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Embracing the 'responsibility to protect': a repertoire of measures including asylum for potential victims

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Abstract

At the 2005 World Summit, the United Nations General Assembly unambiguously recognized a collective international responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Each State has the responsibility to protect their population from these four egregious crimes and the international community, through the United Nations, also has the responsibility to protect these same populations. The recognition of a positive obligation inherent in the concept of sovereignty represents a substantial leap forward in international law.

The implications of this "Responsibility to Protect" ("R2P") remain controversial and the future of the concept remains uncertain. This paper addresses the potential operational substance and application of R2P on the ground. This paper does not address the distinct issue of criteria for humanitarian intervention. Distinction between these two concepts is critical to an understanding of the potential impact of R2P. There are a number of measures short of military intervention that are less controversial and are directly implicated by the recognition of a collective R2P.

The debate surrounding the limits of, and criteria for, military intervention in the affairs of a sovereign State to prevent mass atrocities in the context of R2P can and should continue. Meanwhile incidents of genocide, war crimes, ethnic cleansing, and crimes against humanity can be greatly diminished by operational application of R2P through domestic and international humanitarian actors who can provide early warning, risk analysis, technical assistance and capacity building, as well as international protection through asylum and other measures designed to prevent victimization.

There may be no easier way for the international community to meet its responsibility to protect than by providing asylum and other international protection on adequate terms. A related concern is for states to take effective measures to ensure the protection of internally displaced persons who are often victim to R2P-related crimes. This paper seeks to identify some of the preventive, responsive and rehabilitative measures that are implicated by R2P with a focus on diplomatic, humanitarian, and other peaceful means.

Introduction

> "[E]mbrace the responsibility to protect, and when necessary…act on it"[1]
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> "Recognition of the unity of the human family, and attention to the innate dignity of every man and woman, today find renewed emphasis in the principle of the responsibility to protect."[2]
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> "The 'responsibility to protect' should imply that affected states, donor governments, and partner agencies alike, make all efforts to bring sovereignty, political will, mandates and resources into alignment with better protection…."[3]

Recent historical developments and events in Africa, the Balkans and the Middle East and the challenges they pose to the interpretation of international law and the obligations of states to protect persons in their territory has given rise to number of concerns. For example, the international community of states and civil society organisations, and in particular the United Nations (UN), were severely criticized for inaction in the face of the atrocities that took place during the 1994 genocide in Rwanda.

NATO action in the Balkans to prevent ethnic cleansing, and the subsequent UN administration of Kosovo led some commentators to argue that such actions threaten the international legal order relating to the sovereignty of states. Unilateral action by the United States government in Iraq, without initial UN support, polarized the debate on the scope and value of international law even further.

As noted in the report prepared by the International Commission on Intervention and State Sovereignty: "External military intervention for human protection purposes has been controversial both when it has happened – as in Somalia, Bosnia and Kosovo – and when it has failed to happen, as in Rwanda."[4] In this regard, how does one prevent and respond to gross and systematic violations of human rights in situations where the sovereign state is either unwilling or unable to do so, and where intervention, albeit for humanitarian purposes, might be considered a violation of state sovereignty and international law?

The 2005 World Summit Outcome document, which was adopted at an unprecedented gathering of UN member states, demonstrated broad acceptance of a new norm referred to as the "Responsibility to Protect" (R2P).[5] Its unanimous acceptance at the 2005 World Summit provides evidence of the widespread approval of R2P as a developing legal norm, however, there remains less consensus on the scope and limits of R2P. A key question is what practical value R2P would have for the UN and other actors on the ground?

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[1] Kofi Annan, Report of the Secretary-General, *In Larger Freedom: towards development, security and human rights for all,* (Hereinafter '*In Larger Freedom*') ¶135, UN Doc. A/59/2005 (Mar. 2005).

[2] Pope Benedict XVI, Statement by Pope Benedict XVI, delivered to the United Nations General Assembly, available at: http://www.un.org/webcast/pdfs/Pope_speech.pdf (New York, 18 April 2008)

[3] Erika Feller, Statement by the Assistant High Commissioner for Protection, at 4, delivered to the 57th Session of the Executive Committee to the United Nations High Commissioner for Refugees, available at: http://www.unhcr.org/excom/44b36a6d2.html, Geneva, 2 October 2006.

[4] The International Commission on Intervention and State Sovereignty (Hereinafter "ICISS"), The Responsibility to Protect, at VII (Dec. 2001), available at http://www.iciss-ciise.gc.ca/report-en.asp (follow "View Document (PDF)" hyperlink) (last visited 28 Jan. 2008).

[5] World Summit Outcome (Hereinafter "WSO") Document, GA Res. 60/1, ¶¶138-9, UN Doc. A/Res/60/1 (24 Oct. 2005).

At a minimum, there is agreement that R2P is an emerging international legal norm that recognizes an obligation on states and the international community to protect potential victims from genocide, war crimes, ethnic cleansing and crimes against humanity through a broad spectrum of *preventive, responsive* and *rehabilitative* measures that have yet to be identified.[6] The concept is plagued by a number of misconceptions however, and as noted its practical implications have yet to be developed.[7]

This paper argues that there is a need for common understanding concerning measures implicated by R2P and its practical application in the field. Mischaracterization of R2P as nothing more than military intervention cloaked in political rhetoric remains a road block for many.[8] This paper thus focuses on the scope and meaning of the concept, as well as measures short of military intervention that are derived from R2P which can effectively protect potential victims. In particular it is argued that the grant of asylum and other protection measures are a good starting point to enacting R2P as they are devoid of the controversy surrounding military intervention. Moreover the grant of asylum is enshrined in a well-established treaty framework and it is an effective tool to prevent victimization in the context of the relevant crimes delineated under R2P.

Part I of this paper will discuss the historical context behind the emergence of R2P as an emerging norm of international law. Part II will identify and address several misconceptions surrounding R2P; and finally Part III will focus on giving substance to the concept of R2P, especially through granting asylum and refugee protection on adequate terms.

The emergence of the responsibility to protect

> "[T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach."[9]

Until recently international law has been dominated by a 'state-sovereignty-oriented approach', where states are the primary subjects of the international legal order and are bound only through consent. A human-rights-oriented approach has progressively informed the

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[6] ICISS at ¶2.29

[7] See for example, Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *American Journal of International Law* (January 2007).

The subject of this article is based on work UNHCR has undertaken along with colleagues from the UN secretariat and agencies, funds and programmes in an informal working group established by the Executive Committee on Peace and Security (ECPS) to identify and develop a 'repertoire of measures' that would contribute to the fulfillment of R2P. These discussions within the UN, at the working and principals levels, and the more recent work of the newly appointed Secretary-General's Special Adviser for the Prevention of Genocide and Mass Atrocities and Special Advisor on the Responsibility to Protect respectively, in addition to public seminars and conferences are continuing. Any proposals to establish a mechanism within the UN on R2P, particularly if there are budgetary and staffing implications, will ultimately have to be agreed to by the UN General Assembly and its relevant committees and possibly other organs such as the Security Council.

[8] ICISS at ¶¶2.1, 2.2. Also see Michael Byers & Simon Chesterman, 'Changing the Rules About Rules?', in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, 177, 190-94, JL Holzgrefe & Robert O Keohane eds, Cambridge University Press, 2003.

[9] *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶97 (Appeals Chamber decision, 2 October 1995)

state-sovereignty focussed perspective over the years following the atrocities of World War II.[10] Within a human-rights-orientation the focus on individual human beings as the basis for society, rather than the interests of the state, has increasingly gained currency. Based on this perspective the consent and welfare of the human individual is of paramount consideration, and states and international organizations exercise legitimate power only to the extent that they protect and meet the needs of individuals.

International law continues to function primarily through the relations of states, and the tension between the centrality of state sovereignty and the importance of human rights continues to incite debate.[11] The *UN Charter,* in Article 2(4), prohibits the threat or use of force against the territorial integrity or political independence of any state in their international relations.[12]

Moreover, Article 2(7) emphasizes that nothing in the *Charter* "shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction."[13] There are of course exceptions to the prohibition on the use of force. Article 51 allows individual or collective self-defence against an armed attack, while Article 39 allows for intervention where the Security Council has determined that there is a threat to the peace, breach of the peace or act of aggression.[14]

Several questions have been raised about what constitutes a threat to the peace within the meaning of Article 39 of the *Charter*, such as, whether an internal armed conflict can be a threat to the peace.[15] Questions have also been raised as to what constitutes collective self-

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[10] The international human rights movement was solidified on 10 December 1948 when the United Nations General Assembly adopted the *Universal Declaration of Human Rights* (UDHR). The *Declaration* codified basic civil, political, economic, social and cultural rights that all human beings should respect and protect. The *UDHR*, together with the *International Covenant on Civil and Political Rights* and its two Optional Protocols, and the *International Covenant on Economic, Social and Cultural Rights* form the *International Bill of Human Rights*. A series of international human rights treaties and other instruments adopted since 1945 provide a universal legal framework and jurisprudence for the protection of the human rights of *all* persons. Human rights norms and mechanisms adopted at the regional and national level which *inter alia* reflect the particular human rights concerns of regions, sub-regions and nation states draw upon and are complimentary to the international system of human rights protection. Most states have adopted constitutions and other laws which formally protect basic human rights as reflected in international law. For an overview of international human rights treaty law and related developments see the website of the UN Office of the High Commissioner for Human Rights: www.ohchr.org.

[11] Ramesh Thakur, *TheUnited Nations, Peace and Security*, 245, Cambridge University Press, 2006.

[12] *UN Charter*, Art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

[13] *UN Charter*, Art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.")

[14] *UN Charter*, Art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

Art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 (imposition of economic sanctions by UN member states) and 42 (use of military force by UN member states), to maintain or restore international peace and security.")

[15] *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶30 (Appeals Chamber decision, 2 October 1995).

defence, who ultimately can decide to intervene, and on what grounds?[16] Finally, is the way you treat your own citizens a matter of international law? These issues have largely been resolved in an *ad hoc* fashion on a case by case basis.[17] Without elaboration, boundaries, or consensus, the concepts of sovereignty and intervention can be interpreted in many ways to fit any political agenda. No matter how difficult consensus may be to reach, however, clarity is highly preferable to continued ambiguity.

The concept of R2P comes as the most recent development in the debate about the limits of state sovereignty and the exercise of state power. As noted by Gareth Evans: "It has taken the world an insanely long time, centuries in fact, to come to terms conceptually with the idea that state sovereignty is not a license to kill - that there is something fundamentally and intolerably wrong about states murdering or forcibly displacing large numbers of their own citizens, or standing by when others do so."[18] There would seem to be almost unanimous agreement that sovereignty gives rise to certain responsibilities; however, the language of R2P remains tentative and open to more than one interpretation.[19] In this way it remains to be seen how R2P will be substantively interpreted.

Development of the concept

> "The Responsibility to Protect is a concept in search of a definition, in search of consensus."[20]
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> "In the space of just five short years, a blink of an eye in the history of ideas, the concept of R2P - and with it, above all, the notion that sovereignty was not a license to kill, had, it seemed, evolved from a gleam in a rather obscure international commission's eye, to what now had the pedigree to be described as a broadly accepted international norm, and one with the potential to evolve further into a rule of customary international law."[21]

At the end of 2001 the International Commission on Intervention and State Sovereignty (ICISS) issued a report entitled "The Responsibility to Protect."[22] This report set in motion a paradigm shift in the debate about humanitarian intervention. The report maintained that

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[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* ICJ Judgment of 26 November 1984.

[17] *See* bibliographic entries under 'Country Cases' and 'Past Humanitarian Interventions' in the bibliography found in the supplementary volume to the Report of the ICISS: *The Responsibility to Protect: Research, Bibliography, Background*, (Ottawa: International Development Research Centre for ICISS, 2001, available at: http://www.iciss.gc.ca/pdf/Supplementary%20Volume,%20Bibliography.pdf)

[18] Gareth Evans, President of the International Crisis Group, *Delivering on the Responsibility to Protect: Four Misunderstandings, Three Challenges and How To Overcome Them*, Address to the Stiftung Entwicklung und Frieden (Development and Peace Foundation) Symposium, 20 November 2007 in Bonn, available at: http://www.crisisgroup.org/home/index.cfm?id=5190&l=1 (last visited 28 Jan. 2008).

[19] WSO at ¶138 ("The international community should, *as appropriate*, *encourage and help* States to exercise this responsibility" (emphasis added))

[20] Comment by Ed Luck, Senior Vice-President and Director of Studies, International Peace Institute (IPI); Special Advisor to the UN Secretary-General on R2P at the IPI Policy Forum 'Three Regional Perspectives on The Responsibility to Protect', held on 12 May 2008 in New York.

On the challenges of seeking consensus by UN member states on R2P see the lecture of Gareth Evans entitled 'The Responsibility to Protect: An Idea Whose Time Has Come … and Gone?', David Davies Memorial Institute, University of Aberystwyth, 23 April 2008; available on-line at: http://www.crisisgroup.org/home/index.cfm?id=5407&l=2

[21] Gareth Evans (See FN 18 above).

[22] ICISS (See FN4 above).

sovereignty imposed a responsibility on the state to protect those within its borders.[23] It further argued that where a state fails to act to avert serious harm to those within its borders, through either lack of capacity or will, that the responsibility to protect then shifts to the wider international community.[24] Sovereignty was no longer a license to violate individual human rights and intervention focused on the protection of potential victims rather than the rights, obligations, or immunities of the sovereign and the intervener.[25]

Following the release of the 2001 report, a few years later the High-Level Panel on Threats, Challenges and Change produced a report entitled "A More Secure World: Our Shared Responsibility."[26] This report recognized the responsibility to protect and seized in particular on the idea that R2P should involve a continuum of measures involving prevention, response, and rehabilitation of shattered societies.[27] This perspective was endorsed by former UN Secretary-General Kofi Annan in his report entitled "In Larger Freedom: Towards Development, Security and Human Rights for All."[28] The concept of R2P was then put forward during the 2005 World Summit.[29]

At the 2005 World Summit the UN General Assembly unanimously adopted the collective international "responsibility to protect" populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The World Summit Outcome document unequivocally recognized the responsibility of all governments to protect its population from these four egregious crimes.[30] Of particular significance it recognizes the critical role and responsibility of the *international community* through the United Nations to protect those same populations. The Summit Outcome document established a four part approach to R2P as follows:

- Each individual state has the primary responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity; and this responsibility includes prevention.

- The international community should assist states to exercise this responsibility, and ensure early warning capabilities are established and maintained.

- The international community has a complimentary responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The responsibility is met through appropriate diplomatic, humanitarian, and other peaceful means through the UN and in accordance with Chapters VI and VIII of the *UN Charter*.

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[23] ICISS at ¶¶1.35; 2.14
[24] ICISS at ¶¶2.31; 8.1
[25] ICISS at ¶¶2.16-2.20
[26] Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (Hereinafter '
'), Submitted to the Secretary-General and delivered to the General Assembly, UN Doc. A/59/565 (2 Dec. 2004).
[27] *A More Secure World* at ¶201
[28] *In Larger Freedom*, at ¶¶132, 135, Annex III(7)(b), delivered to the United Nations General Assembly, A/59/2005 (21 March 2005),
(http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement)
[29] WSO (See FN5 *supra*).
[30] WSO at ¶138-39.

- On a case-by-case basis, where the above means are inadequate and national authorities manifestly fail to protect their populations, the international community is prepared to take Chapter VII action through the Security Council.

The ICISS report put R2P in historical context by recognizing that "[h]uman rights have now become a mainstream part of international law, and respect for human rights a central subject and responsibility of international relations."[31] R2P therefore represents progress towards the replacement of sovereign impunity with a culture of national and international responsibility and accountability.[32] Today the international community of states, organizations, and other actors may judge state conduct against the growing body of international human rights norms and instruments.[33]

The source of R2P in international law: treaty and custom

The R2P concept is rooted in international law and applies to specifically enumerated international crimes, to wit, genocide, war crimes, ethnic cleansing, and crimes against humanity. R2P was limited to the context of these four egregious crimes as there is broad agreement and recognition of the need to prevent and address them.[34] The principle of non-interference is thereby preserved to the extent that there is no threat to, or breach of the peace, and more intrusive actions are limited to situations where the sovereign has manifestly failed to take such measures as would contribute to the prevention of these crimes. The listed crimes are well-established and recognized internationally as peremptory norms of *jus cogens* from which no derogation can be permitted.[35]

Therefore, preventing these crimes is an obligation under international law that is binding on all states whether or not they have signed or ratified any Convention. With the exception of ethnic cleansing, which is not defined in international law, all crimes referred to in the R2P documents are codified in various conventions and statutes in international law. Adoption and ratification of the legal framework for these crimes, through ratification and implementation of international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide[36] and the Rome Statute of the International Criminal Court[37] are critical steps towards fulfilment of R2P.

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[31] ICISS at ¶1.25. Of significance, ¶133 of the WSO commits UN member states to: "safeguarding the principle of refugee protection and to upholding our responsibility in resolving the plight of refugees, *including through the support of efforts aimed at addressing the causes of refugee movement*, bringing about the safe and sustainable return of those populations, finding durable solutions for refugees in protracted situations and preventing refugee movement from becoming a source of tension among states. [UN member states] reaffirm the principle of solidarity and burden-sharing and resolve to support nations in assisting refugee populations and their host communities." (emphasis added)

[32] ICISS at ¶2.18.

[33] Id.

[34] ICISS at ¶¶ 4.2; 4.18; 4.19.

[35] "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted by international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Vienna Convention on the Law of Treaties*, Art. 53, 23 May 1969, (Entered into force 27 January 1980); 1154 UNTS 331.

[36] *Convention on the Prevention and Punishment of the Crime of Genocide* (Hereinafter "Genocide Convention"), 9 Dec. 1948, 78 UNTS 278.

[37] *Rome Statute of the International Criminal Court* (Hereinafter "Rome Statute"), 1 July 2002, 2187 UNTS 90.

Genocide

On 11 December 1946 the UN General Assembly unanimously passed Resolution 96(I) that condemned genocide as, "the denial of the right of existence of entire human groups," and tasked a UN committee with drafting a treaty banning the crime.[38] Two years later, on 9 December 1948, the General Assembly unanimously passed the Convention on the Prevention and Punishment of the Crime of Genocide.[39]

The International Court of Justice (ICJ), in an advisory opinion about the Genocide Convention, held that the Convention is to be interpreted in line with its origins and purpose.[40] In its opinion the Court found that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation"; and recognized "the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."[41] Therefore the Convention "confirms pre-existing legal obligations that amount to international *jus cogens*."[42] States are therefore obliged to take all measures within their power to prevent the crime of genocide.

More recently the ICJ held that a state can be held responsible where it manifestly fails to take all measures within its power which might contribute to preventing genocide, and genocide then actually occurs.[43] The Convention's enforcement mechanisms are more explicit about punishment than they are about specific preventive measures, but as the title suggests the object and purpose of the Convention includes prevention and Article VIII allows any contracting state party to call upon the competent organs of the UN to take such action under the UN Charter as they consider appropriate for the prevention and suppression of acts of genocide, conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide and complicity in genocide.[44]

War crimes

The law of war has existed for hundreds of years.[45] International Humanitarian Law (IHL) was eventually codified in the four 1949 Geneva Conventions (on the wounded and sick in armed forces in the field; wounded, sick, and shipwrecked members of armed forces at sea;

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[38] GA Res. 96(I), UN Doc. A/RES/1/96 (11 December 1946), "The Crime of Genocide."

[39] For an inspirational history of the formation of the Genocide Convention and the historical cost of inaction in the face of mass atrocity see Samantha Powers, *A Problem from Hell: America and the Age of Genocide*, Basic Books, New York, 2002.

[40] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 International Court of Justice 15, 28 May 1951.

[41] Id. at 23.

[42] Comment by Juan E Mendez, former Special Adviser to the Secretary-General on the Prevention of Genocide, UNITAR Peace and Security Series Seminar, New York, 3 April 2007.

[43] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* 2007 ICJ 91 (26 February 2007).

[44] Genocide Convention, Art. I & Art. VIII

[45] From conceptions of "just war" as a medieval natural law doctrine that recognized some kinds of war as permissible when for a 'just cause' or with a 'right intention,' the law of war was gradually displaced by less substantive, more procedural conceptions such as the requirement that a just war be "declared." For a detailed description of the historical development of international humanitarian law see Marco Sassòli and Antoine A Bouvier, *How Does Law Protect in War: Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*, International Committee of the Red Cross, Geneva, April 1999. Also: Robert J. Delahunty and John Yoo, *Making War*, 93 CNLLR 123, November 2007 (*citing*: Stephen C. Neff, *War and the Law of Nations: A General History* (2005).

on the treatment of prisoners of war; and on the protection of civilian persons in time of war)[46], and 1977 Additional Protocols (on the protection of victims of international armed conflicts; on the protection of victims of non-international armed conflicts).[47] Each of these instruments contains a list of grave breaches that can be committed in both international and non-international armed conflicts.

Prior to the Geneva Conventions, the Hague Conventions of 1907 had codified the pre-existing laws and customs of war. The Nuremberg Tribunal noted that "by 1939 the rules laid down in the [Hague] Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war..."[48]

> Article 6(b) of the Charter establishing the Nuremberg Tribunal defined "war crimes" as:… violations of the laws or customs of war … including, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[49]

More recently, the Rome Statute of the International Criminal Court has laid out the most current definition of "war crimes." Article 8 recognizes that war crimes include: "Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention; wilful killing; torture or inhuman treatment…"[50] and several other specifically enumerated crimes.

In the context of war, violations by anyone (military or civilian) against protected persons (usually civilians or prisoners of war) are punishable as international crimes.[51] While

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[46] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 Aug. 1949, 75 UNTS. 31; *Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 Aug. 1949, 75 U.N.T.S. 85; *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 Aug. 1949, 75 UNTS 135; *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 Aug. 1949, 75 UNTS 287.

[47] *Protocol Additional (No. I) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, 8 Jun. 1977, 1125 UNTS. 3; *Protocol Additional (No. II) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 Jun. 1977, 1125 UNTS 609

[48] *The Trial of German Major War Criminals before the International Military Tribunal Sitting at Nuremberg*, Germany, November 14, 1945 to October 1, 1946; 41 *American Journal of International Law* 172, 248-49 (1947).

[49] *Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (Hereinafter "Charter of the Nuremberg Tribunal"), Aug. 8, 1945, 82 UNTS 280, 288.

[50] *Rome Statute*, Art. 8 ("War crimes' means grave breaches of the Geneva Conventions of 12 August 1919, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention;" See specific provisions under Art. 8(1)(a) including willful killing; torture or inhuman treatment…; (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law…In the case of an armed conflict not of an international character, serious violations of article 3 common to the four *Geneva Conventions* of 12 August 1949…any…acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause…[as well as] other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law….")

[51] *Rome Statute*, Art. 8

prosecution for war crimes has and continues to take place,[52] it is not uncommon for states to impose some kind of minor administrative punishment which *de facto* and *de jure* allows violators to act with impunity. In some instances states may even condone or encourage violations covertly if not openly.[53]

Today several international criminal tribunals have been established with jurisdiction over grave breaches of the Geneva Conventions. These include: time-limited tribunals established by Security Council Resolution such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda;[54] hybrid-tribunals established by bi-lateral treaty between the host state and the UN such as the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC); the Special Court of Sierra Leone; and the Special Tribunal For Lebanon;[55] and Special panels set-up by an interim UN civil administration and peacekeeping mission such as those established as part of the UN Transitional Administration in East Timor (UNTAET)[56], the United Nations Interim Administration Mission in Kosovo (UNMIK);[57] and finally a permanent court established by treaty, the International Criminal Court (ICC).[58]

The overall role and precedent-setting value of these international criminal courts and tribunals is a strong sign of progress in the development of international law. However, not unlike criminal courts and tribunals in a national context, the deterrent or prevention value of the international criminal institutions is questionable. It is nevertheless clear that the international and 'internationalised' tribunals serve an important and necessary function, and despite sporadic charges of inefficiency and criticism of the limited numbers of convictions to date, they will continue to play a key role in the promotion of international criminal, humanitarian and human rights law.[59]

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[52] As noted in *The Economist*: "…the world's worst tyrants have usually managed to avoid being brought to court for their crimes…[Hitler, Stalin, Mao, Pol Pot, Idi Amin, Mengistu Haile Mariam]….But with the spread of international justice over the past decade, the noose is tightening. It is now accepted that there can be no immunity for the worst violations of human rights, not even for heads of state…Serbia's president, Slobodan Milosevic, was indicted for war crimes in 1999…[Re: Ratko Mladic, Augusto Pinochet, Hissène Habré, Wojciech Jaruzelski, and Saddam Hussein]." The Economist, *War Crimes: Bringing the Wicked to the Dock* (9 March 2006) (available at: http://www.ictj.org/en/news/coverage/article/887.html)

[53] See *i.e.*: UN Econ. & Soc. Council [ECOSOC], *Report of the independent expert to update the set of principles to combat impunity*, Addendum, UN Doc. E/CN.4/2005/102/Add.1 (8 Feb. 2005) (*prepared by* Diane Orentlicher); Human Rights Watch Report, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, Dec. 2005, Vol. 17, No. 17(A) (available at: http://hrw.org/reports/2005/darfur1205/).

[54] *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* (Hereinafter "ICTY"), S.C. Res. 827, UN Doc. S/RES/827 (25 May 1993); *The International Criminal Tribunal for Rwanda* (Hereinafter "ICTR"), SC Res. 955, UN Doc. S/RES/955, 8 November 1994.

[55] *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea* (6 Jun. 2003) available at: http://www.eccc.gov.kh/english/agreement.list.aspx (last visited 28 Jan. 2008) *approved by the UNGA*, A/RES/57/228 (13 May 2003); *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone* (16 Jan. 2002) available at: http://www.sc-sl.org/documents.html (last visited 28 Jan. 2008); *Agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon*, S.C. Res. 1757, Annex, UN Doc. S/RES/1757 (30 May 2007)

[56] SC Res. 1272, UN Doc. S/RES/1272 (25 Oct. 1999); *See Also Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15 (6 June 2000)

[57] *Establishing a UN Interim Civilian Administration in Kosovo*, S.C. Res. 1244, U.N. Doc. S/RES/1244 (10 Jun. 1999)

[58] *Rome Statute* (See FN36 above).

[59] Further information and country and case-specific reports on the work of the international criminal tribunals can be found on the Human Rights Watch 'international justice' programme website at: www.hrw.org/justice

Ethnic cleansing

The term 'ethnic cleansing' is not defined in international law. However the concept is arguably encompassed within the definition of "crimes against humanity" in Article 7 of the *Statute of the International Criminal Court*[60] and Article 5 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.[61] Indeed there is overlap between 'ethnic cleansing' and each of the other three enumerated R2P crimes.[62] The kinds of grave human rights violations and mass atrocities that follow from factual incidents of so-called ethnic cleansing are crimes that often fall under the definitions for genocide, crimes against humanity, or they can fit into specific war crimes.

The term 'ethnic cleansing' was recognized within the terminology of IHL following the conflict in the former Yugoslavia between 1990 and 1995. In Resolution 46/242, the UN General Assembly recognized and condemned the practice of "ethnic cleansing," which the Assembly said constituted a "grave and serious violation" of IHL.[63] In the same resolution it was recognized that what was occurring in the former Yugoslavia was "a concerted effort by the Serbs of Bosnia and Herzegovina, with the acquiescence of, and at least support from, the Yugoslav People's Army, to create "ethnically pure" regions."[64] In Resolution 47/80, the General Assembly reiterated that those who commit or order the commission of acts of "ethnic cleansing" are individually responsible and should be brought to justice.[65]

Crimes against humanity

Crimes against humanity consist of the commission of mass atrocities. There has at no point been a specialized international treaty concerning crimes against humanity, but this category of crimes has been included in the *Charter of the International Military Tribunal of Nuremberg*, the *Statute of the International Tribunal for the Former Yugoslavia* (ICTY), the *Statute of the International Tribunal for Rwanda* (ICTR), and most recently in the *Rome*

[60] *Rome Statute*, Art. 7(1)(h) ("Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;")

[61] ICTY, Art. 5(h) ("The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (h) persecutions on political, racial and religious grounds")

[62] The case against Nikola Jorgic is particularly illustrative of this point. The Higher Regional Court (*Oberlandesgericht*) of Dusseldorf, in September 1997, found the ethnic cleansing carried out by Nikola Jorgic to be genocide. (*Oberlandesgericht Dusseldorf*, "*Public Prosecutor v Jorgic*", 26 September 1997). Jorgic appealed to the European Court of Human Rights (ECHR). The ECHR rejected the appeal, but did note that the German Court's ruling had interpreted German domestic law on genocide more broadly than more recent rulings by the ICTY and the ICJ. (*Jorgic v. Germany*, European Court of Human Rights (ECHR) (Application no. 74613/01, 2007). The ECHR further noted that in the 21st century: "Amongst scholars, the majority have taken the view that ethnic cleansing, in the way in which it was carried out by the Serb forces in Bosnia and Herzegovina in order to expel Muslims and Croats from their homes, did not constitute genocide. However there are also a considerable number of scholars who have suggested that these acts did amount to genocide." (ECHR, *Jorgic v. Germany* §47). (*See also*: *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Trial Judgement, ¶ 84 (Aug. 2, 2001); Prosecutor v. Kupreskic and Others (IT-95-16-T, judgment of 14 January 2000), § 751); *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 91 (26 February 2007)).

[63] GA Res. 46/242, Preamble, UN Doc. A/RES/46/242 (25 August 1992), "The situation in Bosnia and Herzegovina."

[64] Id.

[65] GA Res. 47/80, ¶4, UN Doc. A/RES/47/80 (16 December 1992), '"Ethnic cleansing" and racial hatred.

Statute of the International Criminal Court (ICC) among other sources.[66] The definition has been modified slightly over time from requirements that the crime be committed in connection with an armed conflict or another crime, to a more broad application encompassing a wide variety of potential mass atrocities.

The definition first laid out in Article 6 of the *Charter of the Nuremberg Tribunal* defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*; or persecutions on political, racial or religious grounds *in execution of or in connection with any crime* within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[67] This definition required that the crime be committed in connection with war and in connection with another crime within the jurisdiction of the Tribunal.

The ICTY definition was expanded to include "[t]he following crimes *when committed in armed conflict*, whether international or internal in character, and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts."[68] Again, there is a required connection to armed conflict, but no connection to any other crime is required.

The ICTR definition includes, "[t]he following crimes *when committed as part of a widespread or systematic attack* against any civilian population on national, political, ethnic, racial or religious grounds: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts."[69] Here what is required is connection to widespread or systematic attack against the civilian population, as connection with an armed conflict is not required. Finally, the ICC definition was drafted in the broadest terms to include:

> "[t]he following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecutions against any identifiable group or collectivity on political, national ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under the international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[70]

[66] Charter of the Nuremberg Tribunal, Art. 6; ICTY, Art. 5; ICTR, Art. 3; ICC, Art. 7
[67] Charter of the Nuremberg Tribunal, Art. 6 (emphasis added)
[68] ICTY, Art. 5, (Crimes against humanity) (emphasis added).
[69] ICTR, Article 3 (Crimes against Humanity).
[70] *Rome Statute*, Article 7 (Crimes Against Humanity).

The ICC definition attempts to encompass a wide variety of potential mass atrocities and does not require connection with armed conflict. The progression through these definitions is towards a crime that stands on its own, and it encompasses the diverse kinds of mass atrocities that have been inflicted in the past and that hopefully can be prevented or deterred in the future. Furthermore, crimes against humanity are a part of *jus cogens* and all states have the duty to prosecute and assist in securing the evidence needed to prosecute such crimes.[71]

Three misconceptions of R2P

Beyond defining the crimes encompassed by R2P is the challenging question of how this emerging legal concept can assist states and other actors to take specific preventive or other action to react to genocide and other mass atrocities. Another question is whether R2P is a concept worth pursuing at all? In this context, the debate surrounding the potential operational value of R2P is plagued by several preconceptions and misconceptions. These include: a mischaracterization of R2P as nothing more than humanitarian intervention with armed force; a mischaracterization of R2P as political rhetoric without any practical substance; and a misconception of R2P as unnecessary because it is simply a repackaging of other concepts for which we already have established international law. These misconceptions are usually based on legitimate fears that the concept of R2P will be abused.

A key concern among some states and commentators is that by accepting R2P they would be opening themselves up to challenges to state sovereignty, even legitimising foreign military invasion in extreme cases. Indeed some nations have expressed the view that R2P will be used as an excuse for western political dominance or a license for powerful nations to intervene in less powerful states. There are serious concerns that some powerful states would engage in 'humanitarian intervention' as a pretext to conquest, selective enforcement for discriminatory or political motives, and other potential abuses of the R2P principle.[72] In brief, without further elaboration on the legal framework and operational application, the R2P concept can be interpreted in many ways to fit any political agenda, and for many states this is sufficient reason to stifle or obstruct progress of its development.

Misconception one: R2P is another name for humanitarian intervention

First and foremost among the many misconceptions is a mischaracterization of R2P as being nothing more than humanitarian intervention. Debate about the concept of R2P often devolves into a discussion about the nature of humanitarian intervention and when it is or is not acceptable to intervene militarily. As noted by Evans: "coercive military action is not excluded as a last resort option in extreme cases, when it is the only possible way - as nobody doubts was the case in Rwanda or Srebrenica, for example - to stop large scale killing and other atrocious crimes. But it is an absolute travesty of the R2P principle to say that it is about military force and nothing else."[73]

There are measures short of armed force that are effective tools for the prevention of mass atrocities including: diplomatic efforts; engaging national and regional actors to offer protection; targeted humanitarian response; as well as ensuring international protection for

[71] *Rome Statute*, Part 9, Article 86 (General obligation to cooperate).
[72] ICISS at ¶¶1.2, 1.5.
[73] Gareth Evans (See FN 18 above).

IDPs and refugees. Several commentators have written on the "emerging doctrine" of humanitarian intervention.[74] When the ICISS issued a report entitled "The Responsibility to Protect" they tied the concept partially to humanitarian intervention.[75] Although they changed the terms of the debate by focusing on the rights of the victim and the responsibilities of the sovereign, the controversy about the use of force through humanitarian intervention remains no less polemical.

The ICISS went beyond the responsibility to 'react', and emphasized that R2P includes a responsibility to prevent and a responsibility to rebuild.[76] The succeeding core R2P documents did not focus only, or even primarily, on humanitarian intervention through armed intervention.[77] In fact the 2005 World Summit Outcome Document emphasized that Chapter VII action was a last resort[78] by noting that:

> "… this responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means … establishing an early warning capability ... [using] appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter … helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[79]

In an ideal system, humanitarian intervention would always and only be authorized multilaterally by the international community through formal UN sanction. It would be limited to situations of mass atrocity and would only be resorted to after peaceful means had been exhausted. If and when used, it would be a proportional response, transparently done, limited to the amount of force necessary, and assurances would be made to protect civilians and withdraw forces as soon as possible. The fear is that, in practice, humanitarian

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[74] See, e.g., Douglas Eisner, Humanitarian Intervention in the Post-Cold War Era*, Boston University International Law Journal*, Spring 1993; T Modibo Ocran, The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping, 25 *Boston International & Comparative Law Review,* 1 (2002), William Moorman, Humanitarian Intervention and International Law in the Case of Kosovo, 36 *New England Law Review*, 775 (2002); James D Wilets, Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection, 6 *International Law Students Association Journal of International & Comparative Law*, 645 (2000); Bartram S Brown, Humanitarian Intervention at a Crossroads, 41 *William & Mary Law Rev.* 1683 (2000); Michael L Burton, Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilaterial Humanitarian Intervention, 85 *Georgetown Law Journal,* 417 (1996)); In addition the ICISS supplementary volume provides a 16 page bibliography on 'Humanitarian Intervention' and 'Sovereignty and Intervention.' Available at: http://www.iciss.gc.ca/pdf/Supplementary%20Volume,%20Bibliography.pdf

[75] ICISS at VII (Forward)

[76] ICISS at ¶2.32

[77] *A More Secure World* at ¶201. ("[The responsibility to protect] should be taken up … spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. The primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions."); *In Larger Freedom* at ¶¶132, 135 ("We must…move towards embracing and acting on the "responsibility to protect" potential or actual victims of massive atrocities…[using] diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.").

[78] WSO at ¶139 (Prepared to take collective action, "in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.")

[79] Id.

intervention will result in abuse such as using the concept as a pretext for political or military domination, or selective enforcement for discriminatory or political motives and as a result it could compound a humanitarian crises.

Despite a lack of consensus on the legality and prudence of so-called 'humanitarian intervention' it does in fact take place, as experienced in the case of Bangladesh (East Pakistan), Cambodia, Kuwait, Kosovo, Afghanistan and Iraq.[80] In this context what is needed is not abandonment or rejection of the R2P concept, but rather continued debate and discussion about its implications and development of a legal framework that would minimize the potential for abuse.

The debate over military intervention will no doubt continue. However, the R2P concept and principle is not dependent on resolution of that debate. The adoption of R2P was recognition of the existing international duty on states and the international community to prevent and respond to incidents of mass atrocities.[81] A number of measures can be narrowly tailored to meet this responsibility "through diplomatic, humanitarian, and other peaceful means."[82] While the debate about humanitarian intervention continues, the R2P debate should focus on how to give practical substance to the concept on the ground.

Misconception two: R2P is political rhetoric without any substance

A second misconception is that R2P is political rhetoric that does nothing new, and is therefore destined to come to nothing. This misconception is related to the first, in that those who disregard R2P as mere rhetoric tend to see it as nothing more than a political slight of hand attempting to re-characterize humanitarian intervention in order to garner more support. This misconception fails to view R2P in proper historical context.

The progress made in the sphere of human rights since World War II cannot be characterized as anything less than dramatic. War was only rejected as a valid exercise of foreign policy for the first time in the Kellogg-Briand Pact of 1918. This achieved universal recognition in the *UN Charter* in 1945.[83] Since the 1948 *Universal Declaration of Human Rights* and the subsequent adoption of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* in 1966, international human rights standards have been progressively recognized in a number of different areas, and individuals and minorities have been given standing in many different contexts under international law.

The Genocide Convention demonstrates this point well. The *Convention on the Prevention and Punishment of the Crime of Genocide* was not a political knee-jerk reaction to a Second World War and the Holocaust. It was the product of more than fifteen years of work led by Raphael Lemkin to define a new crime, establish a legal and regulatory framework, and generate support and political momentum through groups in twenty-eight countries with a

[80] ICISS supplementary volume bibliography, 'Humanitarian Intervention' and 'Sovereignty and Intervention.' Available at: http://www.iciss.gc.ca/pdf/Supplementary%20Volume,%20Bibliography.pdf

[81] *A More Secure World*, Part 3, *Collective Security and the Use of Force, Synopsis* ("In all cases, we believe that the Charter of the United Nations, properly understood and applied, is equal to the task: Article 51 needs neither extension nor restriction of its long-understood scope, and Chapter VII fully empowers the Security Council to deal with every kind of threat that States may confront. The task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has.")

[82] WSO at ¶139

[83] UN Charter, Art. 2(4).

joint membership of more than 240 million people.[84] Although the Genocide Convention was unanimously adopted in 1948, it would be fifty years before the international community would convict anyone for genocide.[85] As noted by one commentator: "[Lemkin] was not naïve. He did not expect criminals to lie down and stop committing crimes. He simply believed that if the law was in place it would have an effect – sooner or later."[86]

The Genocide Convention marked the first adoption by the United Nations of a universal human rights treaty. Nonetheless, in the sixty years that have followed, the recognition of international human rights and prosecution of international crimes has dramatically increased. After the adoption by the General Assembly of the *Universal Declaration of Human Rights*, several instruments have been introduced at the international level including:

- The International Covenant on Civil and Political Rights[87]
- The International Covenant on Economic, Social and Cultural Rights[88]
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[89]
- The Convention Relating to the Status of Refugees[90]
- The International Convention on the Elimination of All Forms of Racial Discrimination[91]
- The Convention on the Elimination of All Forms of Discrimination Against Women[92]
- The Convention on the Rights of the Child[93]
- The Statute of the International Criminal Tribunal for the Former Yugoslavia[94]
- The Statute of the International Criminal Tribunal for Rwanda[95]
- Rome Statute of the International Criminal Court[96]

There are also many regional agreements and organizations that deal with human rights, such as:

- The European Court of Human Rights[97]
- The African Commission on Human and Peoples' Rights[98]

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[84] Samantha Power (See FN39 above), at p 55.
[85] *Id* at 60, 485. The first time the 1948 law was enforced was 2 September 1998 when the International Criminal Tribunal for Rwanda found Jean-Paul Akayesu, former mayor of a town in Rwanda, guilty of nine counts of genocide.
[86] AM Rosenthal, "A Man Called Lemkin," New York Times, 18 October 1988, p.A31
[87] International Covenant on Civil and Political Rights, 16 Dec. 1966, UN Doc. A/6316 (1966), 999 UNTS 171.
[88] International Covenant on Economic, Social and Cultural Rights, 3 Jan. 1976, UN Doc. A/6316 (1966), 993 UNTS 3.
[89] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, UN Doc. A/39/51, 1465 UNTS 85.
[90] Convention relating to the Status of Refugees (Hereinafter "1951 Refugee Convention"), 28 Jul. 1951, 189 UNTS 150.
[91] International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, UN Doc. A/6014, 660 UNTS 195.
[92] Convention on the Elimination of All Forms of Discrimination against Women, 18 Dec. 1979, UN Doc. A/34/46, 1249 UNTS 13.
[93] Convention on the Rights of the Child, 20 Nov. 1989, UN Doc. A/44/49, 1577 UNTS 3.
[94] ICTY (See FN54 above).
[95] ICTR (See FN54 above).
[96] *Rome Statute* (See FN36 above).
[97] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 Nov. 1950, Europ. TS No. 5; 213 UNTS 222.
[98] See *Constitutive Act of the African Union* (11 July 2002) OAU Doc. CAB/LEG/23.15 (available at: http://www.achpr.org/english/_info/constitutive_en.html).

- Inter-American Commission on Human Rights[99]
- Inter-American Court of Human Rights[100]

International protection in the form of a system of binding legal instruments and mechanisms codified in international human rights, humanitarian, refugee and criminal law has been recognized as an important priority of the international community of states, UN entities and non-governmental organisations, and R2P is the most recent result of progress made in this area.[101] R2P deals with much more than humanitarian intervention, and the core R2P documents have given the norm substance that goes beyond political rhetoric. It recognizes positive obligations inherent in the concept of sovereignty, as well as the positive obligations of the international community to ensure international protection. Furthermore it focuses on the protection of potential victims rather than the rights of one sovereign to another.

Misconception three: R2P is an unnecessary repackaging of established concepts

The third misconception is that R2P is unnecessary because it is simply a repackaging of other concepts for which we already have established international law. A number of instruments already exist to deal with mass atrocities, for example the *Convention on the Prevention and Punishment of the Crime of Genocide*, the *Geneva Conventions (IHL)*, the *Statute of the International Criminal Tribunal for the Former Yugoslavia* (ICTY*),* the *Statute of the International Criminal Tribunal for Rwanda* (ICTR), the *Rome Statute of the International Criminal Court* (ICC), not to mention provisions of the above-noted human rights treaties.[102]

First of all, R2P is an umbrella concept (not nebulous, but comprehensive).[103] It includes only those measures narrowly tailored to ensuring protection to potential victims of mass atrocities. It does not displace any of these international legal instruments, but rather strengthens them, fills gaps, and encourages adoption and implementation of them by more state parties and in that regard can act as a catalyst for state and UN response.[104]

The concern has been expressed by some UN organizations and NGOs that if certain measures are included under the umbrella of R2P, the concept will swallow everything else or dilute the mandate of certain organizations. The argument being that only a narrow reading of R2P would be consistent with the language of the World Summit Outcome Document.[105] These views are largely the result of the existing ambiguity about the implications of R2P. What is needed is identification of specific measures that are narrowly tailored to the fulfilment of the concept. And while it is true that too broad an interpretation of R2P would deprive the concept of any practical meaning beyond humanitarian assistance, it is also true that too narrow a reading would deprive the concept of any meaning beyond humanitarian intervention. Neither is likely to garner support or effectively address the identified mass atrocities as intended.

While it is correct that the R2P concept uses inclusive language, it is meant to include a repertoire of measures that are narrowly tailored to prevention, response, and rehabilitation in

[99] *Charter of the Organization of American States* (30 April 1948) 119 UNTS 3 (available at: http://www.oas.org/juridico/english/charter.html#ch15).
[100] *Statute of the Inter-American Court of Human Rights* (October 1979) OAS Res. 448 (IX-0/79) (available at: http://www.oas.org/xxxiiga/english/docs_en/cortedh_statute_files/basic17.htm).
[101] See: "New Thinking: The Responsibility to Protect" in Thomas G Weiss, *Humanitarian Intervention: War and Conflict in the Modern World*, at chapter 4, (Polity Press 2007).

the face of the four enumerated international crimes. Of course this will include measures that already exist and are already covered by an existing treaty or convention obligation. However R2P does not take anything away or dilute these elements, but reinforces them and ensures that they are implemented at a minimum in the context of preventing and/or responding to a mass atrocity.

Second it must be understood that the R2P umbrella is not all inclusive. It is limited to those measures that are designed to protect potential victims from mass atrocity. Again, as noted by Evans:

> "Of course, linguistically, one can argue that there is indeed a responsibility to protect … in the case of HIV/AIDS, or the proliferation of nuclear weapons, and much more besides. But 'human security' is much more appropriate umbrella language to use in these cases than 'R2P'."[106]

Preventing and responding to poverty or global warming could also potentially be linked to R2P, but the link is clearly attenuated. Poverty and global warming, HIV/AIDS, and the proliferation of nuclear weapons are not mass atrocities of like kind to genocide, war crimes, ethnic cleansing, and crimes against humanity. Once again, further elucidation of the R2P concept and consensus on the identification of specific measures is required to dispel this misconception.

Third, it must be understood that R2P does not displace measures that fall under its umbrella. R2P is not itself a measure like the grant of asylum or early warning systems. R2P is much more akin to sovereignty, human rights, or due process: in other words, it is a concept that requires implementation of certain measures, imposes rights and duties, places emphasis on certain obligations and fills protection gaps. For example, R2P presents an excellent opportunity to fill gaps often experienced by refugees and internally displaced persons (IDPs). The 1951 *Convention Relating to the Protection of Refugees* would not be diluted or displaced by identification of asylum or *non-refoulement* as measures that states can adopt and implement to protect potential victims from mass atrocities within the meaning of R2P. Furthermore, recognition of R2P could encourage additional steps to be taken towards the adoption of a legal framework for the protection of IDPs.

Giving R2P substance

Former UN Secretary-General Kofi Annan was instrumental in conceiving the R2P concept, working to institutionalize the norm within the UN system, interpreting where and how it could apply, and finally working to implement the norm.[107] Kofi Annan provoked debate

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[102] See FN35; 36; 51; 85-98 Above.
[103] Ramesh Thakur, supra note 11, at 257
[104] ICISS at ¶¶3.1-3.9; *A More Secure World* at ¶¶201-203; *In Larger Freedom* at ¶135; WSO at ¶¶138, 139.
[105] These views have been expressed in numerous UN-based inter-agency discussions on R2P of which the author is aware. Moreover there may be a tendency to engage in a form of self-censorship in conceptualising R2P among UN actors given that, at the end of the day, UN member states will have to endorse and agree to fund any R2P model or mechanism which the UN Secretary-General and Secretariat, as well as participating UN agencies, funds and programmes, propose.
[106] Gareth Evans (See FN 18 above).
[107] "R2P hailed as one of UN's Greatest Achievements Under Kofi Annan's Leadership," See full story at: http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=370

about the legitimacy of intervention. He rightly noted that: "states are now widely understood to be instruments at the service of their peoples, and not *vice versa* … [w]hen we read the [UN] *Charter* today we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."[108] Throughout his final months as Secretary-General, Kofi Annan consistently spoke about R2P.

Current Secretary-General Ban Ki-moon has taken up development of R2P and he has picked up where Kofi Annan left off as a strong proponent of R2P. In May 2007, the Secretary-General appointed Francis Deng, a Sudanese human rights expert, as the new Special Adviser for the Prevention of Genocide and Mass Atrocities, succeeding Juan Méndez.[109] On 11 December 2007, the Secretary-General appointed Edward Luck as Special Adviser on the Responsibility to Protect. Both Mr Luck and Mr Deng have acknowledged the value and desire of working closely together. An early description of Mr Luck's primary role will be to promote conceptual development and consensus-building on R2P.[110]

Within the UN, the Executive Committee on Peace and Security (ECPS) established an informal working group to identify and develop a 'repertoire of measures' that would contribute to the fulfilment of the R2P. Internal debate has revolved around what is meant by the so-called 'international community,' the scope of the R2P concept, and the identification of a particular repertoire of measures that are implicated by the R2P concept, amongst other issues.

The 'international community'

The 2005 World Summit Outcome Document states that "the international community, through the UN, has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the UN *Charter*, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[111] There has been considerable debate about who is meant by "the international community". One reading of the World Summit Outcome would interpret R2P as extending to the international community only as comprising UN member states. This traditionalist approach would have the UN only be an actor charged with responsibility through states and subject to their decisions. This would place the UN and its agencies in a supportive role without any separate and distinct responsibility.

A different reading would recognize that the World Summit Outcome imposes direct responsibility on the UN and its entities as members of the international community. Under this interpretation, as members of the international community, the UN Secretary-General, the Secretariat and the various UN agencies, funds and programmes have a direct, substantive and concurrent responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Given that some UN entities such as the Department of Peacekeeping Operations (DPKO), United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Fund

[108] Kofi Annan, "Two Concepts of Sovereignty," The Economist, 352 (18 Sept. 1999): 49-50.
[109] Press Release, "Secretary-General Appoints Francis Deng of Sudan as Special Adviser for Prevention of Genocide," SG/A/1070, See full story at: http://www.un.org/News/Press/docs/2007/sga1070.doc.htm
[110] Press Release, "Appointment confirmed of UN special adviser on responsibility to protect," See full story at: http://www.un.org/apps/news/story.asp?NewsID=25010&Cr=appoint&Cr1=
[111] WSO at ¶139.

(UNICEF) and the Office of the High Commissioner for Human Rights (OHCHR) play a direct role in delivering protection, it is logical that their actions should contribute to operationalising R2P. But the UN cannot act alone or in a vacuum, and accordingly its efforts must be supported by a variety of actors including intergovernmental bodies at the global, regional and sub-regional levels. In this context the international community is also represented in the important role of non-governmental organisations and the private sector.

Besides articulating the existing obligations of states, the acceptance of a *collective responsibility* to remedy any manifest failure by states in fulfilling their R2P obligations presents new opportunities for recognising the critical role and potential impact of the UN in particular. Through this process the UN becomes empowered to foster cooperation and fill protection gaps amongst its own agencies, funds and programmes, as well as its extensive network of governmental and non-governmental partners.

Resistance to the conferral of obligations on UN organizations under the R2P rubric is similar to the resistance of states: parties are often politically reluctant to recognize new international rights and obligations because they then become *accountable* for failing to uphold or violating them. Moreover recognition of R2P as a positive obligation on the UN in particular opens the door to criticism for inaction or failure (although most would agree that such criticism is already present). Yet another concern is that by closely aligning the mandates of UN actors to R2P would only serve to legitimise the actions of powerful states.

R2P (like the four crimes it is meant to address) was a recognition of existing obligations on each empowered actor to ensure protection to potential and actual victims. A reading of the World Summit Outcome document that confers direct responsibility on the UN and its entities, as members of the international community, is both the most reasonable and prudent understanding of the plain language of the document.[112] It is worth noting that a basic purpose of the UN, as authorised through the *Charter,* is:

> "… to maintain international peace and security … to take effective collective measures for the prevention and removal of threats to the peace … to develop friendly relations among nations … to achieve international cooperation in solving international problems … [and] to be a centre for harmonizing the actions of nations in the attainment of these common ends."[113]

Shrinking away from the direct substantive responsibilities recognized in the *Charter* and elsewhere, and any argument that the UN is limited to a 'supportive role' subject to the whims of each state, is both a strained reading of the plain language and is thereby detrimental to strengthening the legal regime to protect victims of mass atrocities.

Through its extensive field presence the UN is often well-placed to gather first-hand information on emerging political and humanitarian crises, advocate for protecting populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and

[112] WSO at ¶139: "*The international community, through the United Nations, also has the responsibility* to use *appropriate diplomatic, humanitarian and other peaceful means*, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity…to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations…to protect…populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out." (emphasis added).
[113] *UN Charter*, Chapter I 'Purposes and Principles', Art. 1

alert the international community to developments which may lead to these crimes taking place. In the case of UNHCR, for example, the Office can advocate for the grant of asylum and protection to potential victims and can assist states to receive and accommodate refugees on their territory.

The scope of R2P

Concerning the scope of R2P, as referred to above, some commentators have argued that R2P should be understood as applying only to a narrow set of circumstances and that there should not be a re-characterisation of current UN activities under an R2P umbrella even if a broad set of activities can, technically speaking, contribute to the prevention of the listed crimes. This reasoning is based on concern that the R2P concept will become overly broad and diluted and that a broad range of activities would be incorrectly labelled as R2P activities.[114] Others have argued for a broader conception of R2P to include preventive and rehabilitative measures as well as responsive measures as required to make the concept effective.

Effective protection requires long-term *prevention*, as well as a coordinated and directed response, and follow-up reconciliation and rehabilitation. R2P should not be understood as nebulous or all-inclusive, but should be considered a long-term commitment with measures narrowly tailored to prevent and respond to mass atrocities, and then measures to encourage reconciliation and rehabilitation for a community that has suffered from the enumerated atrocities.

If R2P were understood as applying only to a narrow set of circumstances where genocide, war crimes, ethnic cleansing and crimes against humanity are imminent or already being perpetrated, then the concept may be deprived of any practical meaning beyond military or humanitarian intervention. Furthermore, waiting until the crimes are imminent or occurring will, by definition, fail to prevent every time. The parties who adopted R2P in 2005 would be less likely to accept such a reading. Moreover, such a narrow reading would render R2P ineffective. Preventive and rehabilitative actions would be seen as unnecessary, or gratuitous; and practically speaking, the UN and its partners would rarely be able to undertake coordinated operational responses early enough to actually protect populations from the listed crimes or to effectively support UN member states. It would also impose no accountability for a failure to protect.

A middle ground should be found and measures must be identified that are particularly suited to prevention, response, and rehabilitation in the face of genocide, war crimes, ethnic cleansing and crimes against humanity. What is needed is a well-defined, coordinated response where states and the international community of actors including the UN, regional and sub-regional actors and civil society take responsibility according to an established R2P framework.

[114] Re: “Misconception Three” above.

A repertoire of measures

R2P is "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe … but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states."[115] The ICISS recognized three specific responsibilities embraced by R2P: the responsibility to prevent; the responsibility to react; and the responsibility to rebuild.[116] However, it emphasized the primary importance of the responsibility to prevent.[117] The ICISS report calls attention to the clear costs and consequences of action versus inaction, and recognizes the undeniable link between assistance, intervention and rehabilitation.[118]

R2P addresses mass atrocities from the perspective of those seeking or needing support rather than those considering, and those potentially subject to, intervention. State sovereignty as a defence "[cannot] include any claim of the unlimited power of a state to do what it wants to its own people."[119] R2P puts the focus where it should be: on the victims and potential beneficiaries of any action or intervention. Identifying a particular repertoire of measures will require expertise and political consensus, and it should draw upon existing strengths and abilities of the UN system and its partners. That is the current challenge for UN entities, states and other interested parties who are concerned with eventually operationalising R2P.[120]

The importance of asylum to the R2P concept

It is difficult to identify focused, short-term measures designed to address protection in specific instances of genocide, war crimes, ethnic cleansing, and crimes against humanity. However there are a number of existing measures that are implicated by R2P which would benefit from the added exposure and added pressure put on parties to implement them. One such measure largely overlooked in the R2P debate is access to asylum or other refugee and IDP protection. When we speak of victims, we are often speaking of asylum-seekers, refugees, internally displaced persons, or stateless populations. As noted by Thomas Weiss: "The most reliable indicator of suffering in war zones is usually the number of 'refugees.'"[121]

Before the world community recognized the "responsibility to protect," the efforts of Francis Deng and Roberta Cohen working to address the needs of the internally displaced had already established the foundation of R2P by conceptualizing "sovereignty as responsibility."[122]

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[115] ICISS at VIII, "The Commission's Report"
[116] ICISS at ¶2.32
[117] ICISS at XI ("Prevention is the single most important dimension of the responsibility to protect").
[118] ICISS at ¶2.29
[119] ICISS at ¶1.35.
[120] Operational measures may include: preventive diplomacy; building/strengthening international and national legal frameworks by promoting accession to, ratification and implementation of relevant treaties, conventions and domestic legislation; early warning through media and human rights monitoring, reporting and fact-finding; promoting IHL and human rights protection strategies through international and national human rights institutions; sounding the alarm through a system-wide network of UN, governmental and non-governmental actors; establishing and protecting refugee and IDP camps and settlements; individual accountability through cooperation with international tribunals and human rights institutions; and transitional justice, reconciliation, and capacity building.
See David A Humburg, Preventing Genocide: Practical Steps Toward Early Detection and Effective Action, Paradigm Publishers, Boulder/London, 2008, at chapter 13, 'Potential of the UN for Preventing Mass Violence.
[121] Thomas G Weiss, at 89 (See FN99 Above).
[122] Francis M Deng & Roberta Cohen, *Masses in Flight: The Global Crisis of Internal Displacement*, Brookings Institution, 1998, Pgs. 275-280; See Also, United Nations Commission on Human rights, *The Guiding Principles on Internal Displacement*, UN Doc. E/CN.4.1998/53/Add.2, 1998, reprinted as OCHA/IDP/2004/01.

Forced migrants within their own national borders are often more vulnerable than those living outside their country of origin. While international law entitles refugees to protection and assistance through the 1951 *Refugee Convention* and other human rights treaties[123], apart from principles of international human rights law and IHL, no specific treaty law yet exists to ensure protection and assistance to the internally displaced although work on developing such a treaty is reportedly progressing.[124]

Providing refugee protection is no easy task, but at least asylum-seekers and refugees can benefit from well-established principles of refugee law, and the supervisory and legal role of a particular UN agency, UNHCR.[125] IDPs, by contrast, notwithstanding the general application of international human rights and IHL to *all persons*, often "lack food, shelter, and physical and legal security."[126] Furthermore agencies seeking to help IDPs must get permission from the state, often the same political authorities responsible for the abuse or displacement. As stated by Weiss: "… helping and protecting internally displaced persons [therefore] requires at least humanitarian intrusion, if not intervention."[127]

The historical record supports the conclusion that the grant of asylum is, or would be, in many cases the most practical, realistic and least controversial response to assisting victims of mass atrocities. In many cases the absence of, or inadequate response to, asylum-seekers fleeing genocide and human rights atrocities has resulted in significant loss of life.[128] Talk of mass atrocities, in particular genocide, often begins with a discussion of the holocaust during WWII. At that time boats of Jewish and other refugees were turned away from many countries. Many of those denied asylum died in Nazi internment camps.[129]

As a measure of response it should be recognised that gaps currently exist in the system of international refugee protection and there are many current challenges to ensuring the integrity of that system.[130] Incidents of *refoulement* or *non-entrée* of refugees regrettably remain present today, but at the same time there is a proven record of literally millions of persons being saved through the grant of asylum and refugee protection as enshrined in international refugee law and practice. Many of those persons granted asylum since the

[123] 1951 Refugee Convention, (See FN88 Above); See Also: The 1967 Protocol relating to the Status of Refugees, 31 Jan. 1967, 606 UNTS 267; The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 20 June 1974, 1001 UNTS 45.

[124] Through the Organisation of African Unity, UNHCR and other actors are working towards developing a draft Convention on Internally Displaced Persons (IDPs). An international conference on a draft IDP Convention is being planned for 2008/09.

[125] Volker Türk, 'Freedom from Fear: Refugees, the Broader Forced Displacement Context and the Underlying Protection Regime', Collection of the Geneva Academy of International Humanitarian and Human Rights Law, Volume II, Brussels, 2007.

[126] Thomas G Weiss, at 91 (See FN99 Above).

[127] Thomas G. Weiss, at 90 (See FN99 Above).

[128] Samantha Power, at 36 (See FN 38) (in describing the response of Allied powers to increasing admissions for Jews fleeing Nazi Germany has noted: "… the Allies rejected most of the modest proposals to expand refugee admissions, continuing to severely limit the number of Jews who would be granted temporary refuge in the United States and unoccupied Europe"); Similar scenarios, most regrettably, have been experienced more recently by the mixed response of some states to receive refugees from the Former Yugoslavia, Iraq, Rwanda, the Sudan and Burma, amongst others. Meanwhile, there have also been a number of successes in these situations whereby the lives of millions of refugees have been saved by a grant of asylum or other international protection.

[129] See, for example, the story of the SS St Louis at: http://www.ushmm.org/museum/exhibit/online/stlouis/

[130] See Ninette Kelly, 'International Refugee Protection Challenges and Opportunities', *International Journal of Refugee Law*, Vol 19, No 3, 2007; and Brian Gorlick, '(Mis)perception of Refugees, State Sovereignty and the Continuing Challenge of International Protection', in *Human Rights and Refugees, Internally Displaced Persona and Migrant Workers: Essays in Honour of Joan Fitzpatrick and Arthur Helton*, Anne F Bayefsky (ed), Martinus Nijhoff / Brill Academic Publishers, 2006.

inception of the international protection regime were fleeing situations of persecution based on a well-founded fear of genocide, ethnic cleansing and other serious crimes, to wit, persecution[131].

The well-established regulatory framework of the 1951 *Convention Relating to the Status of Refugees* currently has 147 state parties.[132] In the case of IDPs, *The Guiding Principles on Internal Displacement*, while not a treaty, has gained wide currency as a *de facto* regulatory framework for the internally displaced, and has proven to be an effective tool.[133] The core R2P documents do not identify or elaborate any specific measures on how to ensure that the R2P principle is enacted. The grant of asylum and *non-refoulement* and the protection of IDPs as particular protection and life-saving measures, seem especially warranted for reference within the analysis, scope and meaning of R2P.

However the word 'asylum' or discussion of the grant of asylum as a preventive element to the R2P framework does not feature in the core R2P documents, nor does it feature in the emerging literature on the subject.[134] The literature to date seems to largely focus on one measure, the use of armed force for humanitarian intervention, while attention to other strategies and approaches such as early warning, capacity building and preventive diplomacy is almost an afterthought.[135]

Refugee and asylum issues, particularly in recent years, are caught up in broader concerns about international security, transnational crime and terrorism.[136] Protection gaps are particularly problematic for stateless people and IDPs trapped in a legal and social rights void.[137] Preoccupation with state sovereignty remains an obstacle, particularly where protection is concerned. As noted by Erika Feller: "The 'Responsibility to Protect' should imply that affected states, donor governments, and partner agencies alike make all efforts to bring sovereignty, political will, mandates and resources into alignment with better protection."[138]

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[131] Article 1A of the 1951 Refugee Convention defines a refugee as a person who: "… owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail him[her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[132] The number of states parties to the 1951 Refugee Convention and its 1967 Protocol Relating to the Status of Refugees can be found at the UNHCR public website: www.unhcr.org.

[133] United Nations Commission on Human Rights, *The Guiding Principles on Internal Displacement*, UN Doc. E/CN.4.1998/53/Add.2, 1998, reprinted as OCHA/IDP/2004/01. See Hannah Entwisle, 'Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement, *Georgetown Immigration Law Journal*, Vol 19:369, 2005.

[134] See, for example, David A Humburg (See FN 120)..

[135] See, for example, José E Alvarez, 'The Schizophrenias of R2P', Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague, 30 June 2007, available on-line at: http://www.asil.org/resources/president.html

[136] See Strengthening Protection Capacity Project (SPCP), "Protection Gaps: Framework for Assessing Gaps in Protection Capacity", UNHCR Geneva, at: http://www.unhcr.org/protect/PROTECTION/41fe3ab92.pdf; Addressing Security Concerns without Undermining Refugee Protection, UNHCR Geneva, November 2001, at: www.unhcr.ch, and Matthew Gibney, 'Security and the Ethics of Asylum after 11 September', *Forced Migration Review* no 13, June 2002, available on-line at: www.fmreview.org.

[137] *The State of the World's Refugees,* 2006 - Human displacement in the new millennium - Chapter 7: Internally displaced persons, UNHCR Geneva, Oxford University Press 2006, See: http://www.unhcr.org/publ/PUBL/4444afce0.pdf)

[138] Erika Feller, Fifty-seventh session of the Executive Committee of the United Nations High Commissioner for Refugees, Agenda item 5(a), Statement by the Assistant High Commissioner for Protection.

If in addition to its other aspects, R2P could serve to encourage higher prioritization being accorded to state development of legal processes for the determination of an asylum-seeker's status, the protection needs of victims, addressing the root causes of displacement, and restoring national protection; and if R2P were to be interpreted as imposing a positive obligation on states to take steps to prevent victimization, reduce statelessness, and redress the dire circumstances for those who have no human rights protection or even no national rights, this would be a significant achievement.[139]

In short, R2P should bolster the UN's efforts to provide greater protection to persons of concern, whether that be women, children, minorities, IDPs, and refugees from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this regard it should increase accountability for such serious violations of international law, including sexual and gender-based violence through criminal process and other means of redress.

Conclusion

The R2P concept should be celebrated and recognized for what it is: progress towards developing an international legal norm or policy which focuses on international protection, international accountability, and the prevention and deterrence of future occurrences of mass atrocities and serious crimes.

The debate should move forward towards identification of a repertoire of measures that are tailored to prevent and respond to incidents of mass atrocity, as well as rehabilitate to avoid resurgence of violence. The grant of asylum and ensuring refugee protection on the one hand, and if feasible the protection of IDPs, is a good place to start when identifying these measures as there is perhaps no more direct, and in the scheme of tough choices, less controversial way to protect victims and potential victims from mass atrocity.

As soberly noted by former UN Secretary-General Kofi Annan:

> "We must … move towards embracing and acting on the 'responsibility to protect' potential or actual victims of massive atrocities. The time has come for governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service. We must move from an era of legislation to an era of implementation. Our declared principles and our common interests demand no less."[140]

At a time when the international community is striving to take firmer action to act and redress incidents of mass violations of human rights in the case of individual states which are unable or unwilling to grant protection to persons in their territory, we should deploy the full gamut of available tools and resources. Although there is a committed impetus within the UN and its supporters to define, develop and operationalise R2P, and while "a growing number of governments are now ready to cooperate with the international community to address conflict

[139] Id.
[140] *In Larger Freedom* at ¶132 (See FN1 Above).

and displacement in their countries,"[141] we should not forget the troubled history of missed opportunities, the failure of commitment, and the lack of political will to act in some circumstances. In such cases, a call for states to honour existing obligations to grant protection to those who may have to flee their countries or places of origin should not be relegated to abstraction.

In the absence of offering a reasonable chance for protecting IDPs within a sovereign territory, the asylum option must be advocated and acted upon. In some cases facilitating humanitarian displacement through ensuring and granting asylum may be the best protection option. Emerging new concepts, as valid as they may one day prove to be, will not replace tried and true measures such as the grant of asylum and protection to those in need.

At the end of the day, states and other actors, including UN entities, will have to buy into the R2P framework and any proposed mechanisms to make it operational. To this end conceptual clarity is important as it can help convince interested parties of the value of R2P, it can define the scope and limitations of the concept, and it can help develop a practical application of the principle.

[141] Roberta Cohen, Humanitarian Imperatives are Transforming Sovereignty, *Northwestern Journal of International Affairs*, 19 February 2008, available at: http://www.brookings.edu/articles/2008/winter_humanitarian_cohen.aspx?p=1