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SOME CONSIDERATIONS ON THE RESPONSIBILITY TO PROTECT: CAN THE PRINCIPLE "R2P" REINFORCE PRE-EXISTING OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW?

Abstract: Marking the twentieth anniversary of the adoption of the R2P (Responsibility to Protect) principle under the framework of the UN World Summit is an opportunity to reflect on the significance of the principle as a strong political commitment of States to protect their populations from mass atrocities, but also on its legal implications, which are still not entirely clear. On the one hand, it is acknowledged that some elements of the principle do not introduce any new legal obligations on States, other than those already established in pre-existing legal instruments, such as the fundamental treaties of international humanitarian and human rights law, the UN Charter and other legal documents on the responsibility of States, particularly in relation to the breaches of jus cogens and erga omnes obligations. On the other hand, there are still ambiguities pertaining to specific issues of the responsibility of the international community to intervene in another State in case of a manifest failure of national authorities in discharging their responsibility for the protection of civilians facing large-scale atrocities. Since the R2P principle has not gained universal support in State practice twenty years after its formal introduction, it is crucial to discuss its relationship with the existing international legal framework binding on States, as well as its unspecified legal nature.

Keywords: World Summit Outcome Document, responsibility to protect, mass atrocities, jus cogens, international cooperation

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1. INTRODUCTION

The 20th anniversary of the adoption of the World Summit Outcome Document in 2005¹ (further: WSOD) under the auspices of the United Nations is an opportunity to reflect on the effects of the Document on the international community and international law, particularly in regard to the responsibility to protect principle (R2P) and the progress that States made towards a more efficient protection of populations from the most serious violations of human rights. No doubt, the WSOD represents a vital political response of the international community to the most horrific international law violations committed during the 1990s, particularly in armed conflicts in Bosnia and Herzegovina and Rwanda, where States and the UN failed to protect civilians from genocide and other mass atrocities.² Also, the idea of the Document was to deal with some problematic aspects of the concept of humanitarian intervention, which, as cases of Somalia and Kosovo showed, was criticized quite heavily among international lawyers, although it did receive some public support.³ The concept of the R2P has subsequently been affirmed in several Security Council and General Assembly resolutions,⁴ which promoted the idea that it should be understood as an ally to State sovereignty, and not as its adversary.⁵ The adoption of a new concept came as a result of the reflections of the international community at various levels on the modalities of action, i.e., the possibilities of intervention in States facing gross violations of human rights, but in compliance with international law.⁶

Some authors consider the adoption of the WSOD as one of the most important results of the 2005 World Summit, a testimony to a shift in international law and the recognition that State sovereignty is limited by the demands of the protection of human security and human

- 1 General Assembly Resolution, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 24 October 2005. The idea of the R2P emerged from the 2001 Report of an independent commission of experts, who tried to bridge the gap between the principle of State sovereignty and the problems related to humanitarian intervention. Introducing a progressive approach, the Report focused on the idea of shared responsibility to protect between a State facing large-scale atrocities and the international community as a whole. See more in: *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, 2001*, available at: Global Centre for the Responsibility to Protect, <<https://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/>> accessed 12 November 2025.
- 2 For the analysis of failure of bystanders, third States and the UN to protect populations from mass atrocities: André Nollkaemper, *Failures to Protect in International Law* in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 437–461.
- 3 In his 2009 Report, the Secretary-General reminded States of the tragic legacy of the twentieth century and the horrors of the Holocaust, Cambodia, Srebrenica, and Rwanda, thereby warning the international community of its failure to live up to the fundamental responsibilities to protect civilians from mass violence. The Secretary General Report, *Implementing the Responsibility to Protect*, UN Doc. A/63/677, 12 January 2009, para. 5. Referring to interventions in Somalia, Bosnia and Herzegovina, and Kosovo, the Secretary-General expressed concern about how to respond to and prevent such humanitarian crises. *Ibid.*, para. 9. For different definitions of the concept of humanitarian intervention: Davorin Lapaš, “Odgovornost za zaštitu” (“R2P”) u okolnostima prekograničnog terorizma: *Eadem sed Aliter?* (2018) 53 Rad Hrvatske akademije znanosti i umjetnosti, Razred za društvene znanosti, 128.–129. Fabijanić Gagro explains that, notwithstanding some justifications for humanitarian intervention in Kosovo, many authors considered it contrary to the UN Charter, which prohibits the use of force not authorised by the Security Council. Sandra Fabijanić Gagro, ‘Zaštita civila u modernim oružanim sukobima – međunarodnopravna rješenja u svjetlu razvoja novih tendencija zaštite’ (2013) 50 Zbornik radova Pravnog fakulteta u Splitu 634 *et seq.*
- 4 See, for example, Security Council resolutions, UN Doc. S/RES/1674, 28 April 2006, on the protection of civilians in armed conflict and international peace and security, S/RES/1706, 31 August 2006, on the situation in Sudan, S/RES/1970, 26 February 2011, and S/RES/1973, 17 March 2011, on the situation in Libya, S/RES1996, 8 July 2011, on the situation in South Sudan etc.; General Assembly resolution, UN Doc. A/RES/63/308, 7 October 2009, on the responsibility to protect, etc.
- 5 The Secretary-General Report (2009) (n 3) para. 10.
- 6 Fabijanić Gagro (n 3) 636.

rights.⁷ In that sense, Articles 138 and 139 of the WSOD promote the idea that the protection of populations is not a duty and burden of each State alone, but that the responsibility for the implementation of measures towards the protection of civilians facing genocide, war crimes, ethnic cleansing, and crimes against humanity is shared between States and the international community and should be carried out in accordance with international law.⁸ Nevertheless, these provisions underline that the primary bearer of the responsibility for protection is every individual State.⁹ The secondary, residual responsibility lies with the international community, particularly the UN, to help States in discharging their obligations towards their populations and ultimately, take collective action in order to accomplish that goal.¹⁰

However, twenty years after the international community expressed universal support for the R2P, international scholars still have not reached a unanimous stand on the legal implications and legal nature of this principle. In this context, the aim of this paper is to contribute to the analysis of Articles 138 and 139 of the WSOD, focusing on the connection between the specific elements of the R2P principle and existing legal obligations of States arising from the international human rights and international humanitarian legal framework. The idea is to analyse whether this principle introduces any new legal obligations other than those already prescribed by international law, particularly *jus cogens* rules and *erga omnes* obligations. On the other hand, we will discuss ambiguities pertaining to the issue of the responsibility of States and the international community to intervene in another State to protect civilians facing large-scale atrocities, should national authorities fail to discharge their responsibility for protection. The main question concerns the precise implication of the responsibility of the international community to take collective action beyond borders and the issue of whether the WSOD itself offers any guidance in this regard. Finally, we will discuss a still ambiguous issue of the legal nature and future of the R2P.

2. RESPONSIBILITY TO PROTECT UNDER THE CURRENT INTERNATIONAL LEGAL FRAMEWORK

Article 138 of the WSOD states that it is the responsibility of each State “to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”¹¹ Evidently, the intention of this provision is to underline that every State bears the primary re-

7 Carten Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm’ (2007) 101 *American Journal of International Law*, 100–101. More on the understanding that sovereignty is a principle consisting of rights and responsibilities towards the people within a State: Alex J. Bellamy and Ruben Reike, ‘The Responsibility to Protect and International Law’ (2010) 2 *Global Responsibility to Protect* 270–272.

8 WOSD (n 1) Articles 138 and 139.

9 Article 138 explicitly prescribes that “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” *Ibid.*

10 According to Article 139 of the WSOD: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means (...) to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action (...).” *Ibid.* See also the ICISS Report (2001) (n 1) 17.

11 WOSD (n 1) Article 138.

sponsibility to protect its own civilians from the most serious international crimes.¹² However, the obligation of States to ensure the respect for fundamental human rights and security towards their populations does not introduce anything new outside the already well-established international human rights and international humanitarian legal framework. In this context, the Secretary-General himself emphasized that this responsibility is not only an emanation of State sovereignty, but also of “pre-existing and continuing legal obligations of States (...)”¹³

Namely, the duty of States to protect every individual under their jurisdiction has been well recognized in the International Covenant on Civil and Political Rights, specifically in Article 2 (para. 1: “Each State Party (...) undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant (...)”, Article 6 (para. 1: “Every human being has the inherent right to life (...)”), or Article 9 (para. 1: “Everyone has the right to liberty and security of person (...)”).¹⁴ Convention against Torture similarly obliges States Parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction (Article 2, para. 1);¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination in Article 2, para 1 a) prohibits each State Party to engage in acts or practices of racial discrimination against persons, groups of persons or institutions (...).¹⁶

Similar obligations are also firmly established in the international regional legal framework for human rights protection. For example, Articles 1, 2, and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe oblige States Parties to secure basic human rights and fundamental freedoms guaranteed by the Convention to everyone within their jurisdiction, to protect everyone’s right to life by law, and to ensure the prohibition of torture or inhuman or degrading treatment or punishment.¹⁷ The African Charter on Human and Peoples’ Rights contains similar provisions on the duties of States Parties to recognize the rights enshrined in the Charter.¹⁸

The aforementioned legal framework confirms the understanding that States’ sovereignty, apart from its external aspect, also entails internal responsibility regarding the protection of States’ own citizens.¹⁹ Moreover, the responsibility to secure the protection of human rights can, in some circumstances and to a limited extent, apply to a bystander State having jurisdiction in a territory where atrocities take place, for example, in situations of occupation by a third State or when a State exercises some other form of extraterritorial authority.²⁰

12 The primary responsibility of each State in regard to its own populations, whether nationals or not, corresponds to the first pillar of the R2P. See The Secretary General Report (2009) (n 3) para. 11 a).

13 *Ibid.*

14 International Covenant on Civil and Political Rights, 1966, UNTS, Vol 999, 1976, Articles 2, 6, and 9.

15 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, UNTS, Vol 1465, 1987, Article 2, para. 1.

16 International Convention on the Elimination of All Forms of Racial Discrimination, 1966, UNTS, Vol 660, 1969, Article 2, para. 1 a).

17 Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, UNTS, Vol 213, 1955, Articles 1, 2, and 3.

18 African Charter on Human and Peoples’ Rights, 1981, UNTS Vol 1520, 1988, Articles 1, 2, 4, 5, 6.

19 Stahn (n 7) 104.

20 Nollkaemper (n 2) 441–442. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports, 9 July 2004, paras. 102–114, where the Court explicitly stated: “(...) The Court considers that

The responsibility to protect individuals is further regulated through the establishment of the international responsibility of States and individuals for committing the most serious international crimes, some of which are explicitly addressed by the WSOD. Thus, under the provisions of the Genocide Convention of 1948, States Parties commit themselves to condemn genocide as a crime under international law (Article 1), and not to commit genocide.²¹ Furthermore, the Convention places special emphasis on the obligations to prevent and punish genocide,²² both of which are further reinforced by the duty to provide for the effective penalties in the national legal framework for those responsible for genocide (Article 5).²³ Similarly, the International Law Commission's (further: ILC) Draft Articles on Prevention and Punishment of Crimes Against Humanity of 2019 obliges States not only not to engage in acts that constitute crimes against humanity (Article 3, para. 1), but also to prevent and punish these crimes (Article 3, para. 2).²⁴ These provisions correspond to the very text of Article 138 of the WSOD, which says: "This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means."²⁵ This is in line with the idea of the R2P principle advanced by the International Commission on Intervention and State Sovereignty, which highlighted that prevention was the most important dimension of the responsibility to protect, "to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk."²⁶

As far as the responsibility of States to protect their populations from war crimes is concerned, also encompassed by Article 138, the basic international humanitarian legal framework contained in the four Geneva Conventions on the Protection of Victims of War of 1949 prescribes a legal duty of States Parties "to respect and to ensure respect for the present Convention in all circumstances."²⁷ It follows from this provision, according to the elaboration of the ICJ in its Advisory Opinion in 2004, that every State Party to the Conventions, regardless of being a belligerent party or not, is under the obligation to ensure that the requirements of the instruments in question are complied with.²⁸ This means that States are obliged to do everything they can to ensure universal compliance with the humanitarian principles enshrined in the Conventions.²⁹ This interpretation corresponds to the very purpose of the international humanitarian law regime, i.e., to limit the methods, means, and tactics of war-

the International Covenant on Political and Civil rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." *Ibid.*, para. 111.

21 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, UNTS, Vol 78, 1951, Article 1.

22 *Ibid.* For an analysis of the duty to prevent genocide and the obligation to punish genocide in the broader context of the judgements of the ICJ, see Mark Gibney, 'Genocide and State Responsibility' (2007) 7 Human Rights Law Review, 766–773.

23 Genocide Convention, *ibid.*, Article 5.

24 *Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries*, Yearbook of the International Law Commission, UN Doc. 10 (A/74/10), 2019, Article 3, paras. 1 and 3. Just as the Genocide Convention, this document obliges States to criminalize acts that constitute crimes against humanity under their national criminal legislation. *Ibid.*, Article 6, para. 1.

25 WOSD (n 1) Article 138.

26 ICISS Report (2001) (n 1) xi.

27 Four Geneva Convention on the Protection of Victims of War, 1948, UNTS, vol. 75, 1950, Article 1.

28 ICJ Reports (2004) (n 20) para. 158.

29 Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 87 International Review of the Red Cross, 69.

fare and protect people who are not actively participating in armed conflict.³⁰ The most serious violations of the law of armed conflicts represent war crimes, which are, along with genocide, crimes against humanity, and the crime of aggression, subjected to the jurisdiction of the International Criminal Court, as defined in Article 8, para. 2 of the Rome Statute.³¹ War crimes are also covered by customary international law and, as such, are not limited to the international treaty framework.³²

It is evident, therefore, that international law firmly establishes the obligation of States to protect everyone under their jurisdiction from the most serious violations of their human rights, especially those amounting to international crimes.³³ With regard to the element of prevention, based on the considerations of the ICJ, it can be concluded that the obligation of prevention extends beyond the boundaries of a national State whose population is facing the most severe international crimes; it may include other States and international organisations to get involved in the prevention.³⁴ This is in line with Article 138, which underlines the international community's responsibility to encourage and assist States in exercising their responsibility to protect.

The aforementioned provisions represent the core of the international legal framework on the protection of human rights and the responsibility of States not only not to commit the most serious international crimes, but also to ensure the respect and prevention of those rights. In this sense, the purpose of Article 138 is not to impose new obligations and responsibilities, but merely to serve as a reminder for States and the international community that the responsibility to protect is well established in international law and that it is a legal obligation that should be carried out. In this context, it is worth recalling the ICJ's reflection on the purpose of the Genocide Convention, which is to "confirm and endorse the most elementary principles of morality".³⁵ Namely, in the first judgment on the application and interpretation of the Genocide Convention in 2007, the Court explained that the principles underlying the Convention are principles recognized as binding on States, even outside the conventional framework.³⁶ The principle of R2P should therefore serve as a guiding instrument for the implementation of the already established international legal framework.

As for the responsibility of other actors in the international community, the ICJ stated that, considering the universal character of the condemnation of genocide, international cooperation is required "in order to liberate mankind from such an odious scourge."³⁷ We will

30 Bellamy, Reike (n 7) 277.

31 Rome Statute of the International Criminal Court, 1998, UNTS, vol. 2187, 2004, Article 8, para. 2.

32 Sassòli explains that the concept of war crimes is not limited to the violations listed and defined in the Geneva Conventions and Protocol I as grave breaches. See more in: Marco Sassòli, 'Humanitarian Law and International Criminal Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (2009 Oxford University Press) 112–113.

33 Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12 Human Rights Law Review 3.

34 The ICJ did not make the obligation to prevent genocide dependent on a State's jurisdiction over a certain person or a territory, which is a due diligence threshold criterion characteristic of most human rights treaties. Marko Milanović, 'State Responsibility for Genocide: A Follow-up' (2007) 18 European Journal of International Law 685–686.

35 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports, 26 February 2007, para. 161.

36 *Ibid.*

37 *Ibid.* See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports, 28 May 1951, p. 23.

focus on the issue of international cooperation in more detail further below; however, it is important to recall that the ICJ explicitly warned States that they were not excused from their obligation to prevent genocide, in terms of implementing all measures necessary in accordance with the UN Charter.³⁸ This particular reference to international cooperation is even more significant for further understanding of Article 138 of the WSOD, which calls for the international community and the UN to assist States in exercising their responsibility for protection.³⁹ This confirms the idea of shared responsibility, which is primarily linked to the UN and the Security Council if a national State has proved powerless or unwilling or prevent.⁴⁰

3. RESPONSIBILITY TO PROTECT AND *JUS COGENS* OBLIGATIONS

Even greater support for the proposition that the concept of the R2P introduces no new legal obligations on States, as far as Article 138 of the WSOD is concerned, can be found in the *jus cogens* character of the obligations embodied in the R2P. The prohibition of genocide, the obligation to prevent genocide, as well as the prohibition of crimes against humanity and the most serious breaches of the international humanitarian law are examples of international peremptory norms which “the international community accepts and recognizes as norms from which no derogation is permitted (...)”⁴¹ Thus, States as the main subjects of international law bear the highest level of responsibility to adhere to such norms and use “appropriate and necessary means” to fulfil it.

The strongest articulation of the *jus cogens* and *erga omnes* character of the prohibition of the most serious international crimes was given by the ICJ in its decisions on the interpretation and application of the Genocide Convention, and by the ILC, one of the most highly respected institutions for the codification and progressive development of international law. To mention only a few examples, in its judgment in the case *Croatia v. Serbia* of 2015, the Court confirmed that the prohibition of genocide had a character of a peremptory norm (*jus cogens*) and that the Genocide Convention contained obligations *erga omnes*, owed to the international community as a whole.⁴² Further, in the decision in the case between The Gambia and

38 ICJ Reports (2007), *ibid.*, para. 427. The Court further elaborated that the responsibility of a State for failing to prevent genocide is incurred if the State “manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide”. *Ibid.*, paras. 430 *et seq.*

39 WSOD (n 1) Article 138.

40 *Ibid.*, Article 139.

41 Vienna Convention on the Law of Treaties, 1969, UNTS, vol. 1155, 1980, Article 53. There is no official list of *jus cogens* rules; such a character of international norms is established by the jurisprudence of international courts, primarily the ICJ, as well as the “teachings of the most highly qualified publicists of the various nations”. See the Statute of the International Court of Justice, Article 38, para. 1, d). The text of the Statute is available at International Court of Justice: <<https://www.icj-cij.org/statute>> accessed 6 November 2025.

42 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports, para. 87. The Court defined *erga omnes* obligations of States as norms which are “the concern of all States” and that “all States can be held to have legal interest in their protection”. See *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962, Belgium v. Spain)*, Judgment, ICJ Reports, 5 February 1970, para. 33. On the responsibility of States towards the international community as a whole: Santiago Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’ (2010) 21 European Journal of International Law, 387–420.

Myanmar,⁴³ the Court established that all States Parties to the Genocide Convention “have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention”.⁴⁴ Moreover, it is important to highlight that the obligatory nature of the prohibition of genocide is not limited by the Convention as a treaty; these obligations also arise from customary international law.⁴⁵ In its 2007 judgment, the Court elaborated that: “(...) the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”.⁴⁶ The universal goal of protecting humankind from the most hideous violations of human rights of individuals and groups, as well as of guarding the most elementary principles of humanity, is thus merely reinforced by Article 138.

As far as other crimes covered by the WSOD are concerned, the ICJ did not draw conclusions on the *jus cogens* character of rules other than the prohibition of genocide.⁴⁷ The Court had to limit its deliberation exclusively to the interpretation of the Genocide Convention. However, other sources support the conclusion that crimes against humanity and war crimes are peremptory norms of international law, primarily the conclusions of the ILC. In its 2022 Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law, the Commission explicitly linked *jus cogens* norms to their *erga omnes* effect by explaining the following in Conclusion 17, para. 1: “Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (*erga omnes*), in relation to which all States have a legal interest.” Furthermore, in para. 2, the ILC explained that the legal consequences of a breach of such norms entail the right of any State to invoke the responsibility of any other State for violating such a norm in accordance with the rules on the responsibility of States for internationally wrongful acts.⁴⁸ By listing the prohibition of aggression, of genocide, of crimes against humanity, of the basic rules of the international humanitarian law, of torture as examples of peremptory international norms, the ILC confirmed that they are “universally applicable and are hierarchically superior to other rules of international law” (Conclusion 2).⁴⁹

43 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment on the Preliminary Objections, ICJ Reports, 22 July 2022, para. 107. See also: *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports, 3 February 2006, para. 64.

44 *Ibid.* See also: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order on Provisional Measures, ICJ Reports, 26 January 2024, para. 33.

45 Therefore, these rules are binding on States, whether they are Parties to the Genocide Convention or not. See more in Eric Wyler and León Castellanos-Jankiewicz, ‘State Responsibility and International Crimes’ in William A. Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge Taylor & Francis Group 2011) 397–398.

46 ICJ Reports (2007) (n 35) para. 161. See also ICJ Reports (1951) (n 37) 23. On the other hand, Schabas states that it is more appropriate to qualify the prohibition of genocide as a norm derived from general principles of law, but a norm which, due to the universal acceptance by the international community, can be qualified as being of a customary nature. William A. Schabas, *Genocide in International Law: The Crime of Crimes*, (2nd ed Cambridge University Press 2009) 3–5.

47 Andrea Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’ (2007) 18 *European Journal of International Law* 698; Glanville (n 33) 26.

48 *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law*, Report of the International Law Commission, UN Doc. A/77/10, 12 August 2022, Conclusion 17, paras. 1 and 2.

49 *Ibid.*, Conclusion 2. Analysing the issue of the prohibition of the most serious international crimes as peremptory norms of international law, Bassiouni links this prohibition to the principle *aut dedere aut judicare*, the non-applicability of statutes of limitations for these crimes, the universal jurisdiction for the prosecution of these crimes, etc. See Mahmoud Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’ (1996) 59 *Law and Contemporary Problems* 65–66. Among authors

The issues of the responsibility of States for serious violations of obligations arising under peremptory norms of general international law and the particular consequences arising from such breaches have been previously dealt with by the ILC in its Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001. The ILC explained that these rules prohibit the conduct of States that “has become to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values”.⁵⁰ If understood in the context of the protection of the fundamental values of human society, the principle of the R2P should thus be interpreted as a guiding instrument towards the realization and protection of the fundamental values of the international community and the international legal order.

This leads us to the analysis of the next level of the R2P principle embodied in Article 138 and particularly Article 139 of the WSOD in regard to the issue of the responsibility of the international community to help other States in fulfilling their duty to protect populations from mass atrocities. There are still some ambiguities pertaining to what the responsibility of the international community to protect actually implies, especially when it comes to taking collective action beyond borders. This is the subject of the following chapter.

4. RESPONSIBILITY TO PROTECT BEYOND BORDERS

According to Article 138, the primary responsibility to protect populations from mass atrocities lies with national authorities. The second level of responsibility is placed on other States and the international community to assist States in meeting their obligations. However, the Article contains no concrete guidelines on how to fulfil this commitment. It only briefly states that the international community “should, as appropriate, encourage and help States to exercise this responsibility (...).”⁵¹ Taking into account the wording used, “should” and “as appropriate”, it is only logical to conclude that this residual responsibility should not be construed as a legal duty, but merely as a moral incentive for States to be mindful of the situation in another State in regard to its capabilities and willingness to discharge its own responsibility to protect and then act appropriately.

The Secretary-General tried to give a more concrete meaning to the responsibility of the international community. He assessed that this responsibility, which is crucial for the advancement of the R2P, implies cooperation between the UN Member States, regional and subregional arrangements, civil society and the private sector, as well as the UN itself.⁵² The

who confirm the *jus cogens* nature of grave breaches of the international humanitarian law are, for example, Antonio Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 European Journal of International Law 6; Mahmoud Cherif Bassiouni, ‘International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice’ in Cassese (n 32) 131.

50 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of International Law Commission, vol. II (2), UN Doc. A/56/10, 2001, pp. 112–113.

51 WSOD (n 1) Article 138.

52 The Secretary-General declared that the responsibility of other States represents a second pillar of the R2P. The Secretary-General Report (2009) (n 3) para. 11, b). Peacekeeping operations mandated by the UN could also be placed within the second

Secretary-General further highlighted that prevention, building on the first and second pillar of the R2P, “is a key ingredient for a successful strategy for the responsibility to protect”.⁵³

Still, when one contemplates the legal nature of the responsibility of the international community, the real question that arises is: Is a duty of cooperation an obligation under international law? The ILC offered a possible, but indefinite answer to this question in its Draft Articles on Responsibility of States, limiting the issue of cooperation to serious breaches of obligations arising under a peremptory norm of international law. Thus, as one of the consequences of breaches of such a gravity, the Draft introduced a duty of cooperation in Article 41 by prescribing: “States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.”, i.e., of peremptory norms. Moreover, the Article imposed on States a duty not to recognize as lawful a situation created by a serious breach of *jus cogens*, nor render aid or assistance in maintaining that situation.⁵⁴ Due to the diversity of situations in which this provision might be applicable, the ILC did not specify the measures, nor methods that States should use in order to fulfil their duty of cooperation, which corresponds to the concise formulation of this second responsibility in Article 138. Nevertheless, the ILC explained that the duty of cooperation applies to States whether or not they are individually affected by the serious breach, and that it implies a “joint and coordinated effort of all States to counteract the effect of these breaches”.⁵⁵ Still, there are no definite positions among international legal scholars on the question whether positive international law imposes on States a legal duty to cooperate in the context of the responsibility to protect and the idea of collective responsibility.⁵⁶ The ILC took the approach that the obligation of cooperation is still to be qualified as progressive international law.⁵⁷

On the other hand, by analysing in more detail the content of the responsibility entailed in Article 139 of the WSOD, we will try to assess whether the idea of collective responsibility merely confirmed States’ preestablished obligations under the UN Charter, particularly under the collective security system, or it added some new elements which complicate not only the framework of the prerequisites for the cross-border intervention, but also the exact limits of the right (or duty) of the international community to intervene beyond borders in face of mass atrocities.

Namely, in comparison to Article 138, Article 139 establishes more firmly that it is the responsibility of the international community through the United Nations to peacefully, through diplomatic, humanitarian, and other means, help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁵⁸ Still, reference to Chapters VI and VIII of the UN Charter introduces no new legal obligation on States, since under the general inter-

pillar of the R2P, aiming at providing support to host States in fulfilling their protection responsibilities. Haidi Willmot and Ralph Mamiya, ‘Mandated to Protect: Security Council Practice on the Protection of Civilians’ in Weller (n 2) 382.

53 Secretary-General Report (2009), *ibid*.

54 Draft Articles (2001) (n 50) Article 41, paras. 1 and 2.

55 *Ibid.*, p. 114.

56 Similarly, Stahn (n 7) 155.

57 Draft Articles (2001) (n 50) 114. See also Edward C. Luck, ‘The United Nations and the Responsibility to Protect’ (2008) The Stanley Foundation Policy Analysis Brief, 5. More on the progressive development of particular provisions of the Draft Articles of 2001: André Nollkaemper, A., ‘Change in the Law of International Responsibility’ in Samantha Besson (ed), *Theories of International Responsibility Law* (Cambridge University Press 2022) 51–52.

58 WSOD (n 1) Article 139. The responsibility to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection corresponds to pillar three of the R2P principle. See the The Secretary-General Report (2009) (n 3) para. 11. c).

national law, and the Charter, States have the obligation to settle their disputes by peaceful means listed in Article 33 or any other means of their own choice, or by resort to regional agencies and arrangements, according to Chapter VIII.⁵⁹ When it comes to the specific obligation of international cooperation and the obligation to prevent genocide, as it is implied by Articles 138 and 139, there is already a conventional provision of the Genocide Convention (Article VIII), according to which: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide (...)." ⁶⁰ Although States Parties to the Convention are not obliged to turn to the UN organs (they "may" call upon the UN organs), this provision certainly represents a challenge for the General Assembly and the Security Council to take their responsibilities seriously and even act on their own initiative.⁶¹

Further reading of Article 139 entails some additional problematic elements. It is stated that "(...) we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate (...)" . First of all, the phrase used, "we are prepared", shows that by adhering to the WSOD, the UN Member States evidently did not want to submit themselves to any new legal commitments outside the existing legal framework of the Charter. The terminology used can be understood as an expression of a joint political, non-binding declaration.⁶² In that sense, we deem it problematic to expect that States, if not bound by any legal duty, will readily respond to the demands of the responsibility to protect populations in another State. Namely, it is evident from the current state of international relations, primarily between the five permanent Members of the Security Council, that States are reluctant to respond to their responsibility to protect populations in need, although they have all the possible mechanisms and resources within the UN (peaceful and coercive measures), which they are not prepared to use adequately and efficiently. The issue of non-intervention, which is certainly a limiting factor for acting extraterritorially, was precisely the reason why the UN Member States conditioned their consent to the text of the WSOD in the sense that the collective responsibility should be linked to the authorisation of the Security Council and that the R2P be restricted to the four specific crimes.⁶³

Secondly, it is problematic to assert that States have an obligation to react in all situations in which civilians are facing human rights violations. In this context, the wording "(...) on a case-by-case basis and in cooperation with relevant regional organisations as appropriate"

59 UN Charter, 1945, 1 UNTS XVI, Article 2, para. 3, Article 33, para. 1, and Article 52, paras. 1 and 2.

60 Genocide Convention (n 21) Article VIII.

61 Similarly, Stephen J. Toope, 'Does International Law Impose a Duty upon the United Nations to Prevent Genocide?' (2000) 46 McGill Law Journal, 192.

62 Stahn also qualifies this "commitment" as a voluntary, rather than mandatory engagement. Stahn (n 7) 109.

63 Glanville (n 33) 11–12. The phrase "prepared to take collective action" was eventually introduced at the instigation of the US representative, who accentuated that the responsibility of other States is not the same as the responsibility of a host State. Mr Bolton insisted that the responsibility of the international community was only a moral one, not legal. *Ibid.* It is worth mentioning that a Constitutive Act of the African Union introduces an interesting and progressive departure from the classic understanding of the principle of non-intervention by prescribing in Article 4, para. 4 h) that one of the principles of the African Union is: "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." Constitutive Act of the African Union, 2000, UNTS, vol. 2158, 2003. On the relationship between the right to intervention within the framework of the African Union and the authority of the UN to intervene in other States, see Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85 International Review of the Red Cross, 807–826.

states the obvious: it is not possible to anticipate every possible situation that would call for the engagement of the international community to intervene beyond borders. This is in line with the previously cited Article 41 of the ILC's Draft Articles, which does not prescribe precise measures that States should use in order to fulfil their duty of cooperation.⁶⁴ As sovereign subjects, States are free to use all available and appropriate, but exclusively lawful means to help populations in another State facing mass atrocities. However, the burden of assessing that another State "is manifestly failing" in discharging its own responsibility for protection is a heavy one; States are at risk of violating a non-intervention principle, and a host State can question the timing and the legality of the action employed. On the other hand, when invoking sovereignty as a shield against external intervention, host States also carry a burden of justifying the measures they are taking to tackle the situation within their territories in order to fulfil their international obligations. Sovereignty does not extend so far as to be a shield from interventions undertaken to halt the commission of mass atrocities.⁶⁵

Furthermore, Article 139 does not clearly state who should decide on the appropriateness of the collective action. It only mentions the Security Council, which, as is established by the relevant provisions of the UN Charter, is restrained by the qualification of a situation as a threat to peace, breach of the peace, or an act of aggression.⁶⁶ Also, the exception to the principle of non-intervention under Article 2, para 7 of the Charter, according to which the Security Council has the authority to decide on the implementation of enforcement measures in accordance with Chapter VII, is not clear enough with regard to the specific preconditions for the legitimacy of the Security Council's intervention.⁶⁷ The final decision is a matter of political discretion of the Security Council Member States; ultimately, it rests on the interests of the five permanent Members.

In addition, Article 139 is not articulate on the criteria for the determination that a threshold for activating collective action has been reached. It merely speaks of a preparedness to take collective action "should peaceful means be inadequate and national authorities are manifestly failing to protect their populations."⁶⁸ The Secretary-General accepts a flexible approach which implies a "reasoned, calibrated and timely response, which would include "a range of tools available to the United Nations and its partners."⁶⁹ Unfortunately, the system of the UN is very complex and slow, thus undermining the efficiency of collective action in practice.⁷⁰ Furthermore, the most recent years of severely damaged geopolitical relations and the inability of the Security Council to take collective action in a timely and decisive manner do not contribute to a conviction that the Council accepts this responsibility seriously, as a duty under international law, nor even as a moral imperative.

64 Bannon warns that the formulation "case-by-case" basis encourages bad faith actions (vetos) within the Security Council, giving them a powerful negotiating tool in the face of atrocities. Alicia L. Bannon, 'The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism' (2006) 15 *The Yale Journal*, 1160.

65 Similarly, Bannon, *ibid.*, 1162; Bellamy, Reike (n 7) 272.

66 UN Charter (n 59) Article 39.

67 *Ibid.*, Article 2, para. 7.

68 WSOD (n 1) Article 139. See also Stahn (n 7) 117.

69 The Report of the Secretary-General (2009) (n 3) para. 11. c).

70 Bannon is critical of the effectiveness of the UN system in confronting risks of large-scale atrocities within the R2P by warning that the UN is too bureaucratic, the decision-making process is time-consuming, and usually diplomatically and politically very costly. As an example of a slow reaction of the Security Council, Bannon mentions the resolution of 2005, adopted two years after the beginning of violence in Darfur, Sudan. Bannon (n 70) 1159–1160.

It is controversial, though, whether the Security Council as an organ of the UN, or its Member States, should be held internationally responsible for failing to adopt a decision intended to reduce the risk of genocide, crimes against humanity, ethnic cleansing or war crimes, i.e., peremptory norms of international law.⁷¹ The author of this paper strongly adheres to the belief that the *jus cogens* rules of international law are the ultimate limit of the discretionary power of the Security Council Member States, who should not hide behind the political function of the Council nor the UN as an organisation to circumvent their imperative legal obligations in the face of mass atrocities.⁷² Indeed, as observed by the ILC in its Draft Articles on the Responsibility of International Organisations of 2011, international obligations may encompass the conduct of a State when it acts within an international organisation.⁷³ This would be the case when a State, by expressing a certain position within the institutional decision-making process, undertakes a conduct that represents a violation of its own international obligation.⁷⁴ However, as the ILC explains, this kind of situation would require the application of the rules of State responsibility under the Draft Articles on the Responsibility of States of 2001.⁷⁵

In conclusion, it is evident that several elements of the R2P principle remain unclear, particularly those referring to the extent of the duty of States to act extraterritorially in order to help a State manifestly failing to discharge its own responsibility for protection. The prerequisites for exercising this collective responsibility are already prescribed by the UN Charter, although the framework of Chapter VII is also insufficiently effective. Unfortunately, although the goal of the WSOD was to confirm the responsibility of the international community to not stand aside and take every possible action to discharge its collective responsibility, the Articles did not introduce any clarification or guidance for a more efficient implementation of the R2P concept.

5. CONCLUSION

Even after twenty years of the formal introduction of the R2P principle and its almost universal acceptance in the UN General Assembly, its individual components remain unclear and inconclusive, primarily from a legal perspective. Obviously, this principle represents a

71 On restrictions of the use of veto in the Security Council and the effects of *jus cogens* norms of international law on the voting procedure in the Council see Rutvica Rusan Novokmet, 'Međunarodnopravna ograničenja uporabe prava veta u Vijeću sigurnosti UN-a u svjetlu aktualnih prijetnji međunarodnom miru i sigurnosti' (2025) 75 Zbornik Pravnog fakulteta u Zagrebu 105–136. However, some resolutions of the Security Council can be criticized for misjudging the situation in which the intervention was proposed. See, for example, discussions of the Council's Member States after the adoption of the 1556 Resolution in the situation in Darfur in 2004, in which the R2P was invoked. Security Council Meeting, UN Doc. S/PV.5015, 30 July 2004, and Security Council Resolution, UN Doc. S/RES/1554, 29 July 2004.

72 For a theoretical approach to the subject of the responsibility of international organisations in comparison to the responsibility of States: Jan Klabbers, 'Responsibility as Opportunism: The Responsibility of International Organizations' in Besson (n 57) 119–142. The ILC's Draft Articles on the Responsibility of International Organisations of 2011 contains provisions most of which are considered progressive development of international law, considering the lack of practice of international organisations and a great variety of their mandates, competences, etc. See *Draft Articles on the Responsibility of International Organizations, with Commentaries*, Yearbook of International Law Commission, vol. II, Part 2, UN Doc. A/66/10, 2011.

73 Draft Articles (2011), *ibid.*, 91.

74 Paolo Palchetti, 'Responsibility of Members of an International Organization' in Besson (n 57) 151. See also *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, ICJ Reports, 5 December 2011, p. 43, in which the Court found Greece responsible for its conduct within NATO on the assumption that the Respondent's conduct can be assessed independently of NATO's decision.

75 Draft Articles (2011) (n 72) 91.

combination of political and legal considerations, confirming, on the one hand, well-established duties of States under international human rights and international humanitarian law, strengthened by the authoritative judgments of the ICJ, and the work of international scholars, particularly within the ILC.

On the other hand, ambiguities persist in relation to the issue of the precise content and scope of the responsibility of States and the international community to assist national authorities of other States that are manifestly failing to respond to their own responsibilities. Moreover, the duty of international cooperation and the prerequisites for the execution of collective responsibility under the authority of the Security Council still lack clarity and precise meaning, posing questions whether the existing framework on the collective security system can provide an adequate response to the challenges of the R2P, or the Council's Members carry even greater responsibility when it comes to protecting the *jus cogens* and *erga omnes* obligations, and refrain from the use of veto.⁷⁶ Unfortunately, the Security Council might not always be up to the task of making binding decisions for the implementation of the R2P. However, it in no way implies that the Security Council should disregard its authority in issuing recommendations in the context of the R2P. It is important to keep reminding States of their *jus cogens* obligations and the duty to harmonize their responses to genocide and other gross violations of human rights with the most elementary principles of humanity. The role of the General Assembly and other UN organs should not be underestimated in this context.

With time, the practice of States and decisions of the General Assembly and the Security Council might give the R2P more precise content and meaning, but for the time being, the R2P principle can serve as a tool for improving and reinforcing existing legal obligations of States to protect populations, whether their own or those under the jurisdiction of other States, facing the most severe violations of human rights.

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NEKA RAZMIŠLJANJA O ODGOVORNOSTI ZA ZAŠTITU: MOŽE LI NAČELO R2P (*RESPONSIBILITY TO PROTECT*) OSNAŽITI VEĆ POSTOJEĆE OBEVEZE DRŽAVA PREMA MEĐUNARODNOM PRAVU?

Sažetak

Obilježavanje dvadesete obljetnice usvajanja načela R2P (odgovornosti za zaštitu) u okviru svjetskog sastanka na vrhu Ujedinjenih naroda prilika je za razmišljanje o važnosti tog načela kao snažne političke obveze država da zaštite svoje stanovništvo od masovnih zločina, ali i o njegovim pravnim implikacijama koje i dalje nisu potpuno jasne. S jedne strane, potvrđuje se da neki elementi tog načela ne uvode nikakve nove pravne obveze za države, izvan onih koje su već uspostavljene postojećim pravnim instrumentima, poput temeljnih međunarodnih ugovora međunarodnog humanitarnog prava i međunarodnopravne zaštite ljudskih prava, Povelje UN-a kao i drugih dokumenata o međunarodnoj odgovornosti država, osobito kad je posrijedi kršenje *jus cogens* i *erga omnes* obveza. S druge pak strane, i dalje postoje nedorečenosti koje se odnose na neke specifične elemente načela R2P o odgovornosti međunarodne zajednice da intervenira u drugu državu, u slučaju očitog neuspjeha nacionalnih vlasti u izvršavanju njihove vlastite odgovornosti za zaštitu civila suočenih sa zločinima velikih razmjera. S obzirom na to da nakon dvadeset godina od njegova formalnog uvođenja načelo R2P i dalje ne uživa univerzalnu podršku u praksi država, važno je raspraviti njegov odnos s postojećim međunarodnopravnim okvirom koji obvezuje države, kao i njegovu neodređenu pravnu prirodu.

Ključne riječi: World Summit Outcome Document, odgovornost za zaštitu, masovni zločini, jus cogens, međunarodna suradnja



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