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The Responsibility to Protect of the International Community

A study on the protection duties of the United
Nations and its member states

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Table of contents

Abbreviations.....	3
1. Introduction.....	4
1.1. Background.....	4
1.2. Purpose and delimitations.....	8
1.3. Structure.....	9
1.4. Terminology.....	10
2. Responsibility to protect from genocide, war crimes, ethnic cleansing and crimes against humanity.....	11
2.1. Genocide.....	11
2.2. War crimes.....	14
2.3. Crimes against humanity.....	19
2.4. Ethnic cleansing.....	21
2.5. Conclusion.....	23
3. The international responsibility to protect of the states	
– A legal duty to cooperate?.....	24
3.1. Responsibility to protect and the ILC’s regime of “aggravated state Responsibility”.....	24
3.2. Legal duty to cooperate in order to end genocide, war crimes and crimes against humanity?.....	27
3.3. Conclusion.....	29
4. The responsibility to protect of the UN Security Council.....	30
4.1. The responsibility to protect and the UN collective security system.....	30
4.2. Genocide, war crimes, ethnic cleansing and crimes against humanity as “threat to the peace”?.....	31
4.3. Genocide and crimes against humanity as “threat to the peace” also in peacetime?.....	34
4.4. Conclusion.....	39
5. Does the Security Council have a legal duty to protect?.....	40
5.1. The Bosnian genocide case and the Security Council’s responsibility to protect.....	40

5.2. Protection duties versus discretionary powers of the Security Council members.....	44
5.3. Conclusion.....	48
6. Legal responsibility for a failure to protect?.....	49
6.1. Responsibility to protect and the ILC's draft articles on responsibility of International organisations.....	49
6.2. Problems of enforcing the UN's legal responsibility.....	51
<i>6.2.1. Lack of a legal institution with an authoritative jurisdiction on the UN.....</i>	<i>51</i>
<i>6.2.2. The veto right in the Security Council.....</i>	<i>52</i>
<i>6.2.3. Lack of clear primary obligations binding on the UN.....</i>	<i>55</i>
6.3. Conclusion.....	57
7. Concluding remarks.....	58
References.....	63

Abbreviations

ECOSOC	Economic and Social Council
FRY	Federal Republic of Yugoslavia
GA	General Assembly
ICISS	International Commission on Intervention and State Sovereignty
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal of Nuremberg
OHCHR	Office of the High Commissioner for Human Rights
R2P	Responsibility to protect
SC	Security Council
UN	United Nations
UNITA	National Union for the Total Independence of Angola
UNMIS	United Nations Mission in Sudan
UNTS	United Nations Treaty Series
VRS	Army of the Republika Srpska

1. Introduction

1.1. Background

Ten years ago, in 2001, the International Commission on Intervention and State Sovereignty (ICISS) launched its report entitled *The Responsibility to Protect*. With the background of the mass atrocities committed against civilians during the conflicts in Somalia, Rwanda, Bosnia and Kosovo in the 1990's, and the failure of the United Nations (UN) to effectively respond to these crises, the Commission introduced the idea that

sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.¹

Whereas the states by virtue of their sovereignty enjoy the *rights* to territorial integrity, political independence and non-intervention,² the ICISS thus suggested that the states also have a *responsibility* to protect the dignity and basic human rights of their own populations.³ In situations where a state is unwilling or unable to do so, the Commission proposed that the “primary responsibility” to protect of the individual state shifts to an “international responsibility to protect”, and that the international community thus bears a residual responsibility to take action in order to protect endangered populations.⁴

¹ ICISS, *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, 2001, p. VIII.

² Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, 2009, p. 8; See also Articles 2 (1), (4) and (7) of the *Charter of the United Nations*, 26 June 1945.

³ ICISS, *supra* n. 1, p. 8, § 1.35.

⁴ *Ibid*, p. XI, § 1 B and p. 17, § 2.31.

Four years after the ICISS' report was published, the concept of “responsibility to protect” was adopted by the UN member states in the 2005 World Summit. In the *2005 World Summit Outcome* they declared that

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility, to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁵

⁵ A/RES/60/1, §§ 138-139.

This declaration was in many aspects less ambitious than the original concept created by the ICISS,⁶ but at the same time it clarified the scope of the responsibility to protect.⁷ Whereas the ICISS report spoke in more general terms of a responsibility to protect populations from “serious harm as a result of internal war, insurgency, repression or state failure”,⁸ in the 2005 World Summit the world leaders agreed that the concept shall apply to genocide, war crimes, ethnic cleansing and crimes against humanity.

The responsibility to protect has after the 2005 World Summit also been affirmed in principle by the UN Security Council,⁹ and in 2009 the UN Secretary-General Ban Ki-Moon released his report *Implementing the responsibility to protect*,¹⁰ in which he expressed his strong commitment to the efforts of operationalising the principle in practice. The Secretary-General divided the responsibility to protect, as expressed in the 2005 World Summit Outcome, into three supporting pillars,¹¹ the first pillar being each individual state’s responsibility to protect its own populations from genocide, war crimes, ethnic cleansing and crimes against humanity,¹² the second pillar being the international community’s responsibility to encourage and help states to exercise their primary responsibility to protect,¹³ and the third pillar being the international community’s responsibility to take timely and decisive collective action when a state is “manifestly failing to protect its populations from genocide, war crimes, ethnic cleansing or crimes against humanity”.¹⁴

⁶ For a deeper analysis, see for example Bellamy, *supra* n. 2, pp. 83-97 and Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, *American Journal of International Law*, Vol. 101, No. 1, 2007, pp. 108-110.

⁷ Bellamy & Reike, “The Responsibility to Protect and International Law”, *Global Responsibility to Protect*, Vol. 2, No. 3, 2010, p. 273.

⁸ ICISS, *supra* n. 1, p. XI, § 1 B.

⁹ S/RES/1674 (2006), op. § 4; S/RES/1894 (2009), pre. § 7.

¹⁰ A/63/677.

¹¹ *Ibid*, pp. 8-10.

¹² See A/RES/60/1, § 138, first and second sentences.

¹³ See *ibid*, § 138, third sentence and § 139, fourth sentence.

¹⁴ See *ibid*, § 139, first and second sentences.

The responsibility to protect has since its adoption in the 2005 World Summit, and especially since the Secretary-General's report on the implementation of the principle, been widely discussed by both scholars and practitioners. Much of the attention of the commentators has focused on the responsibility to protect of the international community under the second and third pillars of the principle. Also, following the situations in Libya and Syria since the beginning of the "Arab Spring" earlier this year, the residual responsibility to protect of the international community has been a topical issue lately.

As a UN General Assembly resolution, the 2005 World Summit Outcome did not as such have any legally binding effect,¹⁵ but it seems generally agreed that the declaration on the responsibility to protect is firmly based on the existing legal obligations of the states with respect to genocide, war crimes and crimes against humanity.¹⁶ Neither did the language of §§ 138-139 of the Outcome suggest any new legal rights or obligations for the states, the UN or any other international actors to take action in order to protect populations from these crimes, but the international community's responsibility to protect has sometimes been referred to as an "emerging norm".¹⁷ Along with the development of the responsibility to protect during the past decade, there have, indeed, been certain developments of international law, suggesting a greater responsibility or even a legal duty for the international community to take action in order to protect endangered populations in certain circumstances. Therefore, against the background of the 2007 judgement of the International Court of Justice (ICJ) in the *Bosnian genocide* case, and the International Law Commission's (ILC) codification work on the law of international

¹⁵ See Hailbronner & Klein, "Article 10" in Simma (Ed.), *The Charter of the United Nations: A Commentary*, Vol. I, Second Edition, 2002, p. 269, § 44; See also Articles 10-14 of the UN Charter.

¹⁶ See for example A/63/677, § 3; Bellamy & Reike, *supra* n. 7, p. 269; Stahn, *supra* n. 6, p. 118; Strauss, *The Emperor's New Clothes? The United Nations and the implementation of the responsibility to protect*, 2009, p. 25.

¹⁷ See for example *A more secure world: our shared responsibility*, Report of the High-Level-Panel on Threats, Challenges and Change, A/59/565, §§ 202-203.

responsibility of states and international organisations, the issue of international community's responsibility to protect gives rise to some legal reflections.

1.2. Purpose and delimitations

The third pillar of the responsibility to protect expresses the idea that the international community, acting through the UN, should take timely and decisive collective action when national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The purpose of this thesis is to examine this idea from a legal perspective. The analysis throughout the thesis will be based on the second sentence of § 139 of the 2005 World Summit Outcome, in which the UN member states pledged that

*we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.*¹⁸

Comparing this declaration with the ICJ's ruling in the 2007 *Bosnian genocide* case,¹⁹ the ILC's articles on *Responsibility of States for internationally wrongful acts*,²⁰ the ILC's draft articles on *Responsibility of international organizations*²¹ and

¹⁸ Cursives added.

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, ICJ Reports 2007, p. 43.

²⁰ Report of the International Law Commission, Fifty-third session (23 April-1 June and 2 July-10 August 2001), A/56/10 (SUPP), pp. 43-59.

²¹ Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011), A/66/10, pp. 52-66.

the rules of the *Charter of the United Nations* (UN Charter),²² I will reflect upon the protection duties of two international actors mentioned in the passage cited above, namely the states (“we”) and the UN Security Council. Which obligations do the states have under the existing international law to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, when committed *outside* their own borders? Could the UN Security Council, by virtue of its far-reaching powers under the UN Charter, have a legal duty to take action in order to protect populations from these crimes? Could the UN or its member states, for example a permanent member of the Security Council which has blocked collective enforcement action with its veto, incur legal responsibility for the international community’s failure to protect? In other words, *to which extent, if any, does the international community have a legal responsibility to protect?*²³

1.3. Structure

Chapter 2 contains a general introduction to the legal obligations of the states with respect to genocide, war crimes, ethnic cleansing and crimes against humanity. This chapter will confirm that the states have a legal obligation to protect populations from these crimes not only on their own territory, but in certain circumstances also outside the own borders. In Chapter 3, the third pillar of the responsibility to protect will then be compared with the ILC’s articles on Responsibility of States for internationally wrongful acts. I will examine whether the responsibility to protect of the international community matches the ILC’s regime of “aggravated state responsibility”, and whether international law thus imposes on the states a legal

²² *Charter of the United Nations*, 26 June 1945.

²³ For choosing this question as the purpose of my thesis, I was inspired by Luke Glanville’s article “The International Community’s Responsibility to Protect”, *Global Responsibility to Protect*, Vol. 2, No. 3, 2010, pp. 287-306.

duty to cooperate in order to stop genocide, war crimes and crimes against humanity.

Chapters 4 and 5 will deal with the responsibility to protect of the UN Security Council. According to the 2005 World Summit Outcome, collective action under the third pillar of the responsibility to protect should be taken through the Security Council and in accordance with the UN Charter. The Charter confers on the Council the legal authority to take binding enforcement measures in order to maintain or restore international peace and security. In Chapter 4, I will therefore examine whether genocide, war crimes, ethnic cleansing and crimes against humanity fall in all circumstances under the competence of the Security Council. Against the background of the ICJ's 2007 judgement in the *Bosnian genocide* case, I will in Chapter 5 then discuss whether the Security Council could have a legal duty to take action in order to protect populations from these crimes.

In Chapter 6, I will compare the third pillar of the responsibility to protect with the ILC's draft articles on responsibility of international organisations, and reflect upon the possibility of holding the UN legally responsible for a failure to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Finally, in Chapter 7, I will summarise my findings and make some concluding reflections on the possible legal character of the international community's responsibility to protect.

1.4. Terminology

The term "responsibility to protect" has often been abbreviated by commentators as "R2P". I will in this thesis mostly spell it out in full, but will occasionally also use the established abbreviation R2P. The fact that different writers have been referring to the responsibility to protect with different terms indicates that there is no general

agreement on its exact status.²⁴ Most commentators have called it a “concept”²⁵ or a “principle”,²⁶ but it has even been referred to as a “norm”²⁷ or an “emerging norm”.²⁸ As the responsibility to protect has not been adopted in any legally binding document, it does not as such constitute a legal norm.²⁹ However, considering the facts that the idea has been unanimously adopted by the UN member states, that serious efforts are being made to implement it in practice, and that the Security Council has acted upon it in the case of Libya, it does seem justified to speak of the responsibility to protect as a principle, meaning that it is “a fundamental truth or proposition which serves as the basis for belief leading to action”.³⁰ I have thus chosen to adopt Bellamy’s terminology, and will in this thesis use the word “concept” when referring to the responsibility to protect at the time before the 2005 World Summit, and the word “principle” when speaking of it at the time after the Summit.³¹

2. Responsibility to protect from genocide, war crimes, ethnic cleansing and crimes against humanity

2.1. Genocide

Genocide is a crime under international law which can be committed both in times of peace and war, and which is prohibited by the *Convention on the Prevention and*

²⁴ Bellamy, *supra* n. 2, p. 4; Stahn, *supra* n. 6, p. 111.

²⁵ See for example Glanville, *supra* n. 23, p. 287; Stahn, *supra* n. 6, p. 99.

²⁶ See for example Bellamy, *supra* n. 2 p. 7; Bellamy & Reike, *supra* n. 7, p. 268.

²⁷ See for example Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, 2008, p. 11; Arbour, “The responsibility to protect as a duty of care in international law and practice”, *Review of International Studies*, Vol. 34, No. 3, 2008, p. 447.

²⁸ See for example A/59/565, §§ 202-203.

²⁹ See Bellamy & Reike, *supra* n. 7 p. 268; Stahn, *supra* n. 6, p. 102.

³⁰ Bellamy, *supra* n. 2, p. 6.

³¹ See *ibid*, p. 7.

Punishment of the Crime of Genocide (Genocide Convention).³² Article II of the Convention defines genocide as

any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births in the group;
- (e) Forcibly transferring children of the group to another group.³³

Article I of the Genocide Convention imposes on the state parties an obligation to *prevent* and to punish genocide. It does not explicitly prohibit them from *committing* it, but the ICJ has pronounced that the obligation to prevent also implies a prohibition to commit genocide.³⁴ The Convention has to date been ratified by 142 states³⁵, but according to the ICJ, the prohibition of genocide is also a customary norm of international law, and thus binding on all states, whether or not they have ratified the Convention.³⁶ The Court has also recognised it as a peremptory norm of international law (*jus cogens*),³⁷ which means that it is “accepted and recognized by

³² Article I of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948.

³³ The same definition can be found also in the Statutes of the International Criminal Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), see Article 4 of the *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, September 2009; Article 2 of the *Statute of the International Criminal Tribunal for Rwanda*, 31 January 2010; Article 6 of the *Rome Statute of the International Criminal Court*, 17 July 1998.

³⁴ ICJ Reports 2007, *supra* n. 19, § 166.

³⁵ http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants (last visited 30 November 2011).

³⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 15, at p. 23; Reaffirmed in *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, Judgement of 3 February 2006, ICJ Reports 2006, p. 6, § 64.

³⁷ ICJ Reports 2006, *ibid*.

the international community as a whole as a norm from which no derogation is permitted”.³⁸

All the states thus have an obligation to prevent genocide. The Genocide Convention does not explicitly specify whether they must prevent this crime only within or also outside their own territories,³⁹ but the Preamble of the Convention states that “in order to liberate the mankind from such an odious scourge, international co-operation is required”,⁴⁰ thus indicating that the obligation to prevent also applies to genocides committed beyond the states’ own borders.⁴¹ The ICJ pronounced in its 1996 judgement on the *Application of the Genocide Convention* that “the rights and obligations enshrined by the [Genocide] Convention are obligations *erga omnes*”,⁴² which means that they are owed “towards the international community as a whole”, and that “all States can be held to have a legal interest in their protection”.⁴³ The Court also explicitly noted that “the obligation each State has to prevent and punish the crime of genocide is not territorially limited by the Convention”.⁴⁴

In 2007 the ICJ further clarified the scope of the obligation to prevent genocide, as it declared in the *Bosnian genocide* case that the Genocide Convention imposes on the State parties an obligation “to employ all measures reasonably available to them, so as to prevent genocide as far as possible”. The Court found that

³⁸ Article 53 of the *Vienna Convention on the Law of Treaties*, 23 May 1969.

³⁹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, *Provisional Measures*, Order of 13 September 1993, Separate Opinion of Judge Lauterpacht, ICJ Reports 1993, p. 407, § 115.

⁴⁰ Preamble, § 3.

⁴¹ In this respect, see also Article VIII of the Genocide Convention which stipulates that the state parties “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of the acts of genocide”.

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections*, Judgement of 11 July 1996, ICJ Reports 1996, p. 595, § 31; Reaffirmed in *Armed Activities on the Territory of the Congo*, ICJ Reports 2006, *supra* n. 36.

⁴³ *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, *Second Phase*, Judgement of 5 February 1970, ICJ Reports 1970, p. 3, § 33; See also § 34.

⁴⁴ ICJ Reports 1996, *supra* n. 42.

Serbia and Montenegro had violated its obligations under Article I of the Genocide Convention, because it had “manifestly failed to take all measures to prevent genocide which were within its power” in Srebrenica, Bosnia, in 1995.⁴⁵ The Court thus established that a state may, indeed, incur legal responsibility for a failure to prevent genocide, even when the crime has been committed on another state’s territory.

2.2. War crimes

War crimes are violations of international humanitarian law that create individual criminal responsibility under international law.⁴⁶ International humanitarian law in its turn is a vast body of international treaty and customary law that regulates the conduct of armed conflict and seeks to protect persons who are not taking part in the hostilities.⁴⁷ There are different definitions of war crimes in different international instruments,⁴⁸ but the most comprehensive and precise one can be found in Article 8 of the Statute of the International Criminal Court (Rome Statute).⁴⁹ With 119 states parties,⁵⁰ the Statute is not as such universally applicable, but its definition of war crimes embodies at least to some extent customary

⁴⁵ ICJ Reports 2007, *supra* n. 19, § 430.

⁴⁶ Cassese, *International Criminal Law*, Second Edition, 2008, p. 81; Werle, *Principles of International Criminal Law*, 2005, p. 269.

⁴⁷ Cassese, *ibid*, pp. 81–82; Gasser, “Protection of the Civilian Population” in Fleck (Ed.), *The Handbook of International Humanitarian Law*, Second Edition, 2008, p. 237.

⁴⁸ See for example Article 50 of *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949; Article 51 of the *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949; Article 130 of the *Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949; Article 147 of the *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949; Articles 2–3 of the Statute of the ICTY; Article 4 of the Statute of the ICTR; Article 8 of the Rome Statute of the ICC.

⁴⁹ Bothe, “War Crimes” in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, 2002, p. 381.

⁵⁰ http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en#Participants (last visited 30 November 2011).

international law.⁵¹ Article 8 (2) of the Rome Statute lists four different categories of war crimes, namely:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949 [...]
- (b) Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law [...]
- (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 [...]
- [...]
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law [...]
- [...].

War crimes can thus be committed both in international and internal armed conflicts.

Regarding international armed conflicts, in the responsibility to protect context it is the fourth Geneva Convention⁵² and the first Additional Protocol to the Geneva Conventions (Additional Protocol I)⁵³ which are of interest, because these instruments contain provisions for protection of civilians.⁵⁴ When it comes to internal armed conflicts, although the four Geneva Conventions are mainly applicable only in international armed conflicts,⁵⁵ the common Article 3 to the these Conventions imposes on the state parties certain minimum obligations that must be respected also in internal armed conflicts. The states thus have an obligation to treat

⁵¹ See Bellamy & Reike, *supra* n. 7, p. 277; Danilenko, “ICC Statute and Third States” in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. II*, 2002, p. 1894.

⁵² *Convention (VI) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949.

⁵³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977.

⁵⁴ Regarding Additional Protocol I, see in particular Part VI.

⁵⁵ Common Article 2 (1) to the Geneva Conventions.

humanely all persons who do not take active part in the hostilities “in all circumstances”.⁵⁶ Further provisions protecting civilians in internal armed conflicts can be found in the second Additional Protocol (Additional Protocol II).⁵⁷ Ratified by 194 states⁵⁸, all the four Geneva Conventions are universally applicable, but as the provisions of these Conventions also form part of customary international law, they are binding on all states even without any conventional obligations.⁵⁹ Additional Protocol I has to date 171 states parties, and Additional Protocol II 166.⁶⁰ They have thus not reached universal participation, but many of the rules in both Protocols are today regarded as embodying customary international law.⁶¹

The prohibition of war crimes has not generally been recognised as a peremptory norm of international law, but at least some of these crimes have been argued to amount to breaches of *jus cogens*. The International Criminal Tribunal for former Yugoslavia (ICTY) pronounced in the *Kupreškić* case that “most norms of international humanitarian law, in particular those prohibiting war crimes”, are peremptory,⁶² and the ICJ considered in the *Legality of the Nuclear Weapons* case

⁵⁶ Common Article 3, § 1 (1).

⁵⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II)*, 8 June 1977, see especially Part IV.

⁵⁸ ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 15-Nov-2011*, available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited 30 November 2011).

⁵⁹ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, § 79; Greenwood, “Historical Development and Legal Basis” in Fleck (Ed.), *The Handbook of International Humanitarian Law*, Second Edition, 2008, pp. 27-28; Werle, *supra* n. 46, p. 275.

⁶⁰ As of 30 November, see *supra* n. 58.

⁶¹ Regarding Additional Protocol I, see for example Greenwood in Fleck (Ed.), *supra* n. 59, pp. 29-30; Gasser, “Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations” in Fox & Meyer (Eds.), *Armed Conflict and the New Law Vol. II: Effecting Compliance*, 1993, p. 22; Regarding Additional Protocol II, see *Prosecutor v. Duško Tadić a/k/a “Dule”*, ICTY Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, § 117; Regarding both protocols, see also the ICRC’s rules of customary international law in Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, 2005.

⁶² *Prosecutor v. Zoran Kupreškić et al.*, ICTY Trial Judgement, Case No. IT-95-16-T, 14 January 2000, § 520.

that the fundamental rules of international humanitarian law constitute “intransgressible principles of international customary law”.⁶³ The Court did not expressly grant such rules a *jus cogens* status, but according to the ILC it would, with the background of this judgement, seem justified to treat the basic rules of international humanitarian law as peremptory.⁶⁴ According to Hannikainen there is a “strong presumption that at least the prohibitions of the ‘grave breaches’ of the [Geneva] Conventions are peremptory”,⁶⁵ and Orakhelashvili has argued that at least those rules of international humanitarian law that “protect the human beings as such are undoubtedly peremptory”.⁶⁶

The common Article 1 to the Geneva Conventions imposes on the state parties an obligation “to respect and to *ensure respect*” for the Conventions “in all circumstances”.⁶⁷ Whereas to “respect” means that the states must do everything they can to ensure that the rules of the four Conventions are respected by their own organs and others under their jurisdiction, the obligation to “ensure respect” imposes on the states, whether or not themselves involved in an armed conflict, also a duty to do everything in their power to ensure that these rules are respected by all.⁶⁸ The same applies also to Additional Protocol I,⁶⁹ but an equivalent provision was not included in Additional Protocol II. The obligation to ensure respect for international humanitarian law does, however, apply also to internal armed conflicts, at least to the extent that the prohibited acts fall under common

⁶³ ICJ Reports 1996, *supra* n. 59.

⁶⁴ A/56/10 (SUPP), p. 284, § 5.

⁶⁵ Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, 1988, pp. 605-606.

⁶⁶ Orakhelashvili, *Peremptory Norms in International Law*, 2006, p. 64; He mentions for example the common Article 3 to the Geneva Conventions, Article 75 of Additional Protocol I and Articles 4-6 of Additional Protocol II.

⁶⁷ Cursives added.

⁶⁸ Boisson de Chazournes & Condorelli, “Common Article 1 to the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, Vol. 82, No. 837, 2000, p. 69; Pictet (Ed.), *The Geneva Conventions of 12 August 1949: Commentary (IV)*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1958, p. 16.

⁶⁹ See Article 1 (1).

Article 3 to the Geneva Conventions. It has been argued that, although the rules of Additional Protocol II do not explicitly fall under the duty to respect and ensure respect for international humanitarian law, they can, nevertheless, be considered as indirectly covered by this obligation, because the Protocol only “develops and supplements” common Article 3.⁷⁰ The customary law status of common Article 1 was affirmed by the ICJ in the 1986 *Nicaragua* case,⁷¹ and the provision is also an *erga omnes* obligation.⁷² The duty to ensure respect for international humanitarian law is therefore binding on all states and owed to the international community as a whole.

It can thus be concluded that all the states have an obligation to protect not only their own populations but also the peoples outside their own territory from war crimes. They must not only refrain from committing these crimes themselves, but also do everything they can to ensure that others do not commit them. In other words, all the states are under an obligation to ensure that war crimes are not committed by anyone against anyone. This applies both to international and internal armed conflicts, to the latter at least to the extent that the crimes are prohibited in common Article 3 to the Geneva Conventions.

⁷⁰ Boisson de Chazournes & Condorelli, *supra* n. 68, p. 69 and Article 1 (1) of Additional Protocol II; See also Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, 2005, p. 509; Rule 144 stipulates that the states must “exert their influence, to the degree possible, to stop violations of international humanitarian law”, and this rule applies, according to the commentary to the rule, both to international and non-international armed conflicts.

⁷¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits*, Judgement of 27 June 1986, ICJ Reports 1986, p. 14, § 220.

⁷² See Pilloud, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987 p. 36; See also *Prosecutor v. Zoran Kupreškić et al.*, ICTY, *supra* n. 62, § 519; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, § 159.

2.3. Crimes against humanity

So far, the states have not adopted any international convention prohibiting crimes against humanity.⁷³ The commission of these crimes is, however, prohibited under customary international law,⁷⁴ and their prohibition has also been recognised as a *jus cogens* norm.⁷⁵ Crimes against humanity were for the first time criminalized in the Charter of the International Military Tribunal of Nuremberg (IMT) in 1945,⁷⁶ but more recently also for example in the Statutes of the ICTY,⁷⁷ the International Criminal Tribunal for Rwanda (ICTR)⁷⁸ and the International Criminal Court (ICC).⁷⁹ The most comprehensive and specific definition of these crimes can be found in Article 7 (1) of the Rome Statute,⁸⁰ according to which a

“crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

⁷³ A *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity* has, however, been drafted by the Crimes Against Humanity Initiative at the Whitney R. Harris World Law Institute of Washington University School of Law, see <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf> (last visited 31 October 2011).

⁷⁴ Danilenko in Cassese, Gaeta and Jones (Eds.), *supra* n. 51, p. 1890; Werle, *supra* n. 46, p. 218.

⁷⁵ A/56/10 (SUPP), p. 208, § 5; Bassiouni, *Crimes Against Humanity in International Criminal Law*, Second Revised Edition, 1999, p. 210.

⁷⁶ Cassese, “Crimes against Humanity” in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary. Vol. I*, 2002, p. 353: See also Article 6 (c) of the *Charter of the International Military Tribunal*, 8 August 1945.

⁷⁷ Article 5.

⁷⁸ Article 3.

⁷⁹ Article 7 (1).

⁸⁰ See Bassiouni, *supra* n. 75, pp. 178 and 202; Danilenko in Cassese, Gaeta and Jones (Eds.), *supra* n. 51, p. 1892; Cf. also the definitions in the Statutes of the ICTY and the ICTR, which are similar but less detailed.

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution, against identifiably group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

As mentioned above, the Rome Statute is binding only on the 119 states which have ratified it,⁸¹ but the definition of crimes against humanity in the Statute embodies by and large customary international law.⁸² Whereas crimes against humanity were originally punishable only when committed in connection to an armed conflict,⁸³ it is today generally accepted that they can also be committed in peacetime.⁸⁴

Following the peremptory character of the prohibition of crimes against humanity, it is also an obligation *erga omnes*.⁸⁵ In the absence of an international convention in force, there are no codified obligations for the states to prevent these crimes, but following their prohibition under customary international law, all states

⁸¹ See *supra* n. 50.

⁸² Cassese in Cassese, Gaeta and Jones (Eds.), *supra* n. 76, p. 373.

⁸³ *Ibid*, p. 354; See also Article 6 (c) of the Charter of the IMT.

⁸⁴ Bassiouni, *supra* n. 75, p. 86; *Prosecutor v. Duško Tadić*, ICTY, *supra* n. 61, § 141; Werle, *supra* n. 46, p. 219; See also Article 1 of the Proposed Convention on Crimes Against Humanity, *supra* n. 73.

⁸⁵ See Bassiouni, *supra* n. 75, p. 211; Orakhelashvili, *supra* n. 66, p. 269; Cf. also ICJ Reports 1970, *supra* n. 43, § 34 and Article 7 (1) (c) and (j) of the Rome Statute.

do have a duty to refrain from committing them.⁸⁶ According to Hannikainen, peremptory norms oblige the states to prevent violations of these norms within their own jurisdiction,⁸⁷ and it can therefore be argued that the states do have a customary duty to prevent crimes against humanity within their own territory.⁸⁸

2.4. Ethnic cleansing

Unlike the other three crimes dealt with above, “ethnic cleansing” is not as such criminalised under international law. It is not a legal term,⁸⁹ but an expression referring to a policy of serious human rights violations aiming to expel an ethnic group from a certain area, in order to change the composition of the population in that area. The term was used especially in the context of the war in the former Yugoslavia to describe the practice of the Serb forces in Bosnia and Herzegovina of forcing Muslims and Croats to leave their homes.⁹⁰ The Commission of Experts for the former Yugoslavia defined ethnic cleansing as “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area”,⁹¹ and in Bosnia and Herzegovina such operations were according to the Commission

carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threat of attacks on civilians and civilian areas, and wanton destruction of property.⁹²

⁸⁶ Bellamy & Reike, *supra* n. 7, p. 279; See also Hannikainen, *supra* n. 65, p. 722.

⁸⁷ Hannikainen, *ibid.*

⁸⁸ See also Strauss, *supra* n. 16, pp. 34-35.

⁸⁹ Werle, *supra* n. 46, p. 204; See also ICJ Reports 2007, *supra* n. 19, § 190.

⁹⁰ Werle, *ibid.*

⁹¹ Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), S/25274, Annex I, § 55.

⁹² *Ibid.*, § 56.

Ethnic cleansing is not prohibited in its own right in any international convention, but such a policy is in violation of international law, because the different acts constituting it can be subsumed under crimes against humanity, war crimes and in some cases even genocide.⁹³ According to Article 7 (1) (d) of the Rome Statute, “[d]eportation or forcible transfer of population” constitutes crimes against humanity, and the list of war crimes in Article 8 (2) includes “deportation or transfer” of civilians in international armed conflicts,⁹⁴ and “[o]rdering the displacement of the civilian population” in internal armed conflicts.⁹⁵ Whether ethnic cleansing can constitute genocide is more questionable, because although the acts constituting them may be similar, the purposes behind them are different.⁹⁶ Whereas the perpetrators of genocide must have the intention to destroy a group of people,⁹⁷ those of ethnic cleansing “only” aim to expel the group from a certain area.⁹⁸ Ethnic cleansing can, however, be classified as genocide, if the acts constituting it can be characterised as “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”,⁹⁹ and if the for genocide necessary “intent to destroy” is present. This could, according to the commentary to the draft Convention on the Crime of Genocide, be the case if the displaced population is intentionally exposed to circumstances likely to lead to its death, for example if “people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemics”.¹⁰⁰

⁹³ See *ibid*, §§ 55-56.

⁹⁴ Article 8 (2) (a) (vii) and Article 8 (2) (b) (viii); See also Articles 49 and 147 of the fourth Geneva Convention and Article 85 (4) (a) and Article 85 (5) of Additional Protocol I.

⁹⁵ Article 8 (2) (e) (viii); See also Article 17 of Additional Protocol II.

⁹⁶ See Schabas, *Genocide in International Law: The Crime of Crimes*, Second Edition, 2009, p. 234; Werle, *supra* n. 46, p. 204; See also ICJ Reports 2007, *supra* n. 19, § 190.

⁹⁷ Article II of the Genocide Convention.

⁹⁸ Schabas, *supra* n. 96, p. 234; Werle, *supra* n. 46, p. 204; See also ICJ Reports 2007, *supra* n. 19, § 190.

⁹⁹ Article II (c) of the Genocide Convention.

¹⁰⁰ E/447, p. 24.

In conclusion, although ethnic cleansing is not as such a crime prohibited under international law, the acts constituting it are, because they also fall under crimes against humanity, war crimes and in some circumstances even genocide. Therefore, depending on under which of these other crimes the acts of ethnic cleansing can be subsumed, the states have an obligation to protect populations – their own or foreign – from ethnic cleansing to the same extent than from crimes against humanity, war crimes and genocide. In the following Chapters, ethnic cleansing will not always be dealt with as a separate category of criminal acts, but it will simply be assumed that these acts also fall under one of the other three “R2P crimes”.

2.5. Conclusion

The prohibitions of genocide and crimes against humanity are peremptory norms of international law from which no derogation is prohibited, and the same seems to apply also at least to those war crimes that violate the basic rules of international humanitarian law. Ethnic cleansing is not as such prohibited or criminalised under international law, but the acts constituting it can be subsumed under the other three crimes. The states have legal obligations, deriving from both conventional and customary international law, to protect the populations within their own territory from these crimes, and the first pillar of the responsibility to protect is thus not only a political declaration by the UN member states, but indeed a legal duty.

Regarding the responsibility to protect of the international community under the second and third pillars of the principle, the prohibitions of genocide, war crimes and crimes against humanity are norms owed to the international community as a whole (*erga omnes*). The Genocide Convention and the Geneva Conventions impose on the state parties an obligation to prevent genocide and war crimes also when these crimes are committed outside their own borders, and by

virtue of the customary status of these obligations, they apply to all states even without any conventional obligations. There are thus, indeed, existing obligations in international law, coherent to the idea of the international community's responsibility to protect. In the next chapter I will examine the ILC's regime of "aggravated state responsibility" in order to see whether the states are under a legal duty to cooperate in order to protect populations from genocide, war crimes and crimes against humanity.

3. The international responsibility to protect of the states – A legal duty to cooperate?

3.1. Responsibility to protect and the ILC's regime of "aggravated state responsibility"

In 2001, the ILC adopted a set of articles on *Responsibility of States for internationally wrongful acts* (ILC Articles),¹⁰¹ thereby codifying the principle that a state incurs international responsibility if it violates an obligation to which it is bound under international law.¹⁰² As distinct from the "ordinary" responsibility that a state incurs if it violates an international obligation of a reciprocal nature, the Commission established in ILC Articles 40-41 the regime of so-called "aggravated state responsibility",¹⁰³ suggesting that violations of certain peremptory norms of international law create consequences not only for the violating state, but also for all other states.¹⁰⁴ Thus, when a state commits a "serious breach" of a peremptory

¹⁰¹ A/56/10 (SUPP), pp. 43-59.

¹⁰² ILC Articles 1-2.

¹⁰³ Cassese, *International Law*, Second Edition, 2005, p. 262.

¹⁰⁴ A/56/10 (SUPP), p. 282, § 7.

norm,¹⁰⁵ ILC Article 41 (1) suggests that all other states have a duty to cooperate in order to end that breach.

As already noted in the previous Chapter, the prohibitions of genocide and crimes against humanity have been recognised as peremptory norms of international law,¹⁰⁶ and also the prohibition of at least those war crimes that violate the most fundamental rights of the human being have been argued to constitute *jus cogens* norms.¹⁰⁷ Following the peremptory status of the prohibition of these crimes, the idea of the international community's responsibility to protect seems to match ILC Article 41 (1), but the Commission set an additional requirement for the application of the other states' duty to cooperate, namely that the violation must amount to a "*serious breach*" of a peremptory norm.¹⁰⁸

According to ILC Article 40 (2), a breach of a *jus cogens* norm is "serious" when it involves a "gross or systematic failure by the responsible State to fulfil the obligation". According to the commentary to this Article, the term "gross" refers to the intensity or the effects of the violation, denoting "violations of flagrant nature, amounting to direct and outright assault on the values protected by the rule". In order to be "systematic", "a violation would have to be carried out in an organized and deliberate way". Factors which may, according to the commentary, make a violation serious include "the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims". It was also noted that for example the prohibition of genocide is a norm which always requires "an intentional violation on a large-scale".¹⁰⁹

The commission of genocide may thus automatically be considered as a "serious breach" of a peremptory norm, but also crimes against humanity would seem to fulfil the ILC's criterion of seriousness of the violation, at least according to

¹⁰⁵ ILC Article 40 (1).

¹⁰⁶ See also A/56/10 (SUPP), p. 208, § 5.

¹⁰⁷ See also A/56/10 (SUPP), p. 284, § 5.

¹⁰⁸ ILC Article 40 (1), cursives added.

¹⁰⁹ A/56/10 (SUPP), p. 285, § 8.

the definition of these crimes in the Rome Statute. According to Article 7 (1) of the Statute, crimes against humanity must be “committed as part of a *widespread* or *systematic* attack”,¹¹⁰ meaning that they are always committed either on a systematic or large-scale basis. When it comes to war crimes, to the extent that the prohibition of these crimes is *jus cogens*, the fact that Article 8 (2) of the Rome Statute speaks of “*grave breaches* of the Geneva Conventions”¹¹¹ and “other *serious violations*” of international humanitarian law¹¹² could be argued to speak for their inherently flagrant nature, but otherwise these crimes would have to be committed for example as part of a deliberate policy or on a widespread basis in order to constitute serious breaches of peremptory norms.

The idea of the international community’s responsibility to protect thus seems to match the ILC’s regime of aggravated state responsibility, at least as far as genocide and crimes against humanity are concerned. However, the mere adoption of the articles on state responsibility by the ILC did not make them legally binding, and the commentary to ILC Article 41 expressly states that it may be open to question whether general international law actually prescribes such a duty of cooperation when a state commits a serious breach of a peremptory norm, and that Article 41 (1) “in that respect may reflect the progressive development of international law”.¹¹³ The articles on state responsibility were, after their adoption by the ILC, taken note of and annexed to a UN General Assembly resolution,¹¹⁴ but so far they have not been turned to an international convention. The states are therefore bound by the duty to cooperate to end serious breaches of *jus cogens* norms only to the extent that ILC Article 41 (1) actually embodies already existing international law.

¹¹⁰ Cursives added.

¹¹¹ Article 8 (2) (a), cursives added.

¹¹² Article 8 (2) (b), (c) and (e), cursives added.

¹¹³ A/56/10 (SUPP), p. 287, § 3.

¹¹⁴ A/RES/56/83.

3.2. Legal duty to cooperate in order to end genocide, war crimes and crimes against humanity?

The ILC's regime of "aggravated state responsibility" suggests that, to the extent that "R2P crimes" can be characterised as 'serious breaches of peremptory norms', the states have a "positive duty to cooperate" in order to stop genocide, war crimes and crimes against humanity, regardless of whether they have been individually affected by the crimes.¹¹⁵ The only existing treaty obligation that clearly coheres with Article 41 (1) can be found in Article 89 of Additional Protocol I to the Geneva Conventions, which stipulates that

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.

Whereas the cooperation envisaged in ILC Article 41 could, according to the Commission, be taken both within the framework of an international organization and in a non-institutionalised form by a group of states acting independently,¹¹⁶ Article 89 of Additional Protocol I only refers to "cooperation with the United Nations".¹¹⁷ This indicates that the latter Article only applies in cases where the organs of the UN are actually seized by a situation and have decided to adopt, or are discussing, measures to stop the serious violations of international humanitarian law. On the other hand, Article 89 is in perfect accordance with the third pillar of the responsibility to protect, as § 139 of the 2005 World Summit Outcome states that the international community should exercise its residual responsibility to protect "through the United Nations". In this respect it can be noted that states may, of

¹¹⁵ See A/56/10 (SUPP), p. 287, § 2-3.

¹¹⁶ A/56/10 (SUPP), p. 287, § 2.

¹¹⁷ See also Pilloud, *supra* n. 72, p. 1032.

course, also cooperate outside the UN framework, but, in addition to peaceful settlement of disputes,¹¹⁸ they may in such cases only use economic or diplomatic sanctions that do not violate a treaty or any other specific legal obligation to which these states are bound.¹¹⁹

Another existing treaty provision which can be argued to impose on the states a legal duty to cooperate in order to end serious breaches of peremptory norms is Article I of the Genocide Convention, when read together with the Preamble of the Convention. As mentioned in the previous Chapter, the ICJ has established that the states' obligation to prevent genocide is "not territorially limited",¹²⁰ and the preambular § 3 of the Convention states that "in order to liberate mankind from" this crime, "international co-operation is required".¹²¹ Other than that, there are no codified obligations for the states to take joint action in order to end "R2P crimes", but in this respect it should be noted that the Proposed Convention on Crimes Against Humanity, although not yet in force, stipulates that the state parties agree to cooperate with each other in order to prevent crimes against humanity.¹²² The states do, however, most probably not consider themselves as legally bound by any general duty to cooperate in order to end serious breaches of *jus cogens* norms,¹²³ and even if the ILC Articles on state responsibility were to be turned to an international convention, it can be questioned whether any state would be willing to undertake such a legal obligation to cooperate.

¹¹⁸ See Article 33 of the UN Charter.

¹¹⁹ See Article 2 (4) of the UN Charter and ICJ Reports 1986, *supra* n. 71, § 276; Ress & Bröhmer, "Article 53" in Simma (Ed.), *The Charter of the United Nations: A Commentary, Vol. I*, Second Edition, 2002, p. 860, § 4.

¹²⁰ ICJ Reports 1996, *supra* n. 42, § 31.

¹²¹ See also ICJ Reports 1951, *supra* n. 36, p. 23, where the ICJ pronounced that the requirement of co-operation in the Genocide Convention is of "universal character".

¹²² Article 2 (2) (a) of the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, see *supra* n. 73.

¹²³ Regarding the "R2P crimes", see for example the United States' Ambassador Bolton's line of argument at the 2005 World Summit in Bolton, "Letter from John R. Bolton, Representative of the USA to the UN, to Jean Ping, President of the UN General Assembly", 30 August 2005, cited in Glanville *supra* n. 23, p. 293.

It should also be noted that a legal duty for the states to cooperate in “R2P situations” based on ILC Article 41 would require that the serious breach of a peremptory norm is committed “by a *State*”.¹²⁴ This may, however, not always be the case when genocide, war crimes or crimes against humanity are committed by non-state actors.¹²⁵ Even if *jus cogens* norms impose on the states an obligation not only to refrain themselves from violating these norms, but also to prevent such violations by others within their own jurisdiction,¹²⁶ the duty to cooperate would not apply to “R2P crimes” committed for example in failed state situations, because in such cases there are no state authorities in control of the territory.¹²⁷

3.3. Conclusion

The idea of the international community’s responsibility to protect does seem to match the ILC’s regime of “aggravated state responsibility”, at least as far as genocide and crimes against humanity are concerned. Although the ILC Articles on state responsibility did not as such create any legally binding obligations on states, and although the Commission itself admitted that the duty to cooperate in ILC Article 41 is rather a *lex ferenda* obligation, there are indeed certain existing treaty obligations imposing on the states a duty of cooperation in order to end war crimes and genocide.

Whereas ILC Article 41 envisages both institutionalised and non-institutionalised forms of cooperation, the 2005 World Summit Outcome clearly states that the international community should exercise its responsibility to protect through the UN. Whereas the states may also cooperate on their own through

¹²⁴ ILC Article 40 (2), cursives added.

¹²⁵ See Amnéus, *Responsibility to Protect by Military Means: Emerging Norms on humanitarian Intervention?*, 2008, p. 298; See also S/RES/864 (1993), Part A. §§ 7 and 13, where the Security Council deemed that a group of non-state actors, the National Union for the Total Independence of Angola (UNITA), was responsible for violations of international humanitarian law in Angola.

¹²⁶ Hannikainen, *supra* n. 65, p. 722.

¹²⁷ Amnéus, *supra* n. 125, p. 299, n. 1596.

peaceful means, it is the UN Security Council which has the power to impose *binding* collective measures, including the use of military force, against states. In the next Chapter I will therefore reflect upon the responsibility to protect of the UN Security Council.

4. The responsibility to protect of the UN Security Council

4.1. The responsibility to protect and the UN collective security system

According to § 139 of the 2005 World Summit Outcome, the international community should take collective action through the UN Security Council, if the “national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crime against humanity”, and if peaceful measures would be inadequate to solve the situation. The Security Council has, indeed, under Chapter VII of the UN Charter, the power to take binding collective measures when certain circumstances are present.¹²⁸ Article 39 of the UN Charter stipulates that

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Thus, if the Council deems that a situation constitutes, as a minimum, a threat to the international peace and security, it may decide to take non-military enforcement measures, such as economic or diplomatic sanctions, under Article 41, or military enforcement measures under Article 42 of the Charter.

¹²⁸ Frowein & Krisch, “Introduction to Chapter VII” in Simma (Ed.), *The Charter of the United Nations: A Commentary*, Vol. I, Second Edition, 2002, p. 705, § 11.

In this context it is important to note that the international community should always try to solve “R2P situations” primarily through peaceful measures.¹²⁹ However, as was shown for example by the case of Libya earlier this year, enforcement action sometimes becomes necessary when a state is unable to protect its own populations, or, especially when it is the state authorities who are committing the crimes. Thus, in cases where peaceful measures have failed or would be inadequate, a condition for the Security Council to impose collective enforcement measures in order to protect populations from genocide, war crimes, ethnic cleansing or crimes against humanity is that the Council deems that these crimes constitute a threat to the international peace and security.

4.2. Genocide, war crimes, ethnic cleansing and crimes against humanity as “threat to the peace”?

Originally, when the UN Charter was adopted in 1945, the term “threat to the peace” in Article 39 meant mainly military conflicts between states.¹³⁰ However, since the end of the Cold War, the scope of this term has been considerably widened, and it is today generally accepted that also internal armed conflicts and even non-military factors, such as considerable human suffering, may constitute a threat to the international peace and security.¹³¹ When it comes to genocide, war crimes, ethnic cleansing and crimes against humanity, the Security Council has in its thematic resolutions on protection of civilians in armed conflicts endorsed the

¹²⁹ The Security Council may take peaceful measures under Chapter VI of the Charter, but its decisions under this Chapter are *non-binding* recommendations, see Tomuschat, “Article 33” in Simma (Ed.), *The Charter of the United Nations: A Commentary, Vol. I*, Second Edition, 2002, p. 584, § 2; See also Article 36 (1) of the UN Charter.

¹³⁰ Österdahl, *Threat to the Peace: The interpretation by the Security Council of Article 39 of the UN Charter*, 1998, p. 18.

¹³¹ *Ibid*, pp. 18-19 and 43; For a deeper analysis, see also *ibid*, pp. 44-84; Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, 2001, pp. 127-160; Frowein & Krisch, “Article 39” in Simma (Ed.), *The Charter of the United Nations: A Commentary, Vol. I*, Second Edition, 2002, pp. 723-726.

principle of responsibility to protect,¹³² and it has, indeed, also dealt with these crimes in its practice since the beginning of the 1990's.

The clearest precedents for “R2P crimes” constituting a threat to the peace can be found in the Security Council resolutions establishing the *ad hoc* tribunals for former Yugoslavia and Rwanda. In resolution 827 the Council expressed its grave alarm at the “widespread and flagrant violations of international humanitarian law” and “the practice of ethnic cleansing” committed in Bosnia and Herzegovina, and determined that “this situation continues to constitute a threat to international peace and security”.¹³³ In similar terms, in resolution 955, the Security Council determined that the “genocide and other systematic, widespread and flagrant violations of international humanitarian law” committed in Rwanda “continues to constitute a threat to international peace and security”.¹³⁴ In resolution 794 on Somalia, the Council expressed its grave alarm at the “widespread violations of international humanitarian law”¹³⁵ and determined that

the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance constitutes a threat to international peace and security.¹³⁶

Also in resolution 1593, in which the situation in Sudan was referred to the ICC, it seemed to be the war crimes and crimes against humanity committed in Darfur as such that continued to constitute a threat to the international peace and security.¹³⁷

¹³² S/RES/1674 (2006), op. § 4; S/RES/1894 (2009), pre. § 7.

¹³³ S/RES/827 (1993), pre. §§ 3-4; See also S/RES/808 (1993), pre. §§ 6-7; For earlier determinations on threat to the peace in Bosnia and Herzegovina, see S/RES/757 (1992), pre. §§ 5-6 and 17; S/RES/770 (1992), pre. §§ 5 and 8-9.

¹³⁴ S/RES/955 (1994), pre. §§ 4-5; See also S/RES/929 (1994), pre. §§ 8 and 10.

¹³⁵ S/RES/794 (1992), pre. § 8.

¹³⁶ *Ibid*, pre. § 3.

¹³⁷ See S/RES/1593 (2005), pre. §§ 1 and 5 and the *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, S/2005/60, pp. 3-4; In other resolutions on Sudan, the cross-border effects of the conflict in Darfur seemed to affect the Security Council's determination on the existence of a threat to the peace, see for example S/RES/1556 (2004), pre. §§ 7-8 and 20-21; S/RES/1706 (2006), pre. §§ 6-8 and 12; S/RES/1769 (2007), pre. §§ 12 and 15-16.

Other cases where the Council has referred to violations of international humanitarian and human rights law in its Chapter VII resolutions are, for example, Kosovo,¹³⁸ East Timor,¹³⁹ the Democratic Republic of Congo,¹⁴⁰ Libya¹⁴¹ and Côte D'Ivoire.¹⁴²

When it comes to enforcement measures in order to maintain or restore the international peace and security, in some of the cases mentioned above, the Security Council has adopted coercive measures expressly for the purpose of providing protection and/or humanitarian assistance for the endangered populations. In the cases of Bosnia and Herzegovina and Somalia, the Council authorised 'all necessary means' in order to facilitate the delivery of humanitarian assistance,¹⁴³ and likewise, in the case of Rwanda for the purpose of contributing "to the security and protection of displaced persons, refugees and civilians at risk".¹⁴⁴ So far the most important precedent for Chapter VII measures for "R2P purposes" is, however, the case of Libya, where the Council authorised "all necessary measures" expressly in order to "protect civilians and civilian populated areas under threat of attack"¹⁴⁵ and established a flight ban over the Libyan territory "in order to help protecting civilians".¹⁴⁶

It can thus be concluded that genocide, war crimes, ethnic cleansing and crimes against humanity may, indeed, constitute a threat to the international peace and security and give rise to enforcement measures under Chapter VII. It should, however, be noted that in all the cases mentioned above, the Security Council referred to violations of international humanitarian law, which indicates that the

¹³⁸ S/RES/1199 (1998), pre. § 11.

¹³⁹ S/RES/1264 (1999), pre. §§ 13-14.

¹⁴⁰ S/RES/1291 (2000), pre. § 18; S/RES/1565 (2004), pre. § 4; S/RES/1991 (2011), pre. §§ 5 and 9.

¹⁴¹ S/RES/1970 (2011), pre. §§ 2-3 and 6; S/RES/1973 (2011), §§ 5, 7 and 10.

¹⁴² S/RES/1975 (2011), pre. §§ 9 and 13; S/RES/1980 (2011), pre. § 8.

¹⁴³ S/RES/770 (1992), op. § 2; S/RES/794 (1992), op. § 10.

¹⁴⁴ S/RES/929 (1994), op. §§ 2-3; See also S/RES/925 (1994), op. § 4.

¹⁴⁵ S/RES/1973 (2011), op. § 4.

¹⁴⁶ *Ibid*, op. § 6; See also pre. §§ 9 and 17; See even S/RES/1970 (2011), op. § 4, where the Council referred the situation in Libya to the ICC.

crimes were in all cases committed in the context of an *armed conflict*.¹⁴⁷ The Council has repeatedly stated in its thematic resolutions on protection of civilians that

the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law *in situations of armed conflict*, may constitute a threat to international peace and security.¹⁴⁸

However, as noted above in Chapter 2, genocide and crimes against humanity can also be committed in peacetime. Would these two crimes, then, also fall within the competence of the Security Council, if committed in the absence of an armed conflict?

4.3. Genocide and crimes against humanity as “threat to the peace” also in peacetime?

The Security Council enjoys wide discretionary powers under Article 39 of the UN Charter to determine which situations constitute a threat to the international peace and security.¹⁴⁹ The only express limitations to its mandate can be found in Article 24 of the Charter.¹⁵⁰ Article 24 (1) confers the Council “primary responsibility for the maintenance of international peace and security”, and according to Article 24 (2), in discharging its duties under this responsibility, the Council “shall act in accordance with the Purposes and Principles of the United Nations.” Whereas

¹⁴⁷ See also Amnéus, *supra* n. 125, p. 329.

¹⁴⁸ See for example S/RES/1296 (2000), op. § 5; S/RES/1674 (2006), op. § 26; S/RES/1894 (2009), op. § 3; cursives added.

¹⁴⁹ Conforti, *The Law and Practice of the United Nations*. Third Revised Edition, 2005, pp. 171-172; *Prosecutor v. Duško Tadić*, ICTY, *supra* n. 61, § 28; Lamb, “Legal Limits to United Nations Security Council Powers” in Goodwin-Gill & Talmon (Eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie*, 1999, p. 375.

¹⁵⁰ Österdahl, *supra* n. 130, p. 24.

the main purpose of the UN according to Article 1 (1) of the Charter is to “maintain international peace and security”, Article 1 (3) stipulates that the Organisation shall also promote and encourage “respect for human rights”. Following the latter provision, protecting peoples from genocide and crimes against humanity also in peacetime thus falls within the purposes of the UN.

However, whereas Article 24 (1) of the UN Charter does not expressly limit the mandate of the Security Council *only* to the maintenance of international peace and security,¹⁵¹ Articles 13 (1) (b) and 62 (2) confer the task of promoting respect for human rights to the General Assembly and the Economic and Social Council (ECOSOC) respectively. The Charter’s distribution of powers between the Security Council on one hand and the General Assembly and ECOSOC on the other does thus implicitly impose such a limitation to the mandate of the Security Council.¹⁵² On the other hand, the limits of the Security Council’s Chapter VII powers also depend on how the term “peace” in Article 39 is defined. In 1992, the President of the Security Council noted in a statement adopted at the first Council meeting at the level of Heads of State and Government that

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The *non-military sources* of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.¹⁵³

Whereas “peace” according to a narrow definition simply means the absence of an armed conflict, the statement cited above could be interpreted as an expression of a wide definition of the term, including also the presence of certain positive economic, political, social, humanitarian and environmental conditions which are

¹⁵¹ Conforti, *supra* n. 149, p. 177.

¹⁵² See Frowein & Krisch in Simma (Ed.), *supra* n. 131, p. 724, § 19 and p. 725, § 21; *Prosecutor v. Duško Tadić*, ICTY, *supra* n. 61, § 28.

¹⁵³ S/23500, p. 3, cursive added.

necessary for a conflict free society.¹⁵⁴ Such an extensive definition would thus arguably include also the absence of genocide and crimes against humanity in peacetime. The problem with applying the wide definition of peace is, however, that it would not only risk blurring the contours of the term,¹⁵⁵ but also the UN Charter's distribution of competences between the different UN organs.¹⁵⁶ In this respect it should also be noted that the Presidential statement from 1992 continued that "[t]he United Nations membership as a whole, *working through the appropriate bodies*, needs to give the highest priority to the solution" of the non-military sources of instability.¹⁵⁷ This indicates that the Security Council's Chapter VII powers are indeed limited to situations of armed conflict.¹⁵⁸

It is, however, not unthinkable that "R2P situations" requiring collective enforcement action by the international community occur also in peacetime. The principle of responsibility to protect was invoked in the case of Burma/Myanmar in a situation which was not connected to an armed conflict. The country was in 2008 severely struck by cyclone *Nargis*, and despite the urgent need of humanitarian aid for the over two million people affected by the storm, the Burmese military regime refused international help for the survivors.¹⁵⁹ This reckless negligence of the Burmese government against its own people was argued to constitute crimes against humanity, and it was even suggested that the Security Council should authorise coercive delivery of humanitarian aid to Burma/Myanmar.¹⁶⁰ Whether the Burmese authorities' refusal to allow outside help for the cyclone victims in this case actually amounted to inhumane acts "intentionally causing great suffering, or serious injury

¹⁵⁴ de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, p. 139; Österdahl, *supra* n. 130, p. 88.

¹⁵⁵ Frowein & Krisch in Simma (Ed.), *supra* n. 131, p. 720, § 6; See also Österdahl, *supra* n. 130, p. 88.

¹⁵⁶ Frowein & Krisch in Simma (Ed.), *ibid.*; See also de Wet, *supra* n. 154, pp. 139-140.

¹⁵⁷ S/23500, p. 3, cursive added.

¹⁵⁸ Frowein & Krisch in Simma (Ed.), *supra* n. 131, p. 720, § 6; de Wet, *supra* n. 154, p. 140; See also Amnéus, *supra* n. 125, p. 338.

¹⁵⁹ Evans, *supra* n. 27, p. 65; Asia and Pacific Centre for the Responsibility to Protect, *Cyclone Nargis and the Responsibility to Protect, Myanmar/Burma Briefing No. 2*, 16 May 2008, p. 2.

¹⁶⁰ Evans, *ibid.*, p. 66; Asia and Pacific Centre for the Responsibility to Protect, *ibid.*, p. 8.

to body or to mental or physical health”,¹⁶¹ and whether enforcement measures would have been a necessary and proportional response, can be debated, but the Security Council did not adopt any resolution on the matter.

Whereas it can be assumed that in most situations short of armed conflict, peaceful measures are sufficient to solve an “R2P crisis”, it should be noted that a referral by the Security Council of a situation to the ICC in order to prosecute the perpetrators of the crimes requires a Chapter VII resolution.¹⁶² A Chapter VII resolution, in its turn, requires that the Council deems that the situation, although not necessarily amounting to an armed conflict, constitutes a threat to the international peace and security.¹⁶³ What are, then, the odds that the Security Council would further widen the scope of the term “threat to the peace”, so as to include also genocide and crimes against humanity committed in peacetime?

Whereas the 2004 High-Level Panel on Threats, Challenge and Change stated in its report that genocide and large-scale violations of international humanitarian law or ethnic cleansing “can properly be considered a threat to international security and as such provoke action by the Security Council”,¹⁶⁴ others have argued that it is unlikely that the Security Council would invoke its powers in response to a humanitarian crisis short of armed conflict.¹⁶⁵ In the case of Burma/Myanmar mentioned above, China, for example, strongly argued that the situation was a natural catastrophe and not a matter of international peace and security, and that the Security Council was therefore not the appropriate organ to solve the crisis.¹⁶⁶

¹⁶¹ Article 7 (1) of the Rome Statute.

¹⁶² Article 13 (b) of the Rome Statute.

¹⁶³ See, however, the interesting formulation in S/RES/1970 (2011), pre. § 15, where the Council only referred to its “primary responsibility for the maintenance of international peace and security under the Charter of the United Nations”, without expressly determining that the situation in Libya constitutes a threat to the peace.

¹⁶⁴ A/59/565, § 200; See also Amnéus, *supra* n. 125, p. 340, who argues that it would be “far-fetched to conclude” that in extremely serious “R2P cases” the situation must be connected to a present or an impending armed conflict before the Council may adopt enforcement measures under Chapter VII.

¹⁶⁵ Chesterman, *supra* n. 131, p. 140; See also Frowein & Krisch in Simma (Ed.), *supra* n. 131, p. 725, § 21 and p. 726, § 25.

¹⁶⁶ Asia and Pacific Centre for the Responsibility to Protect, *supra* n. 159, p. 9.

On the other hand, however, it can be noted that in the case of Haiti the Council did adopt enforcement measures in a situation that it did not seem to consider as an armed conflict.¹⁶⁷ Following the *coup d'état* through which the democratically elected Haitian President was ousted from power,¹⁶⁸ the Council deemed that the situation in the country “contributes to a climate of fear, of persecution and economic dislocation which could increase” the refugee flows to the neighbouring countries,¹⁶⁹ and determined that “in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region.”¹⁷⁰ Against the background of this case, it is thus not impossible that the Security Council would deem that also genocide or crimes against humanity committed in peacetime could constitute a threat to the international peace and security, at least if these crimes create large refugee flows or some other kind of cross-border effects that affect negatively also the security of other states.

When it comes to the legality of a possible future widening of the concept of threat to the peace, the Security Council is a political organ which takes its decisions based on political and not legal considerations.¹⁷¹ It is generally assumed that the Council interprets the term “threat to the peace” in accordance with the legal limits posed by the UN Charter,¹⁷² but because there is no automatic system of judicial review of the legality of the Security Council decisions,¹⁷³ the Council may basically

¹⁶⁷ See S/RES/940 (1994), pre. § 4 and op. § 4; The Security Council was “[g]ravelly concerned by the significant further deterioration of humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties”, but it did not mention violations of international humanitarian law.

¹⁶⁸ Chesterman, *supra* n. 131, p. 152.

¹⁶⁹ S/RES/841 (1993), pre. § 11.

¹⁷⁰ *Ibid*, pre. § 14; See also S/RES/917 (1994), pre §§ 11 and 13; S/RES/940 (1994), pre. §§ 4 and 10.

¹⁷¹ Conforti, *supra* n. 149, p. 177; See also *Reparation for Injuries in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174 at p. 179.

¹⁷² Österdahl, *supra* n. 130, p. 91.

¹⁷³ Lamb in Goodwin-Gill & Talmon (Eds.) *supra* n. 149, p. 363; The General Assembly or the Security Council itself may under Article 96 (1) of the UN Charter request the ICJ “to give an advisory opinion on any legal question”, but such opinions are not binding, Mosler & Oellers-Frahm, “Article 96” in Simma (Ed.), *The Charter of the United Nations: A Commentary, Vol. II*, Second Edition, 2002, p. 1181, § 2.

interpret the term as it likes.¹⁷⁴ Conforti has argued that the ultimate limit for the Security Council powers under Article 39 is the opinion of the international community. Because Article 24 (1) of the Charter stipulates that the Council acts on behalf of the UN member states,

the conduct of a State cannot be condemned by the Council, and cannot therefore be subject to enforcement measures, *when the condemnation is not shared by the opinion of the most of the States and their peoples*.¹⁷⁵

If the principle of responsibility to protect continues to develop like it has during the past decade, and if the idea of the international community's responsibility to protect keeps gaining increasing acceptance, it can be assumed that a further widening of the term threat to the peace to include also genocide and crimes against humanity committed in peacetime would face few objections.

4.4. Conclusion

The practice of the UN Security Council shows that genocide, war crimes, ethnic cleansing and crimes against humanity may constitute a threat to the international peace and security, but so far the Council has adopted collective enforcement measures in order to protect populations from these crimes only when it has deemed that they have been committed in the context of an armed conflict. However, considering its wide discretionary powers under Chapter VII of the UN Charter and the possible further development and acceptance of the idea of the international community's responsibility to protect, it cannot be ruled out that the Council will in

¹⁷⁴ Österdahl, *supra* n. 130, p. 91; See also ICISS, *supra* n. 1, p. 50, § 6.18.

¹⁷⁵ Conforti, *supra* n. 149, pp. 176-177, cursives in original; See also Article 31 (3) (b) of the Vienna Convention on the Law of Treaties, which stipulates that in the interpretation of treaties "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account.

the future further widen the scope of the concept of “threat to the peace”, so as to include also genocide and crimes against humanity committed in peacetime.

Whether the Council actually chooses to take collective action in a specific situation depends on the Council members’ political discretion. However, if these member states are individually bound by the *erga omnes* obligations to prevent genocide and to ensure respect for international humanitarian law, could it not be argued that these obligations also apply when these states are acting together, within the framework of the Security Council? Against the background of the ICJ’s judgement in the 2007 *Bosnian genocide* case, I will thus in the next Chapter examine whether the member states of the Security Council can have a *duty* to use their influence in the Council meetings, in order to ensure that ‘timely and decisive collective action’ is taken in “R2P situations”.

5. Does the UN Security Council have a legal duty to protect?

5.1. The *Bosnian genocide* case and the Security Council’s responsibility to protect

As already mentioned in Chapter 2, the ICJ established in the 2007 *Bosnian genocide* case that Article I of the Genocide Convention imposes on the states an obligation to “employ all means reasonably available to them, so as to prevent genocide as far as possible”, and that a state may incur legal responsibility for violating this obligation, if it “manifestly failed to take all measures to prevent genocide which were within its power”. A decisive factor for whether a state has “duly discharged” its obligation to prevent is, according to the Court, its “capacity to influence effectively the action of persons likely to commit, or already committing genocide”.¹⁷⁶ Some commentators have suggested that this judgement implies a legal duty for the member states of the UN Security Council to take action in order to protect

¹⁷⁶ ICJ Reports 2007, *supra* n. 19, § 430.

populations from genocide.¹⁷⁷ Due to its extraordinary and wide-reaching powers under Chapter VII of the UN Charter, the Security Council arguably has the “capacity to influence effectively” the perpetrators of genocide, no matter where the crime is committed or about to be committed. Bellamy and Reike have also argued that

as the world’s leading military powers, permanent members of the Security Council have the military capacity to intervene to halt genocide. Thus armed with both the *authority* to intervene and the *capacity* to do so, it could be argued that armed intervention to halt genocide falls well within the scope of ‘reasonably available’ measures for permanent members of the Security Council.¹⁷⁸

Due to their veto right, the five permanent members of the Security Council play a key role in the decision-making process, because each of these states alone has the power to block any decision on collective enforcement action.¹⁷⁹ The ICISS noted in its report that the veto right is probably the main obstacle to effective international action in significant humanitarian crisis situations,¹⁸⁰ and Arbour has therefore suggested that the use of veto hindering collective action to prevent or halt genocide should be regarded as a violation of the vetoing States’ obligation to prevent genocide.¹⁸¹ In similar terms with respect to war crimes, Sassòli has wondered

whether States, having an obligation under common Article 1 [to the Geneva Conventions] and Article 89 of Protocol I to act under certain circumstances

¹⁷⁷ See for example Arbour, *supra* n. 27, pp. 453-454; Gaja, “The Role of the United Nations in Preventing and Suppressing Genocide” in Gaeta (Ed.) *The UN Genocide Convention: A Commentary*, 2009, p. 405; Bellamy & Reike, *supra* n. 7, p. 284-285.

¹⁷⁸ Bellamy & Reike, *ibid*, cursives added.

¹⁷⁹ See Article 27 (3) of the UN Charter.

¹⁸⁰ ICISS, *supra* n. 1, p. 51, § 6.20.

¹⁸¹ Arbour, *supra* n. 27, p. 454.

through an international organization do not violate that obligation if in their capacity as [...] for example members of the UN Security Council, they hinder that organization from taking action.¹⁸²

However, the problem with applying the regime of state responsibility in situations where one or several members of the Security Council hinder the UN from taking collective action is that the individual member states of an international organisation do normally not incur responsibility for the acts of the organisation.¹⁸³ This rule was also codified by the ILC in its draft articles on *Responsibility of international organizations*,¹⁸⁴ Article 6 (1) of which stipulates that

The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an *act of that organization* under international law whatever position the organ or agent holds in respect of the organization.¹⁸⁵

The Security Council's decision-making on whether or not to adopt collective measures under Chapter VII of the Charter clearly falls within the normal functions of the Council. Therefore, regardless of *how* a decision has been taken, that is, how the individual member states voted in the Council, as long as it was taken in accordance with the rules of the UN Charter, the acts (or omissions) following the

¹⁸² Sassòli, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 431.

¹⁸³ Akande, "International Organizations" in Evans (Ed.), *International Law*, Third Edition, 2010, pp. 269-270: See also L'Institut de Droit International, *Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties*, 1995, Article 6 (a); England House of Lords, *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, International Law Reports 1989, Vol. 81, pp. 679-680.

¹⁸⁴ A/66/10, pp. 52-66.

¹⁸⁵ Cursives added; See also Article 57 of the ILC Articles on state responsibility.

decision shall be considered as conduct of the UN, and not the individual member states of the Security Council.¹⁸⁶

Another problem with the proposals of holding a vetoing state responsible for the failure to protect is that, even if the use of veto blocking collective action was to be seen as a matter of state responsibility, it would not solve all the problems connected to the lack of timely and decisive response by the international community. Even if the Security Council did reach a consensus on enforcement measures in a specific “R2P situation”, the implementation of these measures depends also on all the other member states of the UN which are, in principle, obliged to carry out the decisions of the Security Council taken under Chapter VII of the Charter.¹⁸⁷ However, as the UN does not have its own army, for example measures that include sending peacekeepers or military forces to the crisis area may turn out problematic, if none of the member states are willing to make troop contributions for the operation.

Article 43 (1) of the Charter stipulates that

All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

However, as such special agreements have never been concluded, no state is obliged to make such contributions in any particular situation,¹⁸⁸ and the UN is thus completely dependent on its member states’ political will to send troops and other

¹⁸⁶ See also D’aspremont, “Abuse of the Legal Personality of International Organizations and the Responsibility of Member States”, *International Organizations Law Review*, Vol. 4, No. 1, 2007, p. 110.

¹⁸⁷ Aust, *Handbook of International Law*, Second Edition 2010, pp. 195-196; See also Articles 25 and 48 of the UN Charter.

¹⁸⁸ Frowein & Krisch, “Article 43” in Simma (Ed.), *The Charter of the United Nations: A Commentary*, Vol. I, Second Edition, 2002, p. 763, § 9.

resources needed to implement the Security Council resolutions.¹⁸⁹ This problem was obvious for example in the case of Darfur, where the United Nations Mission in Sudan (UNMIS) failed, because no state was willing to contribute with troops to the mission. In the absence of consent from the Sudanese government to the operation, the other states did not want to risk becoming involved in an armed conflict with the strong Sudanese army.¹⁹⁰

It can thus be concluded that if the permanent members of the Security Council were to incur state responsibility for blocking collective enforcement action in an “R2P situation”, then also other member states of the UN should do so, if they fail to do their part in implementing the Security Council’s decisions.¹⁹¹ As different member states have different capacities to contribute to UN missions with troops, assistance and facilities, this would in its turn create the difficulty of determining which states could have done what, and which states should thus incur legal responsibility for their inaction.

5.2. Protection duties versus discretionary powers of the Security Council members

It has often been noted that the states should not be able to ignore their legal obligations when they act together within the framework of an international organisation.¹⁹² Are the members of the Security Council, then, by virtue of their obligations under the Genocide Convention and the Geneva Conventions, obliged to use their influence in the Security Council meetings in order to protect populations from genocide and war crimes?

¹⁸⁹ Chesterman, *supra* n. 131, p. 161.

¹⁹⁰ Amnéus, *supra* n. 125, pp. 376 and 384.

¹⁹¹ See for example Schabas, *supra* n. 96, pp. 523-524.

¹⁹² See Alvarez, “The Schizophrenias of R2P” in Alston & MacDonald (Eds.), *Human Rights, Intervention, and the Use of Force*, 2008, p. 283; Gaja in Gaeta (Ed.), *supra* n. 177, p. 405; Morgenstern, *Legal Problems of International Organisations*, 1986, p. 32.

The ICJ pronounced in the 1949 *Reparation for Injuries* case that, because the UN has a legal personality separate from its member states, the Organisation is not automatically bound by the same duties than its member states. However, the Court also established that, due to its separate international legal personality, the UN is “a subject of international law”, and therefore “capable of possessing international rights and duties”.¹⁹³ In an advisory opinion on the *Agreement between the WHO and Egypt*, the ICJ listed the sources of law which could create obligations for an international organisation, namely general rules of international law, the constituent instrument of the organisation and international treaties to which the organisation is party.¹⁹⁴

The clearest sources of obligations with respect to the international community’s responsibility to protect follow from the Genocide Convention, the Geneva Conventions and the Additional Protocol I. The UN is, however, as an organisation not party to these instruments, and neither can they add anything to the powers or duties of the Security Council, as conferred to it by the UN Charter.¹⁹⁵ When it comes to the constituent treaty of the UN, the purposes of the Organisation in Article 1 of the UN Charter include the promotion of respect for human rights, and Chapter VII of the Charter grants the Security Council a *right* to take collective enforcement action in situations that threaten the international peace and security. However, there is no provision in the Charter imposing on the Council an obligation to take such action in any particular situation.

Regarding the third category of sources of law that can impose obligations on international organisations, it has often been argued that the UN as an organisation

¹⁹³ ICJ Reports 1949, *supra* n. 171, p. 179.

¹⁹⁴ *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion of 20 December 1980, ICJ Reports 1980, § 37.

¹⁹⁵ E/CN.4/Sub.2/416, § 295.

has a duty under general international law to prevent genocide¹⁹⁶ and crimes against humanity,¹⁹⁷ and to ensure respect for international humanitarian law.¹⁹⁸ The UN and its organs are, indeed, bound by the customary prohibitions of genocide, war crimes and crimes against humanity, the more so to the extent that these prohibitions are *jus cogens*.¹⁹⁹ Whereas the Organisation thus arguably has a duty to *refrain from committing* these crimes, it is, however, another thing to say that it also has an obligation to *prevent* or stop them, when committed by others.²⁰⁰ However, regardless of whether the Security Council actually has a legal duty under customary international law to take positive action in order to protect populations from “R2P crimes”, as long as the UN Charter does not explicitly impose on it any obligation to do so, the Council will take such action only when it promotes, or at least does not collide with the national interests of its member states, especially the five permanent members. The Council *may* act as a “law enforcer” if it chooses to take Chapter VII measures for the purpose of ensuring compliance with international humanitarian or human rights law,²⁰¹ but nothing in the UN Charter obliges it to do so, and the Council will thus continue to take its decisions based on political and not legal considerations.

A clear recent example of the political nature of the Security Council’s decision-making can be found in the Council’s response in the cases of Libya and Syria, regarding the respective regime’s brutal violence against their own, peacefully demonstrating populations. Whereas in the case of Libya, the Council did not hesitate to refer the situation to the ICC²⁰² and to authorise “all necessary measures”

¹⁹⁶ See for example Gaja in Gaeta (Ed.), *supra* n. 177, p. 405; Toope, “Does International Law Impose a Duty upon the United Nations to Prevent Genocide?”, *McGill Law Journal*, Vol. 46, 2000-2001, p. 187; See also A/CN.4/553, p. 4 § 10.

¹⁹⁷ Toope, *ibid.*

¹⁹⁸ See for example Boisson de Chazournes & Condorelli, *supra* n. 68, p. 70.

¹⁹⁹ See Orakhelashvili, *supra* n. 66, p. 414.

²⁰⁰ See Seibert-Fohr, “State Responsibility for Genocide under the Genocide Convention” in Gaeta (Ed.), *The UN Genocide Convention: A Commentary*, p. 365, n. 110.

²⁰¹ See Österdahl, *supra* n. 130, pp. 110-111.

²⁰² S/RES/1970, op. § 4.

to protect the Libyan people from the human rights violations committed by its own regime,²⁰³ in the case of Syria, months have passed without the Council having been able to adopt one single resolution condemning similar crimes committed by the Syrian regime against its own people. At the time of writing, over 4,000 civilians have been killed,²⁰⁴ and thousands more have been detained and tortured since the violence started in March this year.²⁰⁵ The Independent International Commission of Inquiry on the Syrian Arab Republic recently found that crimes against humanity have, indeed, been committed in Syria,²⁰⁶ and numerous calls for international action have in this case been made by different UN organs, governments and civil society. However, Russia and China vetoed again in the beginning of October an attempt to adopt a resolution which would have condemned the “grave and systematic human rights violations and the use of force against civilians”, and warned for sanctions if the Syrian authorities would not cease the violence.²⁰⁷

Although the explicit motivation in Resolution 1973 for the enforcement action in Libya was the need to protect the Libyan people, it can be wondered whether factors such as fear of large refugee flows and the potential effects of the conflict to the oil prices affected the Council members’ willingness to solve the crisis. In the case of Syria, on the other hand, Russia and China motivated their veto by the need to respect Syria’s sovereignty and territorial integrity, as well as by the need to solve the situation through peaceful means.²⁰⁸ In this case it has, however, often been suggested in the media that these two permanent members are reluctant to act, because they do not want to jeopardise their relations to Syria. From a *moral*

²⁰³ S/RES/1973, op. § 4.

²⁰⁴ *Statement by UN High Commissioner for Human Rights Navi Pillay at the Human Rights Council 18th Special Session to examine the situation of human rights in the Syrian Arab Republic*, 2 December 2011, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11675&LangID=E> (visited 2 December 2011).

²⁰⁵ A/HRC/S-17/2/Add.1, § 28.

²⁰⁶ *Ibid*, § 108.

²⁰⁷ S/2011/612, op. §§ 1, 4 and 11.

²⁰⁸ SC/10403.

point of view, the Syrians are not less worth protecting than the Libyans, and the Security Council could in this case arguably at least refer the situation to the ICC. However, from a *legal* point of view, nothing in the UN Charter obliges the Council to act.

The ICISS proposed in its report that the permanent members of the Security Council adopt a “code-of-conduct” for the use of the veto, so that in cases where their “vital national interests were not claimed to be invoked”, they would not use their veto to block collective action in significant humanitarian crisis situations.²⁰⁹ This proposal was, however, not adopted at the 2005 World Summit, and neither have the permanent members seemed to move towards any “mutually agreed practice”²¹⁰ in this respect.²¹¹ The permanent members will thus most probably continue to use their veto right in cases where the proposed measures to protect endangered populations from genocide, war crimes, ethnic cleansing or crimes against humanity would collide with their own political, economic or other kind of interests.

5.3. Conclusion

Some writers have argued that the individual member states of the Security Council are bound by the *erga omnes* obligations to prevent genocide and war crimes also when acting together within the framework of the Council, and that they thus have a duty to use their influence and powers in the Council meetings in order to ensure timely and decisive collective action in “R2P situations”. However, whereas genocide, war crimes and crimes against humanity are *legal* terms which can be clearly defined objectively, the interpretation of the term “threat to the peace”

²⁰⁹ ICISS, *supra* n. 1, p. 51, § 6.21.

²¹⁰ *Ibid.*

²¹¹ Any amendment of the UN Charter regarding the use of veto also seems highly unlikely, because in order to come into force, the amendment would have to be ratified by all the five permanent members, see Article 108 of the Charter and ICISS, *supra* n. 1, p. 51, § 6.21.

depends on the *political* discretion of the members of the Security Council. The Council is, according to its practice, indeed “prepared to take collective action”²¹² in order to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. However, as the UN Charter grants the five permanent members their veto right, and as the Charter does not oblige the Council to act in any particular situation, the permanent members will continue to block collective enforcement action when such action does not suit their own national interests.

The UN is as an organisation not bound by any treaties imposing on it a positive legal duty to protect. However, if it is bound by such a duty under customary international law, a failure to adopt collective measures in “R2P situations” would constitute a violation of its international legal obligations. Whereas it is the Security Council which decides whether or not collective enforcement action will be taken in any concrete situation, it is the UN as an organisation which would, according to the general presumption under international law, incur legal responsibility for the failure to act. Against the background of the ILC’s draft articles on responsibility of international organisations, I will in the next Chapter examine the possibilities of holding the UN legally responsible for the international community’s failure to protect.

6. Legal responsibility for a failure to protect?

6.1. Responsibility to protect and the ILC’s draft articles on responsibility of international organisations

The ILC adopted earlier this year a set of draft articles on *Responsibility of international organizations* (draft articles).²¹³ These articles suggest that, in the same

²¹² A/RES/60/1, § 139.

²¹³ A/66/10, pp. 52-66.

way as individual states can be held accountable for their internationally wrongful acts, also international organisations incur legal responsibility when they violate an obligation to which they are bound under international law.²¹⁴ This means that if the UN as an organisation, and the Security Council as an organ of this Organisation, is bound by the customary *erga omnes* obligations to prevent genocide and to ensure respect for international humanitarian law, ILC's draft Article 3 stipulates that if the Organisation fails to take action in order to fulfil these obligations, it incurs international responsibility. Like the ILC Articles on state responsibility, the draft articles on international organisations do not as such have any legally binding effect, but it is, nevertheless, of interest to examine whether these suggested rules could be applied to the UN in the responsibility to protect context.

As mentioned in the previous Chapter, although it is the individual permanent member states of the Security Council which have the decisive power when it comes to adopting collective enforcement measures in "R2P situations", according to ILC's draft Article 6 (1), it would be the UN as an organisation that incurs legal responsibility if no such measures were taken in a situation that, objectively seen, desperately requires them. Draft Article 31 (1) then stipulates that "[t]he responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act". Thinkable options of reparation in cases where the UN has failed to protect populations from "R2P crimes" would be for example compensation for the survivors or the families of the victims under draft Article 36, or satisfaction in the form of "an acknowledgement of the breach, an expression of regret" or "a formal apology" under draft Article 37. However, even if it was generally recognised that the UN has a legal duty under customary international law to protect populations from genocide, war crimes and crimes against humanity, and that the Organisation can incur legal responsibility if it fails

²¹⁴ Draft Articles 3-4.

to fulfil this duty, the problem is that, within the current international legal order, it seems very difficult to enforce the proposed legal responsibility of the UN.

6.2. Problems of enforcing the UN's legal responsibility

6.2.1. *Lack of a legal institution with an automatic jurisdiction on the UN*

The first problem regarding the UN's proposed legal responsibility for failure to protect is that there is no existing judicial mechanism through which such responsibility could be established.²¹⁵ The Organisation enjoys "immunity from every form of legal process",²¹⁶ and national courts have thus no jurisdiction in cases brought against the UN, unless the Organisation chooses to waive its immunity by consenting to the proceedings before the domestic court.²¹⁷ The ICJ has, however, established that

the question of *immunity* from legal process is distinct from the issue of *compensation* for any damages incurred as result of acts performed by the United Nations or by its agents acting in their official capacity,

and that the Organisation may thus "be required to bear responsibility for the damage arising from such acts".²¹⁸ As the "principal judicial organ of the United Nations",²¹⁹ the ICJ could establish the legal responsibility of the UN, but the problem here is that, because the Organisation cannot be party in contentious cases

²¹⁵ See Akande in Evans (Ed.), *supra* n. 183, p. 271.

²¹⁶ Article II, Section 2 of the *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946.

²¹⁷ Akande in Evans (Ed.) *supra* n. 183, p. 273; See also Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN.

²¹⁸ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April, 1999, ICJ Reports 1999, p. 62, § 66, cursives added.

²¹⁹ Article 92 of the UN Charter.

before the Court,²²⁰ the ICJ could pronounce on the issue only if requested to do so by the General Assembly or the Security Council in an advisory opinion.²²¹ These opinions are, however, not legally binding,²²² and neither are these organs obliged to seek such an opinion from the Court in any specific situation.²²³ Under the current international legal system, the legal responsibility of the UN would thus basically be dependent on the Organisation itself admitting that it has committed an internationally wrongful act, and agreeing on appropriate modes of reparation with the injured parties.²²⁴ In this respect it can be noted that the former UN Secretary-General Kofi Annan has indeed, acknowledged and regretted the UN's failure to prevent the genocides in Rwanda²²⁵ and Srebrenica,²²⁶ but so far, the Organisation has never for example paid compensation for victims of "R2P crimes" following its own failure to prevent such crimes.

6.2.2. The veto right in the Security Council

The second difficulty with enforcing the UN's legal responsibility lies in the Organisation's constituent instrument. The UN Charter lacks any provision on the Organisation's legal liability for wrongful acts, and whereas the Charter grants the five permanent members a right to veto any decision on collective enforcement action, the ILC's draft Article 32 (1) stipulates that "[t]he responsible international

²²⁰ See Article 34 of the *Statute of the International Court of Justice*, 26 June 1945 (hereafter "ICJ Statute").

²²¹ See Article 96 (1) of the UN Charter.

²²² Mosler & Oellers-Frahm in Simma (Ed.), *supra* n. 173, p. 1181, § 2.

²²³ Thirlway, "The International Court of Justice" in Evans (Ed.), *International Law*, Third Edition, 2010, p. 609.

²²⁴ See ICJ Reports 1999, *supra* n. 218, § 66 and Article VIII, Section 29 of the Convention on the Privileges and Immunities of the UN.

²²⁵ *Statement on Receiving the Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, 16 December 1999, available at http://un.org/News/oss/sgsm_rwanda.htm (last visited 31 October 2011); See also S/1999/1257, p. 38, where the Independent Inquiry on the genocide in Rwanda concluded that "[t]he delay in identifying the event in Rwanda as a genocide was a failure by the Security Council".

²²⁶ A/54/549, § 503.

organization may not rely on its rules as justification for failure to comply with its obligations". Therefore, if the Security Council's failure to take 'timely and decisive collective action' in an "R2P situation" was caused by a veto in the Security Council, and if this failure constitutes a breach of the UN's suggested obligations under customary international law to prevent or stop genocide, war crimes and crimes against humanity, the Organisation would incur responsibility although the Security Council decision was taken perfectly in accordance with the rules of the Organisation's constituent treaty.

In this context it can also be noted that in situations where the UN's failure to protect lies in a veto in the Security Council, the regime of state responsibility would be both fairer and easier to apply. For example, if a majority of the UN member states supported collective measures in order to solve an "R2P crisis", it would seem inappropriate to hold the whole Organisation responsible for a failure to act which can have been caused by one single permanent member state of the Security Council. Also, as noted above, whereas the UN as an organisation cannot be respondent in contentious proceedings before the ICJ, the individual member states of the Security Council can.²²⁷ The Court has in contentious cases between two states the power to pass a judgement which is binding for the parties, provided that also the respondent state consents to the Court's jurisdiction on that specific matter.²²⁸ Like Bosnia and Herzegovina brought charges against Serbia and Montenegro in the 2007 *Bosnian genocide* case, a state which has been a victim of "R2P crimes" could thus take a vetoing permanent member, or any other state which has contributed to the international community's failure to act, to the ICJ.²²⁹

²²⁷ Article 34 of the ICJ Statute.

²²⁸ See Article 36 of the ICJ Statute; Thirlway in Evans (Ed.), *supra* n.223, p. 586.

²²⁹ See Bellamy & Reike, *supra* n. 7, p. 285; Note, however, that because according to Article 34 of the ICJ Statute "[o]nly States may be parties in cases before the Court", individual victims could not bring such claims before the ICJ, but would have to convince their government to do that for them, see McCorquodale, "The Individual and the International Legal system" in Evans (Ed.), *International Law*, Third Edition, 2010, p. 293.

With the background of the ICJ's judgement in the *Bosnian genocide* case and the general presumption that individual member states of an international organisation do not incur responsibility for the conduct of the organisation, it would, indeed, be very interesting to see how the ICJ would resonate, if the question of legal responsibility of a vetoing permanent member of the Security Council was brought before the Court. The ICJ would probably first establish that the respondent permanent member state is bound by the customary and/or conventional *erga omnes* obligations to prevent genocide and to ensure respect for international humanitarian law, but how the Court would continue is more difficult to predict. Against the background of the rules of the UN Charter, it could pronounce that the permanent members of the Security Council are completely free to use their veto right in contradiction with their individual legal obligations, and that any internationally wrongful act was therefore not committed. On the other hand, if the ICJ chose to follow its reasoning in the *Bosnian genocide* case, it could indeed establish that a permanent member which has vetoed collective action to protect populations from genocide or war crimes, shall incur responsibility, because it "manifestly failed to take all measures [...] which were in its power" to prevent these crimes.²³⁰

In the latter scenario, the question would then be whether it is the permanent member individually or the UN as an organisation who incurs the legal responsibility for the permanent member's internationally wrongful act. Following the general presumption that the member states of an international organisation do not incur responsibility for the acts of the organisation, the ICJ could conclude that, although the permanent member in question has violated its international obligations, it cannot be held legally responsible for this violation. On the other hand, it cannot be ruled out that the Court would break the presumption on the responsibility of the organisation, and conclude that the vetoing permanent member, as a matter of fact, can incur state responsibility for using its veto.

²³⁰ See ICJ Reports 2007, *supra* n. 19, § 430.

How the ICJ would actually resonate if a permanent member of the Security Council was brought in front of it for a failure to protect remains, however, to be seen. In the *Bosnian genocide* case the Court expressly stated that it did not seek to establish any general jurisprudence applicable to all cases where a treaty or some other legal rule binding on the states imposes on them an obligation to prevent certain acts, and that its determination was thus limited to Serbia's obligation to prevent genocide in that specific case.²³¹ Serbia's "capacity to influence effectively"²³² the perpetrators of the genocide in Srebrenica was based on the strong political, military and financial links between the Federal Republic of Yugoslavia (FRY, now Serbia and Montenegro) on one hand, and Republika Srpska and the Bosnian Serb army (VRS) on the other.²³³ Therefore, if the ICJ's criterion of "capacity to influence effectively" is dependent on some kind of extraordinary links between the perpetrators of the "R2P crimes" and the state who 'manifestly failed' to prevent these crimes,²³⁴ then it may be argued to be far-fetched to claim that a vetoing permanent member should incur responsibility in *any* "R2P situation" where it has blocked collective enforcement action. It can also be noted that as the ICJ did in the *Bosnian genocide* case not impose any duty on Serbia and Montenegro to pay compensation for Bosnia and Herzegovina,²³⁵ any potential future judgements with the same outcome would only have symbolic significance for the victim state.²³⁶

6.2.3. *Lack of clear primary obligations binding on the UN*

Finally, the most significant problem in the context of establishing the UN's legal responsibility for a failure to protect is that there are no *clear primary* rules of

²³¹ *Ibid*, § 429.

²³² *Ibid*, § 430.

²³³ *Ibid*, § 434.

²³⁴ See *ibid*, § 430.

²³⁵ *Ibid*, § 469.

²³⁶ See Schabas, "Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes", *Genocide Studies and Prevention*, Vol. 2, No. 2, 2007, p. 115.

international law, binding on the UN, on which the Organisation's legal responsibility under the ILC's *secondary* rules on responsibility of international organisations could be based.²³⁷ Whereas the states have clear primary obligations under the Genocide Convention and the Geneva Conventions respectively to prevent genocide and to ensure respect for international humanitarian law, for violations of which they can incur state responsibility under the ILC's secondary rules, the UN is not party to these treaties. As noted in the previous Chapter, the Organisation does have an obligation not to commit genocide, war crimes and crimes against humanity by virtue of customary international law and *jus cogens*, but it is more difficult to argue that it also has a legal obligation to *protect* populations from these crimes when committed by someone else. Whereas in the former case the UN's internationally wrongful act would lie in positive *action*, in the latter case it would be caused by an *omission*, and, as Klabbers has noted, "legally meaningful accusations of wrongful omissions would seem to presuppose that clear legal obligations exist and, moreover, that those obligations rest on" the UN.²³⁸

As the prevention of genocide, war crimes and crimes against humanity falls under the purposes of the UN, and as the Organisation is in the position to take collective action in concrete "R2P situations", it can be argued to have a *moral* responsibility to protect populations from these crimes. Article VIII of the Genocide Convention stipulates that

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of the acts of genocide.

²³⁷ See Alvarez, *International Organizations: Accountability or Responsibility?* Luncheon Address, Canadian Council of International Law, 35th Annual Conference on Responsibility of Individuals, States and Organizations, 27 October 2006, p. 17; Klabbers, *An Introduction to International Institutional Law*, Second Edition, 2009, pp. 284-285.

²³⁸ Klabbers, *ibid*, p. 285; See also Alvarez, *ibid*, p. 23.

However, the ICJ has expressly stated that this provision supports the system of genocide prevention “at the *political* level rather than as a matter of legal responsibility”.²³⁹ Therefore, whereas the UN can be argued to have a moral and political responsibility to protect, in the absence of clear legal obligations that are binding on the Organisation and that impose on it a positive duty to act in “R2P situations”, it would be very difficult to hold the UN responsible for a *legally* wrongful omission if it fails to take collective action in order to protect populations from genocide, war crimes or crimes against humanity.

6.3. Conclusion

Suggestions of holding the UN legally responsible for a failure to protect populations from genocide, war crimes and crimes against humanity face a number of important difficulties. First, because there is no existing judicial institution with an automatic competence to pass binding decisions on the Organisation or its organs, the UN’s legal responsibility would be dependent on the Organisation itself acknowledging that it has committed an internationally wrongful act, and agreeing to make appropriate reparation for the damage to the victims. Second, while the UN Charter lacks any provision on a possible legal liability of the Organisation, the UN would incur responsibility for a failure to protect even when a decision in the Security Council not to act was taken perfectly in accordance with the Organisation’s constituent treaty. Third, the most important hinder for the UN’s legal responsibility for a failure to protect is that there are no clear primary rules of international law on which the UN’s legal responsibility under the ILC’s secondary rules could be based. Thus, whereas the UN can be argued to have a moral or a political duty to protect, in the absence of any conventional or other specific legal obligations imposing on the Organisation a positive duty to prevent genocide, war crimes and crimes against

²³⁹ ICJ Reports 2007, *supra* n. 19, § 159, cursives added; See also E/CN.4/Sub.2/416, § 295.

humanity, it would be very difficult to accuse it for a legally wrongful omission if it fails to take action in order to protect populations from these crimes.

7. Concluding remarks

Following the *erga omnes* obligations in Article I of the Genocide Convention and the common Article 1 to the Geneva Conventions, the idea of the international community's responsibility to protect does, indeed, have a clear foundation in the existing international law. To which extent, then, does the international community have a legal responsibility to protect?

All the states have, by virtue of the abovementioned conventions and customary international law, an obligation, owed to the international community as a whole, to prevent genocide and war crimes. Therefore, no matter where or by whom these crimes are or risk being committed, all the states basically have an obligation to use peaceful means in order to prevent them. However, unless the states are themselves somehow affected by the genocide and war crimes, they do not necessarily have any interest in trying to prevent them.²⁴⁰ Since the ICJ's 2007 judgement in the *Bosnian genocide* case it has been clear that a state may incur legal responsibility for a failure to prevent genocide. As common Article 1 to the Geneva Conventions establishes an *erga omnes* obligation to protect in even clearer terms than the Genocide Convention, the ICJ's line of argument on state responsibility could arguably be applied also in cases where a state has failed to prevent war crimes, although it had had "the capacity to influence effectively"²⁴¹ the perpetrators of such crimes. However, in the absence of a "World Court" with an automatic and

²⁴⁰ See Jørgensen, "The Obligation of Cooperation" in Crawford, Pellet, and Olleson, (Eds.), *The Law of International Responsibility*, 2010, p. 697; See also Mayer, "In Our Interest: The Responsibility to Protect" in Cooper & Voïnov Kohler (Eds.), *Responsibility to Protect: The Global Moral Compact for the 21st Century*, 2009, p. 50.

²⁴¹ ICJ Reports 2007, *supra* n. 19, § 430.

compelling worldwide jurisdiction, establishing state responsibility for a failure to protect before the ICJ is dependent on the respondent state accepting the Court's jurisdiction on that specific matter.²⁴² Also, as according to Article 34 of the ICJ Statute only states can be parties to a dispute before the Court, a group of individual victims could not alone bring claims against a state for a failure to protect.

When it comes to the collective responsibility to protect of the international community, as soon as a state possesses a “capacity to influence effectively”²⁴³ the perpetrators of “R2P crimes” following its membership in the UN Security Council, the possible legal responsibility for a failure to protect becomes, according to the general presumption under international law, an issue of responsibility of the UN, and not of state responsibility of that individual member state. The UN is not party to the Genocide Convention or the Geneva Conventions, and neither are international organisations automatically bound by the same legal duties as their member states individually. Although, from a moral point of view, the states should not be allowed to ignore their legal obligations when they are acting together within the framework of an international organisation, from a legal point of view the UN and its Security Council are thus not bound by the obligations to prevent genocide and war crimes simply because all their member states are.

The prevention of genocide, war crimes, ethnic cleansing and crimes against humanity does, however, fall within the purposes of the UN, because according to Article 1 (3) of the UN Charter, the Organisation shall promote and encourage respect for human rights. The practice of the Security Council shows that the Council is “prepared to take collective action”²⁴⁴ in order to protect populations from these crimes, but, as shown for example by the case of Syria, only to the extent that such action does not collide with the Council members', and especially the five permanent members', national interests. The problem in this respect is that, whereas

²⁴² See Thirlway in Evans (Ed.), *supra* n. 223, p. 586.

²⁴³ ICJ Reports 2007, *supra* n. 19, § 430.

²⁴⁴ A/RES/60/1, § 139.

genocide, war crimes and crimes against humanity are *legal* terms with clear objective definitions, the Security Council is a *political* organ which may, but does not have to, take its decisions in order to enforce international human rights and humanitarian law. Therefore, no matter how desperately a concrete “R2P situation”, like the one currently in Syria, would, objectively seen, require collective enforcement measures by the international community, it is ultimately the Council members’ political discretion that decides whether or not such measures will be taken.

The prohibitions of genocide, war crimes and ethnic cleansing are not only owed to the international community as a whole (*erga omnes*), but, with the exception of some war crimes, also of peremptory character (*jus cogens*). Following their peremptory status, these norms are binding on the UN and its organs by virtue of customary international law. According to the ILC’s rules on responsibility of international organisations, if the Security Council’s failure to adopt adequate enforcement measures in serious “R2P situations” constitutes a legally wrongful omission, it would be the UN as an organisation that would incur responsibility for the omission. However, whereas the UN does have a duty under customary international law to *refrain from committing* genocide, war crimes and crimes against humanity, in the absence of any treaty commitments or other specific legal obligations, binding on the Organisation, it is difficult to argue that the UN also has a legal duty to *protect* populations from these crimes, when committed by others. The fundamental problem with the proposed legal nature of the international community’s responsibility to protect is thus not only the lack of existing judicial institutions through which the UN’s legal responsibility could be automatically and authoritatively established, but also the fact that it would be very difficult to hold the Organisation legally responsible for a failure to protect under the ILC’s *secondary* rules, when there are no *clear primary* rules of international law, imposing on the UN such an obligation to protect.

In conclusion, as long as there are no clear legal rules imposing on the UN an obligation to prevent genocide, war crimes, and crimes against humanity, the Security Council's responsibility to protect can only be *moral* or *political* in nature. Whether the UN's responsibility to protect will ever turn into a *legal* duty, remains to be seen, but such a development would seem to presuppose some changes in the current international order. In addition to a legal institution with a compelling jurisdiction to establish the responsibility for a failure to protect, a legal obligation to protect would seem to presuppose, first, that the UN acquires its own forces which can guarantee the implementation of the Security Council's decisions on collective action and, second, that the permanent members' veto right would be abolished. However, especially the latter development seems very unlikely, because whereas an amendment of the UN Charter would require a ratification of the changes by all the five permanent members,²⁴⁵ it can be assumed that these states would not agree to give up their veto right.

Nevertheless, the ICJ's judgement in the *Bosnian genocide* case was a first step towards a more legal character of the international community's responsibility to protect. A possible future adoption of the Proposed Convention on Crimes Against Humanity could be the next one, because this draft convention expressly stipulates that the states parties shall cooperate in order to prevent crimes against humanity.²⁴⁶ It should also be noted that the ILC is currently working on a set of draft articles on *Protection of persons in the event of disasters*,²⁴⁷ suggesting that the states shall cooperate in order to protect peoples in the event of

a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.²⁴⁸

²⁴⁵ Article 108 of the UN Charter.

²⁴⁶ Article 2 (2) (a) of the Proposed Convention on Crimes Against Humanity, see *supra* n. 73.

²⁴⁷ A/66/10, pp. 252-253.

²⁴⁸ Draft Articles 1, 3 and 5.

These articles are not applicable in situations of armed conflict,²⁴⁹ but according to the definition of the term “disaster” in draft Article 3, they could perhaps be applied in certain cases of genocide or crimes against humanity committed in peacetime.²⁵⁰ The ILC’s work on this issue is still in progress, but if turned into an international convention sometime in the future, also the articles on protection of persons have potential to reinforce the international community’s responsibility to protect.

It has now been ten years since the ICISS introduced the responsibility to protect to the world community. Seldom does any idea succeed to develop within just one decade to such a widely accepted principle,²⁵¹ and the founding fathers of the concept have thus a reason to be pleased. The international community’s responsibility to protect may never develop into a fully legal responsibility, meaning an automatic legal liability of the UN or other international actors for a failure to protect, but the second and third pillars of the principle will hopefully continue to encourage the UN member states to act in accordance with their individual legal obligations to protect.

²⁴⁹ Draft Article 4.

²⁵⁰ Cf. the case of Burma/Myanmar after Cyclone *Nargis*, mentioned above in Section 4.3.

²⁵¹ See Evans, *supra* n. 27, p. 31.

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