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THE RESPONSIBILITY TO PROTECT: TOWARDS A FORM OF STATE RESPONSIBILITY

Master's Thesis

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Nicole Fraccaroli

TABLE OF CONTENTS

INTRODUCTION

One of the most important developments in world politics in the last decade has been the spread of the twin ideas that State sovereignty comes with responsibilities, domestic and international, and that there exists a global responsibility to protect people threatened by mass atrocity crimes. The 2001 Report of the International Commission on Intervention and State Sovereignty[1] (ICISS) entitled "The Responsibility to Protect" (RtP) recognized that sovereignty triggers an internal responsibility, notably, that "to respect the dignity and basic rights of all the people within the state."[2] From this acknowledgement, the phrase "responsibility to protect" was coined, embodying a responsibility to prevent severe international crimes, a responsibility to react to them and a responsibility to rebuild.[3] The RtP was then formally adopted by the United Nations General Assembly under paragraphs 138 and 139 of the 2005 World Summit Outcome Document[4], in the context of the 2005 World Summit as one of the largest gatherings of Heads of State and Government in history.[5]

The paragraphs explicitly endorse the principle of RtP and limit it to situations of genocide, war crimes, crimes against humanity, and ethnic cleansing; the first three being the international crimes stipulated under Article 5 of the Statute of the International Criminal Court[6] (ICC). While paragraph 138 deals with the primary responsibility of States to protect their own populations, in paragraph 139 the RtP is enlarged to the community of States as a whole.[7] Accordingly, as agreed by UN Member States, the principle rests on three equally important and non-sequential pillars.[8] First, the responsibility of the State to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and from their incitement.[9] Second, the international community's duty to assist the State to fulfil its responsibility to protect.[10] Third, the international community's responsibility to take timely and decisive action, through peaceful and diplomatic means and, if that fails, other more forceful means, in a manner consistent with Chapters VI (pacific measures), VII (enforcement measures) and VIII (regional

[1] G. Evans, M. Sahnoun *et al*. The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty. Ottawa: International Development Research Centre 2001.
[2] *Ibid.;* § 1.35.
[3] *Ibid.;* § 2.29.
[4] World Summit Outcome. UN General Assembly A/RES/ 60/1, adopted 24.10.2005.
[5] Implementing the Responsibility to Protect. UN General Assembly A/RES/63/677, adopted 12.01.2009, § 4.
[6] Rome Statute of the International Criminal Court. Rome 17.07.1998, e.i.f. 01.07.2002.
[7] UN General Assembly, Implementing the Responsibility to Protect, o*p. cit.;* § 1.
[8] UN General Assembly, World Summit Outcome, o*p. cit.;* § 138 – 139.
[9] UN General Assembly, Implementing the Responsibility to Protect, o*p. cit.;* § 11(a).
[10] *Ibid.;* § 11(b).

arrangements) of the UN Charter, in situations where a State has manifestly failed to protect its population from the four crimes.[11]

RtP's intellectual and political origins lay in previous ideas about sovereignty as responsibility and their phrasing in various forms in the 1990s as a response to the commission of genocide, mass atrocities and forced displacement in that decade.[12] Sovereignty has always entitled both rights and responsibilities, and even practitioners associated with the support of unrestrained sovereign power shared this perspective.[13] For instance, "Thomas Hobbes argued that the sovereign's authority was based on an unwritten contract between the State and the individual whereby the individual sacrificed the natural freedom in return for security", entailing the sovereign to take any measure necessary for the preservation of peace, but the contract was broken if the sovereign set an existential threat to the individual.[14] The modern idea of sovereignty as responsibility was developed by the UN's Special Representatives on Internally Displaced Persons (IDPs) in 1990s, Francis Deng and Roberta Cohen, as their principal challenge was how to convince governments to improve protection for IDPs and therefore, they developed the idea of sovereignty to fit this purpose, and argued that "[n]o legitimate State could quarrel with the claim that they were responsible for the well-being of their citizens, and where a State was unable to fulfil its responsibilities, it should invite and welcome international assistance."[15]

The biggest failure of the international community to act decidedly to halt the atrocities committed in Rwanda against the Tutsis in 1994, in the Bosnian war between 1992 and 1995, and in Kosovo war in 1999 fuelled significant discontent; and UN Secretary General Kofi Annan challenged the international society to elaborate a way to harmonize the twin principles of sovereignty and fundamental human rights.[16] The Canadian Government took up this challenge by creating the ICISS;[17] which, chaired by Gareth Evans[18] and Mohamed Sahnoun[19], coined a principle meant to take the action before severe international crimes: The Responsibility to Protect.

[11] *Ibid.;* § 11(c).
[12] A. J. Bellamy, R. Reike. The Responsibility to Protect and International Law. – A. J. Bellamy, S. E. Davies, L. Glanville (eds.). The Responsibility to Protect and International Law. Leiden: Martinus Nijhoff 2011, p. 84.
[13] *Ibid.*; p. 85.
[14] *Ibid.*
[15] *Ibid.;* pp. 85 – 86.
[16] *Ibid.*; p. 86.
[17] *Ibid.*
[18] Australian Foreign Minister from 1988 to 1996.
[19] Between 1992 and 1997 he was the Secretary General's Special Adviser on Africa.

The writer of the master thesis strongly recognizes the potential within such principle. Firstly, as it was affirmed by the Secretary General in the Report "Implementing the Responsibility to Protect", the responsibility to protect is "an ally of sovereignty"[20]. It actually stems from the positive notion of sovereignty as responsibility, and by way of helping States to meet their main protection responsibilities, the concept seeks to strengthen sovereignty and to help States to succeed, not exclusively to react when they fail.[21] And as already argued, the idea of sovereignty as responsibility is not new, as it has its origins in the concept of the State as means for the protection of human rights. As a consequence, human rights protection began to be seen as a part of sovereignty rather than as an exception to it.[22] Secondly, despite the non-legally binding nature of the 2005 resolution referring to RtP, the grounding dispositions of RtP are "tightly integrated in customary international law and based on previous treaties"[23]. Actually, the RtP is not devoid of legal content as some criticisms claim. It is widely understood that the relationship between the RtP principle and international law requires further clarification. As a matter of fact, the research problem of the following thesis lies in the common perception that the Responsibility to Protect does not bind the States of the international community and that it does not impose duties on them to prevent or act before severe international crimes.

The aim of the present master thesis is that to establish the legal nature and content of the three RtP pillar responsibilities and to demonstrate they do account for existing international obligations capable of triggering State responsibility, in case of State's omission to protect its own population or international community's failure to intervene in support of the State where serious international crimes are occurring. The study is meant to demonstrate that the RtP does not merely consist in a non-legally binding resolution, but by way of analysing, exploiting and identifying its legal basis it will be proved that it is embedded in existing international law and that it may constitute a form of State responsibility.

The primary research questions are:

- Upon which, international and regional, sources of International Law and International Human Rights Law can the legal nature of RtP be derived? Is the UN Charter supportive or silent about it?
- Under which circumstances does the UN Security Council come into play?

[20] UN General Assembly, Implementing the Responsibility to Protect, *op. cit.;* § 10(a).
[21] *Ibid.*
[22] D. Gierycz. The Responsibility to Protect: A Legal and Rights-based Perspective. – A. J. Bellamy, S. E. Davies, L. Glanville (eds.). The Responsibility to Protect and International Law. Leiden: Martinus Nijhoff 2011, pp. 101 – 104.
[23] C. G. Badescu. Humanitarian Intervention and the Responsibility to Protect. Security and Human Rights. Abingdon: Routledge 2010, p. 131.

- Are there case studies to exploit in order to identify further legal considerations and which may provide support in developing State practice and *opinio juris*?

To address the questions posed above, the thesis primarily applies analytical method of research supplemented by the comparative method. The research is largely qualitative, carried out from a legal, international human rights and crimes perspective. It comprehensively analyses international and regional legislation, hard law and soft law in order to assess the presence of States' obligations under international law to prevent the commission of international crimes on their territory, to assist the concerned State in discharging its preventive duty, and to take timely and decisive action in front of serious international crimes. For this purpose, the writer is strongly interested in studying as well relevant RtP's regional implementation samples and case studies in order to bolster States' *opinio juris* and to gain insights on RtP capability. Comparative method will be used to make references, to the sources of international law where applicable in order to establish States' international obligations, and to some regional systems in order to determine how they may understand, interpret, and apply the RtP. The presented analysis is supplemented by the study of relevant literature, expert opinions and reports.

The hypothesis of the current study is that, even though uncertainty remains around RtP applicability and further developments are needed to ameliorate it, the interested principle has strong legal roots in international law, basis that are vital to determine its binding nature and whose violation would consequently reflect an internationally wrongful act. That is because, a State can be held responsible if its conduct is attributable to the State under international law and if it constitutes a breach of an international obligation of the State itself.

In the last decades, the RtP has taken the stage of plural debates and discussions and the existing literature is particularly centred on its enmeshment with politics and law, with the claimed consequence that such feature may weaken the credibility and effectiveness of the principle. Strongly investigated as well has been its capability to be currently employed, by way of raising issues and doubts from recent case studies. Therefore, if on one side RtP's challenges, expectations and controversies have been deeply revealed; on the other side, according to the writer not enough emphasis has been placed on the potential the principle boasts of, which is given by its legal basis and force, together with the possible outcome to derive a form of State responsibility. The present master thesis clearly bears an additional value from different sides. On one hand, it is determined to bring to light the legal substance which does not simply qualify the RtP, but which would rather make it a binding instrument to prevent and act against severe international crimes. On the other side, the writer is willing to prove that RtP represents a new way of thinking about mass atrocities, from the moment it imposes responsibilities owned to

States to improve the implementation of existing legal obligations to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing.

States' legal responsibilities embodied in the RtP are contained in and derive from different sources, and therefore the writer will mainly take into consideration primary and subsidiary sources of international law (in particular international and human rights treaties, customary international law, scholarly opinions and judgments) and *jus cogens* norms. At the same time, additional tools prove to be pertinent to conduct the study, such as commentaries on some of the treaties considered and on the draft articles on State responsibility; International Covenant on Civil and Political Rights Committee's general comments; International Court of Justice's advisory opinions; human rights-related declarations; UN Security Council's resolutions and, various regional and national acts which reveal patterns of RtP implementation. Additionally, books and journal articles of prominent professors and practitioners of international law and its branches support the study.

The point of departure of such research is comprised within some of the words the International Court of Justice claimed in occasion of the advisory opinion regarding the "Legality of the Threat or Use of Nuclear Weapons"[24], notably that the General Assembly resolutions may, in certain circumstances, provide evidence for establishing the existence of a rule or the emergence of an *opinio juris*.[25] It is then argued that to establish whether this is true, it is necessary to look at its content and to see whether an *opinio juris* exists as to its normative character.[26]

The study consists of three main parts. Primarily, the author will examine the legal content of the three forms of responsibility which make up the principle, with the intent to assess the existence of States' obligations under international law and therefore to answer to the first research question regarding the relevant sources to rely on to determinate such legal duties. Particularly, the first chapter is dedicated to the first pillar of RtP, and thus the writer will investigate the legal basis of State's responsibility to prevent serious international crimes on its territory. The second chapter concerns international community responsibility. Therefore, its duty before the concerned State will be analysed and demonstrated, as argued by the RtP under pillar number two, and such study will enable to establish the consequences of a breach of RtP international obligations under the law of State responsibility. On the other hand, three major regional mechanisms will be exploited to determine whether and under which circumstances the RtP has been included, accepted and debated within the considered regional systems. The

[24] Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996.
[25] *Ibid.*; § 70.
[26] *Ibid.*

investigation at regional level proves relevant to reveal some degree of States' acceptance of the alleged legal obligation deriving from RtP second pillar. Subsequently, the third chapter deals with the last part of the first question and with the second and third research question. As pillar three requires States, under UN system, to act collectively in case a State fails to fulfil the primary obligation to protect its population; this section is focused on the determination of UN Security Council's duty to take timely and decisive action through the study of UN Charter provisions, Security Council member States' duties and, relevant practice, such as prominent RtP case studies, will be taken into consideration in order to indagate the presence of the two elements which identify customary international law.

The relevance of proving the existence of States' international legal obligations, that define RtP as a whole, is a constant underlying feature of the present master thesis.

The careful legal analysis conducted throughout the chapters is aimed at providing evidence of the legal content of each RtP pillar together with the *opinion juris* as to its normative character, in order to satisfy the final ambition to recognize RtP as a form of State responsibility.

Keywords: international crimes; human rights; third parties; State responsibility;

1. STATE'S RESPONSIBILITY TO PREVENT SERIOUS INTERNATIONAL CRIMES ON ITS TERRITORY

In his 2009 report Secretary General Ban Ki-moon stressed that provisions 138 and 139 of the Summit Outcome are "firmly anchored in well-established principles of international law. Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes, and crimes against humanity"[27]. The first pillar embodied in RtP is the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, crimes against humanity and ethnic cleansing, and from their incitement.[28]

It is noticeable that under international human rights law, States have the duty to protect individuals from human rights violations and these duties are defined in specific international treaties.[29] International human rights law is focused primarily on the conduct of States and it is grounded in a concept of human dignity, which assumes that individuals have inherent attributes that cannot be legitimately restricted by governmental powers.[30] In this respect, human rights law ascertains on one side negative duties upon a State not to interfere with an individual, and on the other side, positive duties which would require it to take positive action to implement human rights protections.[31] Positive obligations demand States to take affirmative steps under certain circumstances to prevent the human rights violation in the first place. This obligation is commonly known as the "duty to protect".[32]

According to the Vienna Convention on the Law of Treaties[33], "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"[34]; and unless otherwise provided, "a treaty is binding upon each party in respect of its entire territory."[35]

Given the scope of obligations undertaken under RtP, it is necessary to disaggregate the legal bases for the varying sets of obligations. Since RtP primarily requires States to act to ensure

[27] Implementing the Responsibility to Protect. UN General Assembly A/RES/63/677, adopted 12.01.2009, § 3.
[28] *Ibid.;* § 11(a).
[29] S. Rosenberg. Responsibility to Protect: A Framework for Prevention. – A. J. Bellamy, S. E. Davies, L. Glanville (eds.). The Responsibility to Protect and International Law. Leiden: Martinus Nijhoff 2011, p. 165.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.;* p. 167.
[33] Vienna Convention on the Law of Treaties. Vienna 23.05.1969, e.i.f. 27.01.1980.
[34] *Ibid.;* Art. 26.
[35] *Ibid.;* Art. 29.

that atrocities do not occur in the first place, it is necessary to identify the legal standards that will determine if and when a State may be held responsible for failing to take action to prevent.

1.1 Crime of Genocide

The duty to prevent genocide rests upon an undisputed obligation of international law: its prevention and punishment.[36] The crime of genocide is now well established through treaties and international jurisprudence.[37]

Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide[38] asserts that "genocide whether committed in time of peace or in time of war, is a crime under international law which they [States] undertake to prevent and to punish". Most countries in the world are party to this treaty which, by broad agreement, reflects customary international law.[39] The recognition of genocide as a crime under international law deserving punishment goes back to the Genocide Convention of 1948 and the crime is also included in the statues of the *ad-hoc* criminal tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court.[40]

The International Court of Justice (ICJ) in the recent case of Gambia v. Myanmar[41], ruled about Myanmar duty to comply with the obligations under the Genocide Convention. In particular, it alleged its responsibility to "take all measures within its power to prevent the commission of all acts within the scope of Article II of the Convention"[42]. The Court even restated that such obligation requires the enactment of domestic legislation to give effect to the provisions of the Convention.[43] The Court observed that the Convention has the object "to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality"[44]. The responsibility to protect, therefore, restates an existing legal obligation in relation to the prevention of the crime of genocide.[45] The ICJ also elaborated on

[36] D. Hubert, A. Blatter. The Responsibility to Protect as International Crimes Prevention. – 4 Global Responsibility to Protect 2012, p. 39.
[37] *Ibid.*
[38] International Convention on the Prevention and Punishment of the Crime of Genocide. New York 09.12.1948, e.i.f. 12.01.1951.
[39] L. Arbour. The responsibility to protect as a duty of care in international law and practice. – 34 Review of International Studies 2008, p. 450.
[40] Rome Statute of the International Criminal Court. Rome 17.07.1998, e.i.f. 01.07.2002, Art. 6; Statute of the International Criminal Tribunal for the Former Yugoslavia. UNSC Resolution 827, 25.05.1993 (amended 17.05.2002), Art. 4; Statute of the International Criminal Tribunal for Rwanda. UNSC Resolution 955, 08.11.1994 (amended 13.10. 2006), Art. 2.
[41] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Order, I.C.J. General List No.178 2020.
[42] *Ibid.;* § 79.
[43] *Ibid.;* § 51.
[44] *Ibid.;* § 69.
[45] L. Arbour, *op. cit.;* p. 451.

this preventive dimension in its judgment in the case of Bosnia-Herzegovina v. Serbia[46], which is helpful in determining the scope of a responsibility to prevent from the moment it was specified that the failure to prevent and punish genocide is a breach of international obligation.[47] In finding that Serbia had failed in its obligation to prevent genocide in neighbouring Bosnia, the Court described the scope of States' responsibility in this regard as "one of conduct and not one of result".[48] The Court elaborated that "the obligation of States is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible"[49]. Therefore, responsibility is incurred in case the State evidently failed to take all measures to prevent the concerned crime which were within its power, and which could have contributed to its prevention.[50] The Court restates that "if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent, it is under a duty to make use of these means as the circumstance permit"[51]. The Court alleges that States must do their best to ensure that acts of genocide do not occur, and it invokes a notion of "due diligence", a well-known concept in international human rights law concerning the positive obligation of a State to take action against threats to human rights, notably to the life and security of the person within its own jurisdiction.[52] Furthermore, the ICJ explicitly states that it does not demand to base its judgment on any other legal source than the Genocide Convention.[53] Despite the fact treaties are only binding on States parties to it, the considered judgment contains further implications, namely that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"[54], and therefore also on non-States-parties and international organizations are bound by such fundamental principles.[55]

To recognize the duty to prevent the concerned crime as a fundamental principle of international law, was also the former Secretary General's Representative on the Prevention of Genocide, who claimed a *de jure* responsibility to protect embodied in the legal obligation to prevent and punish genocide pursuant to the Convention; and specified "[g]overnments are obliged to take all measures within their power to prevent the commission of the crime even before a competent

[46] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007.
[47] *Ibid.;* § 431.
[48] *Ibid.;* § 430.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.;* § 431.
[52] L. Arbour, *op. cit.;* p. 452.
[53] N. Kunadt. The Responsibility to Protect as a General Principle of International Law. – 11 Anuario Mexicano de Derecho Internacional 2011, p. 196.
[54] I.C.J., Bosnia and Herzegovina v. Serbia and Montenegro, 2007, *op. cit.;* § 161.
[55] N. Kunadt, *op. cit.;* p. 196.

court determines that the Convention actually applies to a case at hand."[56] The Court also associated the General Assembly resolution, that creates international law with respect to prevention and punishment of genocide,[57] with the Convention, in order to deduce "that principles underlying the Convention are principles which are recognized by States, even without any convention obligation".[58]

The legal status of genocide crime under international law is reinforced by the fact genocide is a *jus cogens* norm. International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable.[59] To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law.[60] It is noticeable that the term "*jus cogens*" means "compelling law" and, as such, a *jus cogens* norm boasts the highest hierarchical position among all other norms and principles.[61] The legal literature claims that are *jus cogens* the following international crimes: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.[62] In the Barcelona Traction case[63], the ICJ assumed that the obligations of a State towards the international community as a whole are those of "concern of all States".[64] It was actually at the preliminary objections stage of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, that the ICJ stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and *obligatio erga omnes*".[65] Such *jus cogens* rules are binding on all nations and do not allow for derogation under any circumstances.[66] The consequences of *jus cogens* norms are confirmed in Article 53 of the Vienna Convention on the Law of Treaties, which provides that a treaty will be void "if, at the time of its conclusion, it conflicts with a peremptory norm of general international law" and it can only be modified by a subsequent norm of the same character.

Despite the uncontested role played by the Genocide Convention, for the purpose of the thesis the writer values significant to take into consideration international and regional human rights

[56] D. Hubert, A. Blatter, *op. cit.;* p. 43.
[57] The Crime of Genocide. UN General Assembly A/RES/96(I), adopted 11.12.1946, p. 189.
[58] W. A. Schabas. Genocide in International Law. Cambridge: Cambridge University Press 2000, p. 47.
[59] M. Bassiouni. International Crimes: Jus Cogens and Obligatio Erga Omnes. – 59 Law and Contemporary Problems 1996, p. 265.
[60] *Ibid.;* p. 266.
[61] *Ibid.;* p. 267.
[62] *Ibid.*
[63] Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970.
[64] *Ibid.;* § 33.
[65] International Law Commission chapter III § 3. – Draft Articles on Responsibility of States for Internationally Wrongful Acts. Commented Edition. Geneva: International Law Commission fifty-third session 2001.
[66] M. Bassiouni, *op. cit.;* p. 271.

instruments, capable of providing evidence of State's responsibility to safeguard the right to life, liberty and security of all individuals under its jurisdiction and therefore, of its duty to prevent the occurrence of the concerned crime.

Starting from the Universal Declaration of Human Rights[67] (UDHR), it does not pronounce itself directly about genocide, but it strongly reflects a call for the respect of fundamental freedoms, human rights and dignity. If on one side the UDHR is not legally binding by definition, on the other side it holds strong moral force.[68] It is arguable that many of the rights enunciated are now so widely accepted that they form part of general principles of law.[69] No State can avoid the impact of the Universal Declaration, since "[i]n the last sixty years it has increasingly lived up to its proclaimed goal as being a common standard of achievement for all peoples and all nations."[70] Additionally, it is frequently referred to in international, regional, and national human rights instruments and jurisprudence.[71] According to its preamble, States shall strive to achieve the universal and effective recognition and observance of the rights enshrined. Pursuant to Article 1, all individuals are born with freedom and equality in dignity and rights; while Article 3 recognizes everyone has the right to life, liberty and security. Therefore, even though the UDHR does not provide for a specific provision, it is the main symbol of the international community's commitment to recognize "the inherent dignity and the equal and inalienable rights of all members of the human family"[72].

The provisions of the Universal Declaration became two international instruments: International Covenant on Civil and Political Rights[73] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[74] (ICESCR). The ICCPR is unequivocal on the incumbent obligations on contracting parties, as Article 2 provides that States parties undertake to ensure the respect, to all individuals within their jurisdiction, of the rights recognized in the Covenant. Article 6(3) recognizes that once the genocide crime takes place, any State party shall derogate from any obligation assumed under the Genocide Convention. Article 6 acknowledges the right to life of every human being, and according to Article 4(2) no derogation is allowed. In the Human Rights Committee's first general comment on the right to life under the ICCPR, it declared "that the expression "inherent right to life" in Article 6 cannot properly be understood in a restrictive manner and requires that States adopt positive

[67] Universal Declaration of Human Rights. UN General Assembly A/RES/217(III), adopted 10.12.1948.
[68] R. Smith. International Human Rights Law. Oxford: Oxford University Press 2018, p. 39.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] UN General Assembly, Universal Declaration of Human Rights, *op. cit.;* preamble.
[73] International Covenant on Civil and Political Rights. New York 16.12.1966, e.i.f. 23.03.1976.
[74] International Covenant on Economic, Social and Cultural Rights. New York 16.12.1966, e.i.f. 03.01.1976.

measures."[75] Finally, the ICESCR as well shows in the preamble references to the fundamental concept of human dignity and States' obligation to promote, respect and observe human rights and freedoms.

Eventually, salient human rights conventions within three regional mechanisms, the European, the Inter-American and the African one, are considered. The writer will focus on a common Article they share, whose declaration is essential and that reflects the duty upon the States to take the action to prevent its breaches and to ameliorate its implementation: the right to life. Starting from the European system, Article 2 of the European Convention on Human Rights and Fundamental Freedoms[76] (ECHR) declares that "[e]veryone's right to life shall be protected by law." The court has declared that such Article requires the State not only to refrain from the unlawful taking of life, but addedly to take appropriate steps to safeguard the lives of those within its jurisprudence.[77] Thus, "[t]he right to life under the ECHR is clearly not just about the State not killing its citizens but rather about a broader requirement that human life be respected by the avoidance of death where possible and the investigation of its cause where not possible."[78] Additionally, the Charter of Fundamental Rights of the European Union[79] establishes that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; and it proclaims the duty to protect and respect the human dignity under Article 1; the right to life under Article 2, and the right to integrity of a person under Article 3. Article 4(1) of the American Convention on Human Rights[80] (ACHR) protects the right to life in the following terms: "[e]very person has the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception." The right includes "not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence".[81] In this case the right to life looks far beyond, as it incorporates a basic standard of living including access to essential food, shelter and medical care. While, within the American Declaration of the Rights and Duties of Man[82], right to life is integrated with the right to liberty and personal security under Article 1, and in Article 5 is expressed the right to protection of honour and personal reputation. The Inter-American Court stressed that the Declaration is a source of international obligations related to the Charter of the Organization,

[75] E. Wicks. The Meaning of "Life": Dignity and the Right to Life in International Human Rights Treaties. – 12 Human Rights Law Review 2012, p. 203.
[76] European Convention on Human Rights and Fundamental Freedoms. Rome 04.11.1950, e.i.f. 03.09.1953.
[77] Osman v. United Kingdom, Merits, App no 23452/94, ECtHR 28.10.1998, § 115.
[78] E. Wicks, *op. cit.;* p. 202.
[79] Charter of Fundamental Rights of the European Union. Nice 07.12.2000, e.i.f. 01.12.2009.
[80] American Convention on Human Rights. San José 22.11.1969, e.i.f. 18.07.1978.
[81] E. Wicks, *op. cit.;* p. 204.
[82] Organization of American States, American Declaration on the Rights and Duties of Man. Bogotá, 02.05.1948.

and accordingly the Court assumed that it has some legal effect.[83] Turning to the African Charter on Human and People's Rights[84], from whose articles States are not allowed to derogate, Article 4 states: "[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right". This approach, which refers explicitly to concepts that are merely implied in the other human rights instruments, is supplemented by recognition in Article 5 of a "right to respect of the dignity inherent in a human being".

1.2 War Crimes

The Geneva Conventions[85] of 1949 codified what became known as international humanitarian law (IHL) in four separate treaties, which restricts and limits the methods, means and tactics of warfare and protects people that are not actively participating in armed conflict. The scope of these provisions was subsequently broadened through the two Additional Protocols[86] of 1977.

International humanitarian law provides a strong legal foundation for the responsibility of States to protect their population from war crimes, and the latter ones are breaches for which the perpetrators can be held individually liable under international criminal law.[87]The relevant law here is well-defined and well-established as it places clear obligations on States.[88] In order to demonstrate State's legal obligation to prevent the commission of war crimes on its territory, the writer had to deal with two main aspects: on one side the determination of the "duty to prevent" which in this context takes the shape of a "duty to ensure"; and on the other side, the identification of the so called war crimes.

Primarily, it is logical that the ICISS found international humanitarian law to be part of the legal foundation upon which the concept of responsibility to protect was built.[89] A duty to prevent violations of IHL, resembling the one which was formulated by the ICJ for the prevention of

[83] Interpretation Of The American Declaration Of The Rights And Duties Of Man Within The Framework Of Article 64 Of The American Convention On Human Rights, Advisory Opinion, Inter-American Court of Human Rights OC-10/89 1989, § 45 – 47.
[84] African Charter on Human and Peoples' Rights. Nairobi 01.06.1981, e.i.f. 21.10.1986.
[85] Geneva Convention for the Amelioration of the Conditions of Wounded and Sick in Armed Forces in the Field. Geneva 12.08.1949, e.i.f. 21.10.1950; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva 12.08.1949, e.i.f. 21.10.1950; Geneva Convention Relative to the Treatment of Prisoners of War. Geneva 12.08.1949, e.i.f. 21.10.1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Geneva 12.08.1949, e.i.f. 21.10.1950.
[86] Additional Protocol I Relating to the Protection of Victims of International Armed Conflict. Geneva 08.06.1977, e.i.f. 07.12.1978; Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflict. Geneva 08.06.1977, e.i.f. 07.12.1978.
[87] D. Hubert, A. Blatter, *op. cit.;* p. 54.
[88] A. J. Bellamy, R. Reike. The Responsibility to Protect and International Law. – A. J. Bellamy, S. E. Davies, L. Glanville (eds.). The Responsibility to Protect and International Law. Leiden: Martinus Nijhoff 2011, p. 91.
[89] S. Kolb. The UN Security Council Members' Responsibility to Protect. Heidelberg: Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 2017, p. 270.

genocide, had been asserted by an increasingly number of IHL scholars under common Article 1 of the Geneva Conventions, which contains an undertaking by the contracting parties "to respect and ensure respect for the present Convention in all circumstances".[90] Therefore, common Article 1 of the Geneva Conventions shall be interpreted with a view to imposing positive obligations upon the States in the face of violations of said conventions. Among the wide range of positive duties that extend beyond the duty to refrain from committing war crimes, these include "duties to punish the perpetrators of the violations, care for the sick and wounded, cooperate with the International Committee of the Red Cross on certain matters, and take steps to protect the civilian population."[91] Fateh Azzam[92] identifies in his analysis of common Article 1 several norms that, in his opinion, are meant to impose further responsibilities to give effect to the implementation of such humanitarian instruments.[93] These are, firstly, the obligation to enact effective criminal legislation and to prosecute alleged perpetrators; secondly, the possibility of resorting to an enquiry procedure to establish alleged violations; thirdly, the articles precluding that the contracting parties absolve themselves or any other party from liability for grave breaches.[94] The regime of grave breaches does not only require States parties to try or to extradite offenders but imposes an obligation on any States' party to do so if the offenders are found on their territory.[95] This advanced jurisdiction regime labelled *aut judicare, aut dedere,* "is meant to oblige states, belligerents or neutrals, to implement the conventions domestically and to give the means to their judiciary to try or extradite individuals who might have committed a grave breach of the convention."[96] The ICJ addressed the obligation to ensure respect for the Geneva Conventions in the Nicaragua case[97] and affirmed that it originated not only in common Article 1 of the Conventions but also in "general principles of humanitarian law to which the Conventions merely give expression".[98]

Subsequently, the identification of war crimes has led to salient considerations regarding their status under international law and as a consequence, concerning States' obligations. The Geneva Conventions have been almost universally ratified,[99] and the ICJ has suggested that the Geneva Conventions enjoyed such broad accession because "a great many rules of humanitarian

[90] *Ibid.*
[91] A. J. Bellamy, R. Reike, *op. cit.;* p. 92.
[92] He previously served as the Middle East Regional Representative of the UN High Commissioner for Human Rights, Director of Forced Migration and Refugee Studies at the American University in Cairo.
[93] S. Kolb, *op. cit.;* p. 284.
[94] *Ibid.*
[95] E. L. Haye. War Crimes in Internal Armed Conflict. Cambridge: University Press 2008, p. 108.
[96] *Ibid.*
[97] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986.
[98] *Ibid.;* § 220.
[99] E. L. Haye, *op. cit.;* p. 108.

law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity"[100]. Given this special quality, the court has held these norms to "constitute intransgressible principles of international customary law"[101] and accordingly, the fundamental rules are meant to be observed by all States whether or not they have ratified the conventions that embody them.[102] It was furtherly added that "[i]n the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character"[103]. As a matter of fact, it is widely agreed that the prohibition of grave breaches of these rules is a peremptory rule with *jus cogens* status and indeed, this view has been confirmed by both the ICJ and International Law Commission (ILC).[104]

Considering that the prohibition of war crimes, as grave violations of IHL, contemplates customary international law and *jus cogens* character, it follows it is inderogable. There are slightly different definitions of war crimes, but the most accepted contemporary account can be found in Article 8(2) of the Rome Statute, which is claimed to reflect customary international law and whose source stems from the Geneva Conventions and additional Protocols.[105] The grave breaches are contained in Articles 50, 51, 130 and 147 of the four 1949 Geneva Conventions respectively, as well as in Articles 11 and 85 of Protocol I and in Articles 7 and 13 of Protocol II; and in common Article 3 of the four Conventions.

Several conducts that amount to serious violations of IHL, may be linked to some human rights treaties according to which States have the duty to undertake measures in order to prevent breaches. As these results would make even more evident the presence of a State obligation to prevent some conducts, the writer values significant the exhibition of such outcome. Nevertheless, it is essential to remember that war crimes can only be committed in time of war; in fact, the analysis below is willing to show that some of the obligations States have undertaken to fulfil in case of armed conflict, have to be complied by in time of peace as well.

Starting from the wilful killing as an instance of war crime, it is noticeable that in the human rights law language this act is prohibited as a violation of the right to life. The implications of this right have already been shown in the previous sub-paragraph, in relation to the positive measures required by the UDHR, ICCPR, ECHR, ACHR and African Charter on Human and Peoples' Rights. At the same time, it is important to bear in mind that the use of force in IHL is

[100] Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, § 79.
[101] *Ibid.;* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, § 157.
[102] I.C.J., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *op. cit.;* § 157.
[103] *Ibid.*
[104] A. J. Bellamy, R. Reike, *op. cit.;* p. 92.
[105] *Ibid.;* p. 91.

an integral part of the law, while killing is antithetical to the core idea of human rights. Famously, the ICJ in its advisory opinion in the Nuclear Weapon case held that, with regard to the right to life, humanitarian law prevails as *lex specialis*, alleging that the right not arbitrarily to be deprived of one's life applies also in hostilities, but the test of what is an arbitrary deprivation of life is determined by the applicable *lex specialis* humanitarian law.[106]

The prohibition of torture and cruel, inhumane or degrading treatment or punishment, a *jus cogens* norm, is famously claimed in plural tools such as under Article 5 of the UDHR, under Article 7 of the ICCPR and under Article 2 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment[107] (CAT) which declares each State party should take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Within regional mechanisms such prohibition and its prevention are confirmed, respectively under Article 3 of the ECHR, and through the European Convention for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment[108], which aims to institute a non-judicial system of a preventive character.[109] Additionally, such prohibition is declared under Article 5 of the ACHR and of the African Charter on Human and Peoples' Rights, and under Article 1 of the Inter-American Convention to Prevent and Punish Torture[110], whose Articles 5, 6, 7, 9, 11 and 12 specify the positive measures to undertake.

Concerning the serious IHL breach regarding the unlawful destruction and appropriation of property, it will be taken into consideration a case, particularly important since it has the capacity to show how in some circumstances, even though a war crime's prevention cannot find its translation into a human rights convention's provision (like in the previous instances), its breach directly implies the violation of other human rights strongly connected and reliant on the respect of the peremptory norm. It results that the duty to prevent the concerned war crime is linked to the duty to prevent specific human rights violations. In the case of the construction of the wall in the occupied Palestinian territory the starting point for the applicability of IHL to the construction of the wall lay with the fact that Palestinian territory is under belligerent occupation.[111] The ICJ observed the construction of the wall led to the destruction of properties

[106] I.C.J., Legality of the Threat or the Use of Nuclear Weapons, *op. cit.;* § 25.
[107] International Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. New York 04.02.1985, e.i.f. 26.06.1987.
[108] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Strasbourg 26.11.1987, e.i.f. 01.02.1989.
[109] *Ibid.;* Art. 1.
[110] Inter-American Convention to Prevent and Punish Torture. Cartagena de Indias 09.12.1985, e.i.f. 28.02.1987.
[111] A. Orakhelashvili. The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?. – 1 The European Journal of International Law 2008, p. 163.

in violation of Articles 46 and 52 of the 1907 Hague Regulations and Article 53 of the IV Geneva Convention.[112] Secondly, the Court observed that such construction and its associated regime "impede the exercise by persons concerned of the right to work, to health, to education and to an adequate standard of living" under the ICESCR.[113] Thirdly, the Court observed that the construction had deprived a significant number of Palestinians of their freedom to choose their place of residence, thus impeding the freedom of movement under Article 12(1) of the ICCPR.[114]

In respect to the prohibition of unlawful deportation and transfer of a protected person, State's duty to ensure the right of freedom of movement and residence is embedded in Article 13 of the UDHR, Article 12(1) of the ICCPR, Article 2 of Protocol number 4 of the ECHR[115], Article 22 of the ACHR and Article 12 of the African Charter on Human and Peoples' Rights.

Finally, the prohibition of wilful deprivation of a protected person's rights of fair and regular trial finds itself, in the field of human rights instruments, in the form of a State's duty to ensure the respect of the right to a fair trial and to liberty and security, as shown under Articles 9 and 10 of the UDHR, Articles 9 and 14 of the ICCPR, Articles 5 and 6 of the ECHR, Articles 7 and 8 of the ACHR and Articles 6 and 7 of the African Charter on Human and Peoples' Rights.

1.3 Crimes Against Humanity

Unlike genocide and war crimes, crimes against humanity are not codified in a dedicated international treaty but have evolved in a disorderly fashion in customary international law.[116] As already stated, the legal literature discloses crimes against humanity among *jus cogens* international crimes.[117] A recent accepted definition of such crimes is found in Article 7 of the Rome Statute, which is widely recognized as a statement of customary international law.[118]

The writer will resort to the list of acts defined under the Rome Statute and demonstrate States' legal duty to prevent the concerned crimes by way of having recourse to international and regional human rights tools and treaties, and by referring to peremptory norms of international law for the prohibition of the conducts that claim such feature.

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[112] I.C.J., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *op. cit.;* § 132.
[113] *Ibid.;* § 130.
[114] *Ibid.;* § 133 – 134.
[115] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto. Strasbourg 16.09.1963, e.i.f. 02.05.1968.
[116] D. Hubert, A. Blatter, *op. cit.;* p. 45.
[117] M. Bassiouni, *op. cit.;* p. 267.
[118] D. Hubert, A. Blatter, *op. cit.;* p. 47.

1.3.1 The Responsibility to Prevent Under International Human Rights Law

As already clarified at the beginning of the chapter, international human rights law is a set of rules established by convention or custom, and the human rights system has been built on the responsibility of States as the main actors in the international arena and bearers of human rights obligations under international law.

General Comment 31 on the ICCPR asserts that the legal obligation under Article 2 of the ICCPR is both positive and negative in nature.[119] In fact, States Parties must refrain from the violation of the rights enshrined in the Covenant, and must adopt legislative, administrative, judicial and other appropriate measures in order to fulfil their legal obligations.[120] The General Comment provides that the failure to ensure Convention rights found in Article 2, in certain circumstances, may "give rise to violations by States Parties of those rights, as a result of a State Parties' failing to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons and entities."[121] The positive obligations that follow from the requirement in Article 2, according to which States "ensure" protection of Covenant rights, entail a particular set of measures for each right that is protected.[122] Before moving to the study of the relevant provisions, it is important to address as well the doctrine of "due diligence", which has revolutionised the traditional view on international human rights law and issues of State obligations.[123] It is initially an element of the theory of international State responsibility, but has been construed within the human rights framework, and it involves responsibilities on States to prevent acts of violence from taking place, as well as to sentence perpetrators and compensate victims.[124] Accordingly, the State must take reasonable measures of prevention that a government would be presumed to perform under similar circumstances.[125] It follows that the due diligence regime is thus focused on the measures and means. Nowadays it is understood that all rights and freedoms require affirmative action on the part of the State.[126] The matter is complicated by the fact that regional human rights systems do not use the same concepts, as for instance the Inter-American Court and Commission use the term "due diligence", referencing the well-established concept in public international law; whereas, this

[119] Human Rights Committee, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add. 13, 26.05.2004, § 6.
[120] *Ibid.;* § 7.
[121] *Ibid.;* § 8.
[122] S. Rosenberg, *op. cit.;* p. 170.
[123] M. Eriksson. Defining Rape. Emerging Obligations for States under International Law. Leiden: Brill | Nijhoff 2011, p. 200.
[124] *Ibid.*
[125] *Ibid.;* p. 201.
[126] *Ibid.*

language is not employed by the European Court of Human Rights (ECtHR), which just discusses positive and negative obligations of rights.[127]

International human rights law becomes particularly relevant once the legal basis to prevent crimes against humanity are investigated, as most of them rely on international and regional human rights treaties which embody essential provisions to claim States' duty to take appropriate preventive action.

The first act to be considered is that of murder and extermination. In this case as well, it is useful to refer to the UDHR, and especially Article 1 about dignity, Article 3 about right to life, liberty and security and Article 25 regarding the right to a standard of living adequate. It is noticeable the prevention of this conduct is strongly linked to the right to life together with the responsibilities States have to realize the right itself and prevent its violations. This was already shown with reference to Articles 6 under the ICCPR; 2 under the ECHR; 4(1) under the ACHR; 1 under the American Declaration of the Rights and Duties of Man and 4 under the African Charter of Human and People's Rights. Importantly, Article 11 of the ICESCR recognizes the right to an adequate standard of living and to the continuous improvement of living conditions, and it further lists some of the measures and programmes States are required to fulfil; and the American Declaration of the Rights and Duties of Man also contemplates the right to the preservation of health and to well-being under Article 11.

Concerning the act of deportation or forcible transfer, Articles 13 under the UDHR and 12 under the ICCPR are relevant as they state the right to liberty of movement, the freedom to choose the residence and the right to leave any country. Additionally, the Guiding Principles on Internal Displacement state the primary duty and responsibility of national authorities to provide protection to IDPs within their jurisdiction, and the principles reiterate their right to be protected against arbitrary displacement.[128] While at regional level, Protocol number 4 to the ECHR declares freedom of movement under Article 2 and the prohibition of expulsion of nationals and the collective expulsion of aliens respectively under Articles 3 and 4. Freedom of movement and residence is reaffirmed under Article 22 of the ACHR, Article 8 of the American Declaration on the Rights and Duties of Man and Article 12 of the African Charter of Human and Peoples Rights.

[127] *Ibid.;* p. 202.
[128] D. Gierycz. The Responsibility to Protect: A Legal and Rights-based Perspective. – A. J. Bellamy, S. E. Davies, L. Glanville (eds.). The Responsibility to Protect and International Law. Leiden: Martinus Nijhoff 2011 p. 106.

Turning to the act of imprisonment or other severe deprivation of physical liberty, relevant international provisions are Article 3 of the UDHR and in particular Articles 9 and 10 of the ICCPR which determine positive measures meant to be respected and implemented by the States in order for persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. Regionally, practical provisions can be found at European level under Article 5 of the ECHR concerning the right to liberty and security; at Inter-American level under Article 7 of the ACHR concerning the right to physical liberty and under Article 1 of the American Declaration on the Rights and Duties of Man; and finally under Article 6 of the African Charter on Human and Peoples' Rights.

Whereas, the act of persecution, meant as the "intentional and severe deprivation of fundamental rights by reason of the identity of the group or collectivity"[129], may involve the reference to several perspectives due to the different basis upon which a group may be denied of its rights and freedoms. As a matter of fact, in the Kvočka case[130] before the ICTY, the Trial Chamber held that "[d]iscrimination is the main feature that distinguishes the crime of persecution from other crimes against humanity"[131]. At international level, general provisions embodying human beings' equality in dignity and rights, and the duty to ensure the enjoyment of the rights without distinction of any kind can be found in the UDHR under Articles 1 and 2; in the ICCPR under Articles 2, 3, 20(2) and 24(1); and, in the ICESCR under Article 2(3). Globally there are some conventions peculiarly salient as they focus on specific grounds upon which individuals can be discriminated against and determine the positive measures States have to realize. One is the International Convention on the Elimination of All Forms of Racial Discrimination[132], whose Article 2 deems States Parties undertake to pursue by all appropriate means a policy of eliminating racial discrimination, understood as a distinction on the basis of race, colour, or national or ethnic origin. According to its Article 3 "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction", and as a consequence they have to ensure effective protection and remedies. The immediate and effective measures States have to adopt are listed under Article 7. According to Article 2 of the Convention on the Elimination of all forms of Discrimination against Women[133] (CEDAW), States Parties agree to pursue a policy of eliminating discrimination against women by all appropriate means as defined

[129] Rome Statute of the International Criminal Court, *op. cit.;* Art. 7(2)(g).
[130] ICTY, Prosecutor v. Kvočka *et al.*, Judgement, IT-98-30/1-T, 02.11.2001.
[131] *Ibid.;* § 194.
[132] International Convention on the Elimination of All Forms of Racial Discrimination. New York 21.12.1965, e.i.f. 04.01.1969.
[133] International Convention on the Elimination of All Forms of Discrimination Against Women. New York 18.12.1979, e.i.f. 03.09.1981.

accurately in the same Article. In the preamble of the Convention on the Rights of Persons with Disabilities[134] it is affirmed the need for persons with disabilities to be guaranteed their full enjoyment without discrimination. As a point of fact, the purpose of the Convention, as expressed under Article 1, is that "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities" and the general obligations to be adopted in order to reach the objective are listed under Article 4. The Convention on the Rights of the Child[135] appears to be useful as well for the writer's purpose, as, according to Article 2, through its ratification States Parties undertake to ensure the respect of the rights set forth in the Convention to each child within their jurisdiction without any kind of discrimination by adopting legislative, administrative and other measures. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families[136] offers a practical legal basis as well, since pursuant to Article 7 States Parties undertake to respect and ensure to all migrant workers and their families the rights provided for in the Convention; and part three of the Convention is dedicated to the rights States have to recognize through the adoption of the relevant measures. Regionally, there are provisions on the general prohibition of discrimination, such as under Article 1 of Protocol number 12 to the ECHR[137], under Article 1 of the ACHR and under Article 19 of the African Charter of Human and People's Rights; as well as specific conventions. An example is given by the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities[138], which represents a considerable advancement on the other systems. As understandable under Article 2, the aim is that to prevent and eliminate forms of discrimination perpetrated against disabled persons and Article 3 lists solidly the measures to be taken.

Proceeding with the legal analysis of the conducts; the duty to prevent the act of enforced disappearance of persons is strongly emphasized in the International Convention for the Protection of All Persons from Enforced Disappearance[139], as under Article 12(4) it envisages that Parties should take the necessary measures to prevent and sanction acts that obstruct the conduct of an investigation. Articles 22, 23 and 25 list the necessary measures to prevent and impose sanctions for the concerned conduct. Thanks to the definition of enforced disappearance

[134] International Convention on the Rights of Persons with Disabilities. New York 30.03.2007, e.i.f. 03.05.2008.
[135] International Convention on the Rights of the Child. New York 30.11.1989, e.i.f. 02.09.1990.
[136] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. New York 18.12.1990, e.i.f. 01.07.2003.
[137] Protocol No.12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination. Strasbourg 04.11.2000, e.i.f. 01.04.2005.
[138] Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities. Guatemala City 08.06.1999, e.i.f. 14.09.2001.
[139] International Convention for the Protection of All Persons from Enforced Disappearance. New York 06.02.2007, e.i.f. 23.12.2010.

provided for by the Convention under Article 2[140], it is possible to recognize other important provisions that seek to contribute to the determination of the legal basis of the crime's prevention. Among those, Articles 3 and 9 of the UDHR and Articles 9, 10 and 14 of the ICCPR concerning the right to liberty and security, not to be subjected to arbitrary arrest or detention and right to fair trial. Similar provisions are found under Articles 5 and 6 of the ECHR; Articles 7 and 8 of the ACHR; Articles 1 and 18 of the American Declaration on the Rights and Duties of Man; and Article 6 of the African Charter of Human and People's Rights. At Inter-American level was adopted the Convention on Forced Disappearance of Persons[141], which considers the conduct severe enough as it violates several non-derogable human rights enshrined in the American Convention on Human Rights and Declaration on Rights and Duties of Man, and in the UDHR.[142] Through this Convention States undertake to eliminate the forced disappearance of persons, by adopting the measures and the procedures set forth under Article 3.

The last crime against humanity to be investigated in this section is that of rape, sexual slavery, enforced prostitution or any other form of sexual violence of comparable gravity. Even though early international human rights law did not really mention violence against women, it is still pertinent to domestic violence.[143] In fact, Article 3 of the UDHR states, "[e]veryone has the right to life, liberty and security of person", and this right was also stressed by the ICCPR which protects the right to life under Article 6 and the right to liberty and security under Article 9. These rights, as well as others in the UDHR, ICCPR, and the ICESCR, such as the right to equal protection under the law,[144] and the right to the highest standard of physical and mental health,[145] are also legally relevant in the context of domestic violence, following that States parties to these instruments have an implied obligation to shelter women from domestic abuse cases.[146] Despite the fact CEDAW did not concretely include language concerning the field of discussion, its cornerstone, according to which State Parties agree to "condemn discrimination against women in all its forms",[147] was understood as including assault against women.[148] This perspective of violence against women, repeatedly consummated in terms of discrimination,

[140] "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.
[141] Inter-American Convention on Forced Disappearance of Persons. Belém do Pora' 09.06.1994, e.i.f. 28.03.1996.
[142] *Ibid.;* preamble.
[143] The Advocates for Human Rights. – UN Treaties on Domestic Violence, The Advocates for Human Rights, 26.10.2012, accessible at: http://www.stopvaw.org/un_treaties_and_conventions#_ftn7 .
[144] International Covenant on Civil and Political Rights, *op. cit.;* Art. 14.
[145] International Covenant on Economic, Social and Cultural Rights, *op. cit.;* Art. 12.
[146] The Advocates for Human Rights, *op. cit.*
[147] International Convention on the Elimination of all forms of Discrimination Against Women, *op. cit.;* Art. 2.
[148] The Advocates for Human Rights, *op. cit.*

enabled the Committee on the Elimination of All Forms of Discrimination against Women, the monitoring body of CEDAW, to adopt a general recommendation.[149] This recommendation clearly includes gender-based violence as a form of discrimination covered by the CEDAW, it addresses domestic violence as a form of discrimination against women, and it also urges "that violence against women is a violation of the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment, as protected by UDHR Article 5 and ICCPR Article 7."[150] To be more precise, the Committee against Torture claimed "States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking as a violation of the Convention Against Torture."[151] The UN Declaration on the Elimination of Violence against Women[152] in addition obliges States to "exercise due diligence to prevent, punish, investigate and in accordance with national legislation, punish acts of violence against women whether those acts are perpetrated by the State or by private persons"[153]. Furthermore, States must in accordance with Article 4(d) define effective sanctions in domestic legislation to punish the damages caused to women who are subjected to violence. Though the Declaration is not legally binding, the possibility exists that it may generate such a level of State practice and *opinio juris* as to evolve into customary international law.[154] Regionally, each mechanism has adopted a relevant instrument. Pursuant to Article 1 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[155] among the main purposes of the Convention there is that one to prevent, prosecute and eliminate violence against women and domestic violence, and therefore on the basis of Article 4 parties are asked to take the necessary measures to protect the right to live free from violence. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women[156] also provides that States must "apply due diligence to prevent, investigate and impose penalties for violence against women"[157]. Its Article 7 specifically calls on States to take appropriate measures to amend or repeal existing laws and regulations that maintain the persistence and tolerance of violence

[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid.*
[152] Declaration on the Elimination of Violence against Women. UN General Assembly A/RES/48/104, adopted 20.12.1993.
[153] *Ibid.;* Art. 4(c).
[154] M. Eriksson, *op. cit.;* p. 219.
[155] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. Istanbul 11.05.2011, e.i.f. 01.08.2014.
[156] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. Belém de Pora' 09.06.1994, e.i.f. 05.03.1995.
[157] *Ibid.;* Art. 7(b).

against women. Finally, the African Protocol on the Rights of Women[158] requires States to enforce laws to prohibit violence against women whether it occurs in a public or private context,[159] and to adopt "legislative, administrative, social and economic measures, to ensure the prevention, punishment and eradication of all forms of violence against women"[160].

1.3.2 Peremptory Norms of International Law

As already discussed, certain norms in international law are considered to be of such a fundamental value as to enjoy a higher status within public international law. The International Law Commission has proposed that *jus cogens* norms, among the possible ones, consist of the prohibitions of slavery, racial discrimination and apartheid and torture.[161]

The crime against humanity of apartheid has been widely neglected from the moment that jurisprudence is insufficient and the academic discourse modest.[162] Interestingly, the ICC is the first international criminal tribunal to include the crime against humanity of apartheid in its statute.[163] According to critics the crime is a South African phenomenon that has not reached the status of customary law.[164] The provision on apartheid in the Rome Statute of the ICC builds on the International Convention on the Suppression and Punishment of the Crime of Apartheid[165], which appears contentious and not signed by any Western State.[166] Cassese considers the inclusion of apartheid into the Rome Statute to be broader than customary international law.[167] The ICJ in the South West Africa case[168] made clear that "the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law"[169]. Apartheid, as a case of qualified racial discrimination, runs contrary to the human rights law: the UN Charter[170] provides in Article 1(3) that its members have to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion", as in a similar fashion it is possible to observe in the UDHR under Article 2; in the ICCPR under Article 2(1); in the ICESCR under Article

[158] Protocol to the African Charter on Human and People's Rights on the Rights of the Women. Maputo 01.07.2003, e.i.f. 25.11.2005.
[159] *Ibid.;* Art. 3(4).
[160] *Ibid.;* Art. 4(2)(b).
[161] M. Eriksson, *op. cit*; p. 332.
[162] C. Lingaas. The Crime against Humanity of Apartheid in a Post-Apartheid World. – 2 Oslo Law Review 2015, p. 86.
[163] *Ibid.*
[164] *Ibid.*
[165] International Convention on the Suppression and Punishment of the Crime of Apartheid. New York 30.11.1973, e.i.f. 18.07.1976.
[166] C. Lingaas, *op. cit.;* p. 86.
[167] *Ibid.;* p. 103.
[168] South West Africa case (Ethiopia v. South Africa; Liberia v. South Africa), Judgment, I.C.J. Reports 1966.
[169] *Ibid.;* § 293.
[170] Charter of the United Nations. San Francisco 26.06.1945, e.i.f. 24.10.1945.

2(2). Regionally as well under Article 1 of Protocol number 12 to the ECHR; under Article 1 of the ACHR and under Article 19 of the African Charter of Human and People's Rights. While the customary nature of racial non-discrimination is recognised, the question remains whether the crime against humanity of apartheid is a customary norm too.[171] Numerous UN resolutions condemned apartheid and indeed, in the period from 1946 to 1993, at least 14 General Assembly resolutions confirmed apartheid to be a crime against humanity.[172] Furthermore, on one occasion the Security Council affirmed that apartheid was a crime against humanity,[173] as well as once stating that apartheid was a "crime against the conscience and dignity of mankind"[174]. The resolutions may show how apartheid grew to be recognised as a crime against humanity and demonstrate an *opinio juris* of the UN member States and, the ILC seems to strengthen this argument as well.[175] In its 2013 Report on the Formation and Evidence of Customary Law, it noted that the prohibition against racial discrimination and apartheid were peremptory norms.[176] An increasing number of national legislations now contain the crime of apartheid, demonstrating the general acceptance of the crime and State practice as such and, all the international treaties that contain provisions on apartheid have reached a high number of ratifications thereby indicating State practice:[177] 176 States are members of the International Convention on the Elimination of Racial Discrimination. Pursuant to its Article 3, Parties commit themselves to prevent, prohibit and eradicate apartheid.

On the other side, less challenging was the identification of torture as a peremptory norm of international law. It is one of the most severe human rights violations as it constitutes a direct attack on the core of human dignity.[178] It is visible that torture takes an essential role in all four RtP crimes.[179] Together with expulsion of the civilian population, murder and disappearances, torture is an often-used instrument for ethnic cleansing; moreover, as according to Article 1 CAT one of the purposes of torture is discrimination, and it is noticeable that genocide can be committed through torture.[180] Moreover, as already explained, torture of combatants and civilians constitutes a serious breach of international humanitarian law and thus is punished as war crime. Furtherly considering torture as a crime against humanity as well, it is enough clear

[171] C. Lingaas, *op. cit.;* p. 104.
[172] *Ibid.;* p. 105.
[173] UNSC Resolution 556, 23.10.1984, § 1.
[174] UNSC Resolution 392, 19.06.1976, § 3.
[175] C. Lingaas, *op. cit.;* p. 105.
[176] *Ibid.*
[177] *Ibid.*
[178] M. Nowak, K. M. Januszewski, J. A. Hofbauer. R2P and the Prohibition of Torture. – P. Hilpold. The Responsibility to Protect. A New Paradigm of International Law?. Leiden: Brill 2014, p. 305.
[179] *Ibid.*
[180] *Ibid.;* pp. 305 – 306.

that the widespread or systematic commission of torture, in war as well as in peace times, is sufficient to trigger the application of the responsibility to protect.[181] The prohibition of torture is contained in all major human rights treaties: under Article 5 of the UDHR; under Article 7 of the ICCPR; in several Articles of the 1949 Geneva Conventions (such as common Article 3); under Article 3 of the ECHR and under Article 5 of the ACHR and the African Charter on Human and Peoples' Rights. While the 1975 UN Declaration on Torture[182] is a non-binding document, the definition of torture served as an inspiration for the UN Convention against Torture, which prohibits torture at all times.[183] On the basis of its Article 2 States have to undertake the necessary measures to prevent acts of torture in any territory under their jurisdiction and, they are obliged to ensure that acts of torture are offences under their criminal laws. Additionally, at regional level there is the European Convention for the Prevention of Torture and the Inter-American Convention to Prevent and Punish Torture. The first tool established, according to Article 1, a specific Committee consisting of a non-judicial system aimed at examining the treatment of persons deprived of their liberty with a view to strengthening the protection of such persons and preventing the commission of the concerned conduct. The second instrument declares Parties engage themselves to prevent and punish torture through the adoption of the measures developed in the Convention along Articles 6 to 12. Notably,

> "[t]he overwhelming acceptance of torture as an international violation in various regimes of international law, as well as its qualification as an *jus cogens* rule, a non-derogable norm and an obligation *erga omnes* to the community of States, is chiefly due to the acknowledgement of its capability in destroying the personality and assaulting the human dignity of a person."[184]

As a matter of fact, as held by the ICTY, the *jus cogens* nature of torture "articulates the notion that the prohibition has now become one of the most fundamental standards of the international community."[185]

The last crime against humanity whose legal responsibility of prevention is to be proved, is that of slavery, which in turn is a *jus cogens* as well. Globally, the prohibition of slavery is stated under Article 4 of the UDHR, under Article 8 of the ICCPR, and under Article 7 of the ICESCR.

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[181] *Ibid.;* p. 308.
[182] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. UN General Assembly A/RES/3452(XXX), adopted 09.12.1975.
[183] M. Eriksson, *op. cit.;* p. 264.
[184] *Ibid.;* p. 263.
[185] ICTY, Prosecutor v. Furundzija, Judgment, IT-95-17/1-T, 10.12.1998, § 154.

According to Article 2 of Slavery Convention[186], parties agree to prevent and suppress the slave trade and to reach as soon as possible the complete abolition of slavery in all its forms, by the adoption of all appropriate measures as listed under Article 3. At regional level, its prohibition is defined under Article 4 of the ECHR, under Article 6 of the ACHR and Article 5 of the African Charter of Human and Peoples' Rights. Article 4 of the ECHR requires member States to penalise and prosecute efficaciously any act seeking to maintain a person in a situation of slavery, servitude or forced or compulsory labour.[187] For the purpose of complying with this obligation, member States have to set up a legislative and administrative framework.[188]

The findings, exhibiting States' duty to prevent crimes against humanity, are in conformity with the ILC affirmation and determination that such crimes must be prevented by the States in accordance with international law.[189]

The writer values interesting the additional support provided by conventions[190] with the aim to suppress and prevent the use and acquisition of some weapons, whose employment can lead to the commission of the discussed crimes. In fact, the UN General Assembly repetitively acknowledged that the use of nuclear weapons would be a crime against humanity.[191] Consequently, States by undertaking those treaty responsibilities indirectly fulfil the duty to prevent severe international crimes.

1.4 Ethnic Cleansing

The next and last crime upon which RtP has jurisdiction and that is listed as a separate crime is that of ethnic cleansing. Likewise the crimes against humanity, it is not codified in a specific treaty; but most importantly, differently from all the crimes analysed above, it is not included within the Rome Statute. Forasmuch as ethnic cleansing has not been identified as an

[186] International Convention to Suppress the Slave Trade and Slavery. New York 25.09.1926, e.i.f. 09.03.1927.
[187] European Court of Human Rights. Guide on Article 4 of the European Convention on Human Rights. Prohibition of slavery and forced labour. Strasbourg: Council of Europe, last updated: 31.12.2019, § 53.
[188] *Ibid.*
[189] International Law Commission. Draft Articles on Prevention and Punishment of Crimes Against Humanity. Supplement No. 10 (A/74/10). Geneva: International Law Commission seventy-first session 2019, not yet ratified. Preamble, Art. 3(2), Art. 4.
[190] International Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Geneva 10.04.1972, e.i.f. 26.03.1975, Art. 1; International Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Geneva 13.01.1993, e.i.f. 29.04.1997, Art. 1 – 2 – 3; Treaty on the Non-Proliferation of Nuclear Weapons. Geneva 01.07.1968, e.i.f. 05.03.1970, Art. 1 – 2.
[191] S. Chesterman, I. Johnstone, D. M. Malone. Law and Practice of the United Nations. Oxford: Oxford University Press 2016, p. 298.

independent crime under international law, there is no accurate explanation of this concept or the acts that may qualify ethnic cleansing.[192]

A UN Commission of Experts, established by the UN Security Council with the aim to study the violations of international humanitarian law committed in the territory of the former Yugoslavia, explained ethnic cleansing "as a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas."[193] The Commission of Experts also asserted that the violent methods used to displace the civilians can comprise:

> "murder, torture, arbitrary arrest and detention, […] sexual assaults, severe physical injury to civilians, confinement of civilian population in ghetto areas, forcible removal, […] deportation of civilian population, deliberate military attacks […] on civilians and civilian areas, use of civilians as human shields, destruction […] and robbery of personal property, attacks on hospitals […] and locations with the Red Cross or Red Crescent emblem"[194].

States' duties to prevent such acts have already been examined and proved in the previous paragraphs of this chapter since, as acknowledged by the Commission of Experts itself, such practices can amount to crimes against humanity and war crimes, as well as such acts may fall within the meaning of the Genocide Convention.[195] Consequently, in the subsequent chapter, only the three previous international crimes will be considered.

It is nevertheless relevant to recognize that the inclusion of ethnic cleansing, among the crimes the RtP principle has jurisdiction upon, is reflected by its distinctive aim, achievable not only through mass killings, to establish ethnic homogeneity. Unparalleled instances of ethnical cruelty include the Turkish massacre of Armenians during World War I; the Nazis' annihilation of Jews during the Holocaust and the forced displacement and mass killings carried out in former Yugoslavia and in Rwanda during the 1990s.[196]

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[192] United Nations Office on Genocide Prevention and Responsibility to Protect. – Ethnic Cleansing, United Nations, no date of publication available, accessible at: https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml .
[193] *Ibid.*
[194] *Ibid.*
[195] *Ibid.*
[196] History.com Editors. – Ethnic Cleansing, History, 14.10.2009 (last updated 10.06.2019), accessible at: https://www.history.com/topics/holocaust/ethnic-cleansing .

1.5 Concluding Remarks

The first chapter aimed at and succeeded in demonstrating the presence of clear international obligations on States to prevent the crimes which RtP refers to.

For each crime considered, the legal analysis was on one side similar, as it required the study of specific Conventions and International Human Rights Law, necessary to assess the existence of a legal duty to prevent breaches that may amount to serious international crimes, and of positive duties on Parties to ensure the realization of the rights enshrined in the human rights instruments. On the other side, the research demanded different reasonings and approaches due to the features characterizing those crimes. The Genocide Convention is the main uncontested text which derives States duty to prevent genocide and it reflects customary law. Similarly, the Geneva Conventions establish Parties' duty to ensure respect for the provisions, and the prohibition of war crimes has been proved to be an intransgressible principle of customary law. States' legal responsibility to prevent those crimes is strengthened by the presence, as outlined, of duties under relevant human rights treaties. While the crimes against humanity solicited a much deeper study of human rights related dispositions to detect an obligation of prevention; ethnic cleansing was not in need of further analysis, as it may take the form of the crimes already discussed. As a result, the first pillar of RtP embodies an obligation attributable to States to prevent the commission of the four crimes on their territory, according to international treaty and customary law identified and exhibited. It follows that the *opinio juris* criteria is fully met, due to relevant case-law and State practice detected through the commitments undertaken by way of ratifying pertinent conventions.

2. THE RESPONSIBILITY OF THE INTERNATIONAL COMMUNITY

The second set of responsibilities embodied in the RtP are those attached to the international community. As agreed by Member States in 2005, the international community's responsibilities relate to assisting the concerned State to fulfil its responsibility to protect. As such, the writer will first consider the legal quality of pillar two, before considering the regional implementation of the principle.

RtP second pillar is set out in both paragraphs 138 and 139 of the 2005 Outcome Document. As interpreted by the UN Secretary General, and endorsed by the General Assembly, it comprises four main elements: supporting States to meet their pillar one responsibilities; assisting them to practice such responsibility and to build their capacity to protect; and helping States "under stress before crises and conflicts break out".[197] Although this is predominantly a political commitment, it is not entirely devoid of legal content.[198]

Prior to moving to the analysis of specific obligations on States to encourage and assist others in relation to ensuring compliance with the law; it is paramount to recognize that such positive duty, in more general terms, is claimed by plural relevant instruments. For instance, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter[199] proclaims States' duty to cooperate with other States in the maintenance of international peace and security; "in promotion of universal respect for, and observance of, human rights and fundamental freedoms"; and accordingly, every State has the duty to promote the realization of the principle of equal rights.[200] It is declared that UN Charter's principles, embedded in the Declaration, make up basic principles of international law, and consequently all States have to comply with them in their international conduct and develop reciprocal relations on the basis of the observance of these principles.[201] As a matter of fact, under Article 1(3) of the UN Charter it is deemed that one of the Organization's objectives is that to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character. While Article 56 proclaims States' commitment to undertake joint or separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55, among whom the aim to promote

[197] UN General Assembly, Implementing the Responsibility to Protect, o*p. cit.;* § 28.
[198] A. J. Bellamy, R. Reike, *op. cit.;* p. 94.
[199] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. UN General Assembly A/RES/2625(XXV), adopted 24.10.1970.
[200] *Ibid.;* pp. 8 – 10.
[201] *Ibid.;* p. 11.

universal compliance with human rights and fundamental freedoms. The ICJ held that the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[202]

2.1 Crime of Genocide

In order to establish the international community's responsibility to cooperate for and support State's responsibility to prevent the crime of genocide, it will be taken into consideration a case[203] employed in the first chapter, whose relevance lies in the contracting duty to prevent genocide.

Notably, in the claim Bosnia and Herzegovina filed in 1993 before the ICJ against Yugoslavia it was stated that the latter had violated a contractual obligation to prevent genocide in Bosnia and Herzegovina under Article 1 of the Genocide Convention.[204] In addition, the former filed another request with the ICJ for additional provisional measures to be indicated by the Court.[205] This request included the finding "that Contracting Parties to the Genocide Convention have an international legal obligation to prevent the commission of acts of genocide against the People and State of Bosnia and Herzegovina".[206] Judge *ad hoc* Elihu Lauterpacht "felt unable at that stage to find a collective responsibility to prevent genocide wherever it may occur and to accede to the Bosnian request for a finding that all States were under an obligation to prevent the commission of genocide against the people of Bosnia and Herzegovina".[207] At the same time, he affirmed at least some extraterritorial effect of Article 1 so that a State bound by the Convention was obligated to engage in the prevention of genocide outside its territory where it was involved in a conflict.[208] In 1996 the Court decided to dismiss the preliminary objections advanced by the Federal Republic of Yugoslavia against the Court's jurisdiction, on the basis that the conflict in question had occurred on the territory of Bosnia and Herzegovina, by submitting that "the obligation each State has to prevent and punish the crime of genocide is not territorially limited by the Convention".[209]

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[202] I.C.J., Nicaragua v. United States of America, *op. cit.*; § 188.
[203] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Application, I.C.J. 1993.
[204] S. Kolb, *op. cit.;* p. 36.
[205] *Ibid.*
[206] Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Bosnia and Herzegovina (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, I.C.J. 1993, § 111.
[207] S. Kolb, *op. cit.;* pp. 37 – 38.
[208] *Ibid.;* p. 38.
[209] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, § 31.

In 2007 the ICJ returned to the question in its judgment on the merits. Actually, the Court felt compelled to discuss Article 1 as it had not found Serbia responsible for an act of genocide.[210] The majority of the Court held Article 1 of the Genocide Convention to establish a legal duty of all contracting parties "to employ all means reasonably available to them, so as to prevent genocide as far as possible."[211] In the majority's opinion, Serbia had breached the Convention since it had done nothing to prevent the massacres at Srebrenica even though it had been in a position of influence over the Bosnian Serbs who had been responsible for the genocide.[212] The fascinating conclusion seems pregnant with potential for the promotion of human rights and the prevention of atrocities.[213] As a matter of fact, the Court explains that any State party is compelled by the Genocide Convention to prevent the commission of the concerned crime, once it has the power to contribute to restrict in any degree its commission.[214] Moreover, "the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome."[215] The interpretations of Article 1 on the bench ranged from the majority's understanding as a duty of conduct that requires extraterritorial action on the basis of a State's capacity to influence the course of events, to the concept of a duty of result that applies only where a State exercises territorial jurisdiction or control.[216] It results that the Court made an important ruling, as it was established that while Serbia is not responsible for committing genocide, it is responsible for failing to prevent and to punish genocide in Srebrenica, making clear that States may be responsible for actions outside their borders and that there is no territorial limitation on the responsibility to prevent and punish.[217] According to the majority judgment, the crucial parameter to decide whether a State has duly discharged its obligation to prevent is its "capacity to influence effectively the action of persons likely to commit, or already committing, genocide."[218] This capacity depends on geographical distance from the events' scene, the strength of political links, as well as ties of other kinds between the State's authorities and the main actors in the events.[219] In the Bosnian case, the Court examined in detail the influence wielded by Serbia over the agents guilty of

[210] S. Kolb, *op. cit.;* pp. 38 – 39.
[211] I.C.J., Bosnia and Herzegovina v. Serbia and Montenegro, 2007, *op. cit.;* § 430.
[212] *Ibid.;* § 438.
[213] W. A. Schabas. Genocide and the International Court of Justice: Finally a Duty to Prevent the Crime of Crimes. – 2 Genocide Studies and Prevention 2007, p. 115.
[214] I.C.J., Bosnia and Herzegovina v. Serbia and Montenegro, 2007, *op. cit.;* § 461.
[215] *Ibid.*
[216] S. Kolb, *op. cit.;* p. 39.
[217] S. Rosenberg, *op. cit.;* pp. 180 – 181.
[218] I.C.J., Bosnia and Herzegovina v. Serbia and Montenegro, 2007, *op. cit.;* § 430.
[219] L. Arbour, *op. cit.;* p. 452.

genocide in the neighbouring State.[220] The particular closeness of the relationship in question was clarified by the Court's observation that Serbia's position of influence was "unlike that of any other States parties to the Genocide Convention."[221]

As this is the only practice to derive such positive duty on the international community, it turns relevant to consider scholarly pronouncements as well. Several commentators suggested that the parties to the Genocide Convention were also obliged to take action for the prevention of genocide committed in a third State, which was however contested by others.[222] Interesting for the present context is the suggestion by Brian D. Lepard that the undertaking to prevent and punish genocide in Article 1 of the concerned Convention required all parties "to take every step legally possible to prevent genocide, including referral of the matter to the Security Council and encouragement of the Council to act."[223] In particular, the pronouncements in the 2007 ICJ judgment met with a positive response in international legal scholarship and left a noticeable imprint on the academic debate. They fostered the line of thought according to which the Genocide Convention imposes upon the contracting States a duty to prevent genocide even beyond their own territory, from the moment most commentators endorsed the Court's recognition of such an extraterritorial duty; and importantly, only rarely have the findings of the ICJ on the extraterritorial application of the duty to prevent genocide been challenged.[224] The work of William A. Schabas, the leading scholar on the international law on genocide, illustrates the impact which the Bosnian Genocide case may have had on the scholarly debate. While at the beginning he took a cautious approach on the existence of conventional obligations for States parties to prevent genocide; in his 2007 review of the ICJ's decision and in the new edition of his monograph, Schabas endorses the Court's finding that the Genocide Convention establishes a duty to prevent genocide which is not confined to States' respective territories.[225]

Significant attention has been devoted as well to Article 8 of the Genocide Convention, with the intention to determine whether international community's responsibility could be derived from it, since it allows the parties to call upon UN organs to deal with the prevention and suppression of acts of genocide.[226] For present purposes, the crucial question is whether Article 8 imposes obligations upon the States parties that are members of the Security Council. The writer found little support for such reading of Article 8 in either political debates or academic

[220] *Ibid.*
[221] I.C.J., Bosnia and Herzegovina v. Serbia and Montenegro, 2007, *op. cit.;* § 434.
[222] S. Kolb, *op. cit.;* pp. 198 – 199.
[223] *Ibid.;* p. 199.
[224] *Ibid.;* p. 200.
[225] *Ibid.;* p. 201.
[226] *Ibid.;* p. 210.

writings and judicial pronouncements. Similarly, the ICJ, while mentioning Article 8 as a tool in the context of a duty to prevent, at no point suggests that the Article as such imposed an obligation.[227]

Generally speaking, the purpose of the Genocide Convention as a multilateral convention aimed at combating one of the most atrocious international crimes would tend to endorse a broader rather than a narrower reading of its provisions.[228] Indeed, the ICJ found "universal character both of the condemnation of genocide and of the co-operation required in order to liberate mankind from such an odious scourge".[229]

The study of the legal content of RtP second pillar is much more challenging and less obvious. Since if we look at State practice before the 1990s, as suggested by Judge Lauterpacht, by taking into consideration the massacre of Hutu in Burundi in 1965 and 1972, of Aché Indians in Paraguay prior to 1974, the mass killings by the Khmer Rouge in Kampuchea between 1975 and 1978, and killings of Bahai in Iran, the limited reaction of the parties to the Convention in relation to these episodes may represent a practice suggesting the permissibility of inactivity.[230] The Bosnian genocide case represents the only instance where it was recognized by the Court that the genocide prevention is an obligation meant to be undertaken even out of the Parties' territorial jurisdiction, even though such positive duty remains surrounded by contrasting comments and based on parameters to be considered on a case-by-case basis.

Nevertheless, it is of paramount importance to share a recent event which has the potential to consolidate the international community's legal duty in relation to the crime of genocide. The author is referring to the 46-page application submitted to the ICJ by the Gambia, alleging Myanmar responsibility for acts of genocide perpetrated against the Rohingya Muslims in Myanmar. In its application the Gambia declares that Myanmar has breached and continues to violate the obligations set forth under the Genocide Convention,[231] and that its behaviour must be "consistent with the obligation to prevent genocide under Article I"[232]. Gambian Minister of Justice Abubaccar Tambadou's action to seek justice for the Rohingya is truly in line with the ICJ reasoning issued in 2007.

[227] *Ibid.*
[228] *Ibid.;* p. 235.
[229] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 12.
[230] W. A. Schabas, Genocide in International Law, *op. cit.;* p. 495.
[231] I.C.J., Gambia v. Myanmar, *op. cit.;* § 2.
[232] *Ibid.*

2.2 War Crimes

Academic writings and several judgments of the ICJ have already for a long time suggested a broad understanding of the undertaking to ensure respect which may result in far-reaching extraterritorial obligations to prevent violations of the Geneva Conventions.[233]

Like in the case of Article 1 of the Genocide Convention, it is ultimately the light which the different analyses place on the understandings of the States parties that is informative concerning the interpretation of common Article 1 (CA 1) of the four Geneva Conventions. This is visible once the scholarly opinions are being contemplated, and the prevailing doctrine on the undertaking to ensure respect for the Geneva Conventions appears to be what has been labelled the "state-compliance" approach.[234] It considers States parties to the Conventions, whether or not they are involved in a conflict, to be obligated under CA 1 to take or at least to contemplate action to ensure the parties to an armed conflict abide by their obligations under the Conventions.[235] In other words, "[t]he contracting States have the duty under Article 1 to ensure that the provisions of the concerned Conventions are well complied not only by individuals under their jurisdiction but also by third States".[236] An important statement that could be pointing this way can be found in the Commentary published under the general editorship of Jean S. Pictet on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field[237]. According to the commentary, "[i]t follows that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied, or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention."[238] The so-called "state-compliance" approach is useful but does not represent a uniform theory.[239] Strongest in his formulation of the obligation arising from common Article 1 is Fateh Azzam, who asserts a "legal obligation devolving on third States to use all legal means at their disposal for the implementation and enforcement of humanitarian law"[240]. Azzam suggests as well that this obligation is one of result, which follows that any contracting party is in breach of a Geneva Convention as long as respect for its provisions is not achieved in all circumstances.[241] Other scholars formulate vaguer standards suggesting that

[233] S. Kolb, *op. cit.;* p. 272.
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid.;* p. 273.
[237] J. S. Pictet. – Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Commented Edition. Geneva: International Committee of the Red Cross 1952.
[238] *Ibid.;* Art. 1.
[239] S. Kolb, *op. cit.;* p. 273.
[240] F. Azzam. The Duty of Third States to Implement and Enforce International Humanitarian Law. – 66 Nordic Journal of International Law 1997, p. 56.
[241] *Ibid.;* pp. 73 – 74.

Article 1 creates a duty for States parties to at least be mindful regarding what action they might take to prevent or stop violations of international humanitarian law by third States.[242]

Secondly, it will be taken into consideration the study of a relevant abstract issued for the International Review of the Red Cross journal[243], with the objective to define an international legal obligation on third States. Accordingly, CA 1 goes one step further by introducing an undertaking to ensure respect in all circumstances which, in turn, consists of an internal and an external component. The internal component implies that each Party to the Geneva Conventions must guarantee that the Conventions are well complied with not only by its armed forces and its authorities, but also by the whole population.[244] As it was clearly demonstrated in the first chapter, States are legally responsible in case of failure to observe it. The external component deems that third States not involved in a given armed conflict, and also regional and international organizations, have a duty to take action in order to guarantee respect with the Geneva Conventions by the parties to the conflict.[245] The writer recognizes that if compliance with existing IHL constitutes the key element for averting current humanitarian problems during armed conflict, there is then a need to elucidate the extent of this obligation. It is reasonable to assume that CA 1 goes beyond the mere obligation to respect the Geneva Conventions at domestic level. After all, customary principle *pacta sunt servanda* already acknowledges that any State ratifying a particular treaty is bound to comply with it in good faith; wherefore, the relevance of CA 1 is not given by its reiteration of an existing rule of public international law, but rather due to its creation of a legal obligation for each State to ensure respect towards the international community as a whole.[246] As suggested by the relevant abstract, this is what can be deduced from a joint analysis of the *travaux préparatoires* and the subsequent application of CA 1 for over sixty years.

2.2.1 *Travaux Préparatoires* and State Practice

It is important to emphasize that the *travaux préparatoires* are to be regarded as a supplementary means of interpretation; whereas the behaviour of States in the application of a treaty constitutes a primary source in the analysis of conventional obligations.[247]

[242] S. Kolb, *op. cit.;* pp. 273 – 274.
[243] K. Doermann and J. Serralvo. Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations. – 96 International Review of the Red Cross 2014.
[244] *Ibid.;* pp. 708 – 709.
[245] *Ibid.;* p. 709.
[246] *Ibid.;* p. 711.
[247] *Ibid.*

The *travaux préparatoires* of the 1949 Diplomatic Conference show that there was truly little discussion on the issue of CA 1. Mr Pilloud, on behalf of the International Committee of the Red Cross (ICRC), pointed out that "the International Committee of the Red Cross emphasized that the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied"; and the delegates neither opposed this statement, nor raised any issues regarding their accord or discord with it, but chose a broad formulation that comprises an external scope, in terms of an entitlement or a duty.[248] Importantly, as already stated, the Commentaries to the Geneva Conventions published by the ICRC in the 1950s support the view that CA 1 imposes an obligation to ensure respect by others.

It was only in 1968 in Tehran, that the United Nations International Conference on Human Rights, reminded States party to the Geneva Conventions of their responsibility to "take steps to ensure respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict"; and the vast array of subsequent practice supports the imperative nature of the duty to ensure respect for States that are not party to an armed conflict.[249] The ICJ has, on various occasions, asserted the commanding character of the obligation to ensure respect. In the Nicaragua case, the Court considered that even though the United States was not a party to the non-international armed conflict, it had an obligation to ensure respect for the Geneva Conventions in all circumstances.[250] It further added that this obligation did "not derive only from the Conventions themselves, but from the general principles of humanitarian law"[251]. In its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court underscored that "[e]very State party to [the Fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with"[252]. In the case on Armed Activities on the Territory of the Congo[253], the ICJ specifically referred to the duties of States that exercise control outside their own territories, namely in occupied territories.[254] It held almost unanimously that Uganda, "by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international

[248] *Ibid.;* p. 715.
[249] *Ibid.;* pp. 716 – 717.
[250] I.C.J., Nicaragua v. United States of America, *op. cit.;* § 220.
[251] *Ibid.*
[252] I.C.J., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *op. cit.;* § 158.
[253] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005.
[254] *Ibid.;* § 216 – 217.

human rights and international humanitarian law"[255]. A similar appeal was made in the 1990 resolution[256] concerning the uprising of the Palestinian people. The General Assembly not only requested the occupying power to abide by the provisions of the Fourth Geneva Convention, but also called upon all States party to that Convention "to ensure respect by Israel […] for the Convention in all circumstances, in conformity with their obligation under article 1 thereof".[257]

A most thorough study on customary humanitarian law and the relevant international practice has been issued by the ICRC. In line with it, State practice establishes a customary norm for both international and non-international conflicts, according to which "states may not encourage violations of international humanitarian law by parties to an armed conflict […] and must exert their influence, to the degree possible, to stop violations"[258]. The ICRC has published a broad collection of precedents in which States have exerted influence upon other parties to a conflict to comply with humanitarian law, either through diplomatic protests or collective measures.[259] The ICRC survey observes that appeals made by the Committee to ensure compliance with humanitarian law, namely in the conflict of Rhodesia/Zimbabwe and in the Iran-Iraq war, had been addressed to the international community at large and were supported even by States that were not parties to the relevant protocols.[260]

2.2.2 The Nature of the Obligation

As shown from significant State practice, CA 1 goes beyond an entitlement for third States to take steps to ensure respect for IHL. It establishes not only a right to act, but also an international legal obligation to do so. The words "ensure respect" imply an active duty and the term "undertake" suggests an obligation and this applies to both the internal and the external component of CA 1.[261]

Concerning the potential measures for ensuring compliance with IHL available to States not party to an armed conflict, these can be classified into three broad categories. First, measures meant to exert diplomatic pressure; second, coercive measures taken by the State itself; and third, measures undertaken in cooperation with an international organization; and ultimately, the failure to take measures will give rise to the international responsibility of the third State

[255] *Ibid.;* § 345.
[256] The Uprising (intifadah) of the Palestinian People. UN General Assembly A/RES/46/76, adopted 11.12.1991.
[257] *Ibid.;* § 3.
[258] International Committee of the Red Cross. Customary International Humanitarian Law. Volume I: Rules. Cambridge: Cambridge University Press 2005, p. 509.
[259] *Ibid.;* p. 512.
[260] *Ibid.;* p. 511.
[261] K. Doermann and J. Serralvo, *op. cit.;* p. 723.

only when its conduct cannot be viewed diligent.[262] What needs to be proved is the inconsistency between the State's actual conduct and the conduct demanded by the "due diligence standard".[263] It has often been repeated that CA 1 prohibits third States from encouraging the parties to a conflict to violate IHL; and as declared by the abstract under consideration, the fact that these negative duties derive from public international law, as well as the fact that CA 1 uses the active wording "ensure", denotes that the scope of the obligation to ensure respect is "undoubtedly larger than simply not encouraging, and also includes a series of positive obligations."[264] Actually, parties have a duty to exert their influence and take appropriate measures to halt and end ongoing IHL violations, and this is the aspect of CA 1 that serves as basis for Rule 144 identified in the ICRC Customary Law Study,[265] which provides that States "must exert their influence, to the degree possible, to stop violations of international humanitarian law"[266]. Such an obligation to cease IHL violations is stressed in Article 89 of Additional Protocol I, which provides that "[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co–operation with the United Nations and in conformity with the United Nations Charter." Consequently, CA 1 imposes on third States an international legal obligation to ensure respect in all circumstances.

2.3 Crimes Against Humanity

The legal analysis aimed at investigating the presence of international community's responsibility in respect to the third category of international crimes, is going to be dealt with by referring first to the concept of solidarity, as one of the structural principles of International Human Rights Law; and secondly, by way of exploiting the draft articles on State responsibility.

2.3.1 International Solidarity

The principle of solidarity exists in international law and is having an impact on the structure of the law and this is acknowledged by the transformation of the international system from a mere network of bilateral commitments into a value-based global legal order.[267] Moreover, the introduction of the principle of solidarity as a structural principle reflects international law as a regime aimed at fulfilling the promotion of international social justice among States.[268] The

[262] *Ibid.;* pp. 725 – 726.
[263] *Ibid.;* p. 726.
[264] *Ibid.;* p. 727
[265] *Ibid.;* p. 728.
[266] International Committee of the Red Cross, *op. cit.;* p. 509.
[267] R. Smith, *op. cit.;* p. 401.
[268] *Ibid.;* pp. 401 – 402.

principle of solidarity is particularly relevant in regulating concerns common to the international community, among those, the protection and implementation of human rights standards and the preservation of international peace and security.[269] Accepting the existence of such principle in the matrix of international relations means that States should consider, in addition to their own individual interests, the interests of the community of States as a whole.[270]

In terms of institutionalized global governance, both the League of Nations as well as the United Nations as its successor can be considered as organizations whose mandate includes the notion of solidarity as their integral assignment. Neither the Genocide Convention nor the Universal Declaration of Human Rights would exist without a concept of solidarity.[271] The UN Millennium Declaration refers to solidarity as a fundamental value,[272] and as a consequence, the UN General Assembly adopted in 2005 a resolution where it identified solidarity as a fundamental and universal value.[273] In a report to the Human Rights Council the independent expert Rudi Muhammad Rizki reinforced the understanding that international solidarity is perceived as a principle and even a right in international law.[274] It reaffirmed the notion already stressed in Kofi Annan's pioneering report named In Larger Freedom, "that international solidarity must be recognized as a prerequisite for any collaboration in the international community".[275] It is noticeable that the effective realization of individual rights represents a community interest requiring international solidarity.[276] Article 1 of the *Institut de Droit International's* (International Law Institute's) 1989 resolution on the "Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States" claims that States' obligation to protect human rights solicits a duty of solidarity among all States to effectively secure the protection of human rights throughout the world.[277] Karel Vasak[278] developed the concept of solidarity rights comprising the right to a healthy environment and the right to peace; and the particularity of such rights is that they impose on States collective positive obligations.[279] The duty to undertake positive action in terms of international assistance and cooperation is required within numerous human rights related tools, treaties and conventions;

[269] *Ibid.;* p. 403.
[270] *Ibid.;* p. 404.
[271] H. Melber. International Solidarity as an emerging norm in the United Nations. International Solidarity: Yesterday's ideal or emerging key norm ?. Berlin: Opening speech at the International sef Expert Workshop 2016, p. 2.
[272] United Nations Millennium Declaration. UN General Assembly A/RES/55/2, adopted 18.09.2000, § 6.
[273] Implementation of the first United Nations Decade for the Eradication of Poverty (1997-2006). UN General Assembly A/RES/60/209, adopted 22.12.2005, § 43.
[274] H. Melber, *op. cit.;* p. 5.
[275] *Ibid.*
[276] R. Smith, *op. cit.;* p. 410.
[277] *Ibid*.
[278] He became in 1969 the first Secretary-General of the International Institute of Human Rights in Strasbourg.
[279] R. Smith, *op. cit.;* p. 410.

for instance in the preamble and under Article 22 of the UDHR, under Article 1(2) of the ICCPR, and under Articles 1(2), 2(1), 11(1)(2) of the ICESCR.

It is often argued that an interesting manifestation of the notion of solidarity in the context of human rights is the emerging concept of the responsibility to protect. According to Judge Abdul G. Koroma, the concept of a responsibility to protect is legally distinguishable from humanitarian intervention, as for him the basis for international community intervention in favour of a suffering population lies in the international community's solidarity with that population.[280] The principle of solidarity has been assumed as a form of solidarity among States, while the responsibility to protect would connote the international community's solidarity with the population of a particular State; and consequently "[a]pplying the principle of solidarity to human rights means another step forward in the evolution of this principle, since it means broadening the scope of potential addressees."[281] Such development appears to be in keeping with the relevance of international human rights standards and with a modern view of the meaning of state-hood. In fact, States are a means of serving the well-being of their populations and as this is exactly what the first pillar of the concept of responsibility to protect emphasizes, this concept correctly incorporates the principle of solidarity into the international human rights regime, while also adding to its means of implementation.[282]

The 2016 Report of the Independent Expert on Human Rights and International Solidarity [283], and in particular its section named "International solidarity and the extraterritorial obligations of States", turns to be relevant as it examines some issues selected in the light of the weight of their implications for the final version of the draft declaration on the right to international solidarity, submitted to the Human Rights Council in 2017. In the report is actually acknowledged that "[t]he 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights clarify the parameters of the extraterritorial obligations of States and confirm the primacy of human rights among competing sources of international law."[284] Despite the universality of human rights, many States interpret their human rights obligations as applicable only within their own territories and the Maastricht Principles concern the obligations of States and other actors beyond borders. They point out the duty of international cooperation in general, with principles 19-40 being those with the greatest bearing on the proposed draft declaration.[285] The report provides one example, as part of the

[280] *Ibid.;* p. 416.
[281] *Ibid.*
[282] *Ibid.;* p. 418.
[283] Human rights and International Solidarity. UN General Assembly A/RES/71/280, adopted 03.08.2016.
[284] *Ibid.;* § 30.
[285] *Ibid.;* § 31.

Commentary to the Maastricht Principles reads, "[i]nternational cooperation must be understood broadly to include the development of international rules to establish an enabling environment for the realization of human rights and the provision of financial or technical assistance."[286] Maastricht Principles, while focusing on the extraterritorial obligations of States in the area of economic, social and cultural rights, explicitly state under principle 3 that "[a]ll States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially".[287]

Since 2005, the work on a draft Declaration on the Right to International Solidarity [288] has been progressing. The draft recalls the multitude of international and regional human rights treaties and other instruments that express international solidarity and stresses that all regional agreements are founded on international solidarity and cooperation, including the Constitutive Act of the African Union, the Charter of the Organization of American States, the Charter of the League of Arab States, the founding treaties of the European Union, and the Charter of the Association of Southeast Asian Nations.[289] Additionally, international solidarity is defined as essential in overcoming current global challenges and accordingly "is a foundational principle underpinning contemporary international law in order to preserve the international order and to ensure the survival of international society."[290] The definition of the three major dimensions of international solidarity, preventive, reactive solidarity and international cooperation,[291] and the claim that "[i]nternational cooperation shall be aimed at enabling each State to fulfil its primary responsibility to devote maximum available resources to the implementation of its human rights obligations at the national level"[292]; support the finding that the structural principle reflects international community's responsibility to cooperate and assist the concerned State to fulfil its primary responsibility to protect.

2.3.2 Duty to Cooperate Under the Law of State Responsibility

Article 41 of the ILC Draft Articles on State Responsibility[293] has been regarded as a potential expression of the legal content of the second pillar of the responsibility to protect. Actually, the

[286] O. De Schutter, A. Eide *et al.* Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. – 34 Human Rights Quarterly 2012, p. 1104.
[287] UN General Assembly, Human rights and International Solidarity, *op. cit.;* § 33.
[288]Annex of Report of the Independent Expert on Human Rights and International Solidarity. UN General Assembly A/HRC/35/35, adopted 25.04.2017.
[289] *Ibid.;* preamble.
[290] *Ibid.;* Art. 1(2).
[291] *Ibid.;* Art. 2.
[292] *Ibid.;* Art. 9(4).
[293] International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts. Supplement No. 10 (A/56/10). Geneva: International Law Commission fifty-third session 2001, not yet ratified.

ILC proposes obligations of States in the face of a "serious breach by a State of an obligation arising under a peremptory norm of general international law"[294], which take the form of negative duties, and the positive one to cooperate in bringing to an end any such breach. Hence, customary international law could, pursuant to Article 41(1) ILC draft 2001, oblige all States to contribute to halting these crimes wherever they may be committed.[295] The ICJ has frequently held that ILC draft articles reflect customary international law.[296]

Before moving to the legal analysis of Article 41 that spells out the legal consequences entailed by the breaches coming within the scope of the concerned chapter of ILC draft articles; it is paramount to consider provision 40 which defines a serious breach of an obligation arising under peremptory norm of general international law. Both articles, referred by the ECtHR as relevant international law,[297] are found under chapter III of the draft whose concern is that serious breaches of obligations under peremptory norms can attract consequences not only for the responsible State, but for all other States. For this purpose, the Commentary on ILC Draft Articles [298] will be exploited.

On the basis of the commentary, Article 40 declares that in order for an obligation to be qualified under the discussed chapter, it has to derive from a peremptory norm of general international law, and it must have been serious in nature.[299] The concept of peremptory norms is acknowledged by the practice of international and national courts and tribunals.[300] A "serious" breach is specified under paragraph 2 as one which implicates "a gross or systematic failure by the responsible State to fulfil the obligation". In order for a violation to be systematic, it has to be performed in an organized and deliberate way; while the term "gross" indicates the severity of the violation.[301] It must be borne in mind that some of the peremptory norms, most notably the prohibition of genocide, by their nature require an intentional violation on large scale; crimes against humanity involve an attack meant to be widespread and-or systematic and war crimes are usually carried out through an organized method as well. It follows that States' failure to prevent the serious international crimes, covered by RtP, results in triggering State responsibility for the commission of an internationally wrongful act. There has been, however,

[294] *Ibid.;* Art. 40(1).
[295] S. Kolb, *op. cit.;* p. 339.
[296] I.C.J., Bosnia and Herzegovina v. Serbia and Montenegro, 2007, *op. cit.;* § 385, 401; Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2008, § 127.
[297] Güzelyurtlu and others v. Cyprus and Turkey, Judgment, App no 36925/07, ECtHR 29.01.2019, § 157 – 158.
[298] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commented Edition 2001, *op. cit.*
[299] *Ibid.;* Art. 40, § 1.
[300] *Ibid.;* Art. 40, § 2.
[301] *Ibid.;* Art. 40, § 8.

no development of penal consequences for States in the case of these fundamental norms' breaches.[302] For example, the award of punitive damages is not known in international law even in the circumstance of serious breaches of obligations arising under peremptory norms.[303] Nevertheless, Article 40 proves useful to finally assess the consequence of the established State's duty to prevent international crimes from occurring on its own territory, notably, international State responsibility in case it fails to fulfil the international obligation.

On the other hand, Article 41 Draft Articles owns relevance as it encompasses States' positive duty to cooperate under the law of State responsibility. Accordingly, States are under a duty of cooperation in order to halt serious breaches in the sense of article 40. Paragraph 1 does not define the actions meant to be taken by States in order to bring to an end such breaches, and the collaboration must be accomplished lawfully, on the basis of the circumstances of the given situation.[304] However, it is made clear that "the obligation to cooperation applies to States whether or not they are individually affected by the serious breach", and what is actually called for is a joint and coordinated attempt to thwart the effects of these violations.[305] At the same time, the Commentary deems it may be still doubtable whether general international law imposes a positive duty of cooperation, and paragraph 1 is said to reflect the progressive development of international law.[306] Nevertheless, major international human rights treaties and instruments recognize and claim the concerned positive duty as a condition to successfully fulfil the enshrined rights; as the same has been demonstrated in the context of the Genocide Convention and Geneva Conventions. As a matter of fact, paragraph 1 can be perceived with the purpose to foster existing systems of cooperation, as accordingly States are asked for a concrete response to the serious breaches referred to in Article 40.[307] Pursuant to paragraph 2 of Article 41, States are under a "duty of abstention", which entails a first duty not to recognize as lawful a situation which emerges from serious breaches and, secondly, the duty not to aid or assist in maintaining that situation.[308] The existence of the first obligation already finds support in international practice and in decisions of the ICJ.[309] The second negative duty contained in paragraph 2 deals with conduct which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law."[310] As the duty to cooperate under the law of State

[302] *Ibid.;* chapter III, § 5.
[303] *Ibid.*
[304] *Ibid.;* Art. 41, § 3.
[305] *Ibid.*
[306] *Ibid.*
[307] *Ibid.*
[308] *Ibid.;* Art. 41, § 4.
[309] *Ibid.;* Art. 41, § 6.
[310] *Ibid.;* Art. 41, § 11.

responsibility has been assessed, despite the fact Article 41(1) is in need of further confirmation by State practice, it is therefore possible to identify the consequence of its violation, *ergo*, international responsibility through the invocation of responsibility by an injured State. As a point of fact, on the basis of Article 42(b)(i) "[a] State is entitled as an injured State to invoke the responsibility of another State if the breached obligation is owed to a group of States including that State, or the international community as a whole, and the breach of the obligation specially affects that State". The expression "group of States" is designated to indicate a group of States, as a sizeable number of States in the world or in a region, which have committed to achieve a collective purpose.[311] Subparagraph (b)(i) discloses that a State is injured if it is "specially affected" by the violation of a shared obligation. Like Article 60(2)(b) of the 1969 Vienna Convention, where the term was taken from, subparagraph (b)(i) defines neither the nature nor the impact's degree that a State must have held up in order to be regarded as "injured",[312] as according to the commentary this will have to be assessed on a case-by-case basis.

2.4 Responsibility to Protect at Regional Level

The following section pursues to study how RtP has been adopted and implemented at regional level considering the European, Inter-American, and African system. During the 9th annual meeting of the Global Network of RtP Focal Points held in 2019 it was discussed the unique role, played by regional organizations, in engaging to counter mass atrocities as well as to safeguard civilians, due to their political understanding of dynamics within the countries where atrocities take place.[313]

2.4.1 The European Union's Responsibility to Protect

The European Union (EU) as an organization has repeatedly reaffirmed its commitment to RtP through dialogues between its institutions and *vis-à-vis* the outside world.[314] The European Security Strategy agreed in 2003 with its threefold agenda of crisis management, consisting of prevention, response and post-conflict reconstruction may be regarded as the EU's version of RtP.[315] Importantly, the document asserts that "[w]ith respect to core human rights, the EU

[311] *Ibid.;* Art. 42, § 11.
[312] *Ibid.;* Art. 42, § 12.
[313] Global Centre for the Responsibility to Protect. – Summary of the Ninth Annual Meeting of the Global Network of R2P Focal Points, Global Centre for the Responsibility to Protect, 26.07.2019, accessible at https://www.globalr2p.org/publications/summary-of-the-9th-annual-meeting-of-the-global-network-of-r2p-focal-points/ .
[314] S. Kadelbach. The European Union's Responsibility to Protect. – P. Hilpold. The Responsibility to Protect. A New Paradigm of International Law?. Leiden: Brill 2014, p. 237.
[315] *Ibid.*

should continue to advance the agreement reached at the UN World Summit in 2005, that we hold a shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[316]

It is often argued that the EU, being subject of international law and regional organization, is bound by the legally binding components of RtP and equipped with abilities to play an active role in implementing it, as proved by the Common Foreign and Security Policy agenda which encloses the human rights promotion, conflict prevention and the giving of assistance to populations in the relief of disasters.[317] The EU committed itself to principles of precautionary security policies, and the EU institutions and member States explicitly refer to RtP in their declaration on the European Consensus on Development, as well as the Joint Africa EU Strategy is seen as an example of a regional partnership in conflict prevention; but once a serious crisis has occurred, the tools at the EU's disposal display certain limits.[318] It may employ its "Instrument for Stability", a financial mechanism of development politics created to respond to imminent needs; since the Lisbon Treaty, the EU also owns powers regarding the humanitarian aid, and moreover, "the institutions and the member States as early as in 2008 adopted RtP as one of their common principles under international law to guide humanitarian assistance."[319] In point of fact, the potential EU reaction has evolved through the experience obtained during the operation Artemis in the Democratic Republic of the Congo in 2003 and during the Darfur crisis beginning in 2006; but despite the fact the EU should be rigged with sufficient resources to respond to humanitarian crises, the original plan to develop military capabilities which could function independently of NATO has never been fully realized.[320] With respect to post-conflict reconstruction, "[s]trategy papers like the LRRD concept (linking relief, rehabilitation and development) as well as practice like the Rule of Law Mission in Kosovo (EULEX Kosovo) and the training mission in Mali hint of some options available to the EU."[321] To conclude, if on one hand there is no lack of commitments, concept papers and practice concerning the EU's position regarding RtP; on the other hand, invalidities within development politics and reluctant reaction show a gap between concept papers and practice.[322]

Importantly, Sweden and Netherlands have been keen advocates and noteworthy supporters of RtP from its inception and in past recent years, continuously developing their views and

[316] General Secretariat of the Council. European Security Strategy. A Secure Europe in a Better World. Brussels: Council of the European Union 2003, p. 27.
[317] S. Kadelbach, *op. cit.;* pp. 237 – 246.
[318] *Ibid.;* pp. 247 – 249.
[319] *Ibid.*
[320] *Ibid.;* p. 250.
[321] *Ibid.;* p. 251.
[322] *Ibid.;* p. 252.

position on a responsibility to protect populations from genocide, mass killing and ethnic cleansing. The Swedish Prime Minister (from 1996 to 2006) Göran Persson has for example stated that: "[p]revention of atrocities demands international action if governments fail to assume their responsibility."[323] In the report "The Netherlands and the Responsibility to Protect", the Advisory Council on International Affairs "recommends that the Netherlands incorporate and/or elaborate R2P and the concept of civilian protection when formulating strategic visions and doctrines for the Dutch armed forces"; and that RtP should also be a focal point in multilateral organisations of which the Netherlands is a member.[324] According to the report, the Council would envisage the RtP as defining "legal, moral and political obligations and responsibilities of States and the international community".[325]

2.4.2 The Inter-American Responsibility to Protect

Particularly relevant is the way the Inter-American human rights system assumes the RtP in the context of serious violations of human rights that can take the form of genocide, war crimes, crimes against humanity, and ethnic cleansing. Specifically, the Inter-American Commission and the Inter-American Court of Human Rights currently display a broad range of powers that enable them to intervene where there are serious violations of human rights in any country of the Americas, many of which have been characterized by atrocities rising to the level of crimes against humanity and war crimes.[326]

One of the major contributions of this system has been its response to amnesty laws. Notably, the Inter-American Commission and Court have developed international standards that confine the validity of such laws where serious violations like crimes against humanity or war crimes were committed.[327] In a crucial decision in 1992, the Commission found that these laws were incompatible with the American Convention and the American Declaration; and additionally, the system under investigation can provide some lessons on how proper action by international mechanisms can contribute to increase the pressure on States with the view to preventing future violations.[328] In fact, the Court orders States to prosecute and punish those responsible for

[323] D. Amnéus. Swedish State Practice 2004-5: The Responsibility to Protect. – 75 Nordic Journal of International Law 2006, p. 312.
[324] Advisory Council on Internal Affairs of the Netherlands. – The Netherlands and the Responsibility to Protect: the Responsibility to Protect People from Mass Atrocities, International Coalition for the Responsibility to Protect, 06.2010, accessible at http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/3188-the-netherlands-and-the-responsibility-to-protect-the-responsibility-to-protect-people-from-mass-atrocities .
[325] *Ibid.*
[326] C. Portales, D. Rodriguez-Pinzon. Building Prevention to Protect: The Inter-American Human Rights System. – 10 Anuario Colombiano de Derecho Internacional 2017, p. 270.
[327] *Ibid.;* p. 271.
[328] *Ibid.;* pp. 271 – 274.

massacres along with establishing that domestic legislation cannot pose obstacles to the prosecution of the perpetrators of serious human rights violations, and such decisions create public awareness about the need for robust State action in each jurisdiction to protect population against serious crimes.[329] Moreover, "[i]ndividual cases, mainly those of the Inter-American Court, are considered by many national tribunals of the Americas as authoritative sources of interpretation of the American Convention".[330] Concurrently, the adoption of *interim* measures has been a very important aspect of the concerned system's work aimed at preventing serious human rights violations. Those represent concrete instruments to exert pressure on governments to exercise protection in risky situations, and they trigger the RtP in specific situations usually connected to the existence of an armed conflict or a systematic violation of human rights.[331] In conclusion, the Inter-American Human Rights System comprises a set of norms and institutions that govern regional cooperation to foster States' international obligations *vis-à-vis* their population, as it is visible the strong component of prevention in line with RtP.

Particularly relevant and pertinent to the aim of the present section, is the inclusion of references to RtP in several National Security Strategies of USA[332]. Accordingly, it is declared the American and international support for the endorsed principle and the will to guarantee its respect and implementation. Notably, this ambition may be denoted by some passages such as: "we [the USA] will continue to mobilize allies and partners to strengthen our collective efforts to prevent and respond to mass atrocities using all our instruments of national power"[333]; together with the determination to "expect them [the allies and partners] to shoulder a fair share of the burden of responsibility to protect against common threats."[334]

2.4.3 The African Union's Responsibility to Protect

On 11 July 2000 it was adopted the Constitutive Act that established the new organization of African Union (AU), whose crucial purpose included the eradication of conflicts.[335]

[329] *Ibid.;* p. 276.
[330] *Ibid.*
[331] *Ibid.;* pp. 277 – 278.
[332] United States Congress. National Security Strategy of the United States of America. Washington DC: United States Capitol, adopted 26.05.2010; United States Congress. National Security Strategy of the United States of America. Washington DC: United States Capitol, adopted 06.02.2015; United States Congress. National Security Strategy of the United States of America. Washington DC: United States Capitol, adopted 18.12.2017.
[333] United States Congress, National Security Strategy of the United States of America, adopted 06.02.2015, *op. cit.;* p. 22.
[334] United States Congress, National Security Strategy of the United States of America, adopted 18.12.2017, *op. cit.;* p. 4.
[335] E. Y. Omorogbe. The African Union, Responsibility to Protect and the Libyan Crisis. – 59 Netherlands International Law Review 2012, p. 148.

One key provision in relation to intervention is Article 4(h) of the Constitutive Act.[336] Among the AU's founding principles, it includes "[t]he right of the Union to intervene in a Member State […] in respect of grave circumstances, namely war crimes, genocide and crimes against humanity".[337] Labelled the "non-indifference" principle, the AU's right to intervene is a call for regional governments to respond to serious human rights abuses occurring in the territory of others, and it represents a clear shift from the previous non-intervention principle.[338] According to Tiyanjana Maluwa, the first legal counsel to AU, the limitation of the grounds for intervention, set forth in Article 4, "was predicated on the understanding that these acts are now generally recognized as violations of international law".[339] Intervention is therefore permitted when international crimes occur, in line with the approach taken by the UN General Assembly in 2005 in relation to RtP.[340] A second basis for intervention within the Constitutive Act is provided by its Article 4(j)[341], which clearly enables a member State to request assistance from the AU where it is unable to protect its population in a situation of civil conflict.[342] The provision does not however demand a request to come from the State in question, leaving open the possibility for one State to ask for intervention in another, so that if that broad interpretation of Article 4(j) was accepted, it would open the possibility of intervention under the banner of RtP, without the consent of the government of the State in question.[343] If carried out outside UN Security Council authorization, AU intervention under Article 4(h) or 4(j) would appear to be incompatible with the prohibition enshrined in Article 2(4) of the UN Charter; thus, the AU and UN organs have developed a mutually-supportive relationship.[344] The difficulty, however, is that in practice the AU has been unwilling to assume the role that it has carved out for itself, as such pattern was reflected in its approach to the Libyan crisis, where it chose mediation over intervention.[345]

2.5 Concluding Remarks

Despite the political commitment qualifying RtP second pillar, the study carried out through the chapter establishes international community's potential obligations *vis-à-vis* the concerned

[336] *Ibid.;* p. 149.
[337] Constitutive Act of the African Union. Lomé 11.07.2000, e.i.f. 26.05.2001, Art. 4(h).
[338] K. N. Schefer, T. Cottier. Responsibility to Protect and the Emerging Principle of Common Concern. – P. Hilpold. The Responsibility to Protect. A New Paradigm of International Law?. Leiden: Brill 2014, p. 130.
[339] E. Y. Omorogbe, *op. cit.;* p. 149.
[340] *Ibid.*
[341] "the right of Member States to request intervention from the Union in order to restore peace and security".
[342] E. Y. Omorogbe, *op. cit.*, p. 150.
[343] *Ibid.*
[344] *Ibid.;* pp. 153 – 154.
[345] *Ibid.;* p. 163.

State. The legal analysis conducted is not devoid of challenges, as different from the one carried out in the first chapter relying mainly on primary sources of international law.

Article 1 of the Genocide Convention has become the focal point for the judicial and scholarly debate of a contractual duty to prevent genocide and, as seen above, it was the ground from which the ICJ developed an obligation of States parties to take all necessary measures to prevent genocide in the Bosnian case. Whereas, supplementary means of interpretation and State practice prove CA1 of the four Geneva Conventions to impose upon third States an international legal obligation to ensure respect in all circumstances. In the third section, soft-law instruments, accompanied by international treaties, provide evidence of consensus on the international community's duty to undertake positive action; and the law of State responsibility supports the recognition of an international legal obligation stemming from the present RtP pillar. What the first and third study of the international community's alleged duty, in the present chapter, share is a lack of robust State practice, which consequently undermines the *opinio juris* needed to claim the presence of international legal obligations on behalf of the international community. For this reason, the author values advantageous the inclusion of a section devoted to the regional implementation of RtP, which highlights States' belief to be under a legal obligation in respect to others. The way the duty to international assistance is exercised is different, but nevertheless the regional systems exhibit consciousness to be subject to an international obligation.

3. UNITED NATIONS' RESPONSIBILITY TO PROTECT

The last section of the present master thesis is dedicated to the third responsibility defined under the RtP principle. Pillar three places a duty on behalf of member States under the auspices of the United Nations system, as accordingly they are required "to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection."[346] This prompt response may actually include several of the tools the UN boasts of, from the pacific measures and regional/sub-regional arrangements, to the coercive action it has at its disposal.[347]

The question here is whether there is a legal duty to undertake the necessary measures on the part of those with the authority to do so in the UN, such as the Security Council. Among the arguments pointed out to support this idea, there is that one which refers to Article 41 of the ILC's draft articles on State responsibility as it establishes States' responsibility to halt breaches of peremptory norms of international law.[348] Nevertheless, it is still strongly disputed whether the provision sets out a positive duty as well to adopt measures through the UN Security Council (SC).[349] It has also been advocated that the ICJ's ruling in Bosnia v. Serbia may advance an emerging legal obligation to operate on the part of the Security Council.[350] However, from those propositions is not possible to derive any useful form of duty on UN actors; therefore, in order to demonstrate the legal obligation to intervene in timely and decisive manner, the writer will employ a different focus throughout her study.

It is noticeable that within the UN Charter there is no reference to the concerned principle but the latter, under relevant paragraph 139, mentions several chapters embodied in the Charter, and each chapter deserves attention. As a matter of fact, it is firstly claimed that "the international community […] also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter"[351]. The first observation to be made concerns chapter VI, as States are not under a legal duty to settle their disputes, unless it is demanded by the SC when it believes a dispute endangers international peace and security.[352] Secondly, under chapter VIII and notably under Article 52(1), States have no obligation to establish regional arrangements or agencies. It follows that from the considered chapters no legal duty derives on the international community

[346] UN General Assembly, Implementing the Responsibility to Protect, *op. cit.;* § 11(c).
[347] *Ibid.*
[348] A. J. Bellamy, R. Reike, *op. cit.;* pp. 96 – 97.
[349] *Ibid.*
[350] *Ibid.,* p. 97.
[351] UN General Assembly, World Summit Outcome, *op. cit.;* § 139.
[352] Charter of the United Nations, *op. cit.;* Art. 33(2).

to make use of such measures. On the other hand, the principle deems States are ready as well "to take collective action […] through the Security Council, in accordance with the Charter, including Chapter VII"[353]. This chapter deals with SC's action with respect to threats of peace, breaches of peace and acts of aggression, and the UN organ has in this regard specific responsibilities. For this reason, it necessitates more study and analysis and the writer will focus the attention on SC's competences and practice in order to assess its duty to intervene under RtP umbrella.

3.1 The Security Concept and the United Nations Security Council's Competences

International security law is firstly found in the United Nations collective security system and it rests on the non-use of force prohibition under Article 2(4) of the UN Charter and on the institution of the UN Security Council entrusted with the primary responsibility for the maintenance of international peace and security under Article 24 of the Charter.[354]

The establishment of the UN Security Council with such paramount duty has bolstered an acceptance among States of the idea that the security of the international community, not solely that of one State, can be undermined.[355] In fact, there has been a constant shift in recognizing more diverse issues as posing security threats: the expansion of security issues was formally welcomed when State leaders gathered at the Security Council in 1992 and referred to a range of non-military sources of instability in the economic, social, humanitarian and ecological domains as serious danger to international peace and security.[356] Therefore, the idea of international security evolved through the development of a collective security system, particularly under UN authority and "the key to that development lies in the concept of a threat to the peace, a breach of the peace, and an act of aggression under Article 39 of the UN Charter."[357] The fact that the Security Council's practice enlarged the concept of a threat to the peace is well documented:[358] from the creation of *ad hoc* international criminal tribunals in former Yugoslavia and Rwanda; the authorization of UN peace operations and adoption of legally binding resolutions on all States; to several resolutions clearly referring to the Responsibility to Protect principle and the authorization of coercive interventions in Côte d'Ivoire and Libya on the basis of such doctrine.

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[353] UN General Assembly, World Summit Outcome, *op. cit.;* § 139.
[354] N. Hitoshi. The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System. – 3 Amsterdam Law Forum 2011, p. 15.
[355] *Ibid.;* p. 17.
[356] *Ibid.;* p. 18.
[357] *Ibid.;* p. 22.
[358] *Ibid.*

The view that "threat to peace" deals uniquely with interstate relations has undergone changes since the UN Charter was drafted.[359] Actually, "through its practice the Security Council has shown that it takes into consideration as a threat to peace also a situation which emanates from within one country only and which does not really threaten anything more than the domestic peace of a country."[360] It is true however that in most cases such situations will come to represent a threat to the neighbouring countries and will therefore arise as threat to the international peace in the true sense of the term.[361] This trend finds its expression in the way the Security Council has interpreted the notion of "threat to peace" in Article 39,[362] and is tangibly manifested in the role the UN Security Council plays regarding the Responsibility to Protect doctrine. According to Article 24(1) the Security Council has the primary responsibility for the maintenance of international peace and security. As stressed by the 2017 report of the Secretary General, "[t]his responsibility stems from the call in the preamble of the Charter to save succeeding generations from the scourge of war, which […] has brough untold sorrow to mankind", and it is reinforced by the responsibilities set out in paragraph 139 of the World Summit Outcome.[363] In discharging its duties, the Council, according to Article 24(2), shall act in accordance with the purposes and principles of the UN. Paragraph 1 of Article 1 of the UN Charter, declares that a primary aim of the UN is to maintain international peace and security, and for that purpose undertake joint measures to prevent and remove the threats to peace and to suppress the acts of aggression or other breaches of the peace (referring implicitly to Chapter VII); and to elicit by peaceful means the settlement of international disputes or situations which are capable to bring about a breach of the peace (referring implicitly to Chapter VI).[364] Once the Security Council has made a determination under Article 39 that a situation constitutes a threat to the peace, the action is automatically opened to enforcement measures of a non-military kind (Article 41) or military kind (Article 42). For this reason, the interpretation of the notion of threat to peace is seriously central, and Article 48(1) of the Charter states that "the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine".[365]

[359] I. Oesterdahl. Threat to Peace. The Interpretation by the Security Council of Article 39 of the UN Charter. Uppsala: Uppsala University Swedish Institute of International Law 1998, p. 19.
[360] *Ibid.*
[361] *Ibid.*
[362] *Ibid.;* p. 21.
[363] Implementing the Responsibility to Protect: Accountability for Prevention. Secretary General A/71/1016 – S/2017/556, adopted 10.08.2017, § 18.
[364] I. Oesterdahl, *op. cit.;* p. 24.
[365] *Ibid.;* p. 30.

If a legal foundation has to be found in the UN Charter for the authorization of coercive military force to respond to mass atrocity crimes, the evident place to start is Chapter VII;[366] actually Article 42 is sufficiently clear when stating that: "should the Security Council consider the measures provided for in Article 41 would be inadequate or have proven to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security." All this language is well-articulated for its application to external threats, but it is not so obvious how it deals with internal threats to civilian security of the kind of which the principle of the responsibility to protect is concerned.[367] Due to a lack of any provision for judicial review of its decisions, the Council will keep employing considerable extent to define an "international" threat any way it likes, regardless the actual cross-border impact of a particular situation.[368] It does not have explain the choice to determine a matter to be within the scope of Article 42 and it does not explicitly do so.[369]

As made clear from the above paragraphs, to allow for an effective discharge of the UN Security Council responsibility, the drafters of the UN Charter endowed the Council with far-reaching powers. Once a situation falls into its area of competence, the Council boasts of a wide array of tools that may range from primarily preventive measures, to binding resolutions that impose sanctions, or requesting the deployment of military forces under UN command and authorizing military intervention by UN member states.[370]

3.2 United Nations Security Council Members' Responsibility to Protect

The author deeply appreciates what Andreas Kolb, in the book "The UN Security Council Members' Responsibility to Protect"[371], declared, notably that the Security Council is at the heart of the Responsibility to Protect. The crucial role played by the Security Council in relation to the concerned concept can be assumed once the paragraph, within the Outcome Document[372], dedicated to it is being analysed.

The responsibility to protect rests primarily with the State whose population is concerned, but also, although on subsidiary level, with the international community.[373] As observed through the previous chapters, RtP is framed to comprise three pillars as Secretary General Ban Ki-

[366] G. Evans. The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All. Washington DC: Brookings Institution Press 2008, p. 133.
[367] *Ibid.*
[368] *Ibid.;* p. 134.
[369] *Ibid.*
[370] S. Kolb, *op. cit.;* pp. 8 – 9.
[371] S. Kolb. The UN Security Council Members' Responsibility to Protect. Heidelberg: Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 2017.
[372]UN General Assembly, World Summit Outcome, *op. cit.;* § 139.
[373] S. Kolb, *op. cit.;* p. 21.

moon defined in his report "Implementing the responsibility to protect": the protection responsibilities of the State, the international assistance and capacity building, and timely and decisive response.[374] The military action is a last resort under a number of additional conditions only. Finally, and this is where the Security Council becomes meaningful again, interveners are demanded to have an appropriate authority to exercise military force.[375] There are no alternative sources of authority, and the General Assembly is referred to under the "Uniting for Peace" procedure, as well as regional and sub-regional organizations, under Chapter VIII and if following authorization from the Security Council is sought.[376] Focusing on the Security Council rather than on alternative scenarios can be considered as central to the endorsement of the responsibility to protect in the international agenda.[377] Therefore, the ICISS is said to have found "a common denominator", reflected in international law and practice:

> "Article 24 of the UN Charter establishes the Council's primary responsibility for the maintenance and restoration of international peace and security, and the States and the Security Council itself have gradually come to accept that the Council has the competence to intervene also in internal conflicts."[378]

The combination of Articles 24 and 39 can be appreciated in the sense that the SC is under an obligation to act whenever international peace and security are threatened or violated.[379] The substantial parts of Article 24 of the UN Charter are paragraph 1 as well as paragraph 2 sentence 1. In particular, two elements of these clauses deserve attention: the reference to the purposes and principles of the UN as directives for Security Council action in paragraph 2, and the final part of paragraph 1 which could be understood to suggest a collective ownership concept.[380] Presumably, these provisions could assign duties for the individual Security Council members to take collective action for the maintenance of international peace and security or, more broadly, to act in compliance with the purposes and principles of the United Nations.[381] It is relevant to note that the reference to the purposes and principles of the UN applies, in literal meaning, to the Security Council as a collective organ, and not to its individual members; but the assumption that the SC members bear obligations to act for the maintenance of international peace and security under the UN Charter could, however, be deduced from Article 24(1) UN

[374] UN General Assembly, Implementing the Responsibility to Protect, *op. cit.;* § 11(a) – 11(b) – 11(c).
[375] S. Kolb, *op. cit.;* p. 22.
[376] *Ibid.*
[377] *Ibid.*
[378] *Ibid.;* p. 26.
[379] K. Oellers-Frahm. Any New Obligations for the Security Council and Its Members?. – P. Hilpold (ed.) The Responsibility to Protect: A New Paradigm of International Law?. Leiden: Brill 2014, p. 186.
[380] S. Kolb, *op. cit.;* p. 319.
[381] *Ibid.*

Charter, which includes the clause that the Council, in carrying out the concerned duty, acts on account of the member States.[382] Therefore, more than any other provision, this paragraph together with its terminology provides room for a fiduciary relationship between the UN membership at large and the SC. As argued by Lepard, SC members could own "minimal legal obligations to exercise their powers for the benefit of the entire membership", including permanent five's (P5) duty to refrain from exercising veto power if this could lead to SC inaction.[383] At the same time, the prominence of the task through which the UN members have provided the Security Council with the collective security system in which they are bound by the Council's decisions, would point at minimal constraints enforced upon its members' discretion.[384]

With the introduction of the concept of RtP, in cases of genocide, crimes against humanity, ethnic cleansing and large-scale commission of war crimes, the conditions of Article 39 have to be considered fulfilled, empowering the SC to adopt legally binding enforcement measures.[385]

The question remains however what it exactly means that the members of the SC are obliged to act in respect with the UN principles. As the individual members of the SC are bound by the same principles of the organ as such, they have to collaborate when the SC discharges its duties to maintain or restore peace and security, and so they are meant to consider and finally employ all means available to prevent the occurrence of crimes solicited under RtP.[386] Nevertheless, it is noticeable that if they believe that the measure proposed is not appropriate to reach the goal pursued, they may vote against the resolution; and secondly, it is known that one single permanent member owns the power to prevent any action of the SC.[387] A look at Article 27(3) of the UN Charter is not useful, since the Charter itself does not use the term veto and only demands "an affirmative vote of nine members including the concurring votes of the permanent members." Since the Charter is silent on this matter, the legal quality of the veto must be deduced from the purpose characterizing the veto system.[388] The exercise of the veto can lead to a violation of primary rules, such as the obligation to prevent genocide arising under Article 1 of the Genocide Convention, but then it is the violation of the treaty provision which is relevant and triggers responsibility, rather than an abuse of the veto power; therefore revealing

[382] *Ibid.;* p. 320.
[383] *Ibid.;* p. 321.
[384] *Ibid.*
[385] K. Oellers-Frahm, *op. cit.;* p. 188.
[386] *Ibid.;* pp. 190 – 191.
[387] *Ibid.;* p. 191.
[388] *Ibid.;* p. 192.

that the veto does not have proper legal value and does not give rise to any legal obligation, and thus cannot lead to legal responsibility.[389]

If RtP third pillar is considered as a legal obligation, the failure of the SC to undertake measures could constitute an illegal act entailing responsibility because, as mentioned before, the SC would be under the obligation to act.[390] The fact that the UN possesses legal personality means that it bears responsibility which is distinct from that of its members. Article 2 of the Draft Articles on Responsibility of International Organizations (DARIO)[391] makes it clear that the responsibility of an international organization is linked to its legal personality. As also omissions trigger responsibility (Article 4 DARIO) the failure of the SC to take measures in cases of RtP would entail the responsibility of the organization.[392] If the SC does not take action in a particular case of RtP because a permanent member exercises its veto power, it seems however debatable whether the issue of responsibility can be solved simply by linking to the responsibility of the organization flowing from its legal personality.[393] This strict position was however supported by the Special Rapporteur in his report on the responsibility of international organizations with regard to the situation of Rwanda, where he claimed that assuming "that the United Nations had been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations."[394]

On the other side, the responsibility of a member State is not ruled out, as such situations are addressed in Articles 58 to 62 of DARIO, which concern aid or assistance in the commission of wrongful acts, direction and control in such acts, coercion, the circumvention of international obligations or the acceptance of responsibility or leading the injured party to rely on its responsibility. Nevertheless, it is not commonly assumed that these provisions are applicable in cases of an "abusive" exercise of the veto power.[395] Nonetheless, the acceptance of a particular responsibility in RtP cases by the five permanent SC members could be secured by reference to the report of the Secretary General on "Implementing the Responsibility to Protect". Here it was underlined that such members "bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter."[396] In

[389] *Ibid.*
[390] *Ibid.;* p. 196.
[391] International Law Commission. Draft Articles on the Responsibility of International Organizations. Supplement No. 10 (A/66/10). Geneva: International Law Commission sixty-third session 2011, not yet ratified.
[392] K. Oellers-Frahm, *op. cit.;* p. 196.
[393] *Ibid.;* p. 197.
[394] G. Gaja, Special Rapporteur. Third report on responsibility of international organizations. Geneva: International Law Commission fifty-seventh session 2005, § 10.
[395] K. Oellers-Frahm, *op. cit.;* p. 198.
[396] UN General Assembly, Implementing the Responsibility to Protect, *op. cit.;* § 61.

conclusion it has to be stated that the cases triggering the responsibility of member States of an international organization appear limited and that DARIO aim at engaging in the first place the responsibility of the organization, and only in cases where specific voluntary conduct of a State party is present, the responsibility of a member State.

3.3 Case Studies

From the study of the relevant provisions emerged a possible UNSC's duty to take the action in case of a State's failure to halt RtP international crimes; but at the same time no SC's member State has ever been called before the ICJ, for instance, for not having undertaken appropriate measures, like in the Syrian case where no humanitarian and military intervention has been authorized on the basis of RtP. Moreover, it remains open to question whether to require for SC's involvement some kind of provable external element, like cross-border refugee flows, is needed in order to make such case a threat to "international" peace and security. Nevertheless, according to the writer this element could be relevant but not necessary as the crime of genocide, crimes against humanity and war crimes are peremptory norms of international law, and therefore the prompt action of the SC should be triggered due to their specific nature.

For this reason, *opinio juris* will be searched for in SC's practice, as a form of potential evidence, including a study which is significant to exhibit how the UN Charter has been envisaged in relation to the severe international crimes' challenge.

3.3.1 The United Nations Charter and the Prevention of Mass Atrocity Crimes

On the occasion of the 2009 General Assembly formal debate on RtP, many speakers noted that the concept was rooted in the UN Charter; and for instance, Benin explicitly placed the third pillar of the concept in the UN Charter.[397] Significantly, the Beninese delegation not only regarded the third pillar as being coherent with the Charter, but also claimed that member States of UN had obligations resulting from the premises made in the UN Charter.[398]

Actually, when the UN Charter was referred to during the protection of civilians debates, it was primarily mentioned "as a framework that defined and limited competence and powers in the area of the protection of civilians."[399] Moreover, such argumentations have not only been advanced by States that are generally sceptical of collective international intervention for the protection of populations.[400] In fact, they are in line with the World Summit Agreement on the

[397] S. Kolb, *op. cit.;* p. 382.
[398] *Ibid.;* pp. 382 – 383.
[399] *Ibid.;* p. 383.
[400] *Ibid.*

responsibility to protect, in which the member States declared their willingness to take collective action "in accordance with the UN Charter".[401]

The SC itself and the individual member States have highlighted the link between the prevention of mass atrocities and the maintenance of international peace and security.[402] As a matter of fact, the presidential statement issued for the SC during its open debate on the protection of civilians in 2010 for instance, determined that the protection of civilians was "at the core of the work of the United Nations Security Council for maintenance of peace and security."[403] Similarly, the 2014 resolution recognized the urgency to secure respect for international humanitarian law in the context of the Council's primary responsibility for the maintenance of international peace and security.[404] Additionally, with the aim to recognize RtP's bond with the maintenance of international peace and security, several States "have applied prescriptive language derived from the UN Charter which suggests that they considered the SC as having the legal duties in the area of peace and security that may extend to the prevention of mass atrocity crimes."[405] Analogously, the open debates on the protection of civilians were exploited by States from all continents to denote SC's responsibilities or even obligations regarding the protection of civilians under the UN Charter; and specifically remarkable are the statements of some of the P5. By way of example, the US has defined the protection of civilians as "a fundamental element of the Security Council's obligation to ensure international peace and security", the UK marked that it was "among the Council's foremost responsibilities"; whereas China, maintaining a narrow approach to the collective international responsibility to protect, required that the primary responsibility of the SC for the maintenance of international peace and security must not be misused and that it had to exist before it allowed the Council to get proactive.[406]

Despite the acknowledgement that the considered statements, referring to the responsibilities and obligations of the Security Council, do not name the article of the UN Charter on which they are based, the reference to the primary responsibility for the maintenance of international peace and security points to Article 24(1) UN Charter.[407] New Zealand, for instance, has recognized the SC members' peculiar powers attributed by the UN Charter "to act decisively on our behalf"; together with the growing responsibilities that these members have undertaken

[401] UN General Assembly, World Summit Outcome, *op. cit.;* § 139.
[402] S. Kolb, *op. cit.;* p. 386.
[403] UNSC Presidential Statement 2010/25, 22.11.2010, Annex Protection of civilians in armed conflict, p.1.
[404] UNSC Resolution 2175, 29.08.2014, preamble.
[405] S. Kolb, *op. cit.;* p. 386.
[406] *Ibid.;* p. 387.
[407] *Ibid.;* pp. 387 – 388.

with respect to international peace and security by way of stressing the "high responsibility to the broader membership and to the people we represent"; and finally called on the SC members "to exercise more actively their responsibilities when civilians are manifestly the targets of armed attacks".[408]

3.3.2 The Security Council's Resolutions

Since the 2005 World Summit, States have with increasing frequency and intensity discussed RtP in the framework of the United Nations, and especially in the form of and by way of adopting SC resolutions.

The legal obligation, contained in Articles 24 and 25 of the Charter, for UN Charter States parties to comply with the so called decisions of the Security Council is not contingent upon the Council's action in exercise of its Chapter VII powers.[409] The ICJ supported and reaffirmed this point in its 1971 Namibia advisory opinion[410], alleging that "[i]t has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view"[411]; and the Secretary General himself referred to "States obligations to accept and carry out decisions of the United Nations Security Council"[412]. Consequently, this would comprise as well decisions addressing the risk of atrocity crimes or the expression of their commission.[413] Moreover, it is assumed resolutions serve as promoter of general legal convictions and can be regarded as evidence of State practice.[414] This is also valid for abstract resolutions, not connected to a particular situation that constitutes a threat to international peace and security,[415] such as when the Security Council for its part endorsed the responsibility to protect in its 2006 resolution[416] on the protection of civilians in armed conflict, "[reaffirming] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"[417]. Since then, the SC has referred directly or indirectly to the concept in an ever-growing number

[408] *Ibid.;* p. 388.
[409] Dan Joyer. – Legal Bindingness of Security Council Resolutions Generally, and Resolution 2334 on the Israeli Settlements in Particular, Blog of the European Journal of International Law, 09.01.2017, accessible at https://www.ejiltalk.org/legal-bindingness-of-security-council-resolutions-generally-and-resolution-2334-on-the-israeli-settlements-in-particular/ .
[410] Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, I.C.J. Reports 1971.
[411] *Ibid.;* § 113.
[412] Secretary General, Implementing the Responsibility to Protect: Accountability for Prevention, *op. cit.;* § 16.
[413] *Ibid.*
[414] N. Kunadt, *op. cit.;* p. 207.
[415] *Ibid.*
[416] UNSC Resolution 1674, 28.04.2006.
[417] *Ibid.;* § 4.

of resolutions. For instance, the Security Council recalled its earlier reaffirmation of these provisions in the preamble of the 2006 resolution[418] on the situation in Darfur (Sudan) and unanimously affirmed RtP once again in the 2009 resolution[419]. Additionally, the 2009 resolution[420] concerning Chad and the Central African Republic expressly confirms the primary responsibility of the respective government to guarantee the security of civilians in their territory. The Council subsequently referred to RtP in its 2011 resolutions[421] on Libya; in the 2011 resolution[422] on Yemen, in the 2014 resolution[423] and in the 2019 resolution[424]; and through the 2018 resolution[425] on South Sudan and the 2019 resolution[426].

The writer values particularly worth noting the study conducted by Alex Bellamy, where he created a list of cases of mass atrocities for the period of time 2006 and mid 2011 based on the Uppsala Conflict Data Project's database including data from armed conflicts with high rates of intentional civilian killing.[427] The key issue of the analysis consisted in determining whether the SC was more likely to adopt a resolution when RtP was invoked. This included nineteen cases where RtP was referred to, seven where it was not, and around ten cases in which it was invoked but did not involve the commission of RtP mass atrocities.[428] The last instance of cases reflects some States' ambition to secure legitimacy for armed intervention, but such inappropriate invocations of RtP did not receive support from the international society; suggesting the existence of a common understanding among governments of the scope and target of RtP, so that efforts to misuse the doctrine are unlikely to prove successful.[429] The outcome reveals that in 53% of cases of mass atrocities where RtP was invoked by any actor, the SC adopted a resolution concerning that crisis; in contrast to 14% of cases where the principle was not claimed.[430] It follows that the relevance of this study lies in the finding that there is a clear connection between the use of RtP language by governments and the likelihood that the Council will pass a resolution on a particular issue.[431] As a little over half of the cases where RtP had been referred to by States' governments was then followed by SC's resolutions,

[418] UNSC Resolution 1706, 31.08.2006.
[419] UNSC Resolution 1894, 11.11.2009, preamble.
[420] UNSC Resolution 1861, 14.01.2009, preamble.
[421] UNSC Resolution 1970, 26.02.2011, preamble; UNSC Resolution 1973, 17.03.2011, preamble.
[422] UNSC Resolution 2014, 11.10.2011, preamble.
[423] UNSC Resolution 2140, 26.02.2014, § 27.
[424] UNSC Resolution 2456, 26.02.2019, preamble.
[425] UNSC Resolution 2428, 13.07.2018, preamble.
[426] UNSC Resolution 2459, 15.03.2019, preamble.
[427] A. J. Bellamy. The Responsibility to Protect: A Wide or Narrow Conception?. – P. Hilpold. The Responsibility to Protect. A New Paradigm of International Law?. Leiden: Brill 2014, p. 52.
[428] *Ibid.*
[429] *Ibid.*
[430] *Ibid.*
[431] *Ibid.*

it demonstrates that member States may prove to play a role in reminding the Council about its role and responsibility to adopt appropriate measures in RtP situations.

For the purpose of the section, it is equally relevant to consider the frequency as well by which the SC has adopted resolutions referring to States' responsibilities embodied in RtP. For this reason, the author will consider a publication[432] issued by the Global Centre for the Responsibility to Protect, which reports the SC's resolutions referring to RtP in the period comprised between 2006 and 2020. It is visible that almost every year, with the exception of 2008 and 2010, resolutions have been adopted by the SC, either explicitly referring to the relevant paragraphs of the 2005 World Summit Outcome Document[433], or by way of addressing States' duties as outlined within the RtP. To the present time (April 2020) eighty-four SC resolutions refer to RtP, with the highest number of resolutions adopted to deal with the situation in South Sudan (eighteen resolutions), followed by the Central African Republic (eleven resolutions); Sudan (nine resolutions); the Democratic Republic of Congo (eight resolutions); and eight resolutions addressing the maintenance of international peace and security and the protection of civilians in armed conflict. It is remarkable that from 2013 (included) the number of resolutions adopted per-year has increased. Nevertheless, if on one side it is necessary to bear in mind that this is due to the growing number of internal situations that have escalated into bloody conflicts and serious breaches; on the other side, it also suggests SC's will to be involved and to call upon States' duty to comply with international law obligations. From 2006 the SC has been stressing such need by way of exploiting its power to undertake decisions, and the latter ones, due to their nature, frequency and content can serve as an indicator of *opinio juris* on the behalf of the SC to undertake measures when a situation of non-compliance with RtP obligations approaches.

Eventually, as every adopted resolution has emphasized States' primary responsibility to protect civilians from crimes of genocide, war crimes, crimes against humanity and ethnic cleansing, the undertaken decisions may consolidate the finding, accompanied by evidence of *opinio juris*, that characterized the study of the first chapter, notably that States own the legal duty to protect their populations from severe international crimes. This allegation deals with the role played by international organizations' resolutions in providing evidence of customary international law. This aspect will not be discussed in detail, but it is relevant to recognize what

[432] Global Centre for the Responsibility to Protect. – UN Security Council Resolutions and Presidential Statements Referencing R2P, Global Centre for the Responsibility to Protect, 17.01.2020 (last updated 11.04.2020), accessible at https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/ .
[433] UN General Assembly, World Summit Outcome, *op. cit.;* § 138 – 139.

the ILC has declared in this regard, particularly that "a resolution adopted by an international organization […] may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development."[434]

3.3.3 Instances of Military Action

In both, Côte d'Ivoire and Libya the RtP was a key ingredient in the decision by the Security Council to respond, through a military intervention, in a "timely and decisive" manner to the spectre and evidence of mass atrocities.

Starting with the first instance, the 2010 presidential election between Laurent Gbagbo and opposition leader Alassane Ouattara turned into a violent conflict when Gbagbo refused to recognize Ouattara the winner.[435] In 2011, once the conflict was over, Secretary General Ban Ki-moon reported that thousands of civilians had died due to clashes, and the UN High Commissioner for Refugees stated that more than 500,000 Ivoirians were forcibly displaced, and that almost 100,000 Ivoirians fled to neighbouring countries as a result of violence.[436] Gbagbo's and Ouattara's forces were visibly not protecting civilians and committed grave human rights breaches which could involve crimes against humanity.[437] In an attempt to protect the people of Côte d'Ivoire from further atrocities, a military operation began in April 2010 following the deployment of UN Operations in Côte D'Ivoire (UNOCI) by the Secretary General, who commanded to undertake the essential actions to avert the employment of heavy weapons against the civilians.[438] The UNSC passed Resolution 1962 in December 2010 which prolonged the mandate of UNOCI through June 2011 by way of supplying supplementary troops and personnel support to the mission; and subsequently, the Security Council unanimously adopted Resolution 1975 that imposed targeted sanctions on Gbagbo, and "stressed the support given to the mission to use all necessary means within its mandate to protect civilians under threat."[439] Moreover, this resolution deemed that attacks directed against civilians could consist of crimes against humanity, and asserted the primary responsibility of all States to protect.[440]As soon as the Secretary General noticed that Gbagbo's supporters

[434] International Law Commission. Draft Conclusions on Identification of Customary International Law. Supplement No. 10 (A/71/10). Geneva: International Law Commission seventieth session 2018, not yet ratified, Conclusion 12(2).
[435] International Coalition for the Responsibility to Protect. – The Crisis in Cote d'Ivoire, International Coalition for the Responsibility to Protect, no date of publication available, accessible at http://responsibilitytoprotect.org/index.php/crises/crisis-in-ivory-coast .
[436] *Ibid.*
[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*
[440] UNSC Resolution 1975, 30.03.2011, preamble.

launched direct attacks against UNOCI peacekeepers and with the aim to protect civilians,[441] he required UNOCI to "use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence, […] including to prevent the use of heavy weapons against the civilian population"[442]. Consequently, a military operation began on 4 April through UN peacekeepers and French forces with the goal to cease the use of heavy weapons on civilians. Gbagbo's insurgence ended on 11 April 2011 when he was arrested by Ouattara's forces.[443]

Whereas, in March 2011, Libyan dictator Muammar Gaddafi used deadly force against peaceful protesters and threatened to turn even more violent against the residents of rebel-held cities. Conflicts led to serious violations of human rights, so that Security Council decided to adopt unanimously Resolution 1970, that contemplated the adoption of the measures provided by Article 41 of UN Charter.[444] Such precautions included a weapon embargo against the Libyan Arab Jamahiriya, as well as targeted sanctions in the form of a travel ban for certain members of the regime, an asset freeze involving listed members of the Qadhafi family, and the referral of the situation to the ICC.[445] This last possibility is provided for under Article 13(b) of the Rome Statute, to refer situations of concern to the prosecutor of ICC and thus extend the Court's jurisdiction. By the end of February 2011, the crisis had entered a second phase as government forces fought to reacquire cities that had been taken by rebels, and they were later found primarily liable for the commission of war crimes and crimes against humanity.[446] Therefore, on 17 March 2011, the Security Council, by a majority vote of ten in favour with five abstentions, adopted another resolution,[447] in which it requested an immediate ceasefire,[448] reinforced the sanctions on the regime,[449] and declared the Libyan airspace a no-fly zone[450]. Notably, the decisive aspect of such resolution was the mandate given to member States to "take all necessary measures […] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya"[451]. Successively, an international coalition of willing States commenced to conduct airstrikes under the leadership of France, UK and US; and then, in March 2011, NATO assumed full command and control of the military operations against

[441] International Coalition for the Responsibility to Protect, The Crisis in Cote d'Ivoire, *op. cit.*
[442] UNSC Resolution 1975, *op. cit.;* § 6.
[443] International Coalition for the Responsibility to Protect, The Crisis in Cote d'Ivoire, *op. cit.*
[444] S. Kolb, *op. cit.;* p. 483.
[445] *Ibid.*
[446] *Ibid.*
[447] *Ibid.*
[448] UNSC Resolution 1973, *op. cit.;* § 1.
[449] *Ibid.;* § 13 *et seq.;* § 17 *et seq.*,§ 19 *et seq.*
[450] *Ibid.;* § 6.
[451] *Ibid.;* § 4.

Libya.[452] Finally, in October 2011, Muammar Gaddafi was killed by rebel fighters; and afterwards, the National Transitional Council declared that Libya had been fully liberated.[453]

Côte d'Ivoire and Libya represent the sole instances where the Security Council intervened militarily under RtP umbrella in a "timely and decisive" manner. On one side those cases are relevant, as they are representative of the SC involvement by the adoption of resolutions under Chapters VI and VII of the Charter, through the referral to the ICC and the role played by NATO; but on the other side, related practice is limited to such occasions, and this strongly undermines the *opinio juris.* Similar but different is the case of non-intervention in Syria, where the situation became dramatic in 2011 with the civil conflict between President Assad and the rebels. In this circumstance, no humanitarian or military intervention had been undertaken on the basis of the responsibility to protect. From the writer's point of view, the differences with the Libyan-case that led to non-intervention are linked to Assad's control over the State; the strategic role played by Syria in Middle-East and the allies that support the regime, Russia and China, which threatened the use of veto. As a matter of fact, it is noticeable that strategic and geopolitical interests influence the interventions of the international community, short sighted in front of systematic human rights' violations.

It results that the material element of a settled practice, accompanied by the psychological element of a belief that is required under a rule of law, is not sufficiently relevant to assume that the SC deem to be under a legal duty to act. It follows that, if on the one hand the aspiration to introduce a reference to RtP within the UN Charter is excessively ambitious, the principle would rather be in need of additional consistent practice under the auspices of the UN system. This reflects the development and evolution that UN peacekeeping operations have gone through: the current well-known peace operations share with RtP the lack of a direct legal basis under the Charter, but thanks to substantial practice and experience the operations managed to move ahead and nowadays they are regarded among the tools employed to counter threats to international peace and security. Building precedents is indeed a necessary element before one can talk about SC duty to act under RtP umbrella and therefore, a new body of cases, hopefully positive ones, is required.

3.4 Concluding Remarks

It would seem as if the Security Council has begun a new line of practice with respect to the interpretation of Article 39 implying that civil wars, severe human rights crimes and serious

[452] S. Kolb, *op. cit.;* p. 484.
[453] *Ibid.;* pp. 484 – 485.

violations of international humanitarian law, among other things, do constitute real threats to international peace and security and give rise to a "threat to the peace" under Article 39.

In particular, by means of analysing relevant UN Charter provisions that enshrine the SC's competences, it emerges a potential duty on the UN executive organ to intervene, militarily or not, in case of RtP violations. At the same time, the finding from the theory requires to be reflected in the practice, as a form of evidence. In fact, what emerged is that the SC has adopted more than eighty resolutions that refer to the responsibility to protect. It has reminded governments of their primary responsibility to protect, urged national authorities to ensure accountability for breaches of international human rights and humanitarian law, and has twice mandated military operations to halt the occurrence of serious international crimes. The final assessment clearly displays that SC's practice appears to be split from the moment that on one side, resolutions have been deployed constantly and rigorously; whereas, military interventions pro RtP obligations' compliance do not lead to salient precedents upon which to base the SC's concerned duty. As a matter of fact, only if the SC's practice builds on a continuum of actions to prevent and stop mass atrocities through the undertaking of measures it boasts of and *opinio juris* is created over time, UNSC's legal obligation to act, as defined under RtP pillar three, could eventually emerge as a norm of customary international law.

CONCLUSION

The purpose of the presented master thesis was to assess the legal nature of RtP principle's pillar responsibilities, leading to the emergence of international obligations within the doctrine capable of triggering State responsibility, in case of State's omission to protect its own population or to intervene in support of the State where serious international crimes are occurring. As a point of fact, the research problem of the paper lies in the perception that the Responsibility to Protect does not bind the States of the international community and that it does not impose duties on them to prevent or act before severe international crimes. Therefore, the study was meant to demonstrate that RtP does not merely consist in a non-legally binding resolution, but by analysing, exploiting, and identifying its legal basis it has been proved that it is embedded in existing international law.

In order to achieve this final goal, the author has considered separately the three pillars that make up the principle, with a view to establishing their content and the *opinio juris* as to their normative character. In this way, international obligations have been questioned on behalf of the States themselves, the international community and the UNSC. The first research question aimed to analyse upon which sources of International Law and International Human Rights Law the legal nature of RtP can be determined. For this purpose, the thesis firstly examined the first and second pillar and studied the relevant instruments necessary to derive the legal obligations.

The first RtP pillar claims the responsibility of the State to protect its population from genocide, war crimes, crimes against humanity and ethnic cleansing. By way of exploiting international and regional human rights treaties and customary international law, it has been demonstrated States' legal obligation to prevent the commission of the four international crimes on their territory. In addition to the uncontested role played by the Genocide Convention and the Geneva Conventions in deriving State's obligation to prevent the crimes enshrined in those instruments; the responsibility to prevent mass atrocities articulated in RtP is firmly rooted in international human rights law, with respect to the duty that States have to protect individuals within their territory. In fact, the "duty to protect" developed in international human rights law is functionally a duty of prevention. States are required to comply with human rights and to undertake reasonable measures to ensure that non-State actors do not infringe upon fundamental rights of others. The analysis and study of this first obligation has turned to be relevant as clearly supported by pertinent conventions and followed by State practice. Interestingly, while the crime of genocide and war crimes are embodied in their own international treaties; crimes

against humanity are not codified in a particular instrument and therefore, it required a detailed study of international human rights law in order to derive and demonstrate the concerned obligation. Similarly, the crime of ethnic cleansing is not codified and additionally it is not recognized by the Rome Statute of the ICC as a separate international crime. Its study has shown that it may take the form of the other cited crimes and due to this finding, it was not taken into consideration in the analysis of the following RtP pillar responsibility. It results that pillar one of RtP represents a continuing legal obligation on the behalf of States at all times to prevent atrocity crimes within their borders.

The RtP further builds on obligations establishing the international community's responsibility to assist the State to fulfil its responsibility to protect. The interstate obligation to prevent mass atrocities is, however, not as clear under international law. The due diligence standard notably to take reasonable measures to prevent violations in so far as possible, in international practice and especially as articulated in the Bosnia v. Serbia judgment, reflects a developing trend in international law toward the acceptance of a positive interstate obligation to prevent mass atrocities under certain circumstances. A lack of robust State practice has been registered by the writer (especially concerning the crime of genocide and crimes against humanity), a gap which consequently undermines the *opinion juris* needed to claim the presence of international legal obligations on the international community. This is why the writer decided to demonstrate as well how the RtP has been implemented and developed at regional level, from the moment the results of the analysis clearly establish States' belief to be under a legal obligation in respect to others. It follows that such States' responsibility is not as much consolidated as the findings revealed for the first legal obligation considered. If on one side, an interstate obligation may be presumed from Article 1 of the Genocide Convention and CA1 of the Geneva Conventions; on the other side, are mostly soft-law instruments those that deem international solidarity an international community's duty, and it is noticeable that the duty to cooperate under the law of State responsibility necessitates further confirmation by State practice. It results that in this instance, progress will be necessary in the nearest future to grant positive State practice and to ensure the advancement of international law.

At the same time, the writer was interested in examining whether the UN Charter is supportive or not of RtP and the second research question looked at the circumstances where the UN Security Council may come to play a role under RtP umbrella. To solve these questions the third RtP pillar responsibility has been analysed as well, with the purpose to ascertain international community's responsibility to take timely and decisive action under the auspices of the UN system, in situations where a State has manifestly failed to protect its population

from the four crimes. Most of the scholars have supported the idea according to which there is a legal duty to undertake appropriate measures on the part of the UNSC, on the basis of Article 41 of the ILC's draft articles on State responsibility and the ICJ's ruling in Bosnia v. Serbia. As these argumentations are still strongly disputed, the writer decided to focus on the competences of the SC and on its practice to derive SC's duty to act in case of RtP breach. By way of analysing relevant UN Charter provisions that enshrine the SC's competences, it emerged a potential obligation on the UN executive organ to intervene militarily or not in case of RtP violations. As a matter of fact, it would seem as if the Security Council has begun a new line of practice with respect to the interpretation of Article 39 suggesting that serious human rights crimes do constitute real threats to international peace and security and give rise to a "threat to the peace". In a second moment the writer turned to the practice as a proof of evidence and with the aim to answer to the third research question dealing with the study of relevant case studies capable of providing sufficient practice and *opinio juris.* Findings revealed on one side, a positive outcome supportive of the presence of a legal obligation on the SC, notably more than eighty resolutions referring to RtP; whereas, SC's duty to act in military terms is not supported by sufficient practice, as it turns to be limited to two instances.

The findings achieved throughout the study of the three RtP pillar responsibilities have demonstrated that the hypothesis of the paper has been satisfied, from the moment the RtP principle has strong legal roots in international law. At the same time, this hypothesis does not prove to be equally valuable for all three responsibilities embodied in RtP doctrine.

In fact, it has been demonstrated that State's primary responsibility to prevent the occurrence of severe international crimes on its territory is deeply rooted in international law, as the concerned legal obligation derives from international and regional conventions and customary international law. Different were the assessments of the second and third RtP responsibility, since they did not prove to hold uncontested legal obligations on behalf of the international community and the UNSC, due to the presence of gaps. Considering the international community's responsibility to assist the State to fulfil its responsibility to protect, the gap is given by the substantial presence of soft-law instruments that, despite their relevant role, are not legally binding and by the scarce State practice which weaken the *opinio juris* necessary to establish the legal obligation. The main challenges that prevent to claim UNSC's legal duty to undertake necessary measures, deal with the flexible notion of international security and the consequent far-reaching powers the SC has been endowed with, which make complicated the identification of the limits to the SC's action. Moreover, in this case as well the lack of sufficient practice does not enable to claim SC's duty to act militarily in case of State's manifested failure

to protect its population from the four crimes. One more challenge is given by the identification of the consequences that may emerge in case of SC's violation of a legal obligation; thus, whether its member States would be responsible or not. This issue deserves major study and deepening. For this reason, a possible future research avenue on the concerned principle may deal with the careful study of the international solidarity and member States' responsibility for UNSC's conducts.

It follows that to concretely assert an international legal obligation on behalf of the international community and the UN Security Council under RtP umbrella, what is primarily needed is additional practice. Implementation can make the difference, as testified by the growing number of RtP resolutions adopted by the SC, in order to build up a continuum of evidence and to create *opinio juris* over time. Consequently, the initial ambition has not been met because up to now RtP as a whole can not be regarded as a form of State responsibility.

Finally, by way of looking at the content of RtP responsibilities and at the *opinio juris* to their normative character, it is visible that they are not devoid of legal content. In fact, States' primary responsibility to prevent serious international crimes has been proved to be an international legal obligation; while the other responsibilities display relevant legal content with the potential to turn into a legal duty with the support of greater practice and progress. A salient observation to do is that the responsibilities embodied in the RtP principle have never been so prominent and essential as they are nowadays due to the current international scenario, as it is possible to infer from States' recent and ongoing cases cited throughout the chapters, and due to the potential advancement of international law. This means that the present and following years have the strength to create the practice needed to regard all three RtP responsibilities as international legal obligations.

Eventually, the present master thesis prompts to consider the Responsibility to Protect a tool to safeguard and implement already existing legal (and soft law) obligations to counter the crime of genocide, war crimes, crimes against humanity and ethnic cleansing. For this reason, the writer is determined to keep researching on and monitoring related developments and to focus on the second and third RtP pillar responsibility with the ambition to contribute to their consolidation.

ABBREVIATIONS

ACHR	American Convention on Human Rights
AU	African Union
CA	Common Article
CAT	Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
DARIO	Draft Articles on the Responsibility of International Organizations
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
ILC	International Law Commission
P5	Permanent five
RtP	Responsibility to Protect
SC	Security Council
UDHR	Universal Declaration of Human Rights
UNOCI	United Nations Operations in Côte D'Ivoire

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