

## Responsibility to Protect: A Framework for Prevention

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### Abstract

Most agree that prevention is the most important aspect of the Responsibility to Protect. The best way, after all, to protect populations from mass atrocities is to ensure that they do not occur in the first instance. Nonetheless, since the adoption of the R2P Doctrine at the World Summit, academic and policy debate concerning the legal and normative content of R2P, continue to neglect its preventative dimension. This paper begins to fill that lacunae in policy and scholarship by examining seeks to develop the preventative dimension of R2P by examining the relationship between evolving international human rights law on prevention and R2P, with two objectives. The first objective is to bring a much needed focus to the law on prevention, and the second objective is to mediate the debate between those who claim R2P it is a major departure from existing law and those who claim it adds nothing new to the existing body of law. The paper argues that, resting upon international human rights principles, R2P provides, under certain circumstances, for an obligation of due diligence requiring states to take such reasonable measures of prevention as could be expected of states in a similar position. R2P's strength is that harnesses the disparate body of law on the duty to prevent and provides a modicum of conceptual clarity and discipline to its application to mass atrocities.

### Keywords

prevention, 2005 World Summit Outcome Document, international human rights, duty to protect/prevent, due diligence, positive obligations in international human rights law, international law, Bosnia v. Serbia judgment

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## Introduction

The Responsibility to Protect (R2P) is a doctrine of prevention.<sup>1</sup> It commits states to take action to prevent genocide, war crimes, crimes against humanity, and ethnic cleansing (hereinafter ‘Atrocity Crimes’)<sup>2</sup> when they know or should know that populations are at grave risk. Although R2P is understood by some as another name for humanitarian intervention, R2P takes a broader view which, as a last resort allows for the possibility of humanitarian intervention.<sup>3</sup> It provides for a much larger set of policy tools to forestall the need for such intervention in recognition that prevention is the best form of protection.<sup>4</sup>

This paper is concerned with the often neglected legal aspect of the prevention dimension of R2P. It seeks to examine the relationship between the developing international human rights law on protection/prevention and the developing norm of R2P with two objectives. The first objective is to bring a much needed focus to the law on prevention, and the second objective is to advance the debate between those who claim R2P is major departure from international law and those who claim that it adds nothing new to the existing body of human rights law. In the process, the paper indicates where R2P affirms existing law on prevention, where it innovates, and where it signals the progressive development of international law.

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<sup>1</sup> Though the doctrine includes the responsibility to prevent, to react and to rebuild the UN Secretary General and others consistently affirm that the emphasis should be on prevention. Similarly, during discussion of R2P which took place at the 63rd General Assembly, member states confirmed the importance of prevention. ‘As the representative of Nigeria emphasized, prevention rather than intervention was the priority.’ See, Report of the global Centre for the Responsibility to Protect, Implementing the Responsibility to Protect The 2009 General Assembly Debate: An Assessment, August 2009, p. 6.

<sup>2</sup> David Scheffer, ‘Genocide and Atrocity Crimes’, *Genocide Studies and Prevention*, 1/3: 229-250 (2006) (arguing for a single term ‘atrocity crimes’ to capture genocide, war crimes, crimes against humanity and ethnic cleansing); Madeleine K. Albright and William S. Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers*, Genocide Prevention Task Force, 2008, addressing genocide and mass atrocities, pp. xxi-xxii, <http://www.usmmm.org/genocide/task-force/pdf/report.pdf>, accessed 22 June 2009.

<sup>3</sup> Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington D.C.: The Brookings Institution, 2008), p. 56. (Endorsing the view that R2P and classical conceptions of humanitarian intervention are ‘very different concepts’); Susan E. Rice, ‘Remarks on the UN Security Council and the Responsibility to Protect’, at the International Peace Institute Vienna Seminar, 15 June 2009 available at [http://www.usunnewyork.usmission.gov/press\\_releases/20090615\\_126.html](http://www.usunnewyork.usmission.gov/press_releases/20090615_126.html)

<sup>4</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009.

The R2P doctrine as expressed by the International Commission on Intervention and State Sovereignty (ICISS) in its Report, and as adopted at the 2005 World Summit, lays bare that responding to mass atrocities, like a Rwanda or a Srebrenica, is not a false choice either between putting boots on the ground or doing nothing; it is not a zero-sum game.<sup>5</sup> Rather, its significant achievement lies in identifying a continuum of actions ranging from preventing atrocities, to protecting populations should they occur, to rebuilding in the aftermath. The ICISS report provides that ‘prevention is the single most important dimension of the responsibility to protect’<sup>6</sup> stating that ‘it is high time for the international community to be doing more to close the gap between rhetorical support for prevention and tangible commitment.’<sup>7</sup>

The most authoritative statement on and formulation of R2P was made by the General Assembly (GA) at the September 2005 High-level plenary meeting of the United Nations General Assembly where world leaders adopted the Summit Outcome Document (Outcome Document), which embraced the concept of R2P.<sup>8</sup> In Paragraphs 138 and 139 of the Outcome Document, heads of state unanimously affirmed that each individual state has the responsibility to protect its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing, including the prevention of such crimes. They further agreed that states should assist others states in exercising their responsibility.

Moreover, they affirmed that the international community has the responsibility to take actions using peaceful means to protect populations; and should a state ‘manifestly fail’ to protect its population from atrocity crimes, ‘we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter’.<sup>9</sup> Prevention was again perceived as the cornerstone obligation undertaken by the international community.<sup>10</sup>

Since the World Summit, the R2P framework and the language it employs infiltrate most policy discussions of humanitarian crises. Significantly, the UN Security Council has endorsed R2P three times in resolutions concerning the protection of civilians in armed conflicts in general and in reference to the situations in Darfur, Sudan and Somalia in particular.<sup>11</sup> In 2009, the Secretary

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<sup>5</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: IDRC, 2001), p. 16 para. 2.28. The ICISS found that the expression ‘humanitarian intervention’ and past debates over the ‘right to intervene’ were not helpful and did not help to ‘carry the debate forward.’

<sup>6</sup> *Ibid.* p. XI.

<sup>7</sup> *Ibid.* p.19.

<sup>8</sup> ‘2005 World Summit Outcome’, UNGA Res. 60/1, 16 September 2005.

<sup>9</sup> *Ibid.*, Para. 139.

<sup>10</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009.

General produced a report summarising and setting forth a strategy for implementing the R2P. The strategy is three-pillared. Pillar one addresses the responsibility of the state to protect its population; pillar two addresses the international community's duty to assist states fulfill their responsibility to prevent and protect; and pillar three addresses the international community's responsibility to take timely and decisive responses through peaceful means, and should that fail through other more forceful means, in a manner consistent with international law. Pillars one and two constitute crucial elements in the effective prevention of mass atrocity crimes again placing the emphasis on prevention.<sup>12</sup>

Since the adoption of R2P by the GA in its 2005 resolution, academic and policy debates continue over whether R2P has legal content, whether it should have legal content and whether identifying legal content matters.<sup>13</sup> Relevant actors continue to debate the principle's status in international law and policy. Some say it is a tool of 'moral suasion'<sup>14</sup>, others a combination of legal and political norms<sup>15</sup>, and yet others state that it is firmly grounded in international law.<sup>16</sup>

Broadly, most commentators would likely accept that Paragraphs 138 and 139 of the Outcome Document are in themselves a convoluted, compromise of political and legal statements and considerations.<sup>17</sup> Moreover, most would likely agree that while a number of the constituent parts of R2P are unquestionably grounded in international law, R2P as a whole does not presently

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<sup>11</sup> S/RES/1674, 28 April 2006, p. 2; S/RES/1706, 31 August 2006, p. 1; S/RES/1814, 15 May 2008, p. 5.

<sup>12</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, p. 2. The three Pillar typology will be used throughout the paper.

<sup>13</sup> Jose E. Alvarez, 'The Schizophrenias of R2P', Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues International Criminal Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, 30 June 2007, <http://www.asil.org/pdfs/r2pPanel.pdf>, accessed 24 June 2009. (highlighting the risks of R2P as a legal concept).

<sup>14</sup> Albright and Cohen, *Preventing Genocide*, p. 89, 'R2P is best understood as an important tool for moral suasion'.

<sup>15</sup> Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm', *American Journal of International Law*, 101/1: 99-120 (2007) (arguing that the R2P concept encompasses different normative prescriptions that vary widely in their degree of legal foundations). After the adoption of the Outcome Document, Paul Martin, Prime Minister of Canada referred to R2P as a 'powerful norm of international behaviour', Italy referred to it as a principle. Statements, 16 September 2005, <http://www.un.org/webcast/summit2005/statements.html>, accessed 23 June 2009.

<sup>16</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, p. 4, para. 2.

<sup>17</sup> Stahn, 'Responsibility to Protect', p. 67; Ekkehard Strauss, 'A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect', *Global Responsibility to Protect*, 1/3 (2009) (forthcoming).

constitute a legal norm. A GA resolution (Paragraphs 138 and 139 of the Outcome Document) coupled with follow up statements<sup>18</sup> and affirmations<sup>19</sup> by the Security Council, are not generally considered to establish the existence of customary international law.<sup>20</sup> That, is not to say, however, that states did not interpret, reinforce, and, in fact, clarify existing legal obligations in the various ‘responsibilities’ of R2P.<sup>21</sup>

Where one locates R2P on the spectrum from politics to law matters. If the content of R2P is political or moral then the failure to discharge the obligation there under results in different types of repercussions, depending upon the socio-political circumstances surrounding the situation. If however, the obligation rests upon international law than with the failure to discharge that duty comes a host of potential remedies, including the legal liability of the wrongful actor. Politics and institutional arrangements for prevention are important, but they need a relationship with legal norms that give weight and clarity to political aspirations.<sup>22</sup> As Louise Arbour, the former High Commissioner for Human Rights has stated, a lesson learned from Srebrenica and Rwanda is that we need a compulsory legal framework for action – ‘a framework that would trigger not just a political or moral responsibility to act, but a legal one that carries legal consequences.’<sup>23</sup>

<sup>18</sup> For a discussion of the General Assembly’s statements on R2P see, Ekkehard Strauss, *The Emperor’s New Clothes?: The United Nations and the Implementation of the Responsibility to Protect* (Nomos Publishers 2009).

<sup>19</sup> S/RES/1674, 28 April 2006, p. 2; S/RES/1706, 31 August 2006, p. 1; S/RES/1814, 15 May 2008, p. 5.

<sup>20</sup> International custom is a source of international law established by state practice accompanied by a sense of legal obligation – *opinio juris*. See generally, Weissbrodt, Fitzpatrick and Newman (eds.), *International Human Rights: Law, Policy and Process* (Anderson Publishing 2001 3rd edition), pp. 22–23. General Assembly resolutions can provide evidence for the existence of a certain rule or *opinio juris*. They are not however, conclusive of customary international law. See, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep, 8 July 1996, p. 254.

<sup>21</sup> General Assembly resolutions may assist in the determination and interpretation of international law. See, Stahn, ‘Responsibility to Protect’.

<sup>22</sup> Over the past decade there has been a burgeoning of institutional mechanisms established to facilitate the prevention of mass atrocities. For example, in 2004 the UN established the Special Advisor’s Office for the Prevention of Genocide, the Constitutive Act of the African Union granted African heads of state a collective right to intervene, and the United States created a task force on genocide prevention, which recently issued a key report: Albright and Cohen, *Preventing Genocide*.

<sup>23</sup> Louise Arbour, ‘Preventing Mass Atrocities’, transcript from lecture at the Council on Foreign Relations, 12 June 2007, p. 12. [http://www.cfr.org/publication/13580/preventing\\_mass\\_atrocities\\_rush\\_transcript\\_federal\\_news\\_service.html?breadcrumb=%2Fmedia%2Ftranscripts](http://www.cfr.org/publication/13580/preventing_mass_atrocities_rush_transcript_federal_news_service.html?breadcrumb=%2Fmedia%2Ftranscripts), accessed 24 June 2009.

This paper provides that the responsibility to prevent, insofar as it requires states to take action in the face of genocide, crimes against humanity, war crimes and ethnic cleansing, short of military intervention, rests upon established norms of international human rights law. The scope and content of these obligations are disaggregated in two ways: the first based upon the particular instrument under which the obligation is established, and second based upon the role of the actor committing the infringements, the place where the infringements are occurring, and the relationship between the perpetrator and the victim.

The first part of the paper examines the duty to protect/prevent in human rights laws corresponding to pillar one of R2P. The second part of the paper focuses on the *Bosnia and Herzegovina v. Serbia and Montenegro* decision rendered by the International Court of Justice (ICJ) in 2007<sup>24</sup> in order to explore the separate question of a state's obligations under international law to protect human rights outside of its territory, corresponding to pillar two of R2P. The third part of the paper examines the relationship between the duty to protect/prevent in human rights law and R2P and disaggregates the ways in which each works to define the content and scope of the other.

## **Protect Rights /Prevent Violations**

### *Preliminary Issues – Clarification of Terminology and Concepts*

The ICISS developed the responsibility to protect as a guiding principle for the international community of states that rests up on a range of legal obligations and political responsibilities.<sup>25</sup> In fact, the negotiating history of the Outcome Document reveals that these responsibilities were considered to rest up on existing international law.<sup>26</sup> Secretary General Ban Ki-Moon underscored in his 2009 report that the provisions of 138 and 139 of the Summit Outcome are 'firmly anchored in well-established principles of international law. Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes, and crimes against humanity.'<sup>27</sup>

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<sup>24</sup> *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep, 26 February 2007.

<sup>25</sup> ICISS, *The Responsibility to Protect*, p. XI.

<sup>26</sup> Strauss, 'A Bird in the Hand is Worth Two in the Bush', p. 14.

<sup>27</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, para. 3.

These ‘firm anchors’ as described by the Secretary General are found throughout international law ranging from state responsibility as articulated under the International Law Commission’s Articles of State Responsibility to principles of international criminal and human rights law. In fact, some commentators criticise the R2P concept for being overly broad in scope and redundant as to content, because it does not add anything new to state’s existing obligations under international law.<sup>28</sup> This critique however, overlooks the potential strength of R2P. Certainly, the endeavour of exploring the rights of individuals and corresponding duties of states encompassed under the R2P framework is theoretically, doctrinally, and politically difficult, but this does not demonstrate the illegitimacy of the category or unit of analysis. While R2P in some aspects may reinforce or reiterate existing law, its strength lies in the framework it establishes – unearthing, interpreting, and crystallising the obligation to act in the face of mass atrocity crimes.

Given the scope of obligations undertaken under R2P, it is necessary to disaggregate the legal bases for the varying sets of obligations. Since R2P primarily requires states to act to ensure that atrocities do not occur in the first place, it is necessary to identify the legal standards that will determine if and when a state may be held responsible for failing to take action to prevent.

As a threshold matter certain terminology must be clarified. First, the ‘responsibility to protect’ is a term now commonly associated with the concept first articulated by the ICISS report as adopted in the Outcome Document. The ‘*duty* to protect’ is a well known concept in international human rights law that provides, generally, that states have a positive obligation in certain circumstances to prevent private actors from infringing on the rights of other individuals.<sup>29</sup> In essence it requires states to prevent, punish, investigate and redress human rights violations.

Second, R2P entails collective obligations of the international community and national obligations of individual states. While these obligations are autonomous, there is a symbiotic relationship between the two sets of obligations. R2P relies heavily on the concept of peaceful ‘coordinated actions’ to be

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<sup>28</sup> Hurst Hannum, remarks at the ‘The Responsibility to Protect: A Framework for Confronting Identity-based Atrocities, Benjamin N. Cardozo School of Law, March 10-11, 2008 (on file with the author).

<sup>29</sup> Thomas Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’ in Louis Henkin (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp. 72, 77-78. For an exploration of positive obligations in international human rights law, see, generally, Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

taken by the international community as a whole, and, should peaceful means prove inadequate, more coercive collective measures through the Security Council. The notion of collective responsibility resembles the tentative positive duty of cooperation found in Articles 40 and 41(1) of the International Law Commission's Articles of State Responsibility.<sup>30</sup> These Articles provide that certain breaches of international law may be so grave as to trigger not only a right but an obligation (a positive duty) of cooperation among states to foster compliance with the law. This principle is limited to a certain category of violations designated as 'serious breaches'. Serious breaches are defined 'as a gross or systematic failure by the responsible state' to perform 'an obligation arising under a peremptory norm of general international law.'<sup>31</sup> Such breaches would result in a positive obligation of states to cooperate, to bring the serious breach to an end by lawful means through coordinated action. It should be noted, that the Commission is skeptical about whether general international law at present prescribes an obligation of cooperation stating in that respect that Article 41 (1) 'may reflect the progressive development of international law.'<sup>32</sup>

R2P also places, autonomous, positive obligations upon UN member states to take steps to ensure that they do not contribute to mass atrocities outside of their borders. At the World Summit, states committed themselves to 'encourage and help' other states to exercise *their* responsibility to prevent and to assist states 'as necessary and appropriate' build their capacity to protect populations, such assistance being a crucial component of prevention. At a minimum, this suggests that individual states should refrain from exacerbating atrocity

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<sup>30</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001), reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002). (hereafter Articles on State Responsibility). The International Law Commission was established by the UN in 1948 to assist in the development and codification of international law. The Draft Articles on State Responsibility are an authoritative statement on the law, which have been referred to, but not yet adopted by the GA.

<sup>31</sup> Articles on State Responsibility, Article 40. A peremptory norm of international law (otherwise known as a *jus cogens* norm) is one which is accepted and recognised by the international community from which no derogation is permitted. See, Article 53 of the Vienna Convention on the Law of Treaties. Commentators have suggested that prohibitions against aggression, slavery, apartheid, genocide, racial discrimination and 'international crimes' have acquired *jus cogens* status. Crawford, *The International Law Commission's Articles on State Responsibility*, p. 246, Note 4 to Article 40, see also, Restatement of the Law (Third) The Foreign Relations Law of the United States at 102 reporters note 6 (1987).

<sup>32</sup> Crawford, *The International Law Commission's Articles on State Responsibility*, p. 249, Commentary, para. 3.

crimes of other states. Moreover, the collective obligation of the international community to take coordinated action to assist states to protect populations from atrocity crimes implies individual state responsibility to take reasonable steps to prevent the acts it seeks to prohibit. It would be incongruous, though of course not implausible, to suggest that states committed themselves to cooperate to bring atrocity crimes to an end, while omitting each state's individual commitment to do their best not to contribute to such crimes.

*The Duty to Respect and Protect: States' Positive Obligations*

Under international human rights law, states have a duty to protect individuals from human rights violations. These duties are defined in specific international treaties in different contexts, with different purposes. The scope and content of these obligations are disaggregated based upon the role of the actor committing the act, the place where the interference occurs, and the relationship between the alleged perpetrator and victim. In order to appreciate the specific legal obligations to prevent affirmed in Paragraphs 138 and 139 of the Outcome Document, we must parse these separate obligations.

International human rights law is focused primarily on the conduct of states. It is grounded in a concept of human dignity, which provides that individuals have inherent attributes that cannot be legitimately restricted by governmental power. On this view, human rights give rise to 'negative duties' upon a state not to interfere with an individual, rather than requiring the state to take positive action to effectuate human rights protections. At a minimum, human rights law requires states to respect human rights. That is to say state actors may not infringe upon individuals' human rights.

This obligation is firmly rooted in international law. Since Nuremberg and the birth of the Universal Declaration of Human Rights, how a sovereign treats its population has become a legitimate subject of international concern, of international law.<sup>33</sup> The Universal Declaration of Human Rights, along with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>34</sup> form the core of international human rights law. Since their

<sup>33</sup> Sheri Rosenberg, 'What's Law Got to do with it?: The *Bosnia v. Serbia* Decision's Impact on Reconciliation', *Rutgers Law Review*, 61/1: 131-159 (2008), pp. 131-132.

<sup>34</sup> The International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., U.N. Doc. A/Res/2200 [Dec. 16, 1966], 999 U.N.T.S. 172 (ICCPR) [entered into force 23 March 1976]; the International Covenant on Economic, Social, and Cultural Rights G.A. Res. 2200A art. 2, U.S. GAOR, 21st Sess., UN Doc. A/6316, [Dec. 16, 1966] 993 U.N.T.S. 3. (ICESCR)[entered into force 3 Jan. 1976].

adoption, a multitude of other human rights treaties have been promulgated.<sup>35</sup> By the 1980s, human rights as a cornerstone of international law had been firmly established.

By the 1990s, there was a significant movement to pursue *individual* accountability for mass atrocities with the creation of the *ad hoc* tribunals and, ultimately, the adoption of the Rome Statute of the International Criminal Court (ICC) which entered into force in 2002.<sup>36</sup> While international criminal law does not implicate state responsibility for the underlying crime, because it seeks to hold individuals accountable for crimes rather than the state, it is another source of protection for victims and places a responsibility on states to hold perpetrators of mass atrocities accountable.<sup>37</sup>

The highly developed body of human rights and international criminal law provides states with clear indications of the content and scope of the complex set of violations to bodily integrity that make up atrocity crimes.<sup>38</sup> Indeed, the right to life is considered a fundamental right provided for in most international human rights and criminal law treaties and is a peremptory norm of international law. Thus, the legal obligation upon *states* not to commit mass atrocities against its own populations is straight forward.

In today's world, however, many of the atrocity crimes that we experience around the globe are committed surreptitiously at the hands of *non-state*

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<sup>35</sup> For example, the International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4 1969, 660 U.N.T.S. 195 (CERD) [entered into force 4 January 1969]; Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34.180, U.N. GAOR Supp., 46th Sess., U.N. A/34/180 (CEDAW), [entered into force 3 Sept. 1981]; Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 51st Sess., U.N. Doc. A/39/51 (CAT), [entered into force 26 June 1987].

<sup>36</sup> Rome Statute of the International Criminal Court, 17 July, 1998, 2187 U.N.T.S. 90 [entered into force on 1 July 2002][hereinafter Rome Statute].

<sup>37</sup> In fact an examination of the approaches of the International Criminal Court (as provided for in the Rome Statute) and the Responsibility to Protect (as provided for in the World Summit Outcome Document) illustrates a striking similarity in that both focus explicitly on the *primary* responsibility of the State to punish perpetrators or protect its people and giving the international community an active, as opposed to supportive, role in these matters *only* if the relevant State is 'unable or unwilling' (in the case of the ICC, Article 17) or there is a 'manifest failure' (regarding the Responsibility to Protect, para 139).

<sup>38</sup> These include, *inter-alia*, the ICCPR Arts. 6, 7, 9; the ICESCR Arts. 11 -12; Rome Statute; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, 213 U.N.T.S. 222 (ECHR), Arts. 2-5; African Charter on Human and Peoples' Rights, Organization of African Unity, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3rev5 (African Charter) Arts. 4-6; the American Convention on Human Rights, Organization of American States, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (American Convention) Arts. 4-7.

actors, with varying degrees of relationship with the state. For instance, in Darfur, Sudan, many of the atrocity crimes are being committed by the Janjaweed, an organised group that has a complex relationship with the Sudanese government. During the Balkan wars from 1990-1994, many of the crimes were committed by the Bosnian Serbs, who themselves were non-state actors acting under a certain level of influence from Serbia. In those situations the question then becomes what obligations, under existing international human rights law,<sup>39</sup> do states have to prevent private individuals or other states from committing human rights abuses, in particular, human rights abuses which involve violations of the right to life, like atrocity crimes.

As will be examined below, there is an evolving trend in international human rights law to delimit and define states' positive obligations to protect individuals from interferences with the right to bodily integrity committed by private individuals and other states. Essentially, positive obligations require states to take certain affirmative steps under certain circumstances to prevent the human rights violation in the first place.

Because international human rights law was traditionally focused on state conduct the two core international human rights treaties, the ICCPR and the ICESCR, do not set forth specific provisions requiring the state to take steps to protect the rights of individuals from interferences by non-state actors. Likewise, the principal regional human rights treaties, the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR) are also silent on this point. Each, however, contain phrasing that leaves room for interpretive devices to establish just such obligations.<sup>40</sup>

While there are no express provisions in international law requiring a state to protect individuals from human rights violations committed by private individuals, it is now generally accepted that states have positive obligations under international human rights treaties to prevent, punish, investigate and redress human rights violations in areas ranging from the right to life, to respect for private and family life, and the prohibition on discrimination.<sup>41</sup>

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<sup>39</sup> While international criminal law principles are certainly implicated under R2P and bear on specific questions of accountability, as will be seen below, this paper focuses on state responsibility.

<sup>40</sup> ICCPR Art. 2; ICESCR Art. 8; ECHR Art. 1; ACHR Art. 1.

<sup>41</sup> It is outside the scope of this paper to examine the range of positive obligations under international human rights. For an exploration of positive obligations in the European system see Mastair Mowbray, *The Development of Positive Obligations under the European Convention Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004); J.G. Merrills,

In other words states must not only take steps to ensure all governmental actors refrain from committing violations but must also take active steps to prevent private individuals from committing human rights violations within their jurisdiction.<sup>42</sup>

The positive obligation to protect is based upon the theory that rights protected under international human rights instruments must be practical and effective, not theoretical or illusory.<sup>43</sup> In other words, for certain rights to be realised the state may be under a duty to take particular actions. Moreover, Deconstructing a right into its related state duties, provides a clearer notion of the ‘content or proposed content of the right itself.’<sup>44</sup> In essence, positive obligations require, under some circumstances, that states not stand idly by while private individuals infringe the rights of others. For example, the right to life requires that state actors do not kill, but it also requires that states take action to prevent the taking of life by non-state actors, in so far as possible. Of course, a state cannot anticipate every infringement committed by private actors, but it must take positive steps to stop the infringement through its laws and administrative processes, and to offer redress for the victim should a violation occur.

### *Due Diligence – A Duty to Act*

The positive obligation to prevent violations by non-state actors has developed as a standard of due diligence, a concept known in the national law of torts.<sup>45</sup> Due diligence requires such reasonable measures of prevention as could be

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*The Development of International Law by the European Court of Human Rights* (Manchester University Press, 1994); Andrew Byrnes, ‘Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?: Some Current Issues’, *Australian Yearbook of International Law*, 12 (1988), p. 205.

<sup>42</sup> G.J.H van Hoof, ‘The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views’, in P. Alston and K. Tomaševski (eds.), *The Right to Food* (Martinus Nijhoff Publishers, 1984), p. 97. Positive obligations of conduct are extant in other areas of international law. See for example, *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America v. Iran*), Judgment, ICJ Rep, 24 May 1980, (the Court held that Iran was responsible for failing to take any steps to protect the U.S. embassy from the attack that took place in 1979), *United States v. Canada (Trail Smelter)* preliminary decision, 3 Int. Arb. Awards 1911 (1938), final decision, 3 Int. Arb. Awards 1938 (1941) (holding Canada responsible for trans-boundary damage caused by air pollution into the United States).

<sup>43</sup> *Golder v United Kingdom*, App. 4451/70, Judgment, Eur. Ct. H.R., 21 February 1975.

<sup>44</sup> Henry L. Steiner and Philip Alston, *International Human Rights in Context*, 2nd Edition (Oxford: Oxford University Press, 2000), pp. 180–181.

<sup>45</sup> See Restatement (Third) Torts: Liability for Harm at paras. 37, 39–40 (preliminary draft No. 4) (Sept. 5, 2003). In tort, duties arise most frequently from relationships of influence or care.

expected from governments under similar circumstances. It is an obligation of conduct, not of result. This means that if the state took all reasonable measures within its power to prevent the interference, it will not be held responsible should the violation nonetheless occur. For example, if a state authority is aware that individual x harbours the intent to cause bodily harm to individual y, and the public authority takes measures to protect y, such as enforcing a restraining order or providing physical protection to person y, and person x, nonetheless causes harm to person y, the state will not be liable for its failure to prevent the harm. Seen as a due diligence obligation, prevention is the mirror image of protection. From the perspective of the state it has failed in its obligation to protect the victim should the victim be harmed; from the perspective of the victim, the state has failed to prevent the violation.<sup>46</sup>

The Human Rights Committee has coherently articulated the due diligence standard in its General Comment on Article 2 of the ICCPR. Article 2(1) of the ICCPR demands that state parties ‘ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind...[emphasis added]’<sup>47</sup> More specifically, Articles 2(2-3(c)) require States Parties to adopt legislation and remedies necessary to give effect to the rights recognised by the Covenant.<sup>48</sup>

General Comment 31 on the ICCPR provides that the failure to *ensure* Convention rights found in Article 2, in certain circumstances, may ‘give rise to violations by States Parties of those rights, as a result of a State Parties’... failing to exercise *due diligence* to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.’<sup>49</sup> The positive

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<sup>46</sup> In its application to the ICJ in 1993, the government of Bosnia, among other things, asked the Court to declare that Bosnia had the right to defend itself and its people, and therefore construe Security Council Resolution 713 placing an arms embargo on the whole of the former Yugoslavia in such a way as to provide Bosnia with the right to self-defense. The jurisdictional basis for this claim was Article 1 of the Genocide Convention, because the obligation to prevent should also be read as an obligation to protect the Bosnian people.

<sup>47</sup> ICCPR, Art. 2 para. 1.

<sup>48</sup> ICCPR, Art. 2 para. 2.

<sup>49</sup> ICCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13(2004) para. 8. General Comment 31 states that the legal obligation under Article 2(1) is ‘both positive and negative in nature’. It further provides that Article 2’s positive obligations on States Parties to ensure Covenant rights requires the State to protect individuals not just from state action, but from private actors as well. *Ibid.* para. 8. Paragraph 8 further explicates the positive obligation of States Parties to address the actions of private parties: ‘[T]he privacy-related guarantees of article 17 must be protected by law...’ *Ibid.* Additionally, according to General Comment 24, States Parties may not make

obligations that follow from the requirement in Article 2, that states ‘ensure’ protection of Covenant rights, entail a particular set of measures for each right that is protected. For example, the right to be free from torture in Article 7 implies that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.<sup>50</sup>

While the positive obligation to ensure rights attaches to all Convention rights, we will focus on the right to bodily integrity for two reasons. First, the obligations under R2P are primarily focused on preventing mass interferences with the right to life. Second, in practice, the Human Rights Committee and the regional bodies have attached this positive obligation most often in the context of interferences with bodily integrity.<sup>51</sup>

The seminal judgment setting forth the due diligence standard is *Velásquez-Rodríguez* where the Inter-American Court of Human Rights examined a case involving disappearances in Honduras. The Court determined that the Honduran government could be held liable under the American Convention if it failed to take appropriate steps to prevent or punish private individuals who caused others to disappear. In the Court’s words,

[I]n principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the States. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights

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reservations regarding Article 2’s positive obligation requirement such reservations would contravene the objects and purposes of the Covenant. ICCPR General Comment 24(9). General Comment 6 observes that Article 7’s right to bodily integrity ‘cannot properly be understood in a restrictive manner,’ and therefore the protection of that right ‘requires that States adopt positive measures’. ICCPR General Comment 6, para. 5.

<sup>50</sup> ICCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 8. See generally, Rhonda Copelon, ‘The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.’, *New York City Law Review*, 31: 59 (1998), p. 66.

<sup>51</sup> Minorities have been regarded as especially vulnerable therefore requiring protective measures to safeguard them from violations. *Case of D.H. and Others v. The Czech Republic*, App. 57325/00, Judgment, Grand Chamber, Eur. Ct. H.R., 13 November 2007, para. 115; *Case of Timishev v. Russia*, Apps. 55762/00 and 55974/00, Judgment, Eur. Ct. H.R., 13 December 2005, paras 55-56. Similarly, treaties geared to the protection of identifiable groups such as children, women and racial minorities explicitly articulate the positive duty to protect. CEDAW art. 2e, General Recommendation 19 clarifying that states are responsible for otherwise private acts if they fail to fulfill their positive duty to prevent and punish such acts, CERD art. 1 & 2(1)(d)-(1)(e). These development mirrors the concerns addressed by the R2P framework, since minorities and other vulnerable groups are most often the victims of mass atrocities.

violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility for the State, not because of the act itself, but because of the lack of *due diligence* to prevent violation or to respond to it as required by the Convention.<sup>52</sup>

The Inter-American Court's case-law reflects this principle repeatedly holding States responsible on account of their lack of due diligence to prevent human rights violations.<sup>53</sup>

The European Court of Human Rights has developed the most extensive case law over the past decade defining positive obligations upon states parties to the European Convention in areas ranging from the right to life, to respect for private and family life, and the prohibition on discrimination.<sup>54</sup>

In the context of the right to life provided under Article 2 of the European Convention states are obligated under certain circumstances, to take preventative operational measures to safeguard individuals known to be at 'immediate risk to life' from the actions of others. In the seminal case of *Osman v. U.K.* the Court examined the applicants' complaint that the police had failed to protect the lives of Mr. Osman and Ahmet as required under the right to life provided for under Article 2 of the Convention. Mr. Osman had been shot dead and Ahmet wounded by a former teacher of Ahmet who had developed a fatal obsession with him. Prior to the killing the police had been informed of the

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<sup>52</sup> *Velásquez-Rodríguez v. Honduras* Case, Judgment, Inter-Am.Ct.H.R. (Ser. C) No. 4, Judgment of July 29 1988, para. 172. (finding the state of Honduras responsible for the involuntary disappearance of Angel Manfredo Velasquez Rodriguez because it failed to take appropriate steps to prevent or punish private individuals who caused Mr. Rodriguez to disappear.) (emphasis added).

<sup>53</sup> Inter-American Court of Human Rights: *Godínez-Cruz v. Honduras*, Judgment of 21 January, 1989; *Case of Fairén-Garbi and Solís-Corrales v. Honduras*, Judgment of 15 March, 1989 (on the issue of the disappearances in Honduras); (*Villagran Morales et al. v. Guatemala*, Judgment of November 19 1999 (finding that Guatemalan government failed to protect the street children from death and torture).

<sup>54</sup> The growing importance of the notion of positive obligations in European law is well-stated by Judge Evrigenis of the European Court of Human Rights: '[t]he growing complexity of the social fabric is obliging the State to take positive action to protect rights and freedoms which, in the traditional view, only required protection against interference by public authorities. Modern human rights legislation increasingly relies on the concept of a "State conferring benefits". Human Rights have become an area in which the State finds itself confronted with a subtle, shifting synthesis between prohibited interference and compulsory intervention. 'Dimitrios Evrigenis, 'Recent Case Law of the European Court of Human Rights under Article 8 and 10 of the ECHR', *Human Rights Law Journal*, 3 : 121(1982), p. 136.

teacher's attachment, but they had decided that the matter should be dealt with by the school.

The Court held that Article 2 requires states to take appropriate steps to safeguard the lives of those within its jurisdiction. Such steps include the establishment of state apparatus for the prevention of such acts by private individuals.<sup>55</sup> Specifically, the Court established that where there is an allegation that the state authorities have failed in their positive duty to protect the right to life from the criminal acts of an individual,

it must be established to its satisfaction that the authorities knew or *ought to have known* at the time of the existence of a real and *immediate risk* to the life of an identified individual or individuals from criminal acts of a third party and that they *failed to take measures* within the scope of their powers which, judged *reasonably*, might have been expected to avoid that risk.<sup>56</sup> [emphasis added]

In *Paul and Audrey Edwards v. United Kingdom*<sup>57</sup> the Court found that the public authorities failed in their positive obligation to protect the life of an inmate, such obligation arising out of a duty of care owed to detainees. In *Mahmut Kaya v. Turkey* the Court found a duty to protect arising in the context of Turkey's well known crack down on members of the Kurdistan Workers Party (PKK). The applicant, the brother of the deceased, alleged that the Turkish authorities had failed to protect Hasan (the deceased) from contra-guerilla activities operating in the region.<sup>58</sup> Noting the strong indications of illicit links between officials and nationalistic death squads, the Court was

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<sup>55</sup> *Osman v. The United Kingdom*, App. 87/1997/871/1083, Judgment, Eur. Ct. H.R., 28 October 1998, para. 116. (a significant majority of the Court concluded that the state had not failed in its obligation to prevent under the articulated standard, since they were unable to identify any stage prior to the shootings, where the police knew or should have known that the Osman family was at risk).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Case of Paul and Audrey Edwards v. The United Kingdom*, App. 46477/99, Judgment, Eur. Ct. H.R., 14 March 2002. (The applicants' 30 year old son, who had a history of mental illness, had been remanded to custody for making inappropriate comments to women in the street. He was put in a cell with an inmate who had schizophrenia. A few hours later the applicants' son was killed by the second inmate).

<sup>58</sup> *Case of Mahmut Kaya v. Turkey*, App. 22535/93, Judgment, Eur. Ct. H.R., 28 March 2000. (In *Kaya*, a medical doctor Hasan and a friend had secretly treated a member of the PKK and three days later Hasan and his friend were found dead.). Similar breach of this positive obligation was found in *Case of Akkoc v. Turkey*, Apps. 22947/93 and 22948/93, Judgment, Eur. Ct. H.R., 10 October 2000, paras. 81-82 (finding that the Turkish government failed in its positive obligation to protect the life of Zubeyir Akkoc, a Kurdish teacher, being satisfied that she was at a real and immediate risk of falling victim to an unlawful attack and that the authorities must be regarded as being aware of this risk).

satisfied ‘that Hasan Kaya as a doctor suspected of aiding and abetting the PKK was at this time at particular risk of falling victim to an unlawful attack. Moreover, this risk could in the circumstances be regarded as real and immediate.’<sup>59</sup>

As the case law establishes, positive obligations to protect individuals from infringement by private actors of the right to bodily integrity provides that under certain circumstances states have a positive obligation to exercise due diligence, meaning they must take all reasonable measures under the circumstances, to prevent private individuals from infringing upon another’s right to life, in circumstances where they know or should know there is a risk. The duty arises when the state has significant influence over the actor committing the infringement or is under a duty of care in relation to the victim.

What remains vague under the jurisprudence is the precise action required to prevent. In *Valásquez*, the Court remarked that ‘[t]his duty to prevent includes all those means of a legal, political administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.’<sup>60</sup> It is clear from *Valásquez* that punishment is an aspect of prevention, but punishment is not all that is required of the state to satisfy the obligation to prevent.<sup>61</sup> *Valásquez* failed, however, to set forth any objective criterion for determining specific prevention actions other than requiring a general rights-protective regime.

It is outside the scope of this paper definitively to assess what concrete measure must be taken to prevent in respect of each circumscribed right related to the right to bodily integrity. The content and the scope of the right to bodily integrity varies from one treaty to another, according to the wording of the relevant provisions, and depending on the nature of the act to be prevented, each requiring its own set of measures. Generally, states are not required to anticipate and avert other-actor interferences before they occur. Rather, the duty to protect arises when the state owes a duty of care to the victim, such as to inmates who have lost the ability to protect themselves,<sup>62</sup> when the state has

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<sup>59</sup> *Ibid.* p. 89.

<sup>60</sup> *Velásquez-Rodríguez v. Honduras* Case, Judgment, Inter-Am.Ct.H.R. (Ser. C) No. 4, Judgment of July 29 1988, para 175.

<sup>61</sup> The idea that punishment does not equal prevention is picked up by the ICJ in the *Bosnia v. Serbia* decision discussed below.

<sup>62</sup> *Case of Paul and Audrey Edwards v. The United Kingdom*.

a significantly close relationship with the other-actor teetering on direct influence over the act,<sup>63</sup> and with regard to ‘vulnerable’ groups such as minorities and women.<sup>64</sup> Moreover, that international practice is evolving toward a standard of compulsory intervention is evidenced by the specific prohibitions on private interferences with human rights set forth in the more recently adopted international human rights treaties.<sup>65</sup>

R2P internalises and builds on the duty to protect as developed in international human rights law, by explicitly providing that the duty upon a state to protect its population from mass atrocity crimes includes the obligation to prevent the act in the first place.<sup>66</sup> In this way, R2P could be seen to harnesses the disparate and sometimes discursive body of international human rights law on protection to provide a simple directive to act in the face of mass atrocities. At the same time, international human rights law develops and explains the parameters of the obligation that the international community has to prevent under R2P. As explored below, the Genocide Convention as interpreted by the International Court of Justice utilizing, in part, an international human rights framework, provides a further legal basis for this obligation, at least in respect of genocide.

### **Extraterritorial Obligations – The Bosnia v. Serbia Decision**

As established above, the obligation to protect individuals from human rights violations to bodily integrity, by private actors, in a state’s own territory is relatively well settled. The question of what obligations, if any, states have under international law to protect populations from human rights abuses extraterritorially or by other states is less so.

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<sup>63</sup> *Case of Mahmut Kaya v. Turkey; Rodriguez-Valezquez v. Honduras; Godínez-Cruz v. Honduras; Fairén-Garbi and Solís-Corral v. Honduras.*

<sup>64</sup> *Case of Opuz v. Turkey*, App. 33401/02, Judgment, Eur. Ct. H.R., 9 June 2009, (finding that the government in breach of its obligations under Articles 2 (right to life) and 3 (torture) because its legal system did not sufficiently safeguard victims of domestic violence in general, and in particular, the government failed in this specific case to take reasonable measures under the circumstances to prevent the foreseeable injuries to bodily integrity and life of the applicant and her mother).

<sup>65</sup> See, the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34.180, U.N. GAOR Supp., 46th Sess., U.N. A/34/180 (CEDAW) art 2(e), [entered into force 3 Sept. 1981]; Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 51st Sess., U.N. Doc. A/39/51 (CAT), art.2, [entered into force 26 June 1987].

<sup>66</sup> ‘2005 World Summit Outcome’, UNGA Res. 60/1, 16 September 2005. Para. 138.

International human rights treaties contain ‘jurisdiction’ clauses, which provide that states must respect or secure to everyone within their jurisdiction the rights provided therein.<sup>67</sup> The wording varies from instrument to instrument, but the prescription is the same. States, except under exceptional circumstances, have no treaty obligations to secure human rights if they do not have jurisdiction.<sup>68</sup> This means that generally international human rights law does not constrain state action outside of its territory. Exceptionally, a state’s obligations under international human rights treaties apply extraterritorially, when the state is deemed to have ‘effective or overall control’ over a territory or over the actions of non-state actors.<sup>69</sup>

The territoriality concept is affirmed by the International Law Commission in its authoritative statement on the Articles of State Responsibility. The International Law Commission, during the process of developing an overarching methodology of state responsibility, separated the unit of analysis into two parts, primary rules and secondary rules. The primary rules determine the content of state obligations under substantive international law, for example that torture is forbidden or that states must punish individuals that commit crimes against humanity. The secondary rules concern state attribution – whose actions can be considered the actions of the state for the purpose of holding it responsible.

The secondary rules provide for instances where state responsibility may result from conduct occurring extraterritorially or in other words for the conduct of another state. But in order for the extraterritorial state to be held responsible it must have contributed to the conduct in some way. Under certain circumstances a state may be held responsible for the conduct of another state if it directs, controls, coerces, or assists in the commission of the wrongful act.<sup>70</sup> There the liability results from the extraterritorial states own wrongful

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<sup>67</sup> See for example; ICCPR, Article 2.1: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant. ...; ICESCR, Article 2; CAT, Article 2; Convention on the Rights of the Child, Article 2; American Convention on Human Rights, Article 1. See also, Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’, *Israel Law Review*, 40/1: 503-526 (2007).

<sup>68</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 36, 9 July 2004, para 109: ‘jurisdiction of states is primarily territorial’.

<sup>69</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, Merits, ICJ Rep 14, 27 June 1986; *The Prosecutor v Dusko Tadic*, Judgment, IT-94-1-A (AC), 15 July 1999; *The Prosecutor v Predrag Banovic*, IT-02-65/1-S (TC), 28 October 2003.

<sup>70</sup> Articles on State Responsibility, Articles 16-18.

act under the primary rules. But that is only one step. The initial step requires establishing the primary rule of international law that provides for the wrongful conduct in the first instance. The acts attracting the attention of R2P are found in the primary rules of international law on genocide, war crimes, and crimes against humanity, as codified in the Rome Statute. Ethnic cleansing has no independent legal foundation, but is generally found to be a subset of the other crimes.

But for the purpose of our inquiry, the question is whether there is an existing substantive rule of international law that requires a state to *take positive action to prevent* another state from committing genocide, crimes against humanity, ethnic cleansing or war crimes, as required by the Responsibility to Protect? Here the law is more ambiguous.<sup>71</sup> The most clearly articulated legal obligation to take steps to prevent mass atrocities outside of ones own borders, is the duty to prevent genocide established in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>72</sup>

### *Punishment Does Not Equal Protection*

In the recent *Bosnia v. Serbia* decision, the ICJ articulated a standard for assessing the parameters of a state's obligation to act to prevent genocide from occurring in another state. It began by explicitly affirming that the obligation to prevent and the obligation to punish are related, yet, autonomous legal obligations.<sup>73</sup> It then set forth a reasonable, practical, context driven standard drawing from national and international law standards on due diligence, and the law on state attribution to define its content. While the Court strained to confine its ruling to the duty to prevent under the Genocide Convention, the legal standard articulated and methodology applied by the Court bear on state responsibility with respect to other mass atrocity crimes.

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<sup>71</sup> In two cases involving interferences by the local Turkish Cypriot administration (TRNC) in Northern Cyprus, the Court found Turkey responsible for violations of the ECHR. The Court's decisions however are ambiguous on whether Turkey is responsible because the TRNC's conduct is attributable to it or because it failed in its obligation to protect. *Cyprus v. Turkey*, App. 25781/94, Judgment, Eur. Ct. H.R., 10 May 2001, paras. 77-81; *Loizidou v. Turkey*, App. 15318/89, Judgment- merits, Eur. Ct. H.R., 18 December 1996, paras. 52-56. See Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', *Human Rights Law Review* 8/3: 411-448 (2008), p. 411, pp. 441-446.

<sup>72</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

<sup>73</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, para. 427.

Article I of the Genocide Convention provides that genocide is a crime under international law that states undertake to *prevent* and punish.<sup>74</sup> The operative Article VIII of the Convention provides that states may call upon the competent organs of the UN to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide. Article IX provides the jurisdictional basis for bringing contracting states before the ICJ, the UN international court established to hear inter-state disputes. Article I and Article IX are the only provisions related to prevention. Much stronger provisions in the Convention relate to individual criminal responsibility as found in Articles III through V, which place upon states the obligations to criminalise genocide and provide for individual punishment.

Until the 2007 judgment rendered by the ICJ in the *Bosnia v. Serbia* case, international law concerning the crime of genocide (and crimes against humanity) only addressed individual criminal responsibility. It had not addressed the issue of state responsibility.

Since the Nuremberg Trials, and the Genocide Convention in 1948, individual criminal responsibility for genocide has been generally recognised. Importantly, since the establishment of UN *ad hoc* tribunals for the Balkans and Rwanda, the scope, content and status of individual criminal responsibility for genocide, war crimes and crimes against humanity has rapidly evolved. These crimes are now codified in the 2002 Rome Statute of the International Criminal Court.<sup>75</sup> States may not be brought before these criminal tribunals, as the tribunals' jurisdiction is limited to individuals. This focus on individual criminal accountability reflects what had been the prevailing understanding that states prevent genocide by punishing *genocidaires*.

Academics and policy makers focus on international criminal law as the vital legal source underpinning R2P. This is natural, given that the Outcome Document uses international criminal law categories to define R2P's scope and content. Punishment, however, so far has not established itself as a successful prevention tool. While the war and impending genocide was occurring in Bosnia, the international community, paralysed into inaction, managed to create the ICTY, by Security Council resolution 827 in 1993. The genocide in Srebrenica occurred in July of 1995. Not one case had been heard by then. The threat of prosecution had not deterred individuals from committing acts of genocide.

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<sup>74</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948. Hereinafter, Genocide Convention.

<sup>75</sup> Rome Statute, 17 July, 1998, 2187 U.N.T.S. 90, Article 5: Crimes within the jurisdiction of the Court; Article 6: Genocide; Article 7: Crimes against humanity; Article 8: War Crimes.

In the wake of the swift one hundred day genocide in Rwanda, of which the UN Rwanda peace keeping commander – Romeo Dallaire – had warned the UN Department of Peacekeeping Operations explicitly,<sup>76</sup> the Security Council created the ICTR. The major response to the ongoing atrocities in Darfur has been to refer the situation to the ICC. Despite the referral in March 2005 atrocities continue in Darfur more than four years later. On 4 March 2009, the ICC issued an arrest warrant for President Omar Bashir. As a result, thirteen humanitarian aid agencies (60% of all humanitarian assistance in Darfur) were promptly expelled from the Darfur region of Sudan, leading to a significant risk of further civilian deaths.<sup>77</sup> Sudanese leaders have not been deterred.

In all of these situations the international community equivocates – then establishes a tribunal or makes a referral to the ICC. With the establishment of the ICC in 2002 war criminals can no longer count on impunity. This is a significant step forward. Further, these threats of criminal prosecution may serve to deter would-be *genocadaires*, once an established track record demonstrates that there will, in fact, be no impunity.

But, the jubilant celebration of international criminal law that we see among our colleagues has obscured the fact that little to no prevention efforts have taken place.<sup>78</sup> In this respect, R2P, with its explicit focus on the responsibility to prevent the kinds of mass atrocities that international criminal law can only punish, has an important contribution to make toward the normative shift away from ‘punishment equals prevention’ toward prevention as a set of positive obligations to take action.

Until the *Bosnia v. Serbia* judgment the duty to prevent genocide under the Convention had been vague to non-existent. In its judgment, the ICJ identified state obligations to prevent genocide and confirmed that *states* may in fact be responsible for committing genocide. The Court gave a tempered, yet wide, reading to the state obligation to prevent under Article 1 of the Convention. Bringing together existing international human rights concepts of positive obligations requiring due diligence and general international law concepts of

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<sup>76</sup> Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories From Rwanda* (New York: Farrar, Straus and Giroux, 1998), pp.104-107.

<sup>77</sup> Julie Flint, ‘Justice and Hunger’, SSRIC Blog: Making Sense of Darfur, 6 March 2009, <http://www.ssrc.org/blogs/darfur/2009/03/06/justice-and-hunger/>, accessed 22 June 2009.

<sup>78</sup> Michael Reisman, ‘Before Victims Become Victims: Preventing Genocide and Mass Murder’, Webcast -Klatsky Seminar in Human Rights, 15 January 2008, Case Western Reserve University School of Law, <http://law.case.edu/lectures/index.asp?yr=2007-2008>, accessed 24 June 2009. Some suggest that R2P has already exerted an influence on the international community prompting it to act to prevent a full scale conflagration in Kenya. See, Donald Steinberg, ‘Responsibility to Protect: Coming of Age?’ *Global Responsibility to Protect* (this issue, 2009).

state attribution based upon the nature and extent of the relationship between states and non-state actors, the Court provides significant guidance for the emerging obligation of a state's responsibility to prevent mass atrocities extraterritorially.

*Use Your Influence Wisely*

On 20 March, 1993, during the height of the Balkan wars of the 1990s, Bosnia sued the Federal Yugoslav Republic (subsequently Serbia and Montenegro, subsequently Serbia) on the basis of Article IX of the Genocide Convention. Bosnia alleged violations of the Genocide Convention, asking the ICJ for relief in connection with Serbia's actions during the conflict and for reparations for civilian casualties. Specifically, Bosnia asked the ICJ to find that Serbia had committed genocide under Article II of the Genocide Convention. In addition, Bosnia asserted that Serbia violated its obligations under Articles I and III of the Convention by failing to prevent and punish genocide, being complicit in genocide, and for conspiring to commit and inciting genocide.<sup>79</sup> Finally, Bosnia requested provisional measures requiring Serbia to cease its actions in the conflict. For its part, Serbia claimed that the Genocide Convention only applied to individual accountability – not state responsibility. Moreover, it claimed that the acts complained of by the applicant were not committed.

In April 1993, the Court ordered provisional measures requiring that Serbia immediately 'take all measures within its power to prevent the commission of the crime of genocide'<sup>80</sup> and in particular 'to do all in their power to prevent the commission of any such acts in the future.'<sup>81</sup> Yugoslavia 'should in particular' ensure that any military or paramilitary organisation under its control or influence, or supported by it,

do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.<sup>82</sup>

In September of that year, the Court reaffirmed the provisional measures indicated in April, finding that 'the present perilous situation [as now exists in

<sup>79</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, p. 20.

<sup>80</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Request for the Indication of Provisional Measures, Order, ICJ Rep, 8 April 1993, para. 52.

<sup>81</sup> *Ibid*, para. 45.

<sup>82</sup> *Ibid*, para. 52.

Bosnia Herzegovina] demands ... immediate and effective implementation of those measures.<sup>83</sup> The final decision in the case was not rendered until February 26, 2007, long after the conflict had ended and the hard line regime in Belgrade was gone.<sup>84</sup>

In its one-hundred and seventy-one page decision, which includes over ten separate opinions, the Court made several important rulings: 1) states may be responsible for committing genocide, thus confirming that individual criminal responsibility under the Convention does not supplant state responsibility; 2) the Court confirmed that genocide had occurred in Srebrenica, confirming the decision of the International Criminal Tribunal for Yugoslavia in *Krstic*;<sup>85</sup> 3) the Court established that while Serbia is *not* responsible for committing genocide, Serbia *is* responsible for failing to prevent and to punish genocide in Srebrenica, thus making clear that states may be responsible for actions outside its borders (i.e., there is no territorial limitation on the responsibility to prevent and punish); and 4) the failure to prevent and to punish is not a criminal act, but a breach of an international obligation. The Court distinguished between the criminal act, which is committed by individuals, attracting individual accountability, and the obligation of the state under international law not to commit genocide and to take action to prevent and punish.

The Court's determination on Serbia's responsibility to prevent and punish forms the core of the decision, these being the only obligations Serbia was found to have breached. The Court begins by establishing that the obligation to prevent is autonomous and not merged with the responsibility to punish.<sup>86</sup> Moreover, the duty to prevent extends beyond Article VIII, which provides for submission to the competent UN organs to take such action as appropriate to prevent genocide. Drawing on the legal concepts of due diligence and the

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<sup>83</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Further Requests for the Indication of Provisional Measures, Order, ICJ Rep, 13 September 2003, para. 59.

<sup>84</sup> In fairness to the Court the delay was in some part due to unusual procedural maneuvers (including one in 1999 where the Bosnian co-agent – of Serb ethnicity – without knowledge or support of the agent of the state withdrew the case before the ICJ – as Vojin Dimitrijevic notes 'injecting a whiff of the Balkans into the halls of the Peace Palace'. See, Vojin Dimitrijevic and Marko Milanovic, 'The Strange Story of the Bosnian *Genocide Case*', *Leiden Journal of International Law*, 21: 65-94 (2008), p 74.

<sup>85</sup> *The Prosecutor v. Krstic*, Judgment, IT-98-33-A (AC), 19 April 2004.

<sup>86</sup> That punishment and prevention are two separate though related endeavours was also recognised recently by the ICC in its appointment of Juan E. Mendez as a Special Advisor on Crime Prevention. See ICC Press Release, 19.06.2009 available at <http://www.icc-cpi.int/Menus/ICC/Press%20and%20Media/Press%20Releases/News%20a> [last accessed 26 June 2009].

relationship between states and non-state actors it defines the scope of the responsibility to prevent genocide found in Article 1 of the Genocide Convention.

The specific obligation to prevent requires that a state party to the Genocide Convention employ *all* means *reasonably* available to it, so as to prevent genocide so far as possible. It is an obligation of conduct, not of result; an obligation of due diligence. In the Court's words,

[a] State does not incur responsibility simply because the desired result was not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were in its power, and which might have contributed to preventing genocide.<sup>87</sup>

Moreover, the obligation to prevent and the corresponding duty to act arises

the instant that the State learns of, or should normally have learned of, the existence of a *serious risk* that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of those means as the circumstances permit.<sup>88</sup>

The Court used an objective standard of knowledge to gauge when the state's duty is triggered. The obligation to prevent does not require the State to know that a genocide is occurring or is about to be perpetrated; it is sufficient for the relevant state to be aware of the grave risk of genocide.<sup>89</sup> In the Court's opinion

[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.

This objective standard is consistent with the Court's construction of the content of the obligations of states under Article I. Article I obliges contracting states to exercise due diligence – take any possible measures – to forestall acts of genocide – so far as possible. It follows that they must do so, even when

<sup>87</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, para 430.

<sup>88</sup> *Ibid* at para. 431. (emphasis added).

<sup>89</sup> In respect of complicity in genocide, the ICJ held that the relevant state must possess full knowledge of the facts of the crime committed or to be committed by the perpetrator. *Ibid* at para. 432.

there is only the high risk that private individuals or state agents may engage in genocide.<sup>90</sup>

Having established that states have a responsibility to take reasonable measures to prevent genocide even outside their own borders, when it knows or should know of a risk of genocide, the Court then set forth parameters for identifying when the responsibility to take such measures arises. It can not be that each time genocide occurs every state is responsible because each state individually and collectively failed to prevent it. There must be a limiting principle. If all states are always under some vague obligation to prevent genocide wherever it occurs, than no one state is ever under any specific obligation to prevent genocide in a particular instance. Such a conclusion would be a recipe for inaction.

Essentially, the Court had to determine the basis upon which the actions of the Bosnian Serbs might be attributed to the state of Serbia under international law. This question threw the Court into the murky waters of extraterritorial responsibility for the commission/omission of human rights violations committed by actors other than the state.<sup>91</sup>

In this regard, the Court first established that the notion of ‘due diligence’ calls for an assessment *in concreto*.<sup>92</sup> Hence, the determination is heavily fact-dependent. Having described the obligations, it then sets forth ‘various parameters’ to assess whether a state has discharged its obligations. The first parameter is an assessment of whether the relevant state has the ‘capacity to influence effectively the action of persons likely to commit, or already, committing, genocide.’<sup>93</sup> This capacity depends upon several elements including geographic distance, the strength of political links, and all other relevant links between the state and the relevant actors. The second parameter provides that capacity must also be assessed by legal criteria, since ‘every State may only act within the limits permitted by international law’.<sup>94</sup> This necessarily limits the use of

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<sup>90</sup> Former High Commissioner for Human Rights Louise Arbour describes the Court’s approach to constructive knowledge as analogous to the common laws’ analysis of the duty of care in torts: ‘What the Court posits is, at heart, an internationalized form of duty of care, as between States, already well known in domestic legal systems as between private litigants.’ Louise Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’, *Review of International Studies*, 34/3: 445-458 (2008), p. 452.

<sup>91</sup> The failure to act can constitute an omission giving rise to a violation. For a general discussion of omissions in international criminal law, see Gerhard Werle, *Principles of International Criminal Law* (Asser Press, 2005), pp. 170-172.

<sup>92</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, para 430.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

military force in accordance with the UN Charter. Finally, a state may only be held responsible for breaching its obligation if genocide is actually committed.<sup>95</sup> Essentially, a state may be held responsible if the court finds that a state had the means and influence actually to affect the outcome to prevent genocide and that it manifestly refrained from using them.

After noting that Serbia had been enjoined by the Court, in two Orders on provisional measures issued in 1993 to ensure that no genocide be committed, including by persons under its influence (reinforced duty to prevent) it goes on to state that FRY ‘was in a position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand the Republika Srpska and the VRS [*Vojska Republike Srpska* – Bosnian Serb Army] on the other’.<sup>96</sup>

Using a lesser standard of proof than that required for complicity to commit genocide, that of a ‘high level of certainty’ (rather than proof beyond all doubt), the Court determined that Serbia had significant influence over the Bosnian Serbs. Serbia therefore was under a positive, substantive obligation to take action. Nonetheless, Serbia took no initiative to prevent the atrocities in Srebrenica, and therefore was in violation of Article 1 of the Genocide Convention. It found Serbia responsible for its own wrongful act of failing to exercise due diligence so as to prevent violations by third parties.

The obligation to prevent arises and is established based upon the level of *influence* a state has to change the course of action, determined by its political, economic and all other links to the actors in question. Two dissenting opinions from Justices Tomka and Skotnikov raise concerns about the courts standard of influence. They believe that the recognised legal standard for constraining state action outside of its territory should be one of ‘control’.<sup>97</sup>

These concerns, however, are misplaced. Attachment to the ‘control’ standard presumes that the control standard is determinate. It is not. It is indeterminate and hotly contested.<sup>98</sup> ‘Control’ in the sense of state attribution or in the sense of extraterritorial obligations is elastic. While international practice often speaks in terms of control to determine the application of human rights

<sup>95</sup> Articles on State Responsibility, Article 14.

<sup>96</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, para 434.

<sup>97</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, Skotnikov Declaration pp. 9-10, Tomka Declaration pp. 28-29.

<sup>98</sup> Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’; Wilde, ‘Triggering State Obligations Extraterritorially’.

obligations outside the state, the word does not have an autonomous meaning. Moreover, notions of control exist on a continuum from complete control,<sup>99</sup> effective control,<sup>100</sup> overall control,<sup>101</sup> and even influence.<sup>102</sup> The usage is heavily dependent on the facts of the case and the nature and content of the specific obligation at issue.

The influence standard articulated by the Court fits well with its construction of the positive obligation to prevent, and is a useful move. It draws a clear distinction between the standard for attributing the wrongful act of genocide or conspiracy to commit genocide (effective control) to Serbia and the standard for attributing responsibility to Serbia for *its failure* to discharge its obligation to take reasonable steps to prevent genocide. It establishes that to the extent the state has a significant level of influence over the actors committing genocide such that it is highly likely it can change the course of events, then it must use that influence wisely.

It is difficult to ascertain precisely the distinction between the low end of the control standard (overall control) and influence. After all, in its decision the Court makes clear that it is cognisant of the central role that Serbia played in the actions and policies of Bosnian Serb forces. For instance, after hearing evidence that Serbia provided up to 90 percent of the material needs of the Republika Srpska, that Serbia was paying a substantial portion of the Serb paramilitary forces, and that the economies of Republika Srpska and Serbia were almost completely integrated, it found that had Serbia withdrawn this support, the Republika Srpska's options would have been greatly constrained.<sup>103</sup> Given this level of influence, the bar remains very high for establishing the sufficient level of influence necessary for the legal duty to prevent to arise. Moreover, the Court gives no clear indication of what preventative measures Serbia should have taken. Instead it found Serbia responsible for failing to take any action. This is less than helpful in setting objective criterion for action. Nonetheless, the shadowy obligation to prevent genocide receives a much needed modicum of substance with this decision.

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<sup>99</sup> *Nicaragua v. United States*, para. 109-110 (description of case).

<sup>100</sup> *Ibid.* at para. 115.

<sup>101</sup> *Loizidou v. Turkey; The Prosecutor v. Dusko Tadic* (AC), 15 July 1999, paras. 83-89; *Ilascu v. Moldova and Russia*, App. 48787/99, Judgment, Eur. Ct. H.R., 8 July 2004, para. 316.

<sup>102</sup> *Ilascu v. Moldova and Russia*, para. 392. (holding Russia responsible for acts committed by a separatist movement in Moldova because of Russia's 'decisive influence' over the separatist group).

<sup>103</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, paras. 240-241.

### The Relationship between the duty to protect and R2P

While the Outcome Document is the most authoritative statement on R2P, it is certainly not its only articulation.<sup>104</sup> R2P is a dynamic norm which has and will continue to develop. UN member states specifically agreed to keep R2P on the General Assembly's agenda with a commitment to continue considering 'the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind ... *international law*.'<sup>105</sup>

How then can we relate the developing international law on the positive obligation of states to protect/prevent with the developing norm of R2P? As established above, the responsibility to protect rests upon the articulation of positive obligations under international human rights law to prevent state and non-state actors from infringing up on another person's human rights. This obligation requires states to take reasonable measures to prevent the violation from occurring in the first instance. It is based upon the notion of due diligence, which has now been expressly incorporated into the responsibility to prevent genocide by non-state actors, within and outside of a state's borders.<sup>106</sup> This evolving trend requiring states to take action to prevent human rights violations generally, and in relation to mass human rights atrocities in particular, has manifold implications for understanding the current legal content of R2P and its potential for future development.

First, reading the responsibility to protect through the lens of the duty to protect expressed in human rights law highlights and clarifies the preventative thrust of R2P. The duty to protect, like the first pillar of R2P, is an obligation upon states to prevent human rights violations by state actors and private individuals. Like R2P, human rights protection obligations exist on a continuum. First, protection requires setting up an effective rights regime, which should act to stave off human rights violations; second it entails the obligation

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<sup>104</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009, para. 10, drawing on earlier articulations of R2P in preparing his report. See for example: High-Level Panel on Threats, Challenges and Change, *A more Secure World: Our Shared Responsibility*, A/59/565, 2 December 2004; Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005, 21 March 2005, paras. 16–22.

<sup>105</sup> '2005 World Summit Outcome', UNGA Res. 60/1, 16 September 2005, para.139 (emphasis added). It should be noted that there are concerns that further deliberations by the GA may claw back some of the commitments made at that 2005 World Summit Outcome. During its 63rd session in July of 2009 the General Assembly discussed R2P and affirmed its principles.

<sup>106</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment 2007, para. 430.

to investigate infringements; third it requires punishment; and fourth it requires redress.

R2P builds on these obligations and innovates when it makes the link between a state's obligation to protect its population and the responsibility of states to assist other states with their obligations. Delimiting the scope of R2P in this way, may help to mediate the persistent debates over whether R2P applies to a particular situation where atrocity crimes are occurring. R2P 'applies' to all situations where mass atrocities are occurring, based upon existing human rights law, and innovates where it calls upon states to assist. The question, rather, is what are states obligations in the face of these mass atrocities? While R2P provides the framework for action, the underlying human rights principles upon which it rests fill in the content.<sup>107</sup>

Moreover, this approach underscores the dynamic relationship between the development of R2P and the development of international law. As explored above, R2P is consistent with human rights law in providing for an obligation upon states to take certain steps to prevent the acts it seeks to prohibit. R2P as articulated by the GA in the Outcome Document assists in the interpretation of the body of law on positive obligations and gives a modicum of conceptual clarity and discipline to its application to mass atrocities. In this respect it is of consequence to note that the representatives of Bosnia in the *Bosnia v. Serbia* case specifically invoked R2P in their argumentation regarding Serbia's obligation to prevent genocide under the Convention.<sup>108</sup>

Second, the obligation of states to protect populations from mass atrocities is one of collective and national responsibility. These separate obligations, however, should be read together in order for the duty to prevent to be practical and effective, not theoretical or illusory. The collective component of R2P provides that when a state manifestly fails to protect, the *international community* will take action through cooperative action. Likewise, the international community as a whole committed itself to 'encourage and help' states prevent mass atrocities and assist other states 'as necessary and appropriate' to build capacity to protect their populations from atrocity crimes. While, the concept of collective cooperation is not unknown in international law, the International Law Commission is ambivalent about whether general international law prescribes a duty of cooperation, providing that such a duty may reflect the

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<sup>107</sup> Alex Bellamy, 'The Conflict in Sri Lanka and the Responsibility to Protect', 1 May 2009, <http://www.e-ir.info/?p=1053&print=1>, accessed 24 June 2009 (providing that the first pillar points to a universal and enduring R2P).

<sup>108</sup> Transcript of the oral argument of Mr. Condorelli before the ICJ on 7 March 2006 CR 2006/11 available at <http://www.icj-cij.org/docket/files/91/10606.pdf> [accessed 8 July, 2009].

progressive development of international law.’ This second pillar of R2P, therefore, does not presently appear to rest upon firm legal ground. Though, the reiteration of a duty of collective cooperation by the GA in R2P itself exerts an influence upon the law’s development.

More interestingly perhaps, is the fact that this collective obligation undertaken by the international community to take coordinated action to assist states to prevent atrocity crimes implies individual state responsibility to take reasonable steps to prevent the acts its seeks to prohibit. In this respect, an emerging legal obligation exists and is most developed when one state has an extensive amount of influence over another state or non-state actors, such that the state may be in a real position to influence the course of events. The due diligence standard that is developing under human rights law, from the jurisprudence of the *Valdquez* and *Osman* cases as articulated in modified form in the *BiH v. Serbia* judgment gives, guidance, albeit limited, to states about what is expected of them in this regard.<sup>109</sup>

Three examples clarify this point. If the United States precipitously pulls out of Iraq and genocide occurs could there be a viable claim that the United States violated its responsibility to prevent? Under the *BiH v. Serbia* test, there is a strong argument that the United State has significant influence over Iraq, economically, militarily, and politically giving rise to a duty to use all means reasonably available to it, which might contribute to preventing genocide. Given that the ICJ did not set forth objective standards for determining when a state has sufficient capacity or influence to prevent genocide, aside from emphasising the nature of the close relationship between Serbia and the Bosnian Serbs, it is unclear what level of influence would be sufficient. Moreover, it would have to be established that the United States could have been expected to foresee a grave risk of genocide.

Rwanda has hinted at the possibility of future legal action against France for its alleged material support in 1994 to the radical Hutu regime found responsible for the genocide. Over the past few years, journalists and scholars have explored the relationship between the French government and the Hutu government during the 1990s.<sup>110</sup> Generally, these reports suggest that France

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<sup>109</sup> See for example, Andrea Gattini, ‘Breach of the Obligation to Prevent and Reparation thereof in the ICJ’s Genocide Judgment’, *European Journal of International Law*, 18/4: 695-713 (2007), p. 698 (remarking that the Court missed the opportunity to give much needed guidance ‘on the highly debated question of the existence and scope, *de lege lata* or *ferenda*, of the duty or responsibility to protect’).

<sup>110</sup> See Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families*; Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (C. Hurst & Co. Publishers, 1995).

provided military and political support to the Hutu government and assisted alleged perpetrators to escape. In a 2008 report, the Rwandan Government accused the French of active assistance to the Hutu *genocadaires*, and an international panel has concluded that France had both the knowledge and the influence to stop the genocide.<sup>111</sup> If a case was brought to the ICJ, the Court would seek to determine the extent of France's influence over the actions of the *genocadaires* and whether it should have known that genocide was likely to occur.<sup>112</sup>

It is well known that China more than any other state has contributed diplomatically, economically, and, militarily to keeping the mass atrocities going in Darfur.<sup>113</sup> Some have suggested that it may be possible to establish the relevant criterion for attributing state responsibility to China. China very well may have the relevant influence over Sudan, and it has already been established that at a minimum, there is most certainly a grave risk of genocide occurring in Darfur.<sup>114</sup> Moreover, as described above, under general human rights principles, depending upon the extent of China's influence or control over the relevant actors or territory, China could be under a positive obligation to take steps to prevent crimes against humanity from being committed. Though, this claim would be more difficult to establish under current international law practice.<sup>115</sup>

Third, the due diligence concept adopted by the ICJ in the *Bosnia v. Serbia* judgment establishes that governments do not face the same definitional challenge when determining whether they are under an obligation to act to

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<sup>111</sup> Andre Wallis, *Silent Accomplice: The Untold Story of France's Role in the Rwandan Genocide* at 84 (2006) citing International Panel of Eminent Personalities, Rwanda: The Preventable Genocide (July 2007). The panel was composed of representatives from Botswana, Mali, India, Algeria, Liberia, Canada and Sweden.

<sup>112</sup> For an extensive analysis of the application of the *Bosnia v. Serbia* decision on Rwanda see, Paul Schmitt, 'The Future of Genocide Suits at the International Court of Justice: France's Role in Rwanda and Implications of the Bosnia v. Serbia Decision', *Georgetown Journal of International Law*, 40/2:585-623 (2009).

<sup>113</sup> Eric Reeves, 'Beijings's Propaganda Campaign Can't Obscure Complicity in Darfur Genocide', 5 March 2008, <http://www.sudanreeves.org/Article207.html>, accessed 23 June 2009.

<sup>114</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Application of the Prosecutor for a warrant of arrest warrant 14 July 2008. For a discussion of the application of the *Bosnia v. Serbia* decision to the situation in Sudan, see Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 *Fordham Int'l L. J.* 871 (2008).

<sup>115</sup> As noted above, it is unclear whether a state has an obligation to protect against human rights violations, even crimes against humanity, outside its jurisdiction. See generally, Milanovic, 'From Compromise to Principle'.

prevent genocide that a prosecutor does to secure a genocide conviction. The ICJ does not require the state to have knowledge that genocide is occurring or is about to occur. It is enough if the relevant state was aware or should normally have been aware of the *risk* of genocide. Former U.S. Secretary of State Colin Powell articulated this concept to the U.S. Senate Foreign Relations Committee in 2004 when he testified that Sudan bears some responsibility for the genocide in Darfur in part *because* ‘despite having been put on notice multiple times, Khartoum has failed to stop the violence.’<sup>116</sup>

The articulation of a standard for prevention based upon a duty to act when a state has objective knowledge of a ‘grave risk’, can guide the international community when it seeks to determine the evidentiary threshold for the relevance of R2P in respect of extraterritorial obligations. Over the past decade governments and institutions have painstakingly sought to determine whether a situation rose to the level of genocide before deciding whether it had to take action. Similar questions are now presenting themselves in the context of R2P where governments and institutions have sought to determine whether R2P ‘applies’ in terms of states’ extraterritorial obligation.

Since R2P is explicitly a doctrine of prevention, it is logical to suggest that the international community apply a similar evidentiary standard as that applied by the ICJ in the *Bosnia v. Serbia* judgment when determining R2P’s relevance to a certain situation.

The ‘objective knowledge of a grave risk’ standard provides a conceptual jumping off point for lawyers, policy makers, and academics. Utilising this standard the international community should be analysing whether there is a grave risk of genocide in Darfur (for example) such that certain individual state obligations, as well as a collective obligation to prevent, are being triggered. It gives us a conceptual framework within which to deal with genocide prevention, rather than *post hoc* genocide punishment. In fact, as will be addressed in the final point, R2P signals a move, albeit tentative, toward the extension of the responsibilities up on states to include the prevention of war crimes, crimes against humanity, and ethnic cleansing in addition to genocide.

Finally, the obligation to prevent genocide as a peremptory norm of international law raises the specter of an obligation upon States to prevent

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<sup>116</sup> Remarks of Secretary of State Colin L. Powell on the Crisis in Darfur before the Senate Foreign Relations Committee, 9 September 2004, Washington, D.C., <http://www.voanews.com/english/archive/2004-09/a-2004-09-09-8-Text.cfm?moddate=2004-09-09>, accessed 22 June 2009.

<sup>117</sup> See, William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), p. 500.

the commission of certain other peremptory norms of international law.<sup>117</sup> The object and purpose of the Genocide Convention and R2P support this suggestion. The Genocide Convention grew out of the horrors of the Holocaust and is intended to prevent genocide. R2P grew out of the mass atrocities committed during the 1990s and is intended to prevent genocide and other mass atrocities. In this sense, R2P is the progeny of the Genocide Convention reflecting the complex social fabric that now makes up today's gruesome tales of crimes that 'shock the conscience' of the world.

Generally, the popular understanding of genocide is far broader than the legal understanding. Often, what the ever growing anti-genocide movement is really complaining against are most likely crimes against humanity. But the point is that members of the movement are outraged by certain mass atrocities that have completely offended their sense of decency. Like genocide, the codification of crimes against humanity grew out of the conception that some crimes 'shock the conscience of mankind'.<sup>118</sup> As Geoffrey Robertson explains, perpetrators of these crimes are conceived as enemies of the world because 'the very fact that a fellow human could conceive and commit them diminishes every member of the human race.'<sup>119</sup>

In this way, that sense of moral urgency that led to the Genocide Convention and its prevention obligation applies equally to crimes against humanity. This, the author suggests, has led a growing number of policymakers, academics and activists to utilise the term – mass atrocities - rather than specific legal categories of genocide, war crimes, crimes against humanity.<sup>120</sup>

There appear to be several reasons for this conflation of terms. First, legalistic arguments about whether a situation is or is not genocide have impeded fast and appropriate action.<sup>121</sup> Second, this semantic twist evidences, perhaps even unconsciously, that measures required to prevent and punish mass atrocities are in the eyes of the world the same for all mass atrocities. Indeed, the same methodological principles that the ICJ applied in delimiting the duty to

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<sup>118</sup> Genocide Convention, Preamble; Rome Statute, Preamble.

<sup>119</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 2000), p. 236.

<sup>120</sup> For example, Albright and Cohen, *Preventing Genocide*. See also, Scheffer, 'Genocide and Atrocity Crimes'.

<sup>121</sup> Scheffer, 'Genocide and Atrocity Crimes', p.230, Albright and Cohen, *Preventing Genocide*, pp. xxi-xxii.

<sup>122</sup> The ICJ however does not have jurisdiction generally over crimes against humanity. It has jurisdiction over acts of genocide only by virtue of the explicit jurisdictional provision in Article IX of the Genocide Convention. So, even if states were found to have breached a hypothetical obligation to prevent crimes against humanity, the question of legal adjudication remains.

prevent genocide in the *Bosnia v. Serbia* judgment would apply, at least in theory, to state responsibility for other mass atrocity crimes.<sup>122</sup> Thus, the underlying principle and methodology grounding the obligation to prevent genocide may apply with equal force to certain types of crimes against humanity. In other words, mass crimes against humanity and genocide may require similar responses, even though they are legally different crimes.

In a strict legal sense, however, the non-applicability of the Genocide Convention to crimes against humanity means that currently international law does not place upon states a positive obligation to prevent mass atrocity crimes that do not rise to the level of genocide. In fact, even in respect of genocide, it is unclear how far the *Bosnia v. Serbia* judgment will extend given Serbia's unique and intimate relationship with the Bosnian Serbs. But, we can see an emerging trend toward the possible acceptance of such an obligation in limited circumstances. In accepting the responsibility to protect in the Outcome Document, states affirmed that they are committed to preventing mass atrocity crimes, including crimes against humanity. That this commitment may eventually solidify into a legal norm is cumulatively supported by the Rome Statute's codification of crimes against humanity, Article 41 of the Articles of State Responsibility, which provides that where the responsible state commits a serious breach of a peremptory norm of international law, other states have an obligation to cooperate to bring an end to that serious breach through lawful means, the *Bosnia v. Serbia* decision, and the development of positive obligations under human rights law. This legal practice reflects the progressive development – *de lege ferenda* – of the acceptance of a legal norm to prevent, not only genocide, but atrocity crimes.<sup>123</sup>

## Conclusion

The responsibility to prevent mass atrocities articulated in R2P is firmly rooted in international law, with respect to the duty that states have to protect individuals within their own territory. Thus, pillar one of R2P represents a continuing obligation upon states, at all times. In fact, the duty to protect established under international human rights law, is in reality the mirror image of the duty to prevent. It is functionally a duty to prevent human rights violations. States are obligated to respect human rights and to take reasonable steps

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<sup>123</sup> See, Marko Milanovic, 'State Responsibility for Genocide', *European Journal of International Law*, 17/3: 553-604 (2006), p. 601.

to ensure that non-state actors do not infringe upon the fundamental rights of others.

R2P builds on these internal obligations establishing states' responsibility to assist other states with their obligations. The obligation of states to prevent/protect populations from mass atrocities committed by another state or outside its borders is not as clear under international law. Nor was it *expressly* agreed to by the member states in the Summit Outcome Document, having only committed to assist states with *their obligations* to protect. The due diligence standard – to take reasonable measures to prevent violations in so far as possible in international practice, especially as articulated in the *Bosnia v. Serbia* judgment, however, reflects a nascent, yet developing trend in international law toward the acceptance of a positive obligation to prevent mass atrocities under certain circumstances. R2P itself is an important part of this developing trend, harnessing the general notion of the duty to protect/prevent and crystallising its application to the prevention of mass atrocities. It is another step in the development of the principle underlying the Genocide Convention, namely that states may no longer stand idly by when faced with crimes that shock the conscience of the mankind.