

## Losing the Utility of the Responsibility to Prevent: the confines of international law and focus on genocide prevention

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### Abstract

The Responsibility to Protect (R2P) norm has spawned a lot academic literature since its formulation in 2001. The focus of these has mainly been on the responsibility to react, the second of the tri-partite continuum that makes up the R2P norm. This is undoubtedly due to the controversial nature associated with military action. This preoccupation ignores the importance of the initial step of R2P – the responsibility to prevent. This is compounded by the fact that presently prevention is mostly focused on the prevention of genocide. This is problematic because state practice in relation to the prevention of genocide usually is to ensure that genocide is occurring before prevention begins. This detracts from R2P's equal theoretical treatment of genocide, crimes against humanity, war crimes and ethnic cleansing – vastly different crimes. It is my contention that the present level and nature of focus on prevention in international law would undermine the utility of R2P as an instrument to be used by the international community. An individual state's compliance with R2P within its borders is easy to evaluate; it is in the extra-territorial exercise of R2P that problems arise. This article aims to examine the responsibility to prevent by dissecting the component crimes of R2P and their prevention, examining prevention through the overarching lens of disciplines in international law and the various practicalities that impede prevention. The inclusion of the prevention gross human rights violations in the ambit of R2P is examined as an answer to the difficulties addressed.

### Introduction

In 2000 Kofi Annan's Millennium Summit report challenged the members of the UN to seek a solution to the tension that exists between sovereignty and the protection of human rights. He highlighted the difference between the challenges which the world faced in 1945 and the challenges the world faced in 2000.<sup>2</sup> He observed that '*wars since the 1990s have been mainly internal. They have been brutal, claiming more than 5 million lives. They have violated, not so much borders, as people.*'<sup>3</sup> While humanitarian intervention may be a desirable response to these problems, he recognized the sceptics and dangers of the doctrine. The International Commission on Intervention and State Sovereignty (ICISS) was set up in reaction to the statements of the Secretary-General to find solutions to these problems. The ICISS released its report in December 2001.<sup>4</sup> The basic principle of R2P as it affects the responsibility of the international community was summed up in the opening synopsis of the report. It states as follows that

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<sup>2</sup> Kofi Annan, *We, the Peoples: The Role of United Nations in the 21<sup>st</sup> Century, Millennium Report of the Secretary-General of the United Nations* (New York: United Nations, 2000), pp. 10-11.

<sup>3</sup> *Ibid.* p. 43.

<sup>4</sup> Alex Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009), pp. 37, 51.

where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.<sup>5</sup>

The ICISS also divided R2P into a continuum of 3 sub-responsibilities, namely, the responsibility to prevent; the responsibility to react, and the responsibility to rebuild.<sup>6</sup> The report gave priority to the responsibility to prevent as the pivotal part of the R2P continuum.<sup>7</sup> It stated that ‘prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.’<sup>8</sup>

The High-level Panel on Threats, Challenges and Change, in their report *A More Secure World, Our Shared Responsibility*, in 2004 recognized that there was an international responsibility to protect populations within sovereign countries ‘in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.’<sup>9</sup> This started the process of delimiting R2P’s scope to cover only four offences.<sup>10</sup>

Former UN Secretary General Annan in his report on the UN titled *In Larger Freedom: Towards Development, Security and Human Rights for All*, published in 2005, stated that

if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian, and other methods to help protect the human rights and well-being of civilian populations<sup>11</sup>

In 2005, representatives of the Member states of the UN met for a World Summit. The main purpose for this Summit was to assess advancement made since the Millennium Declaration, adopted by all Member states in 2000 which contained the Millennium Development Goals. The World Summit considered the concept of R2P and agreed that

[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, ... to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.<sup>12</sup>

This paragraph limits the scope of R2P and confines the responsibility of the international community to the protection from the four crimes of R2P namely; genocide, war crimes, ethnic cleansing, and crimes against humanity. UN Secretary-General Annan’s successor Ban Ki-Moon, released a report in 2009 titled, ‘Implementing the Responsibility to Protect’, which outlined three pillars for achieving protection for vulnerable populations by both the international community and individual states. These pillars were centred on, domestic state responsibility, international assistance as well as capacity building, and military intervention as a last resort.<sup>13</sup>

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<sup>5</sup> International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. xi.

<sup>6</sup> *Ibid* pp. xi, 19-45.

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

<sup>8</sup> *Ibid* p. xi.

<sup>9</sup> High-level Panel on Threats, Challenges and Change, *A More Secure World, Our Shared Responsibility* (New York: UN, 2004), <http://www.un.org/secureworld/report2.pdf>, accessed 9 July 2013.

<sup>10</sup> This will be elaborated upon below.

<sup>11</sup> Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*. A/59/2005. 21 March 2005, paragraph 135.

<sup>12</sup> 2005 World Summit Outcome Document, UNGA Res. 60/1, 16 September 2005, paragraph 139.

<sup>13</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009.

### The Responsibility to Prevent

The responsibility to prevent as formulated by the ICISS was to prevent ‘deadly conflict and other forms of man-made catastrophe.’<sup>14</sup> It cited prevention as ‘the single most important dimension of the responsibility to protect,’ suggesting that prevention efforts should be exhausted before recourse to intervention.<sup>15</sup> To perform this responsibility, the ICISS prescribed accountability, good governance, protection of human rights, socio-economic development and fair distribution of resources on the part of a sovereign state in relation to its own people.<sup>16</sup> It proposed support from the international community in the form of development assistance, efforts aimed at addressing the root causes of conflict; support for local initiatives to advance good governance, human rights, or the rule of law; good offices missions, mediation and other means of dialogue or reconciliation, inducements and a willingness to apply punitive measures.<sup>17</sup>

The report identified a gap between rhetorical and actual economic and political support for prevention.<sup>18</sup> To close this gap, the ICISS recommended effective early warning to identify and analyse fragility and risks of a crisis, identifying the policy measures available to combat them, and willingness to use the measures to combat the crisis;<sup>19</sup> in other words, early warning, a ‘preventive toolbox’ and increased political will.<sup>20</sup> The Commission asked for a more structured form of early warning<sup>21</sup> centralised within the UN headquarters<sup>22</sup> with the assistance of regional actors.<sup>23</sup> The Commission recommended embarking on both root cause and direct prevention.<sup>24</sup>

The ICISS identified some problems in implementing the responsibility to prevent. Firstly, state’s sovereignty and the fear of humanitarian intervention; this was countered by stating that intervention should only be considered when prevention fails.<sup>25</sup> Another problem identified in the report is the lack of coordination between disparate actors with divergent interests in the international community.<sup>26</sup> The Commission mentioned the importance of an ‘operational strategy’ to implement the responsibility to prevent.<sup>27</sup>

Nevertheless, the Commission failed to identify the international community, the legal basis for prevention and a cure for lack of political will. Its formulation lacked ‘conceptual innovation’<sup>28</sup> and suggestions on guidelines or triggers for prevention.<sup>29</sup> The incompleteness of the conceptual nature of the responsibility to prevent has been traced to the fact that though the Commission posits that prevention is the most important aspect of R2P, it may just have been added to the continuum just to make humanitarian intervention more acceptable to states.<sup>30</sup> Nevertheless, prevention has subsequently been identified as the most important aspect of R2P, casting doubt on this suggestion.

The World Summit Outcome Document limits prevention to the four crimes of R2P. This document recognises the responsibility of the international community to protect (that is, prevent, react, rebuild) populations from those four crimes. States at the summit committed to ‘helping States build capacity’ to perform R2P ‘and to assisting those which are under stress before crises and

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<sup>14</sup> ICISS, *R2P*, p.19 paragraph 3.2.

<sup>15</sup> *Ibid.* xi.

<sup>16</sup> *Ibid.* 19 paragraph 3.2.

<sup>17</sup> *Ibid.* 19 paragraph 3.3.

<sup>18</sup> *Ibid.* 20 paragraph 3.8.

<sup>19</sup> *Ibid.* 20 paragraph 3.9.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* 21 paragraph 3.12.

<sup>22</sup> *Ibid.* 21 paragraph 3.14.

<sup>23</sup> *Ibid.* 22 paragraph 3.17.

<sup>24</sup> *Ibid.* 22 – 25 paragraphs 3.18 – 3.32.

<sup>25</sup> *Ibid.* 25 paragraph 3.34, emphasis mine.

<sup>26</sup> *Ibid.* 26 paragraph 3.36.

<sup>27</sup> *Ibid.* 26 paragraph 3.37.

<sup>28</sup> Alex Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (London: Routledge, 2011), pp. 17, 19.

<sup>29</sup> *Ibid.* 17.

<sup>30</sup> *Ibid.* 19.

conflicts break out'.<sup>31</sup> Since the 2005 World Summit, the emphasis of the UN has been on prevention of the four crimes of R2P.<sup>32</sup> On the other hand the focus of academic literature has been intervention in respect of the four crimes of R2P.

One of the problems with the UN's emphasis on prevention is that due to the fact that genocide already had a legal preventive regime prior to the World Summit, the focus of R2P prevention has been on the prevention of genocide. This in my opinion is counterproductive because the practice of this prior prevention has been to question whether genocide is occurring before acting.<sup>33</sup> This practice differs from the regime of prevention prescribed by the ICISS. Furthermore, it is illogical to ensure that what you want to prevent is occurring before you determine that you should prevent it. What should be determined is the *possibility* or *probability* of that event occurring. Nevertheless, the other crimes have not fared any better when it comes to prevention, but much worse. Apart from R2P there seems to be no structured legal regime to prevent crimes against humanity. There is a proposed Convention on the prohibition of crimes against humanity which has an Article that places an obligation on all signatory states to prevent and punish crimes against humanity, mirroring Article 1 of the Genocide Convention.<sup>34</sup> But customarily, states have not placed an obligation upon themselves to prevent crimes against humanity. While international humanitarian law (IHL) prohibits the commission of war crimes, there are few provisions that ask for the prevention of their commission. These are mainly provisions that ask for military commanders to prevent the commission of war crimes by soldiers under their command.<sup>35</sup> The convictions for and reports of war crimes that occur after conflicts, indicate that these provisions may not be adequate to prevent war crimes. Ultimately, the best way to prevent war crimes may be to prevent conflict itself. A legal structure to prevent ethnic cleansing is problematic as ethnic cleansing is not a legal but political concept as; this will be explored later.

### Genocide Prevention

R2P has highlighted genocide as a paramount international crime. However, the importance that attaches itself to the prevention and prohibition of genocide dates to before the promulgation of the genocide convention when Raphael Lemkin advocated for a convention to criminalise large-scale attacks on racial or ethnic groups.<sup>36</sup> In 1946 a UN General Assembly Resolution 96 (I) was adopted stating that genocide was a crime in international law and asking that a convention be signed to that effect.<sup>37</sup> In 1948 the Convention on the Prevention of the Crime of Genocide (Genocide Convention) was adopted by the General Assembly.<sup>38</sup>

Article 1 of the Genocide Convention states that genocide is an international crime which all states are mandated to 'prevent and to punish.' Article 2 of the Convention defines genocide. What exactly prevention of genocide entails has proved to be somewhat of a conundrum. To this end, the International Court of Justice (hereinafter 'the Court' or the ICJ) adjudicated upon the duties of state signatories to the Genocide Convention in the *Bosnia Genocide case*. The Court stated that the duty to prevent genocide is closely allied with capacity; proximity in this case could determine capacity.<sup>39</sup> While the Court in the *Bosnia Genocide case* dealt primarily with the duty (of the signatories to the

<sup>31</sup> Paragraph 139, 2005 World Summit Outcome Document.

<sup>32</sup> Bellamy, *Global Politics*, p. 33.

<sup>33</sup> This was done in Rwanda and Darfur.

<sup>34</sup> Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity. <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf> accessed 3 July 2013.

<sup>35</sup> Article 87 Protocol 1 additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts 1977.

<sup>36</sup> Diane Orentlicher, 'Genocide' in Roy Gutman, David Rieff, et al (eds.), *Crimes of War: What the Public Should Know*. (New York: W.W. Norton & Co., 1999) p. 154.

<sup>37</sup> William A. Schabas, *An Introduction to the International Criminal Court*. (3<sup>rd</sup> Edition, UK: Cambridge University Press, 2007) pp. 7-8.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina V. Serbia and Montenegro), judgment of 26 February 2007 at p. 182, paragraph 430.

Genocide Convention) to prevent genocide, it would be logical to tentatively apply this finding to a general duty to prevent until such a time as the ICJ or a concurrent court asserts that these findings do or do not apply. The ICJ in the *Bosnia Genocide case* also stipulated that a state has a duty to act to prevent genocide even when concerted effort is needed but such a state is acting alone.<sup>40</sup>

The ICJ stated that the duty to prevent, though involving criminalising genocide and punishing individuals who commit genocide, was not limited to these aspects but entailed active international obligation on states.<sup>41</sup> The Court applied a standard of ‘proof at a high level of certainty’<sup>42</sup> rather than the criminal standard of proof beyond all reasonable doubt. Therefore, it is implicit in this judgement that the standard of proof for states’ international obligations is slightly lower than criminal burden of proof applicable in international criminal law. Based on the ICJ judgement in the *Bosnia Genocide case* the duty to prevent is made up of the four major components.

Firstly, a duty to prevent is one of conduct and not of result. This means that a state (or the community of states acting in concert) should use all means within its power to prevent atrocity.<sup>43</sup> In such a case a state is not in breach of its responsibility even if genocide (mass atrocity[?]) occurs as long as it has done all within its power using all available legal means to act to prevent the atrocity. This applies neatly to all the four crimes of R2P. However, it may be difficult to technically apply such a rule to ethnic cleansing as it would be legally difficult to determine that such a crime has been committed due to its non-existent physical and mental elements.

Secondly, the capacity to influence events and thus prevent mass atrocity determines the level of the obligation.<sup>44</sup> The court stated further that geographical proximity to, or political or historical links with the state committing, or whose nationals are committing, the atrocity, or within which the atrocity is being committed, may serve as a means to measure the capacity to influence or achieve prevention. States within regions such as Africa may thus have a higher level of obligation to prevent atrocities within the region.<sup>45</sup> Under this stipulation it is possible to assume that states with historical links such as colonial links may also have a stronger obligation to prevent mass atrocity; provided of course that they are able to influence and achieve prevention. States with better economic strength and long history of applying political pressure may be adjudged to have more capacity than states with less political might.

Furthermore, states must act within the limits of international law.<sup>46</sup> In other words, to achieve prevention, states must not contravene international law. States should abide by the rules of positive and customary international law, such as the prohibition of the use of force as contained in Article 2(4) of the UN Charter and Article 1 of the Declaration on Principles of International Law Friendly Relations, as well as the time-honoured principles of non-interference in what is primarily within the domestic sphere of a state’s affairs. The means by which peaceful prevention is achieved should also be within the limits of international law. International law therefore governs the means of prevention and scope of preventive action. Infrastructure set up by international law, legally utilised can serve as mechanisms for prevention.

Finally, each state ought to act to ensure it fulfils its responsibility even if no other state is acting or acting alone will be insufficient to prevent the atrocity.<sup>47</sup> The ICJ stated that ‘the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.’<sup>48</sup> This is because according to the Court ‘responsibility is ... incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Bosnia Genocide case* paragraph Provisional Measures Order 45; Ekkehard Strauss, ‘A Bird in the Hand is Worth Two in the Bush – On the Assumed Legal Nature of the Responsibility to Protect’, *Global Responsibility to Protect*, 1/3: 291 – 323 (2009), p. 316; Ekkehard Strauss, *The Emperor's New Clothes: The United Nations and the Implementation of the Responsibility to Protect* (Baden-Baden: Nomos, 2009), p. 30.

<sup>42</sup> *Bosnia Genocide case* paragraph 210; Strauss ‘A Bird in Hand’, p. 316.

<sup>43</sup> *Bosnia Genocide case* paragraph 430; Strauss, *The Emperor's New Clothes*, p. 31.

<sup>44</sup> *Bosnia Genocide case* paragraph 430; Strauss, *The Emperor's New Clothes*, p. 31.

<sup>45</sup> Kwesi Aning and Samuel Atuobi, ‘Responsibility to Protect in Africa: An Analysis of the African Union’s Peace and Security Architecture’, *Global Responsibility to Protect*, 1/1: 90 – 113 (2009), p. 104.

<sup>46</sup> *Bosnia Genocide case* paragraph 430

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

might have contributed to preventing the genocide.<sup>49</sup> It is therefore not a defence to posit that action by that particular state would have been insufficient to stop the atrocity. Each state is expected to act using all means available to it to prevent atrocity even if they would be insufficient without the input of other states. In other words where a state has the capacity to influence and prevent genocide within another state it ought to use that capacity to act to prevent genocide even where its sole action would be insufficient to prevent genocide. This may be through mediation, referral of situations to the UN General Assembly or the UN Security Council and refraining from exacerbating volatile conditions.

Definitely, more has been written or said about the prevention of genocide than the prevention of any other international crime.<sup>50</sup> Nevertheless, the drafters and supporters of R2P and all its documents have seen it fit to include within the ambit of prevention, the three other international crimes. However, the focus in the responsibility to prevent has been on prevention of genocide.<sup>51</sup> Although there are marked similarities between genocide and crimes against humanity; one should bear in mind that at the end of the Second World War in October 1945, when the Allies put 24 German leaders on trial and convicted 19 of them for crimes committed during the war<sup>52</sup>, they were not convicted for genocide but mostly for crimes against humanity, war crimes and crimes against peace.<sup>53</sup> This emphasises the marked similarity between the four crimes of R2P; it also shows that setting apart genocide as a superior crime may have no practical value.

### **The Other R2P Crimes: The Neglected Three... Or Is It Two (?)**

Crimes against humanity are defined in Article 7 (1) (a-k) of the Rome Statute of the International Criminal Court (ICC), Article 5 (a-i) of the International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) statute and Article 3 (a-i) of the International Criminal Tribunal for Rwanda (ICTR) statute to encompass a 'widespread or systematic' murder, extermination, enslavement, forcible enslavement or deportation of populations, imprisonment contrary to international law, torture, sexual violence, persecution of specific populations (not necessarily ethnically distinct), intentionally causing great suffering among other acts. To qualify as crimes against humanity, the acts have to be done 'as part of a widespread or systematic attack directed against any civilian population.'<sup>54</sup> Nevertheless, there has been no strategic arrangement to prevent the commission of crimes against humanity. Ideally such an arrangement should be closely allied or similar to an improved structure for the prevention of genocide.

War crimes are grave breaches of the Geneva Conventions or violations of international humanitarian law (IHL). In the case of internal conflicts or non-international armed conflicts this would mean contraventions of the Article 3 common to the Geneva Conventions 1949, Additional Protocol II to the Geneva Conventions, Article 8(2)(a)(i-vii), 8(2)(c)(i-iv) and 8(2)(e)(i-xii) Rome statute of the (ICC). Definitions of war crimes are also codified in Articles 2 and 3 of the ICTY statute and Article 4 of the statute of the ICTR. War crimes against civilians include physical and/or mental violence to life or health, murder, torture, collective punishment, hostage taking, terrorism, prohibiting the fair trial of prisoners of war, humiliating or degrading treatment, sexual violence,

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<sup>49</sup> *Ibid.*

<sup>50</sup> Lawrence Woocher, 'Early Warning for the Prevention of Genocide and Mass Atrocities' paper presented at the 2007 Annual Meeting of the International Studies Association, Chicago, 28 February - 3 March 2007; Jie Song and Qingjiang Kong, 'A Generalization of the Obligation to Prevent: From Genocide Convention to Racial Discrimination Convention', *Frontiers of Law in China*, 6/1: 1- 16 (2011); Mark Gibney 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' *Global Responsibility to Protect*, 3/2: 123 - 151 (2011).

<sup>51</sup> See Luke Glanville 'The Responsibility to Protect Beyond Borders' *Human Rights Law Review*, 12/1: 1 - 32, (2012); Alex Bellamy 'Conflict Prevention and the Responsibility to Protect' *Global Governance*, 14/2: 135 - 156 (2008); Mark Gibney 'Universal Duties: The Responsibility to Protect, the Duty to Prevent (Genocide) and Extraterritorial Human Rights Obligations' *Global Responsibility to Protect*, 3/2: 123 - 151 (2011).

<sup>52</sup> William A. Schabas, *An Introduction to the International Criminal Court*. (3<sup>rd</sup> Edition, UK: Cambridge University Press, 2007) p. 6.

<sup>53</sup> Article 6(a-c) Charter of the International Military Tribunal at Nuremberg.

<sup>54</sup> Article 7 ICC Statute

slavery and pillage. War crimes also encompass the actual waging of war by acts contrary to IHL such as targeting civilians or annihilating settlements, religious or medical personnel and/ or buildings, the use of child soldiers and displacing populations. War crimes have to be unlawful acts which are committed in the context of an armed conflict – international or non-international.

‘Ethnic cleansing’ is a term which has not been codified in any international treaty or judicial statute. However, the Commission of Experts Established Pursuant to Security Council Resolution 780 defined ethnic cleansing as ‘rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.’<sup>55</sup> It should be noted that ethnic cleansing is not a legal term<sup>56</sup> therefore, it is unlikely to form part of a criminal conviction, but is of purely political and academic significance. Scheffer, however, recognises ethnic cleansing as a subcategory of the crime against humanity of persecution.<sup>57</sup> Strauss considers the crimes against humanity and war crimes of deportation and forcible transfer most closely related to ethnic cleansing.<sup>58</sup> Strauss asserts that acts that constitute ethnic cleansing can be qualified as one or all of crimes against humanity, genocide and war crimes.<sup>59</sup> Ethnic cleansing as defined by the Commission of Experts can only be achieved by targeting a large group of people of a particular ethnic group and not by isolated ‘hate crimes.’<sup>60</sup> Due to its non-legal and therefore non-criminal character, it may be truer to say that there are three R2P crimes and not four.

### **Prevention and IHL**

Any of the crimes of R2P committed during an armed conflict, international or non-international would be a breach of international humanitarian law. Apart from the Genocide Convention which forms part of the corpus of IHL legislation, there are few provisions within IHL for the prevention of breaches of IHL.<sup>61</sup> Structurally, one would assume that the concepts of universal jurisdiction and command responsibility would avoid impunity and reduce the commission of war crimes. This, however, is difficult to assess. It is impossible to tell if the incidence of grave breaches of IHL would have been more if these concepts had not been developed. Ending impunity through prosecution and universal jurisdiction<sup>62</sup> includes establishing criminal tribunals which may be more effective than national courts.<sup>63</sup> Nevertheless, with the concurrent jurisdiction inspired by the ICC, third party states have the opportunity to try suspects of mass atrocities in national courts. The prevention of crimes of war is, however intimately tied up with conflict prevention, which is not an obligation under international law but more of a utopian hope.

### **Prevention and IHRL**

Gross violations of human rights may be a trigger or a symptom of any one of the four crimes of R2P, which makes the international human rights law regime relevant to R2P. Furthermore, the legal and physical elements of the R2P crimes of genocide, ethnic cleansing, crimes against humanity and war crimes, especially in the context of an internal conflict, overlap with human rights violations. Thus it is impossible to commit ethnic cleansing, crimes against humanity or genocide (or all simultaneously)

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<sup>55</sup> Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/1994/674 - 27 May 1994.

<sup>56</sup> Strauss, ‘A Bird in the Hand’, p. 315; Strauss, *The Emperor's New Clothes*, p. 35.

<sup>57</sup> David Scheffer ‘Atrocity Crimes Framing the Responsibility to Protect’ *Case Western Reserve Journal of International Law*, 40/1&2: 111 – 136 (2007-8), p.128; Article 7(1)(h) ICC Statute.

<sup>58</sup> Strauss, ‘A Bird in the Hand’, p. 316.

<sup>59</sup> *Ibid.* 315.

<sup>60</sup> Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/1994/674 - 27 May 1994.

<sup>61</sup> Article 87 Protocol 1 additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts 1977.

<sup>62</sup> Bellamy, *The Responsibility to Protect*, p. 118.

<sup>63</sup> International Peace Academy ‘The Regionalization of Conflict and Intervention’, IPA Seminar Report at Regional Approaches to Conflict, New York, 5-9 May 2003, p.5.

without violating the right to life or the right to be free from torture at the same time. It is unlikely that any of the four crimes be committed without an attendant violation of human rights. The obligation of states and the international community in the protection of human rights are usually divided into three levels namely: an obligation to respect; an obligation to protect; and an obligation to fulfil.<sup>64</sup> These obligation levels have been researched mainly in relation to ESC rights.<sup>65</sup>

What does this have to do with the prevention of R2P crimes? Let us say, for example, a group is being deprived of their right to food by burning of farms and food storages areas during the course of an armed conflict in violation of international humanitarian law. This action would amount to a war crime as well the commission of the crimes against humanity of extermination and persecution.<sup>66</sup> It is also primarily a violation of the victim group's right to food. Both international human rights law and international humanitarian law contain adequate provisions to protect the groups' and the individual's human rights. The question therefore is whether the international community not only has a duty to ensure that there are laws and mechanisms in place to prevent violations of human rights and the four crimes, but also whether there is a duty to ensure that these laws are adhered to and the mechanisms work. It would be ridiculous to some extent to assume that when they were put in place there was no intention that they work.

The decision in the Bosnia case above<sup>67</sup> clearly explains the duty of states to prevent genocide arising from the Genocide Convention.<sup>68</sup> This element of prevention may also be perceived as the logical intent of all human rights treaties even if not explicitly codified.<sup>69</sup> In other words it is unreasonable to promulgate international legislation for the international protection of human rights if there is no intention to internationally prevent the violation of those human rights. In considering the international human rights conventions it may be assumed that they contain indications of state obligations to their citizens.

Gibney has suggested that there is an implicit obligation to prevent the occurrence of human rights violations; according to him it is only logical that a Convention which outlaws an act intends to prevent the occurrence of such an act.<sup>70</sup> The legal prohibition of an act is the first step to preventing it; there cannot be effective prevention without prohibition. This is a rational argument that I believe can apply to both IHL and international human rights law.

One of the ways in which the regime of international human rights law can be used to further an international community responsibility to prevent is the promotion and enforcement of human rights. Considering that the four crimes of R2P are primarily composed of violations of human rights in specified situations, this method of prevention is apposite to R2P because it is in diametric opposition to the four crimes. Systematic and gross violation of human rights may form the underlying causes or the contributory factors in the commission of the crimes of R2P.<sup>71</sup> However, it may be over-simplistic to assume that complete adherence to international human rights will prevent

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<sup>64</sup> Asbjørn Eide, 'The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right', UN Economic and Social Council Report. 7 July 1987, E/CN.4/Sub.2/1987/23 p. 14 paragraph 66.

<sup>65</sup> Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the Obligation to Protect', *Human Rights Law Review*, 9/2: 225 – 255 (2009); Eide, 'The New International Economic Order', 1 – 73; Lilian Chenwi, 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions', *Human Rights Law Review*, 8/1: 105 – 137 (2008); 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' *Human Rights Quarterly*, 20/3: 691 – 704 (1998).

<sup>66</sup> Common Article 3(1)(a); Article 4(1) Additional Protocol II; Article 4(2)(a) Additional Protocol II; Article 8(2)(a)(i) ICC Statute; Article 8(2)(c)(i) ICC Statute; Article 8(2)(e)(i) ICC Statute.

<sup>67</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) 2007, 26 February General List No. 91

<sup>68</sup> *Ibid* Bosnia Genocide case at paragraph 438

<sup>69</sup> Mark Gibney, 'Genocide and State Responsibility', *Human Rights Law Review* 7/4: 760 – 773 (2007), p.769.

<sup>70</sup> *Ibid*.

<sup>71</sup> Oskar N.T. Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?' *Human Rights Quarterly*, 29/3: 686 – 693 (2007), p. 704; Isebill V. Gruhn, 'Human Rights Abuses in Africa: Local Problems, Global Obligations' *Human Rights Review*, 1/1: 65 – 77 (1999).



all atrocities.<sup>72</sup> While promoting the protection of human rights may be at the core of R2P, using the promotion of human rights as a means of implementing R2P creates another legal quandary. International law is not too explicit when defining the extraterritorial obligations of states to prevent violations of human rights that occur within the territory of states.<sup>73</sup> Furthermore, the protection of human rights is primarily the obligation of domestic states; any attempt by the international community to ensure the adherence to human rights within the territory of a sovereign state may be seen as an imposition of foreign precepts on people unwilling to accept them as their own. The first step in utilising human rights as a preventive measure is finding within all cultures principles reminiscent of the foundation blocks of human rights.

Governmental bodies have a higher obligation to ensure the implementation of international human rights as state members are signatories to the human rights covenants and are also bound by that portion of them that has become customary international law. On the other hand non-governmental bodies should apply themselves to bridging the gap between principles of international human rights and the cultures and acceptable practices of the people of the concerned state. While it is possible that preventive diplomacy may ask for the promotion and protection of human rights, non-state actors involved in conflict or atrocity may refuse to implement human rights. It may prove difficult to ensure that non-state parties to a conflict adhere to human rights, especially as the nature of domestic conflict is such that it relies on civilian attack and the violation of human rights. Nevertheless, the promotion of human rights is a strategy that can be used in conjunction with preventive diplomacy. Promotion of human rights is a means of prevention that does not require the existence of a conflict, unlike measures contained within the regime of IHL. Human rights protection does not require a trigger, a conflict or even a pretext. Due to state sovereignty, I would like to distinguish between an obligation to prevent, which is what Gibney and I seem to advocate for, and an obligation to intervene which is sometimes confused with actions in prevention.

### **Prevention v. Intervention**

R2P has frequently been read as a replacement to humanitarian intervention. However, R2P is much more than humanitarian intervention. R2P is a continuum of three responsibilities, starting with the responsibility to prevent. According to the ICISS document this responsibility (prevention) should be exhausted before the responsibility to react should be considered. In other words, the stance of R2P could be and should be interpreted thus: *a situation which has not been subject to the responsibility to prevent, in full measure, cannot invoke the responsibility to react and is therefore not a true R2P situation.* Humanitarian intervention may then be considered because R2P no longer applies. If preventive measures have been employed but have failed, the responsibility to react can then be invoked, starting with non-military measures, such as sanctions, trade and arms embargos. Military intervention (formerly humanitarian intervention) can be embarked upon as a last resort. This I believe is the logical conclusion to arrive at considering all the documents and statements on R2P.<sup>74</sup>

Humanitarian/military intervention while essential and necessary, in some cases may prove detrimental to the adoption of R2P. Humanitarian intervention does not purport to address the root cause(s) of conflict, therefore, when the troops have been withdrawn there is no guarantee that violence will not reignite due to the same root causes.<sup>75</sup> Hence, the 'rebuild' arm of R2P is intertwined with the 'prevent' arm; rebuilding a state suffering from inherent weakness will 'prevent' conflict from re-igniting or igniting.<sup>76</sup> Therefore, humanitarian

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<sup>72</sup> Thoms and Ron, 'Do Human Rights Violations Cause Internal Conflict?' pp. 686 – 693.

<sup>73</sup> John Cerone 'Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context' *Israel Law Review*, 40/2: 72 – 128 (2007), p. 94.

<sup>74</sup> See notes 4, 11 and 12 above.

<sup>75</sup> Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa*. (Leiden/ Boston: Martinus Nijhoff Publishers, 2004) p. 302.

<sup>76</sup> Kreijen, *State Failure, Sovereignty and Effectiveness*, p.302; Galtung in his conceptualisation of structural violence references societies with violent structures that easily lend themselves to recurrent internal strife. Johan

intervention shows itself to reside solely within the 'react' dimension of R2P rather than the 'prevent.' This is the edge which R2P theoretically has over humanitarian intervention; this is why preventive means should be exhausted before military action is considered.

### **International Community: The Actors in Prevention**

R2P envisages that where a state is unwilling or unable to protect its own people the onus falls on the international community. This formulation brings with it a number of difficulties not least of which is the nebulous character of the international community. R2P can be said to presuppose active contribution by a cohesive and actual 'international community' rather than a requirement that states act multilaterally (in conjunction or otherwise) to prevent and react to mass atrocities. In other words this means R2P assumes the existence of 'an international community, unified by a conception of common good and with the means to prevent egregious violation of its core principles...'<sup>77</sup> Furthermore, differing interests exist amongst key actors in the international community.

The ICISS report on R2P states

[e]ffective conflict prevention depends on disparate actors working together strategically. States, the UN and its specialized agencies, the international financial institutions, regional organizations, NGOs, religious groups, the business community, the media, and scientific, professional and educational communities all have a role to play.<sup>78</sup>

This indicates that prevention is not the exclusive domain of states alone. However, what is unclear in the R2P debate is how to come about an operational strategy to ensure that when it comes to prevention, the international community is able to muster all its component parts – state and non-state actors – to work as a cohesive singular entity towards a particular goal. It is possible that when the discussion was put before the General Assembly the ICISS did not wish to overcomplicate the issues, or have actors raise objection on peripheral matters. Nevertheless, the differing nature of actors may cause a distinct nature of responsibility and liability for inaction to attach itself to each different actor. The differing nature of each actor's individual interests would also affect their political will to act. In addition to this, prevention lies in the intersection of international politics and international law. An operational strategy that will enable the international community to prevent mass atrocities effectively should ideally lie within that intersection.

Furthermore, the practice of prevention if based on the template of genocide prevention would make a mess of international community responsibility to prevent – the secondary responsibility to prevent. According to the formulation of R2P, the international community has no responsibility to prevent till an individual state has failed to prevent mass atrocities occurring within its own borders. It may be logical to assume that if a state has failed to prevent mass atrocities, those atrocities would have begun to occur and the responsibility of the international community would cease to exist. This drastically reduces the applicability of R2P.

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Galtung, 'Cultural Violence', *Journal of Peace Research*, 27/3: 291 – 305 (1990), p. 293; Johan Galtung, 'Violence, Peace, and Peace Research', *Journal of Peace Research*, 6/3: 167 – 191 (1969), p.171.

<sup>77</sup> Rajan Menon, 'Pious Words, Puny Deeds: The "International Community" and Mass Atrocities', *Ethics and International Affairs*, 23/3: 235 – 246 (2009), p. 237.

<sup>78</sup> ICISS, *The Responsibility to Protect*, pp. 25 – 26, paragraph 3.36.

## **The Utility of Confining the Responsibility to Prevent to the Confines of International Law and the Focus on Genocide**

One of the major problems in implementing the responsibility to prevent is that it has been agreed that it remain within the confines of international law. Prevention of international crimes in international law, more or less, turns on the prevention of genocide. State practice of prevention may cause the confines of international law to stifle the responsibility to prevent into futility. Customarily, it is the practice of states to consider whether genocide is occurring before accepting that an obligation has arisen. This results in a tortuous cycle from which there is no way out. First, we determine that genocide is occurring before we determine whether an obligation has arisen. After we determine that an obligation has arisen because genocide is occurring, the obligation is no longer relevant because there can be no obligation to prevent what has already occurred. A structure and culture of prevention built on this approach would render R2P ineffective as technically, 'prevention options should always be exhausted before intervention is contemplated.'<sup>79</sup> Therefore, under the above structure, intervention would never be justifiably contemplated.

As mentioned above the purest means to prevent war crimes is to prevent conflict. This would also serve to prevent an arena in which the other crimes of R2P can occur. Nevertheless, there is no structure or provision for conflict prevention within international law. Conflict prevention remains mostly in the spheres of international politics and international relations. There is no legal prohibition against waging war, though there are rules constraining how the conflict is operated. In an idealistic world, there can be conflicts without war crimes, but there cannot be war crimes without conflict. International law seems to operate oblivious to this fact. Conflict prevention should ideally be increasingly brought into the sphere of international law.

Most academic literature on prevention is centred on conflict prevention and emanates almost entirely from the field of political science.<sup>80</sup> This ignores the pragmatic difference between conflict prevention and the prevention of mass atrocities. Conflict prevention in itself does not raise the question of legal obligation on the part of the international community, though war crimes are to be prosecuted. The prevention of mass atrocities carries with it, though sometimes unclear, more than just a moral obligation.

While the R2P report itself clearly indicates a desire to prevent conflict,<sup>81</sup> the Outcome Document, and the UN Secretary General's report on Implementing R2P have plunged the relation between conflict and R2P into ambiguity. Is R2P meant to prevent conflict that results from the four crimes or conflict in which the four crimes occur? Or does R2P not concern itself with conflict at all? The importance of the answers to these questions is to determine how R2P and the responsibility to prevent in particular are to be operationalized.

Despite the copious supporting documents as regards R2P and literature by supporters of R2P,<sup>82</sup> the lines between intervention and prevention under R2P are blurred. It is often assumed that an R2P situation indicates that troops can be sent in. However, R2P does not call for military action before the exhaustion of preventive measures. While it may be argued that military measures can prevent, this is not completely true for three reasons. Firstly, the military is mostly required to mitigate atrocities that are already occurring, meaning that the responsibility to prevent is largely irrelevant to the situation and the responsibility to react should be invoked; leading us back to the tortuous argument of reacting before preventing. Secondly, as most national militaries are trained for

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<sup>79</sup> ICISS, *The Responsibility to Protect*, p. xi.

<sup>80</sup> Alice Ackerman, 'The Idea and Practice of Conflict Prevention', *Journal of Peace Research*, 40/3: 339 – 347 (2003); Werner Bauwens and Luc Reyckler, *The Art of Conflict Prevention* (London: Brassey's, 1994); John N. Clarke, 'Early Warning Analysis for Humanitarian Preparedness and Conflict Prevention', *Civil Wars*, 7/1: 71 – 97 (2005); Michael S. Lund, 'Conflict Prevention: Theory in Pursuit of Policy and Practice' in Jacob Bercovitch, Viktor Kremenyuk, and William I. Zartman (eds.), *The Sage Handbook of Conflict Resolution*, (London: Sage, 2009) pp. 287 – 321.

<sup>81</sup> ICISS, *The Responsibility to Protect*, p.19 paragraph 3.2.

<sup>82</sup> See for example, Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, D.C.: Brookings Institution Press 2008); Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?', *International Relations*, 22/3: 283 – 298 (2008); Alex Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (London, Routledge: 2011).

combat, sending them to prevent violence seems counter-intuitive and may result in further casualty. Thirdly, seeing military intervention as the best and final solution to mass atrocities, ignores the root causes, results in unnecessary expense and loss of life, and almost inevitably violence recurs.

It is strange that the Outcome Document at the World Summit included in the crimes of R2P ethnic cleansing and left out gross violations human rights. Ethnic cleansing has no force of the law, as such, while the inclusion of gross violations of human rights would have aided the implementation of R2P, especially the 'prevent' dimension. It is easier to respond to gross violations of human rights in a non-military fashion and therefore label a situation an R2P situation which would trigger military intervention as a last resort if all means of peaceful intervention fails. The events in Syria provide a good example of an instance where this could have been invoked.

All official documents on R2P are clear that the responsibility of the international community is triggered by a state's failure to protect its own people. The reason for this is clear in the case of a responsibility to react. It remains unclear how the international responsibility to prevent can be operationalized when it has to wait for state failure which would mean that the time to prevent has passed, again this renders the responsibility to prevent useless. The nullification of the responsibility to prevent disarms the power and utility of R2P.

The way in which revolutionary laws and norms are formulated indicates a culture of retrospectivity. This means that while they would almost certainly apply to previous events they may be useless for future catastrophes. This is evident in the relation of the Genocide Convention to the Holocaust and the relation between the Rwandan and Bosnian crises and R2P. R2P could have been invoked in the case of Rwanda but was not completed prepared for future crises, such as those of Cote d'Ivoire, Libya, Syria and Darfur.

It has been posited on several occasions that the preventive arm of R2P is the most important aspect of this principle.<sup>83</sup> On the other hand in the case of genocide it is almost trite law that state signatories to the Genocide Convention have a duty to prevent genocide – though that duty has not been taken up. This was adjudicated upon by the ICJ in the *Bosnia Genocide case*.<sup>84</sup> In relation to the position which the ICJ adopted in this case, it has been suggested that despite the fact that most international human rights treaties do not include a duty to prevent violations of human rights protected in them, it may only be sensible to read a duty to prevent violations into these treaties in order to implement international human rights law.<sup>85</sup> However, the duty/obligation to prevent in international law is mostly an ethical one and not a legal one. This reduces the effectiveness of R2P. If the responsibility to prevent had more legal teeth, R2P itself would have more legal effect.

### **'Resolutionary' Approaches**

One of the highlights of R2P is its attempt to depart from the 'old' approaches to internal strife in international law and politics, for example, 'sovereignty as responsibility'. While this is a step in the right direction, the process has to be built upon to achieve a tangible and desirable result. In other words, new ways to solve old and new problems should be adopted that are conversant of the problems of the old ways but are also cognisant of the reasons why those old ways have persisted.

Due to the intersect between human rights and IHL, it would be beneficial if in the interpretation of R2P and its 'prevent' dimension more recourse is made to human rights to help to understand and operationalize prevention. The black-letter international law as well as customary international law is tailored to prohibit and punish illegal actions and not prevent them. The four crimes of genocide have to be 'stretched out' to discover the point at which preventive action can legitimately be embarked on by the international community. The international community's responsibility under R2P is predicated on state failure to protect. I believe, therefore that gross violations of human rights, as well as indicators of violations, may provide in some way an answer to

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<sup>83</sup> States at the UNGA plenary meeting in July 2009, UN GA 97<sup>th</sup>, 98<sup>th</sup>, 99<sup>th</sup> and 100<sup>th</sup> Plenary Meetings Sixty-Third Session.

<sup>84</sup> *Bosnia Genocide Case*

<sup>85</sup> Gibney, 'Genocide and State Responsibility', p. 769.

this dilemma. The inclusion of gross violation of human rights may bring more clarity to the exercise of the responsibility to prevent, especially if it replaces the non-criminal ethnic cleansing.

International law and international politics is very reactionary. Implementing R2P would require a definite shift in this culture. Preparedness for prevention rather than reactionary prevention would reframe the nature of prevention and make it more useful to real-life situations. While early warning has been cited as the primary tool for ensuring prevention,<sup>86</sup> the debate can be seen from different perspectives. It is a question of either the appropriateness of response or the preparedness for prevention. If effective and early response is the prerequisite to prevention, prevention will be futile as there can only be a response to an event that is already occurring. When the focus is response and not preparedness, a gap is introduced between early warning and early response, a gap that renders prevention impossible. Nevertheless, R2P is a continuum and while it requires emphasis and systemization of the prevent dimension, the threat of force cannot be totally done away with. However, military intervention as it is currently practiced is flawed and ineffectual; it is selective, untimely, unsuitable for specific conflicts, forced by uniformed public opinion, politicised and in some cases almost farcical.<sup>87</sup> Preparedness to prevent may reduce the instance of where military intervention may be inappropriately used. It may also be advisable not to predicate international responsibility to prevent on state inability or unwillingness to prevent atrocity, but make it more flexible while maintaining the strictures of the responsibility to react.

While it may be imprudent to suggest that the responsibility to prevent seek answers outside current international law, we must not forget that law by its very nature is constantly evolving. International law has developed by reacting to and anticipating events on the international scene; this has resulted in evolution. R2P itself, is an example of such evolution. Law, by its nature is reactive. While it is possible to anticipate breaches to legislate against, sometimes situations occur that have not been provided for in contemporary law. Limits collectively placed on state powers to avoid abuse may deter positive action when needed. For example, limits placed on the practice of humanitarian intervention may prevent states from taking positive action to stop suffering. What this means is that law evolves to solve problems that the promulgation of law may have caused and cannot backtrack because that would leave the mischief that it was original promulgated to solve unresolved. Therefore, not only does law evolve to provide for existing and anticipated human misconduct, it also has to react to redress limitations and imbalances which arise as a result of new legislations. Consequently, in address the exercise of prevention within international law, legal scholars should recognise that a rigid perception of what international law is would retard the development of R2P and the development of law itself.

## Conclusion

In my opinion there are three concepts that frame the responsibility to prevent that cause the R2P norm to lose its utility. Firstly, 'prevention options should always be exhausted before intervention is contemplated.' Secondly, 'R2P must be implemented within the limits of international law.' Finally, 'the responsibility to prevent can only be triggered by a primary state's failure to prevent atrocities.' While I agree with the sentiments expressed in the first concept, the second and the third I believe can be viewed with more flexibility. The focus on preventing genocide further clouds the issues involved and should be dispensed with in the case of R2P which has include four crimes in its corpus. As ethnic cleansing is not a crime in itself, it could be replaced or enlarged by gross violations of human rights.

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<sup>86</sup> Sara Rakita, 'Early Warning as a Tool of Conflict Prevention', *New York University Journal of International Law and Politics*, 30/3-4: 539 – 588 (1998), 542.

<sup>87</sup> Michele Griffin 'A Stitch in Time: Making the Case for Conflict Prevention', *Security Dialogue*, 32/4: 481 – 496 (2001), p. 481.