militarily feasible to take enforcement action or even peace-enforcement action in all such cases, particularly in the territory of a permanent member state, but also in states where major powers have political, military or economic interests. This problem of 'selectivity' with the R2P was also acknowledged and discussed in the ICISS report. Council authorisation must be on a case-by-case basis, as stated in the Outcome Document.

The Outcome Document's criteria for R2P, comprising any of the grave crimes (war crimes, genocide, crimes against humanity or ethnic cleansing), with the state concerned manifestly failing to protect its population from those crimes, also set up a threshold, or qualifier, that would appear to limit the Council in its deliberations for future humanitarian interventions.

Does the R2P doctrine on military intervention change the Council's action in humanitarian crises, or is it more or less the same thing as humanitarian intervention? Would it be necessary to distinguish future Council practice authorising humanitarian interventions for the protection of human rights from military 'R2P authorisations', depending on whether the R2P criteria are present or not.[134] May the Council authorise humanitarian interventions in situations where the R2P criteria are not present?[135] The recent decline in authorised humanitarian interventions does not point to a broadening of the conception. Were they to occur, then 'R2P interventions' could arguably constitute a specific or qualified form of 'humanitarian intervention.' The utility of a more elaborate distinction between 'R2P-intervention' and 'humanitarian intervention' however appears unnecessary at present.

Moreover, if the Security Council trend of including civilian protection mandates in its peace support operations, using a double legal basis under Chapter VII and host state consent, becomes a permanent model for the future, the traditional cases of authorised humanitarian interventions that we saw in the first half of the 1990s may not appear on the scene again. With such an institutionalisation of the protection of human security, we might need to reformulate the concept of humanitarian intervention or find a new category for describing enforcement action with protection mandates including consent, possibly dropping the 'intervention' element in the terminology. Future consensual UN authorised peace-enforcement measures with a dominant humanitarian purpose and extensive civilian protection mandates could, I would suggest, be referred to as 'humanitarian peace-enforcements' or 'civilian protection peace operations (or peace-enforcements)'. It is possible that in such a case, only unauthorised humanitarian interventions will be referred to as 'humanitarian interventions'.

On the other hand, the legal literature and case studies on humanitarian intervention confirm that there are few legal limitations to the Council's decision to authorise military enforcement measures where it finds that such crimes have been committed. The only legal barrier to such military action is that the Council must find that the humanitarian situation constitutes a 'threat to the peace' under Article 39, and that peaceful means are found to be inadequate under Article 42. The Council's powers in its interpretation of the UN Charter have been confirmed by its practice on humanitarian intervention in the 1990s in response to humanitarian crises emanating from internal armed conflicts (with international effects, or if lacking international effects, where the humanitarian crisis evolved from a failed state situation) (see Chapter 3.4.).

It could thus be argued that the external R2P for the Security Council is thus subsumed under a double qualifier due to the Chapter VII requirements for military enforcement action. The situations do not only have

133 Although the Security Council has a primary responsibility for the maintenance of international peace and security in accordance with Article 24 of the UN Charter, this responsibility has its political and military limitations. Certain decisions on enforcement measures are simply not politically possible to achieve in the Council. The veto powers set the outer limits of the Council's action.

134 *Cf.* ICISS, *The Responsibility to Protect*, p. 33, para. 4.20.

135 *Cf. ibid.*, p. 34. The ICISS report excludes for example systematic racial discrimination, systematic imprisonment or other repression of political opponents, cases where the population is denied its democratic rights by a military take-over, and rescue operations of a state's own nationals on foreign territory.

to fulfil the R2P criteria, but also other factors will and must be taken into account. The R2P criteria for military intervention are only necessary but not sufficient criteria for the Security Council to take on its external responsibility to protect when military means are necessary. The question is whether the R2P criteria therefore in fact limit or inhibit Council action for the protection of human security, instead of enabling or triggering such action?

I would suggest that legally speaking the R2P criteria do not legally enable but possibly politically enable military enforcement action for the protection of human security within a state in new situations. The criteria do not legally enable the Council to take more action in new situations now than the Council already did prior to the 2005 endorsement. However, it could be argued that they would morally and politically enable and trigger the Security Council to gather support or to pressure the Council for such action when any of these international crimes are being committed in intra-state humanitarian crises – in particular in humanitarian crises not emanating from internal armed conflicts, or from internal armed conflicts lacking international effects. It should be politically easier to argue and push for action by the Council as a result of the criteria.

When it comes to rape and other sexualised gender-based crimes committed in a widespread or systematic manner as a weapon of war, the Security Council has now made the necessary connection by means of resolution 1820 (2008) to connect these crimes to the external responsibility to protect and to subsequent enforcement action under Chapter VII. This assertion and the R2P criteria may contribute as enabling factors for more forceful action to combat such gender-based crimes in armed conflict by the Security Council.

Scholars have argued that the criteria may inhibit the Council by becoming a subject of controversy, whether fulfilled or not. Although one could argue that the criteria would not limit the Security Council in situations in which they have already been applied implicitly through earlier Council practice, they would still constitute a double qualifier for the Council to consider. It is possible that the Council determines a situation where grave crimes are being committed to constitute a 'threat to the peace', but would find itself deadlocked in terms of imposing enforcement measures due to controversy over whether the state is 'manifestly failing' to protect its population or not.

3.3. The precautionary principles – use of force guidelines for the Security Council?

The precautionary criteria listed in the ICISS report, which intended to make the Security Council more efficient by maximising the potential to achieve consensus for action, by minimising abuses of the concept of R2P and by legitimising the Council's decision to use force, were not embraced by the UN member states in the Outcome Document – with the possible exception of the 'principle of last resort' and proportionality. The formulation in paragraph 139 that enforcement measures under Chapter VII and VIII could be considered 'if peaceful means were to be inadequate', does not impose a new obligation on the Security Council, but already forms part of Article 42 of the UN Charter.

These suggested precautionary principles had already been transformed in both the 2004 High-Level Panel report and the *In Larger Freedom* report to constitute guidelines for the Security Council in deciding on the authorisation of the use of force in general, not only with respect to R2P situations. However, these recommendations were rejected by states at the World Summit of 2005. It is probable that R2P proponents held the view that such guidelines might become a barrier to action, or create unnecessary restrictions on the powers of the Security Council. At this point, the guidelines are not legally binding on the Council.

Whether the Council should comply with the precautionary principles (right intention, last resort, proportional means and prospects of success) when deciding on the question of authorising military enforcement to address grave human security threats that meet the R2P threshold, is therefore debatable, except for the principles of proportionality and last resort that already reflect *lex lata*. The Security Council could be said to be bound by the customary *jus ad bellum* and *jus in bello* principles of proportionality and necessity in its capacity of authorising force.[136] The ICISS report thus challenges *lex lata* to some extent, in particular Article 39 of the UN Charter, by its prescription that the precautionary principles *must* be satisfied when the Council takes a decision on responsibility to react by military means.[137]

Since the R2P criteria for military intervention were not accepted as guidelines for the Council at the 2005 UN World Summit, and since then have not been

136 O'Connell, Mary Ellen, *The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform*, Blokker, Niels, Schrijver, Nico (Eds.), The Security Council and the Use of Force. Theory and Reality - A Need for Change?, Koninklijke Brill NV, Leiden, 2005, p. 58; Gardam, Judith, *Legal restraints on Security Council military enforcement action*, Michigan Journal of International Law, vol 17, 1995-1996, pp. 285-322.

137 ICISS, *The Responsibility to Protect*, p. 47, para. 6.1., and pp. 31-37, in particular paras. 4.13 and 4.32.

endorsed by the Council as binding guidelines for future Council decisions, they are not legally binding on the Council as such. The ICISS proposition thus continues to be a *lex ferenda* (law as it should be) proposal until such time as this happens. As a matter of fact, the formal adoption of the R2P precautionary principles by the Council as binding guidelines for itself is unlikely to happen. There is too much resistance by the US to restricting or binding itself to further legal obligations on the use of force, and there is even more resistance by China and Russia to codifying any legally binding rules relating to humanitarian interventions.

Furthermore, the Security Council could not become legally bound by the R2P precautionary principles (right intention, and prospects of success) by implementing them in its own practice, since it does not become legally bound by its own organ practice. The Council could thus not informally adopt them through its own practice. There would therefore be no point in investigating whether the Council's practice on humanitarian intervention is becoming consistent with the R2P 'precautionary principles' because it would not carry any legal significance in terms of enabling, limiting or restricting the powers of the Council in taking decisions on the use of force. However, it could be assumed that the Council at least acts on the basis of a right intention in the sense that its decisions on enforcement action have the purpose of maintaining international peace and security, and are undertaken when there are prospects of success in upholding international security.

If Council practice on civilian protection in armed conflict continues within the ambit of peace-enforcement operations (including both consent and Chapter VII mandate) instead of as humanitarian interventions against the will of the state, these guidelines may be of little importance for the legality of an operation. In fact, the most important situations where the precautionary principles for R2P could play a guiding and legitimising role are in those cases of humanitarian intervention that are authorised by the Security Council, but where consent is lacking, or that constitute unauthorised enforcement actions outside the UN Charter.

3.4. The Security Council's post-Cold War humanitarian interventionism and R2P

The practice of the Security Council of authorised humanitarian intervention in a series of cases in the 1990s shows that the Council has established that flagrant and grave violations of human rights and international humanitarian law within a state may constitute threats to the peace. The relevant cases are the authorised interventions in Bosnia (1992-1993), Somalia (1992), Rwanda (1994), and East Timor (1999). Not only has the Council extended the interpretation of what constitutes a 'threat to the peace' under Article 39 of the UN Charter, but has also shown in these cases that military enforcement measures may be necessary to address a humanitarian crisis. In recent years, almost all writers and governments have accepted humanitarian intervention if authorised by the Security Council.[138]

The Council decided to authorise military interventions to address humanitarian crises of a different but similar kind in these cases. In all of them, the humanitarian crises emanated from internal armed conflicts, but not solely, with the possible exception of the mixed armed conflicts in the case of Bosnia. The humanitarian crises in the different cases have their own particular circumstances of origin such as the genocide in Rwanda, the policy of ethnic cleansing in Bosnia, the drought, food shortages, widespread malnutrition and starvation in Somalia, the colonial background in the Indonesian persecution and harassment of the seceding East Timorese, and the ethnic and/or environmental and resource related conflict in Darfur. All of the humanitarian crises also had international repercussions that were considered to threaten the security and stability of other states or regional stability, Somalia being the only exception.[139]

Thus a legal right of the Security Council to authorise humanitarian interventions in such humanitarian crises is confirmed by this practice.[140] The Commentary to the UN Charter asserts that it now seems widely accepted that extreme violence (amounting or leading to a humanitarian crisis) within a state can give rise to Chapter VII enforcement action.[141] This extensive interpretation may be seen as reflecting an evolutionary interpretation by the Security Council in its application of the UN Charter. Its practice in the application of the Charter should be seen as being compatible with the 'ordinary meanings' of the written framework and thus *sub legem* (under the law) in accordance with Article 31 (3)(b) of the Vienna Convention on the Law of Treaties (VCLT).[142]

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138 Boyle, Alan, Chinkin, Christine, *The Making of International Law*, Oxford University Press, Oxford, 2007, p. 111.

139 On the other hand, the failed state situation in Somalia made that case unique, and it has been argued that a failed state situation may replace the 'double strategy' of demanding 'international effects of the internal crisis' for the Council to take the case onto its agenda. See e.g. {, 2004 #591}, pp. 149, 170. This position is represented by a minority of scholars.

140 Téson, Fernando R., *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd edition, Transnational Publishers, Inc., Ardsley, 2005, pp. 188-189.

141 Frowein/Krisch, *Article 39*, Simma, Bruno (Ed.), The Charter of the United Nations. A Commentary, 2nd edition, Oxford University Press, Oxford, 2002, p. 723, para. 18.

142 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331,

3.5. Does the Security Council have a legal responsibility to protect with military means?

Is an external R2P norm developing, or does the Security Council already have such a legal right to protect by military means under the UN Charter and international law? Could the practice of authorised humanitarian intervention in the 1990s amount to evolutionary interpretation developing a legal right for the Council to protect human security by military means? Does this right have similarities with the external R2P formulated in the Outcome Document paragraph 139?

The above mentioned case studies (Chapter 3.4.) show that the Council's extensive interpretation of Article 39 of the UN Charter through its practice also included the grave grimes of genocide, crimes against humanity, war crimes or ethnic cleansing. The extended interpretation of a 'threat to the peace' would thus arguably also cover part of the R2P criteria as set out in paragraph 139 of the Outcome Document,[143] so that any of these grave crimes may be determined to constitute a threat to the peace under Article 39.

The practice of the Council in the post-Cold War period by which it has authorised UN forces, member states and regional organisations to conduct forceful humanitarian interventions, shows that it perceives itself to have not only a legal right but also a moral and political responsibility to protect people in need from genocide, ethnic cleansing, crimes against humanity and war crimes committed within a state under certain circumstances.

It could be contended that also this assessment and conclusion is based upon an evolutionary interpretation of Article 39, within the ordinary meaning of its wording and in accordance with Article 31 (3)(b) of the VCLT. It could thus be claimed that Council practice of evolutionary interpretation not only supports a legal right to determine that grave crimes against international law might constitute a threat to the peace under certain circumstances, but that it also reflects a legal right to decide on military enforcement measures to address such grave human security threats.

These case studies reveal that the Security Council has consistently complied with the relevant R2P criteria on military intervention, which supports a legal right for the Security Council to protect populations against grave crimes by military means. The case studies show that the Council in fact has the capacity, power and political will to authorise humanitarian interventions to protect human security, not only when grave crimes against international law are being committed, but also when other factors are present, such as widespread famine, as in the case of Somalia. The R2P criteria, as laid down in the Outcome Document, are thus necessary but not necessarily sufficient criteria for the Security Council to decide on military enforcement measures for the protection of civilians. However, it could be argued that the practice of the Council in the post-Cold War period, in authorising UN forces, member states and regional organisations to conduct forceful humanitarian interventions, shows that the Council perceives itself as having not only a *legal right* but also a *moral and political responsibility* to protect people in need from atrocities such as genocide, ethnic cleansing, crimes against humanity and war crimes within a state under certain circumstances.

Accordingly it could be argued that under *lex lata*, situations of violent and severe threats to human security which amount to grave crimes against international law, such as genocide, war crimes or crimes against humanity, may be considered to constitute 'threats to the peace', and may be addressed by the Security Council through the authorisation of military enforcement action when the state concerned manifestly fails to protect and where peaceful means have proved to be inadequate. This norm, expressing a legal right for the Council to take on an external responsibility to protect human security within a state by military means under certain circumstances, could be said to be based upon an evolutionary interpretation of the UN Charter.[144]

Some commentators, however, would argue that this new interpretation and practice is limited to certain circumstances and therefore would only *partly* support

143 The R2P criteria: any of the grave crimes against international law and the state manifestly failing to protect. The assessment as to whether or not peaceful means are found inadequate is a political decision that the Council may make with respect to Articles 41 and 42, and it does not affect the interpretation of Article 39.

144 The Council practice constitutes subsequent practice in the application of the UN Charter within the ordinary meaning of the wording of Chapter VII, and in accordance with Article 31 (3) (b) of the VCLT. But if a narrow approach is taken to the powers of the Security Council under the Charter, on 'peace' and what may constitute 'threats to the peace', the new practice may instead be regarded as being contrary to the wording of the UN Charter, and is thus better understood as subsequent practice in the application of the UN Charter *contra legem*, even though it is practice within the UN Charter framework. For a treaty norm to become informally modified by subsequent practice within the treaty framework there must be 'consistent practice' and 'common consent' by the state parties to the treaty. This means that there must be a common understanding, or general acceptance, among the parties as a whole about the modification of the treaty, implying more than a majority of the members but not a qualified majority. The existence of *opinio juris* as in customary law is not required. In this case, there has been not only consistent practice but arguably also common consent to the Security Council practice extending the interpretation of a threat to the peace under Article 39, resulting in the informal modification of the UN Charter – in the same manner as has been the case with the informal modification of Article 27 (3) of the UN Charter. Thus humanitarian interventions authorised by the Security Council establishing a legal right to an external responsibility to protect by military means may be argued to have become part of *lex lata* (if not by evolutionary interpretation, at least) by informal modification of the UN Charter through subsequent practice by the Security Council during the 1990s.

an external R2P for the Council. The Security Council's implementation of the R2P doctrine and the exercise of its external responsibility to protect is subsumed under a 'double qualifier', since not only will the R2P criteria have to be present but the Security Council will also have to find that the situation in question constitutes a 'threat to the peace' under Article 39 of the UN Charter.

It has been argued by restrictive scholars that the Council practice on humanitarian interventions in the 1990s reflects a limitation on the kinds of humanitarian situations which have been considered to constitute a threat to the peace. These have all been linked to internal armed conflict[145] (the most restrictive position include that these have to have international effects, or if lacking such effects take place in a failed state situation).[146]

The most restrictive scholars only accept that the Council makes determinations of a narrow, negative definition of 'peace' under Article 39 meaning the "absence of armed conflict between states." This view precludes a positive definition of the peace that includes friendly relations and other economic, social and political and environmental conditions from the Security Council's primary responsibilities.[147] Thus only security threats which would (or could) result in an 'international armed conflict' could hence be invoked by the Council, taking this restrictive approach. Nevertheless, Council practice in the 1990s has expanded this interpretation to also cover intrastate armed conflicts. de Wet, however, is not convinced of the existing arguments for unlinking the 'international' dimension of 'a threat to the peace' in Article 39. She asserts that an opposite conclusion would amount to an unbounded and unlimited discretion on the part of the Security Council, which would ignore the structural limitations of the UN Charter and give the Council an uncurbed flexibility that could undermine its own efficiency.[148]

Frowein and Krisch, however, assert authoritatively in the Commentary to the United Nations Charter that the original intention was to task the Council with the prevention of 'interstate war,' although *not* exclusively.[149] Notwithstanding that a textual and systematic interpretation favours a conclusion that 'intrastate war' in itself is not a breach of the peace, consistent practice of the Council since the 1990s has firmly broadened the notion of a 'threat to the peace' in this respect.[150] The practice comprises determinations of 'internal armed conflict' situations as such to constitute threats to the peace even without international effects,[151] and states as well as scholars have accepted and acknowledged this legal development.[152] It thus supports the view of 'peace' as a wider notion than just the absence of 'interstate war', and includes the absence of 'intrastate wars' with or without 'international effects'. Frowein and Krisch conclude that "it appears now safe to assume that any internal armed conflict of a considerable scale can constitute a threat to international peace and security."[153] Thus, the cross-border criteria (international effects) for Article 39 determinations may no longer be valid.[154]

However, this authoritative interpretation also claim that the requirement of a threat involving an 'armed conflict' may still be a valid limitation in the interpretation of the UN Charter.[155] Glennon argues that peace can only be threatened by the use of a *threat of force*, which is not present for example in situations of refugee flows or human rights violations.[156] Such a conclusion would limit Council action to protect against grave crimes in situations of peace. Unless the humanitarian crisis amounts to an imminent threat of an armed conflict. Both genocide and crimes against humanity are defined as possible to be committed also in peacetime.

The consistent presence of 'internal armed conflicts' in the Council practice on 'humanitarian intervention' extending Article 39 reflect that there is still a military criterion present in the determinations. Thus Council

145 Frowein/Krisch, *Article 39*, Simma, Bruno (Ed.), The Charter of the United Nations. A Commentary, 2nd edition, Oxford University Press, Oxford, 2002, p. 723, para. 18.

146 de Wet, Erica, *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, Portland, 2004, pp. 149, 170.

147 de Wet, *The Chapter VII Powers of the United Nations Security Council*, pp. 138-140. This is a minority, according to Téson, see Téson, Humanitarian Intervention: An Inquiry into Law and Moral-ity, 3rd edition, pp. 286-286.

148 de Wet, *The Chapter VII Powers of the United Nations Security Council*, p. 144.

149 Frowein/Krisch, *Article 39*, Simma (Ed.), The Charter of the United Nations. A Commentary p. 720, para. 7.

150 The Security Council has established such consistent practice in the cases of Liberia, Angola, Rwanda, Zaire, Albania, the Central African Republic, Sierra Leone and East Timor, *ibid*., pp. 723-724, para. 18.

151 *Ibid*., pp. 723-724, para. 18. Both the texts of the Council resolutions and its preceding debates before their adoption show this stance in the Security Council, according to Frowein and Krisch.

152 *Ibid*. p. 720, para. 7.

153 *Ibid*., p. 725, para 18.

154 Whether or not one should regard this change as an informal modification of the Charter through evolutionary interpretation or as a result of subsequent practice informally modifying the UN Charter (by 'consistent practice' and 'common consent') could be debated. It depends on whether one views the new practice and widened interpretation of 'a threat to the peace' as falling within the wording of Article 39 or to be contra legem. (See my own position in the conclusions of Chapter 6.3.3. and 6.3.4.).

155 Frowein/Krisch, *Article 39*, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 725, para. 18.

156 Glennon, *Limits of Law, Prerogatives of Power. Interventionism after Kosovo*, pp. 102, 107-109. How grave human rights violations which give rise to massive refugee flows can take place without violence, persecution and repressive action is difficult to imagine. It appears that this author has not made the shift from state security to human security in his mindset about what security implies. Concepts change over time because reality changes and the perception of reality as well, and the UN Charter is constructed to hold such a flexibility, even though not all commentators appear to agree on this. See also Higgins, *Problems and Process. International Law and How We Use It*, p. 255 who describes the determination of threats to the peace in the cases of Rhodesia, South Africa, Northern Iraq and Somalia as legal fictions.

practice in this particular area does not yet appear to have accepted an interpretation of 'peace' as meaning the absence of extreme human suffering, nor viewing security threats which are not linked to an armed conflict to constitute a threat to the peace. The UN Charter Commentary takes the following position:

> A threat to the peace exists when, in a particular situation, a danger of the use of force on a considerable scale exists. This definition would encompass internal conflicts, but would exclude situations of concern that are either unconnected to a particular crisis or do not involve the danger of forcible action. In any case, though, the SC enjoys broad discretion in the assessment of the situation and the gravity of the danger.[157]

The case of Burma after the cyclone Nargis in May 2008 supports the view that the Council is politically restrictive in determining natural catastrophes and humanitarian situations not involving military threats or armed conflicts as constituting a threat to the peace.[158]

Other scholars, however, argue that 'peace' should not only denote the absence of (international) armed conflict but should be interpreted to include the absence of extreme human suffering emanating from other sources other than interstate war. The legal basis is found in a teleological interpretation of the UN Charter and its preamble, by which prevention of 'extreme human suffering' resulting from war is the rationale for the maintenance of international peace and security.[159]

This humanitarian undertone of the Charter and its objective of preventing extreme human suffering is contended to also cover extreme suffering in all its forms in situations or crises not necessarily emanating from war, such as grave violations of the *jus cogens* norms prohibiting genocide, slavery, systematic torture or systematic and extensive racial discrimination, committed in peace. Such crimes are violations of *erga omnes* obligations which *all* states have a legal interest in curbing, why it is argued that such violations could and should preferably be halted or mitigated by collective enforcement measures channelled through the Security Council – even in situations where there is an absence of war.

Taking a wider approach on the interpretation of 'peace' – not necessarily linked to the absence of war – the Security Council is seen to be in power of authorising military measures to prevent genocide and crimes against humanity also in peacetime situations short of armed conflict where an unfolding humanitarian is considered to constitute a threat to the peace and peaceful measures are found inadequate. This position would thus support the concept of external responsibility by the Security Council to protect populations from grave international crimes by military means within a state, both in peace and war. Evans, for example, takes this position when contending that the Council has considerable latitude in defining an international threat any way it likes.[160] In fact, several other cases of Article 39-determinations support this conclusion, in that the Council has previously found other situations short of armed conflict to constitute a threat to the peace.[161]

Furthermore, it could be argued that the Genocide Convention grants the Council further rights to take decisions on collective action to 'prevent genocide' under Article VIII also in peacetime, why its authority would be wider on this particular crime in comparison with other grave crimes. However, at the same time Article 103 of the UN Charter provides that the UN Charter provisions prevail over any conflicting treaties. Does the Council powers under the UN Charter set the outer framework for the Council's action and thus limits the powers of the Council granted under Chapter VII of the Genocide Convention? Taking a broad approach on the interpretation of the Council's powers does not lead to a conclusion that the Council is inhibited to act forcefully to prevent genocide in peacetime.

157 *Ibid.*, p. 726, para. 25.

158 It could possibly be counter-argued that the reason the Security Council did not take enforcement measures in this situation was the close ties existing between China and Burma, or that the non-forceful measures were successfully used to achieve the required results, avoiding the unfolding of a further humanitarian catastrophe.

159 See the discussion in de Wet, *The Chapter VII Powers of the United Nations Security Council*, pp. 142-143, referring to arguments by Martin Lailach (1998).

160 Evans, *The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All*, p. 134. However, he adds the limitation of actual cross-border impact of a particular situation.

161 See *e.g.* the cases of Southern Rhodesia and South Africa, see SC Res. 217, 20 November 1965, UN Doc S/RES/217, 1965, op. para. 1. The Security Council declared the continuance in time of the illegal authorities of Southern Rhodesia, which had declared independence, to constitute a "threat to international peace and security", and SC Res. 282, 23 July 1970, UN Doc S/RES/282, 1970, pp. 7 and SC Res. 418, 4 November 1977, UN Doc S/RES/418, 1977, op. para. 1. The Council determined that the policies of apartheid and the build-up of the South African military police forces constituted a potential threat to international peace and security in 1970, and then later in 1977, it determined that "having regard to the policies and acts of the South African Government, the acquisition of arms and related matériel constitutes a threat to the maintenance of international peace and security". de Wet argues that both these cases rely on the 'double strategy' in which the tensions created in the region by the secession in Southern Rhodesia as well as the arms build-up in South Africa gave the cases the necessary international link for the Council to determine the situations as threats to international peace and security, de Wet, *The Chapter VII Powers of the United Nations Security Council*, pp. 150-151. In the case of Southern Rhodesia, the Council authorised limited use of force (by the United Kingdom) to stop oil tankers from violating the embargo.

It would also be far-fetched to conclude from the restrictive argumention made by some commentators that in the case of an extreme humanitarian crisis where any genocide or crimes against humanity were being committed or imminent to occur, the situation must have deteriorated to a position of, or provoked an imminent armed conflict for the Security Council to be able to take action under Chapter VII. If this were true, no preventive action by the Council to prevent genocide and protect against other grave crimes would then be possible.

Whether the Council factually assesses and determines an 'R2P situation' to constitute a threat to the peace and decides to take military enforcement action in the particular situation, is arguably an issue more of a political rather than a legal character. Although, it has to comply with its obligations under the Charter, international customary law and *jus cogens* in doing so.[162] Circumstances other than the gravity and extent of violations of human rights and humanitarian law, such as political, security and economic factors, interests and relationships, will carry weight and be decisive on the part of the Security Council in considering whether or not to authorise a humanitarian intervention. The geopolitical aspects, power politics and the security interests of the permanent members of the Council, as well as the political willingness and preparedness of member states to take on their external responsibilities to protect through military means will all be crucial and decisive. But a positive development of a more common understanding among Council members on human security and the importance of the R2P in the future cannot be ruled out.

Thus not only the UN Charter and international law but also international politics restrict the Council's ability to act. The veto powers of the permanent members and the reality of geopolitical security set the outer limits on the possibilities open to the Council to assume its responsibility to protect by military means. Specific conflicts in certain states are not possible to take action on without jeopardising regional or world security and stability. But in those cases where the veto powers do not have vital security (not economic or other types of non-security) interests, the Security Council could, and should, use its legal right and exercise its political and moral responsibility to protect human security when the state concerned is manifestly failing to do so – and by military means if necessary. Practice shows that even without the presence of a vital security interest but in the presence of other economic and political interests of the permanent members, there may be obstacles to the Security Council taking necessary humanitarian action when needed. This legal right to protect by military means would be possible in situations where the permanent members do not have large economic or political interests, as long as there are at least some interests or strong humanitarian motives activated in a humanitarian crisis. Where strong national interests, or no interests at all, are present, there is a risk that the legal right and possibility of the Security Council to act with military means may be ignored.

The Darfur case reveals another inherent problem with the implementation of the norm. This is the weakness and incompleteness of the collective security system due to the lack of Article 43 agreements[163] and its impact on the Security Council's capacity to carry out its political and moral responsibility to protect by military means. Darfur shows that even when the Security Council has taken the necessary decisions to implement the R2P with forceful means, because of this gap in the system, the implementation of its resolutions is not automatic. Because the implementation of the Council's responsibility to protect by military means depends and relies upon individual states to provide troops and to co-operate to implement Council resolutions, the external R2P of the Council could not develop into a 'legal responsibility' in the sense of a legal obligation carrying international accountability, if the failure to protect lies in states failing to comply with Security Council resolutions.

The collective security system was not constructed to encompass and address R2P situations in a comprehensive manner. Thus the principle of state sovereignty is not the only obstacle to the R2P norm. Certain aspects of the collective security system itself are thus challenged by the external R2P if it is to be implemented on an institutional basis through the Security Council. The geopolitics of international security and the veto power of the permanent members cause the application of the use of military force to protect human security to suffer from selectivity, as with all other cases on the Council's security agenda, owing to the necessity of case-by-case assessments. Article 39 empowers the Council to make a determination on whether or not a situation constitutes a threat

162 A restrictive approach to the powers of the Council under the UN Charter to determine a threat to the peace would, supported by its own practice (see Chapter 6.3.3.), hence limit to some extent the possibilities open to the Security Council to exercise its external responsibility to protect by military means. This would mean that the Council would only have a right under the UN Charter to protect human security within a state by military means when grave crimes were being committed (or causing an imminent armed conflict) unless a new interpretation of what might constitute a threat to the peace is made.

163 Article 43 of the UN Charter provides that states "undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. […] The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."

to the peace, breach of the peace, or aggression – but it does not oblige the Council to take further action under Chapter VII.[164] The Council's primary legal responsibility for the maintenance of international peace and security in accordance with Article 24 of the UN Charter does not impose a legal duty on the Council to decide on military enforcement measures under Chapter VII.

A legal responsibility in the form of a duty or obligation would require that the Council treats similar cases alike, or otherwise face legal accountability – utopia! No state, organisation, group of peoples or individual will be able to find a legal remedy for the failure of the Council to take the necessary humanitarian action required to protect by military means as long as the collective security system is constructed in its present form, nor for that matter, for the failure to take enforcement measures of other kinds. This is a result of, as well as the basis for, the political character of the Security Council and the collective security system.

The 'R2P norm' as a whole (containing both non-military and military responses and responsibilities) would arguably never be able to develop into a legal obligation for the Security Council to protect human security within a state from grave crimes as long as the norm includes a military element. But this does not lessen the fact that the Council may have legal duties to protect human security by non-military means, and that it has a moral and political responsibility to protect, as endorsed at the UN World Summit in 2005. These latter aspects, however, have not been further examined in this article.

The terminological shift from the earlier 'right to humanitarian intervention' to an external 'responsibility to protect' could therefore be asserted to have limited influence or effect at the legal level with regard to humanitarian interventions authorised by the Security Council. Thus from a legal point of view with regard to military protection, a responsibility to protect for the Security Council, when it involves the use of force, may be seen as a misnomer, since it does not constitute an obligation but in part rather takes the form of a legal right. But from a political point of view the wording reflects reality to the extent that the Council is able to act on its political and moral responsibility, both by non-military and military means.

In conclusion, the external responsibility of the Security Council to protect by military means should be seen partly as a *legal right* but also as a *moral and political responsibility*, based upon the formulations of the Outcome Document and the Council's earlier practice. This practice supports a legal right to authorise humanitarian interventions to protect people against the commission of grave crimes.

164 Frowein/Krisch, *Article 39*, Simma (Ed.), The Charter of the United Nations. A Commentary, p. 719, para. 3.

4. THE R2P – A LEGAL OBLIGATION TO PREVENT GENOCIDE?

4.1. The Genocide Convention and humanitarian intervention

Because genocide, imminent or present, imposes legal obligations on state parties to the Genocide Convention to act to prevent it, and to punish the perpetrators of the crime, the international community has in several cases tended to resist declaratory statements of the existence of genocide in order to avoid activating certain legal consequences.[165] There have been several debates around the 'g-word' (the g-word controversy) in the cases of Rwanda, Bosnia and Darfur, where the term 'genocide' was deliberately avoided so as not to create a moral or legal imperative to take action.[166] Instead other terms such as 'ethnic cleansing', 'mass murder', and 'crimes against humanity' were referred to in describing atrocities and various humanitarian situations.

The declaration and use of the term genocide confers legal obligations to prevent and punish this crime under the Genocide Convention.[167] The following chapters will discuss the legal obligation to prevent genocide for individual member states, as well as for the UN, in relation to military force. The legal obligation to prevent genocide on the part of member states is regulated by Article I of the Convention, which affirms that genocide is a crime under international law, entailing certain legal consequences. It reads:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

The Article does not *expressis verbis* prohibit states from committing genocide themselves, but the ICJ asserted in the Bosnia v. Serbia Case (2007) that such a prohibition follows from the fact that genocide is a crime under international law and follows from 'the obligation to prevent and punish' the commission of the crime of genocide.[168]

The Genocide Convention is not specific as to what the legal obligation to 'prevent genocide' exactly entails.[169] However, case law from the ICJ and the legal literature elucidate different aspects of the obligation of states to prevent it. This obligation may include both non-military and military force. Serbia Montenegro was ordered by the ICJ in 1993 to take "all measures within its power to prevent the commission of the crime of genocide".[170] In 2007 the court restated that a state must "employ all means reasonably available" to it to prevent genocide as far as possible, from the point that it learns, or should normally have learned, of the existence of a serious risk that it will be committed.[171] In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance.

A violation of the obligation to prevent genocide results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. Responsibility for such omissions is only activated if genocide is actually committed.[172] The court's statement that to incur state responsibility for failure to prevent genocide it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed, has been met with scepticism since it is not supported by international practice.[173]

There are limitations on this legal obligation to prevent with respect to the state's 'capacity to effectively influence' the actions of persons likely to commit genocide. The capacity varies greatly from state to state and is dependent on the geographical distance and the strength of political and other links to the actors involved in an imminent genocide.

165 Schabas, William A., *Genocide in International Law*, Reprinted 2002, Cambridge University Press, Cambridge, 2000 p. 495.

166 Engle, Karin, *"Calling in the Troops": The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Itervention*, Harvard Human Rights Journal, vol 20, 2007, pp. 189-226, p. 210, and note 83.

167 See Article I of the Genocide Convention; Schabas, *Genocide in International Law*, pp. 495-496.

168 Bosnia v. Serbia Case (2007), p. 63, para. 166; The pronouncement that states are under the obligation no to commit genocide was criticised for stretching the interpretation of Article I. This issue raised several dissenting opinions arguing that genocide can only be committed by individuals. State responsibility for genocide, however, only occurs if genocide actually was committed, but state responsibility for failure to prevent genocide can arise by mere omission to act to prevent, and is triggered by the state's awareness that there is a serious risk that genocide will be committed and where the state has the capacity to effectively influence the perpetrators, Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgement*, p. 699.

169 Wills, Siobhán, *Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations*, Journal of Conflict & Security Law, vol 9, 3, 2004, pp. 387-418, p. 410.

170 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Indication of Provisional Measures, Order of 8 April 1993, ICJ Reports, 1993, p. 3, para. 52. A (1).

171 Bosnia v. Serbia Case (2007), pp. 154-155, paras. 430-431.

172 Milanovi , *State Responsibility for Genocide: A Follow-Up*, p. 687.

173 Bosnia v. Serbia Case (2007), para. 432.

The following chapter illustrates that the legal obligation of states to prevent genocide under the Genocide Convention also imposes far-reaching obligations outside their own territories when there are links to the perpetrators and the action. In the 2007 case, the ICJ declared that the 'duty to prevent' genocide is not territorially limited and extends beyond a state's borders, so that the state concerned may act in ways appropriate to meet its obligations under the Genocide Convention. However, this does not mean that a state's duty to prevent genocide under the Convention implicitly allows for the use of force in any other states. If no links or 'capacity to effectively influence' are present, the legal obligation to prevent genocide in another state may not be based upon the Genocide Convention but possibly on customary law, in the form of an *erga omnes* obligation to prevent it.

When it comes to the legal duty to prevent genocide beyond a state's territory, the legal right to use military force must comply with the general rules on the use of force under international law.[174] The Genocide Convention does not expressly vest member states with such a legal right in the obligation to prevent genocide in Article I, and the ICJ case law does not extend this obligation to include the use of military force in another state, even if there are links to the perpetrator.

In cases of genocide on the territories of other states where no such links have been present, state practice on military intervention in fact shows limited reactions to such episodes among state parties to the Genocide Convention. This might represent a practice suggesting a permissibility of inactivity by individual states.[175] States would therefore be obliged to seek a Security Council authorisation or to develop a customary rule for unauthorised interventions for the prevention of genocide in another state through military means.

The UN's obligation to prevent and suppress genocide is also regulated in the Genocide Convention. Article VIII of the Convention reads:

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

While the formulation reflects a need for a member state of the Genocide Convention to push the UN to take action, the legal obligation to take such action may not be questioned. The precise nature of this legal obligation, however, is not stipulated expressly in the provision, which states only that it should be considered appropriate for the prevention and suppression of genocide and made in accordance with the UN Charter. This means, for example, that Article VIII allows for the Security Council to decide on military enforcement action under Chapter VII for the prevention and suppression of genocide, as long as the action is made under the UN Charter. Schabas states that state parties to the Genocide Convention have expressly conceded to the United Nations the right of intervention in this sphere, and state practice since 1948 suggests that such intervention may include military action, but that this is viewed as a right rather than an obligation.[176] Thus a situation where genocide is being committed must be deemed to constitute a 'threat to international peace and security' within the meaning of Article 39 of the UN Charter, and military enforcement measures must be considered an appropriate measure by the Council in order for an authorisation of such forceful action to take place.[177]

The use of military force for the prevention of genocide cannot be legally based upon the Genocide Convention alone, but depends on the political assessment of the Security Council under the UN Charter. Thus the Genocide Convention does not grant an express treaty-based *right* for the UN through the Security Council to use force for the prevention and suppression of genocide. Neither does it impose any express *obligation* on the part of the UN to intervene by military means in other states in order to prevent genocide.[178] The Security Council practice on humanitarian intervention confirms, however, that military means may be employed, and have been employed, for the purpose of preventing genocide and other grave crimes under international law. The UN Charter provisions regulating and limiting the Security Council's powers under Chapter VII will however set the framework for such action.[179]

In summary, neither states nor the UN have a legal obligation under the Genocide Convention in the sense of a 'legal duty' to use "military means" to prevent genocide *in the territory of another state*. The legal obligation for sta-

174 Milanovi , *State Responsibility for Genocide: A Follow-Up*, p. 687; Bosnia v. Serbia Case (2007), para. 430.

175 See Schabas, *Genocide in International Law*, p. 495.

176 *Ibid*., p. 498.

177 *Ibid*., p. 499. Schabas mentions two cases of Security Council practice on the prevention of genocide: in Bosnia (1992) and Rwanda (1994), see *ibid*., pp. 459, 461.

178 *Ibid*., p. 491.

179 It is open to discussion whether Article VIII of the Genocide Convention extends the right of the UN through the Security Council to decide on military enforcement measures to prevent genocide to also cover the commission of this crime within a state in peace-time. As Chapters 3.4 and 3.5. show, the Council's right to authorise humanitarian intervention has been limited to humanitarian crises emanating from armed conflicts with international effects. The UN Charter provisions prevail over a conflicting treaty, which is why the answer to this question lies in how extensive or restrictive one prefers to interpret the Council's powers under Chapter VII of the UN Charter.

tes under the Genocide Convention to prevent genocide does not expressly vest member states with such a 'legal right' to use military force in another state under Article I. Thus states would have to seek a Security Council authorisation or develop a customary rule for unauthorised interventions to provide such protection through military means.

The legal right and obligation of the UN (when called upon by a state) to take appropriate measures to prevent and suppress genocide under Article VIII does not directly grant an express treaty-based legal right or duty for the UN to use force for the prevention and suppression of genocide. But at the same time, neither does Article VIII exclude the legal right of the Security Council to authorise military enforcement action if the particular situation is considered to constitute a threat to the peace under Chapter VII of the UN Charter and therefore warrants the prevention of genocide by military means. Thus the UN, through the Security Council, has a legal right under the Genocide Convention *and* the UN Charter to take military enforcement measures to prevent and suppress genocide.

To conclude so far, the international treaty obligations to prevent genocide do not independently support a legal right or duty for states to use military force to prevent it. At the same time, the Genocide Convention protection regime does not exclude the use of military force as long as it complies with general international law, meaning that authorised, but not unauthorised, humanitarian interventions for the prevention and suppression of genocide are legal. The UN through the Security Council has a legal right under the Convention and the UN Charter to take military enforcement measures to prevent and suppress genocide. This legal regime, however, does not fully accommodate an external responsibility to protect human security within a state by military means against other grave crimes, apart from genocide.[180]

4.2. The Bosnia v. Serbia Case (2007) and the duty to prevent genocide

In the Bosnia v. Serbia Case (2007) the ICJ asserted that the obligation to prevent genocide is "unqualified" and creates obligations distinct from those that appear in the subsequent articles of the Convention.[181] The obligation to prevent genocide is both normative and compelling, not merged in the duty to punish, but has its own scope extending beyond Article VIII of the Genocide Convention. The court furthermore pointed out that despite the possibility of states requesting the competent organs of the United Nations to take such action as is deemed appropriate according to that article, states are not relieved of their own state obligations to take action in accordance with Article I in order to prevent genocide, as long as this is achieved in accordance with the UN Charter or any decisions by its competent organs.

According to the court, the duty to prevent imposes "positive obligations on states to do their best to ensure that such acts do not occur". A state may be found to have violated its obligation to prevent

> even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.[182]

The court asserted that a state has positive obligations to take preventive action at the moment it becomes 'aware', or should normally be aware, of a 'serious risk' that genocide will be committed. The *dictum* urges states to take positive anticipatory measures in accordance with the Genocide Convention. For a particular state to be found guilty of violating this duty it is sufficient to establish that the state possessed the 'means' to prevent genocide and manifestly refrained from exercising them.[183] Moreover, a state must "employ all means reasonably available" to it to prevent genocide as far as possible, from the point that it learns, or should normally have learned, of the existence of a serious risk that it will be committed.[184] This is a wide ranging positive obligation for states to prevent genocide, which the court outlines in its interpretation of Article I.

It does not need to be proved that the state concerned defi nitely had the 'power to prevent' the genocide in question in order to incur state responsibility if a failure to prevent genocide were to occur. The court stated that the obligation to prevent genocide is one of 'conduct' and not of 'result', in the sense that a state cannot be under an obligation to succeed in preventing it. The court mentioned 'due diligence' and that state responsibility is incurred if the state 'manifestly fails' to prevent genocide. The language selected by the court resonates with the formulations on responsibility to protect in the Outcome Document (2005).

180 See the previous note 155.

181 Bosnia v. Serbia Case (2007), p. 61, para. 162.

182 *Ibid.*, p. 155, para. 432.

183 Cassese, Antonio, *International Criminal Law*, Oxford University Press, New York, 2003, p. 158, para. 438.

184 Bosnia v. Serbia Case (2007), pp. 154-155, paras. 430-431.

In assessing whether a state has duly discharged its obligation to prevent genocide, the 'capacity to effectively influence' the action of persons likely to commit, or who are in the midst of committing genocide must be analysed.[185] This capacity depends, according to the court, on several parameters: 1) the geographical distance of the state concerned from the scene of the events, and 2) the strength of the political links, as well as links of all other kinds, between the state authorities and main actors. This capacity may also vary depending on the state's legal position vis-à-vis the situation and persons at risk of genocide. International law may restrict or in other ways regulate the means available for the state to have recourse to in carrying out its obligation to prevent genocide.[186] The court asserted that the FRY was in a position to influence the Bosnian Serbs during the period under consideration (the massacres of Srebrenica):

> [O]wing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.[187]

The court further concluded:

> [T]he Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised.[188]

In the court's preliminary objections in the Bosnia v. Serbia Case (1996), it asserted that the obligation of states to prevent and punish the crime of genocide was not territorially limited by the Convention.[189] In the final judgement, the ICJ explained that this did not mean that the Convention is territorially unlimited. The court continued by stating that Articles I and III are not limited by territory but apply to a state "wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question".[190]

The obligation to prevent is, however, limited by the state's 'capacity to effectively influence' the action, the geographical distance to the state concerned and the political and other links to the actors involved in an imminent case of genocide. The proximity between Serbia and Republica Srpska indicates the necessary level of control over the actors preparing to, or actually committing, genocide. Serbia was found to have violated its obligation to prevent the genocide committed by the Bosnian Serb Army (VRS) and the Republika Srpska in the case of Srebrenica in July 1995. Due to a lack of conclusive evidence of genocidal intent and knowledge of the genocide plans, Serbia was not found to be complicit in the genocide, but the strong links and support to these actors gave Serbia a position of influence over the Bosnian Serbs. The ICJ, however, rejected the 'overall control' test adopted by ICTY in the Tadi Case, and instead used the two-test of attribution for state responsibility for acts by non-state actors applied in its own case law from the Nicaragua Case:[191] 'effective control' based on 1) the issuance of directions or 2) the enforcement of specific operations.[192] The 'overall control' test of the Tadi Case was considered to overly broaden the scope of state responsibility.

The traditional criterion of jurisdiction for state responsibility was thus exchanged with a 'capacity to effectively influence'.[193] The line of control or capacity to influence with regard to the legal obligation to prevent genocide outside a state's territory is not only dependent on the geographical distance and political links to the actors, but must also, according to the court, be assessed by legal criteria, since every state may only act within the limits permitted by international law.

The 'closeness' in the links between the relevant states, institutions and actors involved in or connected with imminent acts of genocide must of course be assessed on a case-by-case basis. Even if it was not the intention of the court, one may argue *de lege ferenda* that in the future, it would be possible to open up the interpretation, leading to wider responsibilities to react to impending genocide than have been seen to date. A stronger focus on the 'capacity' to take action to prevent when a state becomes aware of a serious risk that genocide will be committed, together with historical and political links and responsibilities, could play a larger role in its prevention in an ever more interdependent and interlinked global village.[194] This *lex ferenda* development finds

185 *Ibid*., p. 154, para. 430.

186 One interpretation of this *dictum* could well be that the prohibition on the use of force restricts unilateral humanitarian interventions for the purpose of preventing genocide.

187 Bosnia v. Serbia Case (2007), para. 434.

188 *Ibid*., p. 157, para. 438.

189 Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia). Preliminary Objections, ICJ Reports, 1996, p. 595, p. 616, para. 31.

190 Bosnia v. Serbia Case (2007), para. 183.

191 Nicaragua Case (1986), para. 115; Milanovi , *State Responsibility for Genocide: A Follow-Up*, p. 670; Prosecutor v. Tadi , Appeals Chamber Judgement, Case No IT-94-1-A,15 July 1999, para. 120.

192 Cassese, *The Nicaragua and Tadi Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia*, pp. 652-653, 665. The test was, however, not based on state practice or other authoritative grounds, and does not seem to be validated by general international law.

193 Bosnia v. Serbia Case (2007), para. 430.

194 *Cf.* Milanovi , *State Responsibility for Genocide: A Follow-Up*, p. 694.

support in the newly developed concept of R2P, entailing moral and political responsibilities to protect in certain circumstances.[195]

The ICJ judgment does not pronounce on the right to use military force (humanitarian intervention) to prevent genocide in another state. In the interpretation of the court's *dicta*, international law proper should be viewed as setting the outer framework for the interpretation of what 'reasonable means available' may imply. The legal rules regulating the use of force not only by individual states, but also in relation to the conduct of states through coalitions of the willing, regional organisations and through the Security Council, should therefore guide the answers in each individual case.[196]

To summarise, the question of whether the Genocide Convention's limited obligation for states to prevent genocide by other states outside their own state territory could or should be undertaken by military means is not regulated in the Convention, and nor was it directly or explicitly ruled upon by the ICJ in the Bosnia v. Serbia ase (2007). This ICJ case does not extend this legal obligation to a right to use military force in another state, even if there were to be links to the perpetrator. The court's reference to 'all reasonable measures' does not expressly rule out the use of force, but when such action would involve the transgression of territorial borders, the use of force on another state's territory must comply with the regulation on the use of force in international law in general. There is no indication that the court intended to interpret the Genocide Convention to grant an individual legal right or duty for states to use military force outside their own territories for the purpose of preventing genocide. The legal obligation of states to prevent genocide under the Genocide Convention does impose far-reaching obligations outside the state's own territory, but with regard to the use of military force to prevent genocide in another state, the rules on the use of force in international law have to be complied with. Thus states would have to seek a Security Council authorisation or develop a customary rule for unauthorised interventions for such protections.

195 *Ibid*., p. 687; Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgement*; p. 702.

196 In short, humanitarian intervention by individual states as well as by coalitions of the willing is prohibited, while the Security Council has a legal right under the UN Charter to take such action. Regional organisations have started a customary development towards an *ex post facto* legitimisation of unauthorised humanitarian interventions (the ECOWAS interventions in Liberia (1991) and Sierra Leone (1997)).

4.3. An erga omnes obligation to prevent genocide by military means?

The principles underlying the Genocide Convention are recognised as binding on states, even without conventional obligations. The condemnation of genocide and the duty to co-operate to liberate mankind from genocide takes on a universal character.[197] The 'prohibition of genocide' has the character of a *jus cogens* norm (a peremptory norm),[198] and the 'duty to prevent genocide' on the part of states may be referred to as an *erga omnes* obligation – one which all states have a legal interest in upholding, and possibly also enforcing.[199] Thus the obligation of states to protect people from genocide is not only regulated in the Genocide Convention, but is also an *erga omnes* obligation, and part of customary law.[200] Consequently, the obligation to prevent genocide is owed to the international community as a whole and exists even if a state is not a party to the Genocide Convention, since the prohibition on genocide is a *jus cogens* norm and therefore binding on all states.

If a state violates a peremptory norm of *jus cogens* or an *erga omnes* obligation, 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.[201] The possibility open to invoke state responsibility for committing genocide or for failure to prevent it is thus open to every other state under customary law and the rules on state responsibility. However, the law on state responsibility admits military counter-measures only if the prior violation of international law also involved the use of force against another state. Since the use of force involved in genocide is not directed as an armed attack against a state but against people, forceful reprisals without Security Council authorisation would be in breach of international law.

197 See the preamble to the Genocide Convention; see also the Court's statement on the issue of genocide as a crime under international law in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion: ICJ Reports, 1951, p. 15, p. 23.

198 On the peremptory character of genocide, see Bosnia v. Serbia Case (2007), para. 161; Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), 3 February 2006, ICJ Reports, 2006, p. 1, para. 64.

199 Toope, Stephen J., *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?*, McGill Law Journal, vol 46, 2000-2001, pp. 187-194, p. 193; Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgement*, p. 697.

200 Cassese, *International Criminal Law*, p. 98; *Cf.* however Gattini who argues that a breach of the obligation to prevent genocide does not in itself constitute a violation of *jus cogens*. Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgement*, p. 697.

201 See Article 48 (1) (b) of the ILC Articles on State Responsibility; Milanovi , Marko, *State Responsibility for Genocide*, European Journal of International Law, vol 17, 3, 2006, pp. 553-604, pp. 564-565.

Schabas argues *lege ferenda* that humanitarian intervention could be legally permissible as a result of the treaty-based obligation to prevent genocide in Article I of the Genocide Convention and the customary norm that it reflects, even without Security Council authorisation.[202] Since the prohibition on genocide is a *jus cogens* norm and constitutes an *erga omnes* obligation, it would trump any incompatible obligation such as the prohibition on the use of force, even if this was embedded in the UN Charter, and would thus allow for the use of military force by individual states to prevent genocide.

A counter-argument to the justificatory claim of Schabas for unauthorised intervention is that there exists no legal rule that regulates conflicts of *jus cogens* norms as in this case – a conflict between the prohibition on the use of force and the prohibition on genocide. On the other hand, if a narrow approach is taken to the *jus cogens* character of the prohibition on the use of force, only aggression is part of *jus cogens*, not humanitarian intervention. The use of force in order to prevent genocide would thus fall under the customary part of the prohibition and would therefore yield to the *jus cogens* prohibition on genocide as well as the *erga omnes* obligation to prevent it. There is thus a window of opportunity in this area, in that states may develop a right under customary law by means of state practice on such humanitarian intervention supported by *opinio juris*.

Toope claims *de lege ferenda* that the UN, and in particular the Security Council, may also be vested with another basis for action to prevent genocide apart from Article VIII of the Genocide Convention, namely as a right and duty under customary law on behalf of all states and of humanity to enforce and implement the *erga omnes* obligation to prevent it.[203] He mentions that the Council could adopt "an active coordinating and recommendatory role that carries strong legitimacy", but he does not further specify what this would consist in and nor does he specifically address whether it would include the use of military force for this purpose.

However, regulation on *erga omnes* obligations is scarce. There is a lack of support for arguing that such obligations also include a right for states to use military force for their protection in the absence of Security Council authorisation. The ICJ did not rule on the *erga omnes* character of the obligation to prevent genocide in the Bosnia v. Serbia Case, and specifically left out the issue of the prevention of genocide of non-nationals in another state.[204]

Schabas' and Toope's contentions could be regarded as a *lege ferenda* argument not yet firmly supported in international law or by states, although with strong moral support. The legal analyses and case studies on unauthorised humanitarian intervention do not show sufficient support for the positions being part of general international law. There are no genuine cases of unauthorised humanitarian intervention in the post-Cold War period for the purpose of preventing genocide (the cases of Liberia (ECOWAS in 1990), Northern Iraq (individual NATO states in 1991) and Kosovo (NATO in 1999) did not involve the crime of genocide). However, a potential customary process of an emerging norm allowing for such unauthorised humanitarian intervention by states for the prevention of genocide could, and would, legalise such action when crystallised into law.

Thus, in summary, neither states nor the UN have a *lex lata* customary *erga omnes* obligation to protect genocide by military means. The same limitations to the right to use military force to prevent genocide under the Genocide Convention would apply to the customary *erga omnes* obligation to prevent genocide on the part of states and the UN. States would have to seek Security Council authorisation or develop a customary rule for unauthorised interventions for such protection through military means.

4.4. An external responsibility to protect people from genocide?

Engle holds that the vast majority of policymakers and international legal scholars who equate a finding of genocide with a responsibility to protect, rely on, in particular Article I of, the Genocide Convention as the basis of their argument.[205] But it would perhaps also be possible to argue that there are even more similarities between R2P in the Outcome Document and Article VIII of the Genocide Convention. The principle of R2P as endorsed by states, including by military means, is primarily to be carried out collectively through the Security Council and not by each and every state unilaterally (*cf.* Article I of the Genocide Convention which is directed towards each state). The Genocide Convention's limited obligation for states to prevent genocide outside their own state territory in other states (based upon a capacity to influence) is not really equivalent to the 'external responsibility to protect' populations from genocide and other grave crimes. The external R2P does not assume any linkages or capacity to influence a potential perpetrator of genocide in another state for the responsibility to protect to be activated.

202 Schabas, *Genocide in International Law*, p. 500.

203 Toope, *Does International Law Impose a Duty upon the United Nations to Prevent Genocide?*, p. 194.

204 See Bosnia v. Serbia Case (2007), para. 184 (7)

205 Engle, *"Calling in the Troops": The Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Iervention*, p. 211.

From the various *dicta* of the court in the case, and drawing on Article VIII, it seems that a reasonable conclusion would be that the use of military force to prevent genocide in another state complies with the Genocide Convention as long as the measures are taken in accordance with international law and the UN Charter.

In other words, when people face genocide, the Genocide Convention Article I imposes a legal obligation on member states to prevent genocide (and punish the perpetrators). Article VIII endows the UN with the legal right and duty (when called upon by a state) to take appropriate measures to prevent and suppress genocide, involving both non-military and military measures – as long as these measures are taken in accordance with the UN Charter and international law. For individual states this means that the use of force may be employed in their own territory, but when acting outside their territory, and when the UN employs the use of force to prevent genocide, military action should be authorised by the Security Council in accordance with the UN Charter. An emerging norm on R2P by military means, however, might change the legal scene in the future, if regional organisations are also granted the legal right to use unauthorised military force to prevent grave crimes in international law when a state is manifestly failing to protect its own population.

5. CONCLUDING REMARKS

The external R2P of the Security Council endorsed at the UN World Summit in 2005 should be seen as a major achievement. The legal right of the Security Council to authorise military enforcement measures to protect populations against genocide, war crimes, and crimes against humanity, are confirmed by the post-Cold War practice of the Council of authorising humanitarian interventions. The UN Charter and international law arguably support this conclusion, taking a broad approach to the powers of the Council under the Charter.

When it comes to the prevention of genocide, it has been argued that the Genocide Convention does not confer any further rights or impose further duties on the Security Council when deciding on the use of force than it already has under the UN Charter. At the same time, it has been claimed that the Genocide Convention grants the Council a right to take decisions on collective action to 'prevent genocide' also in peacetime. It has been argued in this article that the Security Council has a legal right under international law to authorise a humanitarian intervention in a situation of imminent genocide or genocide being committed also during peacetime. A traditional interpretation of the UN Charter would arguably hinder such a decision, and does not appear to be in conformity with the political and moral declaration on the R2P endorsed by states in 2005. However, taking a broad approach to the interpretation of the Council's powers under the UN Charter leads to the conclusion that the Council is able to act forcefully to prevent genocide (and crimes against humanity) also in peacetime. There is hence no conflict of treaty provisions.

This means that the Security Council may undertake its external responsibility to protect populations from genocide (and other grave crimes) through the determination that such grave crimes may constitute a threat to the peace, and subsequently authorise military enforcement for the prevention of such atrocities when peaceful means are found inadequate under Chapter VII of the UN Charter.

Unauthorised humanitarian interventions by states, coalitions of the willing and regional organisations undertaken as an act of external responsibility to protect, are not yet supported by international law. However, it could be argued that in exceptional circumstances, such forceful protective measures may be legally acceptable under the doctrines of *ex post facto* or implied authority if the relevant criteria are present.[206] Such military force to prevent genocide would fall under the customary part of the prohibition on the use of force, and would therefore not violate *jus cogens*. There is not sufficient state practice in this area to confirm such a rule, but such a rule could develop through a customary process if future state practice in this field becomes legally accepted by states.

206 Ress/Bröhmer, *Article 53, Simma*, Simma (Ed.), The Charter of the United Nations. A Commentary, 2nd edition, p. 866, para. 17-25. This *lege ferenda* argument would *mutatis mutandis* also extend to coalitions of the willing and individual states in the field of humanitarian intervention.

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