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Shared Responsibility for the Prevention of Genocide?

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Abstract: The legal obligations to prevent genocide are well-established in international law. However, their allocation between different actors is still under discussion. The law does not give satisfactory answers in terms of the role of multiple actors and their corresponding responsibilities in genocide prevention. Most experts would agree that under certain circumstances States may legally be required to cooperate to ensure effective prevention of genocide. Recent developments such as the adoption of the World Summit Outcome Document of 2005, which enshrines the concept of the responsibility to protect, emphasize the importance of combined efforts to prevent genocide. It is, however, less clear how States share their obligation to prevent genocide, and how they share those obligations with the international organizations such as the United Nations. It proved difficult to delineate the boundaries of ensuing legal responsibilities. The degree of shared responsibilities and their allocation between the respective actors should be explored in this context. This question will be analyzed in the paper by taking into account relevant international jurisprudence and state practice.

1. Introduction

In his Report on the fall of Srebrenica (1999), the Secretary General of the United Nations emphasized that ‘[t]he international community as a whole accepts *its share of responsibility* for allowing the tragic course of events by its prolonged refusal to use force in the early stages of the war.’² The Report further states that ‘[t]his responsibility is *shared* by the Security Council, the Contact Group and other Governments which contributed to the delay in the use of force, as well as by the United Nations Secretariat and the mission in the field’.³ Similarly, the UN-sponsored Report on the 1994 tragic events in Rwanda stated that ‘[t]he United

¹ Research Fellow, Max Planck Institute for Comparative Public Law and International Law; The author wishes to thank André Nollkaemper, Nienke van der Have, Ilias Plakokefalos, Helmut Aust, Matthäus Fink and Matthias Lippold for their helpful comments and suggestions. The usual disclaimers apply.

² Report of 15 November 1999, A/54/549, para 501 (emphasis added).

³ *ibid* (emphasis added).

Nations should acknowledge *its part of the responsibility* for not having done more to prevent or stop the genocide in Rwanda'.⁴ *Ingvar Carlsson*, who chaired the Rwanda investigation, concluded that '[e]ach part of the UN system – the Secretary General, the Secretariat, the Security Council and the Member States – *has a share* in the responsibility for the failures of the UN Mission. It was a failure of the UN system as a whole'.⁵ There have also been voices that argued that members of the UNSC must bear a special responsibility for recent failures to prevent genocide.⁶ Indeed, as experience shows each particular case of genocide in the late 20th century was more or less the result of a failure of a multiplicity of actors to effectively prevent the atrocities.⁷

Some of the forms of shared responsibility demonstrated by the examples above are not governed by international law (which primarily deals with responsibility of states and international organizations as well as individuals). However, these examples show that the issue of sharing responsibilities for the prevention of genocide among various entities has been discussed from different perspectives,⁸ including international law, but also from moral and political perspectives⁹. In this context, some commentators have arrived at the conclusion that 'there are no legal parallels to moral taint and moral shame' for genocide prevention.¹⁰ The Reports on Rwanda and Srebrenica, in turn, indicated that the share of responsibility of the United Nations has to be regarded as a political one,¹¹ raising questions of political accountability.¹² The problem of translating political and moral responsibilities into specific

⁴ Report of 15 December 1999, S/1999/1257, 59 (emphasis added).

⁵ I Carlsson, 'The UN Inadequacies' (2005) 3 *Journal of International Criminal Justice* 837 at 846 (emphasis added).

⁶ R Dallaire, K Manocha and N Degnarain, 'The Major Powers on Trial', (2005) 3 *Journal of International Criminal Justice* 861.

⁷ For an overview, see S Totten and WS Parsons (eds), *Century of Genocide*, third edition (Rutledge 2009). See also L Kuper, *Genocide – Its Political Use in the Twentieth Century* (Yale University Press 1982); L Kuper, *The Prevention of Genocide* (Yale 1985).

⁸ A recent Report of the SG on the system of collective security is called 'A more secure world: our shared responsibility'. The Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004) UN Doc A/59/565.

⁹ According to Carlsson: 'The members of the Security Council have a particular responsibility, morally if not explicitly under the Convention, to react when faced with a situation of genocide', I Carlsson, 'The UN Inadequacies' (n 5) at 844. See L May, *Sharing Responsibility* (University of Chicago Press 1992); see also L May, 'Collective Inaction and Shared Responsibility' (1990) 24 *Nous* 269.

¹⁰ L May, *Genocide – A Normative Account* (CUP 2010) 260.

¹¹ P Klein, 'The Attribution of Acts to International Organizations' in J Crawford, A Pellet, and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 307.

¹² A Nollkaemper, 'Multi-level Accountability: A Case Study of Accountability in the Aftermath of the Srebrenica Massacre' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law*

legal categories and allocating legal responsibilities between the respective actors seems to have remained controversial and unresolved. The situation is further complicated by a difficulty to legally determine the scope and content of permissible preventive action. The question what the states and other entities can and must do in the face of a large-scale humanitarian catastrophe was extensively explored after the 1999 NATO intervention in Serbia. The Independent International Commission on Kosovo concluded that the intervention without an authorization of the UNSC to remove the Milošević Government from power was ‘legitimate, but not legal’,¹³ and emphasized ‘the need to close the gap between legality and legitimacy’,¹⁴ in such critical situations.

The idea of sharing responsibilities between states and the UN as the main, though imperfect, embodiment of the international community¹⁵ permeates the concept of the responsibility to protect (R2P),¹⁶ which gave rise to further discussions on the role and responsibilities of the international community to prevent core crimes including genocide.¹⁷ The 2005 Outcome Document, which was adopted at the 2005 World Summit and constitutes the most authoritative statement of R2P concept, states that ‘[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’¹⁸ The document emphasizes that the responsibility to protect of the

– *Considering Sovereignty, Supremacy and Solidarity. Essays in honour of Professor Ruth Lapidoth* (Hart Publishing 2008) 345.

¹³ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 289.

¹⁴ *ibid*, 10.

¹⁵ See, for example, B Simma/A Paulus, ‘The “International Community”’: Facing the Challenge of Globalization’ (1998) 9 EJIL 266 at 274, where the authors argue that ‘what the [United Nations] Charter undoubtedly did achieve was the translation of the concept of the “international community” from an abstract notion into something approaching institutional reality’. On the notion of the international community in international law see also A Paulus, *Die Internationale Gemeinschaft im Völkerrecht – Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Beck 2001).

¹⁶ UNGA, 2005 World Summit Outcome Res A/60/1 (24 October 2005) UN Doc A/Res/60/1, paras 138-9; see also *Responsibility to Protect: the Report of the International Law Commission on Intervention and State Sovereignty* (International Development Research Centre 2002); Panel Report (n 8).

¹⁷ J Hoffmann and A Nollkaemper (eds), *Responsibility to Protect – From Principle to Practice* (Amsterdam University Press 2011). AJ Bellamy, SE Davies and L Glanville (eds), *The Responsibility to Protect and International Law* (Martinus Nijhoff Publishers 2011); A Orford, *International Authority and the Responsibility to Protect* (CUP 2011); Societe Française pour le Droit International, *Colloque de Nanterre – La Responsabilité de protéger* (Editions Pedone 2008); G Evans, *The Responsibility to Protect – Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press 2008); UNSC Resolution 1973, which was adopted under Chapter VII UNC authorizing the recent military operation against the Regime of Colonel Qaddafi in Libya, invoked the responsibility to protect concept, UNSC Resolution 1973, 17 March 2011.

¹⁸ World Summit Outcome Document (n 16) para 138.

international community is a secondary one and is triggered when the respective states manifestly fail to protect their populations.¹⁹

This paper attempts to explore the question as to whether there is a shared responsibility²⁰ for the prevention of genocide in positive law, in terms of primary obligations, and how those obligations are allocated between different actors. To analyze the issue of the allocation of responsibilities, the paper deals with the scope and content of the primary obligation to prevent genocide.

In its 2007 *Bosnian Genocide Case*,²¹ the ICJ (the Court) arrived at the conclusion that there is an obligation of conduct²² to prevent genocide.²³ The Court based its approach on the ‘capacity to effectively influence’ concept, which is used to determine whether a state has an obligation in the first place. It remains legally irrelevant whether the states succeed in their preventive efforts²⁴ and actually prevent the occurrence of the crime. Although the 2007 judgment constituted an important step towards clarifying the ambiguities surrounding the notion of genocide prevention (as enshrined in the Genocide Convention²⁵), it does not seem to have fully clarified the content and scope of the obligation to prevent genocide. It is

¹⁹ *ibid*, para 139: ‘The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’

²⁰ For a definition see A Nollkaemper and D Jacobs, *Shared Responsibility in International Law*, ACIL Research Paper No 2011-7 (SHARES Series), finalized 2 August 2011 (www.sharesproject.nl), 72: ‘obligations that two or more states (or other actors) jointly owe towards a third party’; see also A Nollkaemper, *Issues of Shared Responsibility before the International Court of Justice*, Amsterdam Law School Legal Studies Research Paper No. 2011-01.

²¹ *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 [2007] ICJ Rep 43.

²² On the distinction between the obligations of means / conduct and the obligations of result see J Combacau, ‘Obligation de Résultat et Obligations de Comportement: Quelques Questions et Pas De Réponse’ in *Le Droit International: Unité et Diversité - Mélanges Offerts A Paul Reuter* (Édition A. Pedone 1981) 181. See also PM Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10 EJIL 371.

²³ *Genocide Case* (n 21) para 430.

²⁴ R Pisillo-Mazzechi, ‘The Due Dilligence Rule and the Nature of the International Responsibility of States’ (1992) 35 GYIL 9.

²⁵ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277. According to Article II of the Convention, ‘genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such: a. Killing members of the group; b. Causing serious bodily or mental harm to members of the group; c. Deliberately inflicting on the groups conditions of life calculated to bring about its physical destruction in whole or in part; d. Imposing measures intended to prevent births within the group; e. Forcibly transferring children of the group to another group’.

submitted that, in order to be able to give a convincing answer to situations of shared responsibility that may arise with respect to genocide prevention, the scope and content of the primary obligation of prevention must further be clarified.

The paper proceeds as follows: in the second chapter, the evolution of a legal obligation to prevent genocide will be discussed, and the range of actors (states and the United Nations) potentially bearing responsibility for the prevention of genocide will be determined. Further, it will be examined whether there is a development towards an obligation to cooperate to prevent genocide (chapter 3) and what its legal status is. An obligation of preventative cooperation may have significant impact on the distribution of responsibilities. The actors that are in a position to cooperate to effectively prevent genocide could be seen as bearing more responsibility to act. Finally, the issue will also be dealt with as to what rules on allocation of responsibilities apply in this case (chapter 4). At the end of the paper, an attempt will be made to conceptualize the notion of shared responsibility for the prevention of genocide (chapter 5). Enforcement of shared obligations and shared legal consequences²⁶ will not be covered by this contribution.

The paper argues that the international community (institutionalized in the form of the United Nations) may be held responsible for a failure to prevent genocide. This approach can be based on the recognition of a fundamental responsibility of the international community to protect its members from genocide. However, this does not exclude or somehow weaken the responsibility of the individual members of that community (in a primary meaning) whose degree of responsibility may vary according to their capacity to effectively influence (though this can also be seen as a form of collective responsibility).

2. The evolution of a legal obligation to prevent genocide

2.1. Obligation of states to prevent genocide

According to Article I of the 1948 Genocide Convention, states have an international legal obligation to prevent and punish acts of genocide.²⁷ The obligation to prevent is further elaborated in Article VIII of the Genocide Convention according to which the states may call upon the competent organs of the United Nations to take appropriate action for the prevention

²⁶ See A Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18 EJIL 695.

²⁷ Genocide Convention (n 25) Article I: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.

and suppression of acts of genocide.²⁸ These provisions (Article I in conjunction with Article VIII) have been subject to criticism. They have been criticized for not defining the role of the UNSC, arguably the most suitable organ of the UN for the purposes of genocide prevention.²⁹ The predominant view is that the provision does not add new powers to the competences of the respective organs of the United Nations (in particular, the UNSC).³⁰

However, already the 1951 Advisory Opinion of the ICJ indicated that ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’.³¹ The Court emphasized the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind. The Court concluded that a further consequence arising from this conception is the *universal character* both of the condemnation of genocide and of the cooperation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention).³² The ICJ found that genocide was ‘contrary to moral law and the spirit and aims of the United Nations’.³³

Special emphasis on the duty to prevent genocide was placed in the proceedings brought by Bosnia and Herzegovina against the Federal Republic of Yugoslavia (FRY) in 1993. In its indication of provisional measures the ICJ determined that Article I of the Genocide Convention imposes obligations on parties ‘to do all in their power to prevent the commission of any such acts in the future’.³⁴ In its judgment of 11 July 1996, the Court emphasized that the Genocide Convention does not territorially limit the obligation of States to prevent and punish genocide.³⁵ On 26 February 2007 the ICJ held that Serbia had violated its Article I

²⁸ *ibid*, Article VIII.

²⁹ See, for example, O Ben-Naftali, ‘The Obligation to Prevent and Punish Genocide’ in P Gaeta (ed), *The UN Genocide Convention - A Commentary* (OUP 2009) 27 at 30.

³⁰ G Gaja, ‘The Role of the United Nations in Preventing and Suppressing Genocide’ in P Gaeta (ed.), *The UN Genocide Convention - A Commentary* (OUP 2009) 397 at 400. See also Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 8 April 1993, ICJ Rep (1993) 3, 22-4.

³¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 23.

³² *ibid*.

³³ *ibid*, 22.

³⁴ Provisional Measures Order, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 8 April 1993, ICJ Rep (1993) 3, 22.

³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, para 31.

obligation to prevent genocide³⁶ because it failed to take any measures within its power to prevent genocide in Srebrenica in July 1995.³⁷ While determining the parameters for assessing whether the state discharged its obligation to prevent genocide the ICJ focused on the respective state's capacity to influence³⁸ the course of events on the ground. The Court also emphasized that the Convention imposes the obligation to prevent on 'any State party which, in a given situation, has in its power to contribute to restraining in any degree the commission of genocide'.³⁹

It is submitted that the notion of a capacity to effectively influence does not amount to control. In order to determine whether a state has such capacity, the geographical distance to the crime scene, political and other ties⁴⁰ with the respective actors, the state's 'legal position vis-à-vis the situations and persons facing the danger' must be taken into consideration.⁴¹ Further, the obligation to prevent arises 'at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'.

Although the Court construed an obligation of conduct leaving the choice of appropriate means of prevention to the states, the means chosen must be in accordance with international law. As *Lauterpacht* pointed out, 'it would be difficult to say that [the States] become positively obliged to provide [the victim State] with weapons and military equipment'⁴² in order to ensure effective prevention. Neither can it be argued, according to Judge *Simma*, that the 'powerful states have an obligation to prevent every and all genocide' or 'to resort to force to prevent genocide'.⁴³ *Louise Arbour* argued that the 'powerful States may be reasonably expected to play a leading role in bolstering appropriate measures of prevention, dissuasion and remedy across a geographic spectrum commensurate with their weight, wealth, reach, and

³⁶ *Genocide Case* (n 21) para 450.

³⁷ *ibid*, para 438.

³⁸ *ibid*, para 430.

³⁹ *ibid*; according to the Court, 'for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them', *ibid*, para 438.

⁴⁰ H Aust, *Complicity and the Law of State Responsibility* (CUP 2011) at 402: 'the overall amount of support for the authorities of the Republika Srpska by Serbia underlined the special relationship between the two entities'.

⁴¹ *Genocide Case* (n 21) para 430.

⁴² Separate Opinion of Judge *ad hoc* Lauterpacht, 1993 Provisional Measures Order (n 30) 103.

⁴³ B Simma, 'Genocide and the International Court of Justice' in C Safferling and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (ZMC Asser Press 2010) 262.

advanced capabilities'.⁴⁴ As will be shown below, the capacity to effectively influence may constitute a useful but not unproblematic (and exclusive) basis for allocating responsibilities for the prevention of genocide.

2.2. Obligation to prevent as applied to the United Nations

In the sense of primary obligations, the rights and obligations of IOs are not necessarily the same as those of a State.⁴⁵ The scope and content of those rights and obligations is determined by functions and competences of the respective International Organisation.⁴⁶ IOs that possess a legal personality separate from the legal personality of their member states⁴⁷ may bear the primary obligation to act in a particular situation.⁴⁸

It may safely be concluded that the obligation to prevent genocide goes beyond the treaty law of the Genocide Convention⁴⁹ and forms part of customary international law⁵⁰. According to *Fassbender*, the Genocide Convention of 1948 'ha[s] become part of the constitutional foundation of the international community'.⁵¹ Customary international law covers both individual and collective actors.⁵² *Gaja* noted in this respect: 'Assuming that general international law requires States and other entities to prevent genocide *in the same way*⁵³ as the Convention on the Prevention and Punishment of the Crime of Genocide, and that the United Nations has been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-

⁴⁴ L Arbour, 'The responsibility to protect as a duty of care in international law and practice' (2008) 34 *Review of International Studies* 455.

⁴⁵ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ Rep 1949, 179.

⁴⁶ *ibid*, para 180; see also HG Schermers and NM Blokker, *International Institutional Law* (Martinus Nijhoff Publishers 2003) § 1570.

⁴⁷ *Reparation for Injuries* (n 45) 174.

⁴⁸ G Gaja, 'Third Report on Responsibility of International Organizations', UN Doc A/CN.4/553, 3, 13 May 2005.

⁴⁹ For more details on treaty law and interpretation of that law see *Genocide Case* (n 21); see also A Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' in U Fastenrath, R Geiger, D-E Khan, A Paulus, S von Schorlemer, C Vedder (eds), *From Bilateralism to Community Interests – Essays in Honour of Judge Bruno Simma* (OUP 2011) 629. For a more detailed discussion see P Gaeta (ed), *The UN Genocide Convention – A Commentary* (OUP 2009).

⁵⁰ See WA Schabas, *Genocide in International Law – The Crime of Crimes* (CUP 2009 second edn) 648: 'Parallel to the Genocide Convention there exists a body of customary international law, and some have argued that it is in some respects more complete than the instrument itself. ... The definition of the crime of genocide is undoubtedly part of international custom, as are the basic obligations to punish and prevent genocide'.

⁵¹ B Fassbender, *Targeted Sanctions and Due Process* (2006) 26.

⁵² O Ben-Naftali, 'The Obligation to Prevent and Punish Genocide' (n 29) 40.

⁵³ Emphasis added.

making process could not exonerate the United Nations'.⁵⁴ In his Third Report on Responsibility of International Organizations, *Gaja* refers to 'the failure on the part of the United Nations to prevent genocide in Rwanda'.⁵⁵

The question whether customary international law requires states and IOs to prevent genocide in the same way as the Genocide Convention cannot be fully addressed in this paper. What should, however, be stressed is that the obligation to prevent genocide is linked to the primary task of the UN to maintain international peace and security. In its Resolution 941, the SC emphasized that the practice of 'ethnic cleansing'⁵⁶ by the Bosnian Serb forces constituted a clear violation of international humanitarian law and posed a serious threat to the peace efforts. The SC was 'determined to put an end to the abhorrent and systematic practice of "ethnic cleansing" whenever it occurs and by whomsoever it is committed'.⁵⁷ In Resolution 955 on Rwanda, the SC expressed its concerns at 'the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda' and determined that this situation continued 'to constitute a threat to international peace and security'.⁵⁸ Moreover, the SC issued resolutions declaring the widespread and systematic attacks against civilians a threat to international peace and security.⁵⁹ It remains in the (wide) discretion of the Security Council to determine what constitutes a threat to international peace and security within the meaning of Article 39 of the UN Charter. However, the practice indicates that the SC qualifies crimes against humanity and acts of genocide as a threat to international peace. Although the practice is meagre and inconsistent, the functional character of tasks and obligations of the UN would suggest that the UN should bear a particularly strong responsibility to prevent genocide.

⁵⁴ G Gaja, 'The Role of the United Nations in Preventing and Suppressing Genocide' (n 30) at 405; see also G Gaja, 'Third Report on Responsibility of International Organizations' (n 48) para 10. SJ Toope, 'Does International Law Impose a Duty upon the United Nations to Prevent Genocide?' (2000) 46 McGill L.J. 187. According to the author, the Convention on the Prevention and Punishment of the Crime of Genocide obliges the United Nations to act to prevent genocide. Furthermore, there is an *erga omnes* obligation owed by the UN to the international community to prevent gross violations of human rights.

⁵⁵ G Gaja, 'Third Report on Responsibility of International Organizations' (n 48) 4.

⁵⁶ ICTY concluded that '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide', *Stakić* Judgment IT-97-24-T 31 July 2003 para 519. The ICJ shared The ICTY's view in its Genocide Case (n 21) para 190.

⁵⁷ S/RES/941 (1994), 23 September 1994.

⁵⁸ S/RES/955 (1994), 8 November 1994.

⁵⁹ See, for example, the UNSC Resolution 1970 on the situation in Libya, in which the SC invoked the R2P concept, S/RES/1970 (2011), 26 February 2011; in its Resolution 1973, the SC determined that the situation in Libya constituted a threat to international peace and security under UNC VII and authorized 'Member States ... to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack', S/RES/1973 (2011), 17 March 2011.

With respect to a treaty-based obligation of states to prevent genocide, Judge *ad hoc* *Lauterpacht* noted in the ICJ proceedings that while ‘on its face, it could be said to require every party to positively prevent genocide wherever it occurs, the limited reaction of states to acts of genocide that have occurred since the coming into force of the Convention, suggests the permissibility of inactivity’.⁶⁰ One may be inclined to argue that such ‘permissibility of inactivity’ may also be extended to the IOs, particularly to the UN, when taking into account the practice (and the cases in which the UN did not act effectively). On the other hand, a lack of practice did not prevent the ICJ in its 2007 ruling to frame the obligation to prevent genocide as a ‘hard’ legal obligation. This has been explained not only by the strong links of Serbia with Bosnia but also, in a more general fashion, by the object and purpose of the Genocide Convention, the universal condemnation of genocide as a crime of crimes and the cooperation required to eliminate it. This is not fully transferable to IOs (in particular, to the UN in this case); they are not party to the 1948 Convention. However, in respect to the mandate and mission of the UN and the origin of the Genocide Convention, which lies within the UN⁶¹, a presumption may be emerging that the organization will bear special responsibility for prevention in the face of a serious risk of genocide.

Two trends that point to the evolution of an obligation of the United Nations to prevent genocide have to be emphasized – one normative and another institutional, with normative implications.

First, legal developments indicate that the obligation to prevent genocide consecrates a fundamental public good in a normative sense which must be upheld; moreover, there is an underlying collective interest in the prevention of genocide. The ICJ held in *Barcelona Traction* that the outlawing of genocide creates ‘obligations of a State towards the international community as a whole’.⁶² In 1996, the ICJ stated that ‘the rights and obligations

⁶⁰ Separate Opinion of Judge *ad hoc* Lauterpacht, 1993 Provisional Measures Order (n 30) para 115. Gaja also emphasizes that the SC responded to acts of genocide only in recent years. Article VIII of the Genocide Convention does not add any additional powers to the UNSC. See G Gaja, ‘The Role of the United Nations in Preventing and Suppressing Genocide’ (n 30).

⁶¹ In its Resolution of 11 December 1946, the General Assembly of the United Nations affirmed that ‘genocide is a crime under international law which the civilized world condemns’. It stated that genocide ‘is contrary to moral law and to the spirit and aims of the United Nations’, A/RES/96(I).

⁶² *Barcelona Traction, Light and Power Company, Limited, Judgment* (1970) ICJ Rep 3 at 246. For a discussion of the issue as to whether the obligations *erga omnes* give rise to certain positive obligations to take action, see C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005); see also G Gaja, ‘Do States Have a Duty to Ensure Compliance with Obligations *Erga Omnes* by Other States?’ in M Ragazzi (ed) *International Responsibility Today – Essays in Memory of Oscar Schachter* (Martnus Nijhoff Publishers 2005) 31.

enshrined by the Convention are rights and obligations *erga omnes*'.⁶³ In *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Rwanda), the ICJ concluded that the prohibition of genocide was a peremptory norm.⁶⁴

Second, international and national efforts undertaken to institutionally underpin the obligation to prevent genocide⁶⁵ create a platform for increased cooperation among states and IOs. States as well as the UN are taking measures in order to create mechanisms for early warning and effective prevention. Thus, they are trying to enhance their preventative capacities, to make them more effective. There are normative consequences attached to this institutional capacity as will be shown in the following.

It must be mentioned that the question of authority remains contested in this context. The concept of the responsibility to protect (R2P) does not seem to have resolved it. In particular, it remains unclear when and on the basis of what criterion the responsibility to protect of the international community is triggered. However, it can be argued that the R2P concept further

⁶³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, para 31.

⁶⁴ *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, para 64.

⁶⁵ On 21 February 2008, the Secretary General appointed a Special Adviser for the Responsibility to Protect in order to support 'conceptual development and consensus building' and to 'assist the General Assembly to continue consideration of this crucial issue'. Press-statement of the Secretary General, 21 February 2008, UN Doc SG/A/1120, BIO/3963, <<http://www.un.org/News/Press/docs/2008/sga1120.doc.htm>> accessed 30 September 2012. The SC initiatives under the aegis of the responsibility to protect resulted in the bolstering of the Office of the Special Adviser on the Prevention of Genocide and the concomitant strengthening of the early warning capacity of the United Nations. See on this the Report of the Secretary-General, 'Early warning, assessment and the responsibility to protect' UN Doc A/64/864. On the measures taken by the states see H Cooper, 'Obama Takes Steps to Help Avert Atrocities', *New York Times* (3 August 2011) at <<http://www.nytimes.com/2011/08/04/us/politics/04policy.html>> accessed 30 September 2012. Furthermore, there is an ongoing discussion on the creation of R2P national focal points to ensure a more effective implementation of the R2P concept: 'The R2P Focal Points initiative led by the governments of Ghana, Denmark, Costa Rica and Australia in association with the Global Centre for the Responsibility to Protect, calls upon states to appoint a senior-level government official to facilitate the creation of national mechanisms for mass atrocity prevention and to promote international cooperation via a global network of R2P focal points', Global Centre for the Responsibility to Protect, Press Release of 9 October 2012 on the opening of the 67th session of the United Nations General Assembly in September 2012, at <http://globalr2p.org/media/pdf/Opening_of_67th_UNGA_and_R2P.pdf> accessed 25 October 2012. According to the Global Centre for the Responsibility to Protect, since September 2010 17 countries have appointed a national R2P focal point: Australia, Argentina, Belgium, Botswana, Costa Rica, Czech Republic, Denmark, France, Ghana, Guatemala, Italy, Netherlands, Sweden, Switzerland, Uruguay, United Kingdom, United States, see further details at <<http://globalr2p.org/advocacy/FocalPoints.php>> accessed 25 October 2012. The Global Centre for the Responsibility to Protect explains that '[a]n important step that governments can take to improve intra-governmental and inter-governmental efforts to prevent and halt mass atrocities is the appointment of a national R2P Focal Point. This senior level official is responsible for the promotion of R2P at the national level and will support international cooperation by participating in a global network. Appointment of a national R2P Focal Point is a step that can be implemented by governments with differing levels of capacity in mass atrocity prevention to demonstrate their commitment to R2P', see at <<http://globalr2p.org/advocacy/FocalPoints.php>> accessed 25 October 2012.

reinforces a responsibility for *preventative cooperation* and protection.⁶⁶ Judge *Simma* called the ICJ's determination of the obligation to prevent genocide the Court's 'specific contribution to the development and (and continued vitality) of the 'responsibility to protect'.⁶⁷ Although R2P does not [yet] create an independent competence of the SC - separate from, and additional to its Article 39 competencies; however, it can be regarded as a reaffirmation by the international community of its fundamental responsibility to prevent genocide.

2.3. Interim Conclusion

Thus, as a preliminary conclusion, it can be argued that the obligation to prevent genocide is a shared obligation between states as well as between states and the UN. It is, however, less clear how those obligations are shared between different actors. To answer this question, the content of the obligation to prevent must be placed in context.

3. Is there an obligation of preventative cooperation?

The issue of ensuring international cooperation in the prevention of genocide has been at the roots of the discussion in international law about genocide.⁶⁸ It can be argued that the implementation of the obligation to prevent genocide, *by its very nature*, presupposes the need for cooperation between states and international institutions.⁶⁹ However, can the states and the IOs (UN) legally be required to cooperate with a view to preventing genocide?

In its 1951 Advisory Opinion, the ICJ referred to the universal character of the co-operation required 'in order to liberate mankind from such an odious scourge'.⁷⁰ This statement, however, has not been further qualified. Although the ICJ emphasized in its 2007 judgment that 'the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result' of preventing genocide in Srebrenica;⁷¹ it did not explicitly

⁶⁶ On the role of multilateral forums in the creation and shaping of international law see JI Charney, 'Universal International Law' (1993) 87 AJIL 529.

⁶⁷ B Simma, 'Genocide and the International Court of Justice' (n 43) 262. See also a similar approach taken by L Arbour, 'The responsibility to protect as a duty of care in international law and practice' (n 44) 445; Schabas argues that 'the decision reinforces the emerging doctrine of the responsibility to protect', W Schabas, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)', EPIL (online edn).

⁶⁸ R Lemkin, 'Genocide as a Crime under International Law' (1947) AJIL 145.

⁶⁹ O Ben-Naftali, 'The Obligation to Prevent and Punish Genocide' (n 29) 44. The author argues that 'a strong case could be made for the existence of a universal obligation to prevent'.

⁷⁰ Advisory Opinion, *Reservations to the Genocide Convention*, 28 May 1951, ICJ Reports (1951) at 23.

⁷¹ *Genocide Case* (n 21) para 430.

state that there is a positive obligation to cooperate; nor that it required institutionalized action under the auspices of the UN as the most effective way of genocide prevention. The Court simply admitted that a conduct based on multilateral cooperative efforts may be more effective in the face of genocide.⁷²

However, it can well be argued that under certain circumstances States and other actors may legally be required to cooperate to ensure an effective prevention of genocide.⁷³ Such assumption seems to be rooted in the existing normative framework. Already the preamble to the Genocide Convention of 1948 recognizes as much. Moreover, the ILC Articles on State Responsibility determine that the ‘States shall cooperate to bring to an end through lawful means any serious breach’ of international law.⁷⁴ A similar provision is entailed in Article 42 (1) DARIO, which requires cooperation between States and international organizations to end serious breaches.⁷⁵

However, when is the obligation to cooperate for preventing genocide triggered and what is its scope? This issue is linked to the broader obligation to prevent genocide. The ICJ stressed that a suggestion ‘that the obligation to prevent genocide only comes into being when perpetration of genocide commences ... would be absurd since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act’.⁷⁶ Such obligation arises when there is a ‘serious risk that genocide will be committed’.⁷⁷ This may already occur at a relatively early stage. In fact, genocide does not occur overnight. There are always certain pre-conditions conducive to genocide. This means that ideally prevention/protection should start at a relatively early stage.

A related question would be then whether states and other actors have an obligation to improve their capacities of early warning and prevention in order to be able to make effective

⁷² *ibid*, the Court concluded that ‘it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce’.

⁷³ See, for example, G Gaja, ‘Do States Have a Duty to Ensure Compliance with Obligations *Erga Omnes* by Other States?’ in M Ragazzi (ed) *International Responsibility Today – Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 31.

⁷⁴ ILC Draft Articles, Article 41 (1). *Legal Consequences of the Construction of a Wall*, ICJ Rep 2004 136 at 200 para 159.

⁷⁵ Article 42 (1) DARIO, according to which ‘States and international organizations shall cooperate to bring to an end though lawful means any serious breach’.

⁷⁶ *Genocide Case* (n 21) para 431.

⁷⁷ *ibid*.

preventive (and cooperative) efforts possible. Recent developments such as the adoption of R2P by the 2005 World Summit have reinforced efforts to close the existing prevention gap through international cooperation and through enhancing the mechanism of early warning and prevention.

Although a specific meaning of the obligation to cooperate⁷⁸ as well as its legal nature and scope is not settled in international law,⁷⁹ the existence of a link between the obligation to cooperate in the face of genocide and a broader obligation to effectively prevent is obvious. This means that under certain circumstances the states may be required to fulfil their obligation to effectively prevent genocide through the means of cooperation.

This consequently raises further questions: who is obliged to cooperate? What are the contents of the obligation to cooperate? Such cooperation may take place at the global, regional or bilateral levels. The goal of cooperation must be to ensure effective prevention. It is obvious that not all states may be legally required to cooperate, for a simple reason: some loosely structured cooperation would be irrelevant in terms of effective prevention. Thus, the notion of effective prevention cannot be stretched as far. However, this is an area where the reasoning of the ICJ can be further developed. States and international organizations that are in a position to contribute to effective prevention through cooperation would have such a primary obligation to provide assistance to each other. Such cooperation may include the use of a wide range of means including some forms of political (military) pressure and assistance. Moreover, States and international organizations may, among others, be required to take diplomatic and other action⁸⁰ to exert influence on actors that may appear most capable of preventing genocide in a given situation (all these measures need to remain in accordance

⁷⁸ 'Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.' ILC commentary, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' Article 41 marginal n 2 at <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 30 July 2012.

⁷⁹ N Jorgensen, 'The Obligation of Cooperation' in J Crawford, A Pellet, and S Olleson, *The Law of International Responsibility* (OUP 2010) 697. 'It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy', ILC commentary Art 41 marginal n 3. See also A Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' (n 49) 629; A Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 EJIL 883 at 888.

⁷⁹ *Genocide Case* (n 21) para 461.

⁸⁰ ICJ noted in its *Tehran Hostages* case that 'the institution of diplomacy ... proved to be an instrument essential for effective co-operation in the international community', ICJ Rep 1979, 19.

with international law). Thus, the obligation to cooperate may be structured rather broadly. However, how to ensure that such broadly structured cooperative obligations still remain effective? In other words, would such broadly structured cooperation facilitate effective prevention?

In many cases the states and other actors would be able to meet their obligation to effectively prevent only through the means of some form of *institutionalized* cooperation. It can be argued in this context that an ideal avenue for advancing the effective preventative efforts by states and IOs would be the UN and its collective security system. This seems to be a framework within which the obligation of the international community to effectively prevent the occurrence of the crime of genocide can be realized. Thus, the cooperation through the means of the UN collective security system may constitute the most appropriate form (but not the single possible form) of *institutionalized* preventative action by the international community.⁸¹

Does this mean that the UN would be the sole duty-bearer? The United Nations relies on its members in implementing its fundamental function of protection/prevention. Thus, some differentiation would be called for here in order to determine certain criteria for allocation of different degrees of responsibilities. The states may be required to contribute to UN collective action to prevent genocide as part of their customary law obligation to take all reasonable measures based on their capacity to effectively influence (it is clear that without the states' contributions and support the UN would not be in a position to build a much-needed collective capacity to effectively prevent genocide; however, the existence of a more specific obligation to contribute troops to UN peace operations remains contested). Under certain circumstances, Article 2 (5) of the UN Charter may also be invoked, requiring assistance to the UN.⁸² Article 1 (3) UNC should also be mentioned in this context, which states that it is one of the purposes of the UN 'to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms'. Furthermore, according to Article 2 (2) of the UNC, all members of the United Nations 'shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'.

⁸¹ See, for example, A/66/874-S/2012/578 Responsibility to protect: timely and decisive response (Report of the Secretary-General). This report elaborates on other forms of cooperation within the UNC system (it does not deal with the Chapter VII issues only).

⁸² 'All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter...'; see also Article 49 UNC: 'The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council'.

A further question is how and to what extent the obligations of cooperation impact the allocation of responsibilities at the level of primary rules.

The efforts of the ICJ to identify the *legal* parameters for the determination of the responsible states for the prevention of genocide are, of course, laudable. The Court admitted that there may be differing degrees of responsibilities and emphasized that ‘the first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing genocide’.⁸³ Such capacity, according to the Court, is based on geographical distance and political ties. It must be noted in this context, however, that the geographical distance and political ties do not necessarily always produce a capacity to influence. The capacity to influence need not be given and static; rather, it can be *built* as a result of inter-state and other international efforts. As the ILC emphasized, ‘cooperation ... is often the only way of providing an effective remedy’.⁸⁴

In this context, a question may be raised as to whether and under what circumstances a failure to cooperate and/or to provide assistance with a view to preventing genocide would already amount to a breach of a duty to cooperate to prevent. Large-scale humanitarian catastrophes normally generate a range of reactions that under certain circumstances may also serve as an indication of the respective states’ or organizations’ wrongful inactivity. For example, different organs of the UN, including the SC, the GA and the secretariat took action in Rwanda. Thus, there was no inaction in literal sense. What was missing was an effective preventive action (and cooperation) against genocide (thus, formally discussing the issue of unfolding genocide as such would not satisfy the obligation to prevent genocide). This may equally imply that in some cases the UN will have to reshape its (traditionally neutral) peacekeeping activities in order to effectively deal with the changing circumstances on the ground and to meet their obligation to prevent genocide.⁸⁵

⁸³ *Genocide Case* (n 21) para 430.

⁸⁴ ILC commentary Art 41 marginal n 3.

⁸⁵ The Rwanda Report of 1999 stated the following: ‘Faced in Rwanda with the risk of genocide, and later the systematic implementation of a genocide, the United Nations had an obligation to act which transcended traditional principles of peacekeeping. In effect, there can be no neutrality in the face of genocide, no impartiality in the face of a campaign to exterminate part of a population. *While the presence of United Nations peacekeepers in Rwanda may have begun as a traditional peacekeeping operation to monitor the implementation of an existing peace agreement, the onslaught of the genocide should have led decision-makers in the United Nations – from the Secretary General and the Security Council to Secretariat officials and the leadership of UNAMIR – to realize that the original mandate, and indeed the neutral mediating role of the United Nations, was no longer adequate and required a different, more assertive response, combined with the means necessary to take such action*’, S/1999/1257 (15 December 1999) 50-1.

This benchmark of effective prevention may equally imply that the states (and the UN) have to take steps to strengthen their capacity of effective early warning and prevention (however, this remains controversial). If the respective entity with certain involvement in the crime scene is not in a position to take effective preventive action independently, it can be presumed that some international assistance must be sought. On the other hand, the international community through the UN may also be required to provide assistance to ensure a necessary capacity to influence,⁸⁶ or to act independently to uphold its own general responsibility for genocide prevention.⁸⁷

On the other hand, however, the determination of the exact role of a multiplicity of actors may represent a difficult task. This especially applies to omissions where it is not necessarily evident what the states and IOs failed to do or where the dividing lines between their respective responsibilities may be drawn.

4. Allocating responsibilities for the prevention of genocide

The obligation to prevent genocide is, by its very nature, a collective obligation, which is based on both treaty and customary law. It seems logical to conclude in this context that shared attribution of a collective omission to prevent genocide is possible, meaning that the UN may be held accountable. Such accountability would be based on the criterion of effective prevention, which requires cooperation. This collective dimension of the obligation to prevent genocide does not imply, however, that states cannot be held individually responsible for their respective failures to prevent genocide. For this purpose, this section will attempt to separate the role of states and IOs, even if such separation is not always an easy task. For example, what could have been the responsibility of Belgium for its withdrawal of peacekeeping troops in the face of Rwandan Genocide that followed the killing of 10 Belgian soldiers in Kigali, analyzed through the lens of shared responsibility? Could there have been any legal responsibility? What is the extent of responsibility of the Netherlands for the failure of its

⁸⁶ The UNSG even argues that '[i]n addition to persuasive measures and positive incentives, pillar two could also encompass military assistance to help beleaguered States deal with armed non-state actors threatening both the State and its population', Report of the Secretary-General, *Implementing the Responsibility to Protect* (2009) UN Doc A/63/677 para 29. See also paragraph 139, World Summit Outcome Document (n 16) states: '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.'

⁸⁷ See, for example, GA Resolution 47/116 A of 18 December 1992, which emphasized 'the responsibility of the United Nations and the international community ... to help the South African people in their legitimate struggle for the total elimination of *apartheid* through peaceful means'.

peacekeepers to protect the civilians in the UN-protected area of Srebrenica?⁸⁸ What is the responsibility of the UNSC, and the UN, for the Council's decision to reduce the number of troops in the face of Rwandan Genocide? Can the Council be legally responsible for its Chapter VII actions? The answers to these questions (that cannot be provided in this paper) depend on the conceptual approach taken. Following the logic of independent responsibility, such questions can only be answered in context, taking into account the circumstances of the case and the particular contributions of the relevant actors (states, UN, and the organs of the UN). However, it can also be argued that those failures constitute parts of a broader picture pointing to a collective failure of the United Nations as an (institutionalized) embodiment of the international community.

There are thus two analytical frameworks for approaching the issue of shared responsibility for the prevention of genocide. First, the notion of collective responsibility for a collective omission to be allocated between different actors; second, the notion of special responsibility of the international community as a whole (as represented by the United Nations); this approach would need further specification with regard to the rules on the allocation of responsibilities, so as to make shared responsibility operational and thereby lead to effective remedies.

4.1. Joint omissions and shared responsibility: rules on allocation

The UN and its member states have their respective independent obligations to prevent genocide. The ICJ, while dealing with the primary obligation of prevention, emphasized in the Bosnian Genocide Case that 'even if and when the [UN] organs have been called upon, this does not mean that the States parties are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the UN Charter and any decisions that may have been taken by its competent organs'.⁸⁹ Thus states and IOs may act independently, contributing their share to a collective endeavour. Therefore, a failure to prevent genocide may be attributable to the individual entities or collective actors (the UN), or

⁸⁸ On the liability of the Netherlands for Srebrenica deaths see Court of Appeal The Hague, LJN: BR0132, 5 July 2011, at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0132&u_ljn=BR0132> accessed 30 September 2011; District Court The Hague, LJN: BF0187, 10 September 2008, at <<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0187>> accessed 30 September 2011; see also A Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Removal of Individuals from the Compound of Dutchbat', at <<http://www.sharesproject.nl/dual-attribution-liability-of-the-netherlands-for-removal-of-individuals-from-the-compound-of-dutchbat>> accessed 30 September 2012; C van Dam, 'The Netherland Found Liable for Srebrenica Deaths', ASIL Insights, 19 September 2011.

⁸⁹ *Genocide Case* (n 21) para 427.

both of them in parallel (independent omissions).⁹⁰ Parallel responsibility of a state and an international organization remains a possibility.⁹¹ However, as already indicated above, the obligation to prevent genocide is a collective (shared) obligation.

An assumption that *implied consent* to the legal consequences of an involvement in a collective failure may serve as a basis for allocation of responsibilities seems problematic because it would, especially in cases of omission, extend the responsibility to remotely connected states (that do not have the capacity to effectively influence, even through some cooperation). It remains unclear whether there are legal obligations to cooperate on early warning and to act on it (which failed in Rwanda back in 1994).⁹² Thus, the uncertainty regarding the scope and content of a primary rule may have an impact on the allocation of responsibilities for genocide prevention. Furthermore, there is no automatic presumption of *joint omission* in positive law on the part of the states which are loosely connected with each other only through their *membership* in an international institution.⁹³ However, the opposite view is also possible – according to this view, the states may be held responsible by virtue of their (active) membership of the organization.⁹⁴

A crucial question thus remains as to how to determine the responsible entity from the multiplicity of actors and the content of ensuing responsibilities of all involved actors. It seems that the state's capacity to influence will play a crucial role in determining its responsibility. On the other hand, taking into account the fundamentality of the responsibility to prevent genocide as initially enshrined in the 1948 Genocide Convention and reaffirmed as

⁹⁰ The ILC states that '[t]he fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances', ILC Commentary on Article 3 para 6. See also C Dominice, 'Attribution of Conduct to Multiple States and the Implication of a State in the Act of another State' in J Crawford, A Pellet, and S Olleson, *The Law of International Responsibility* (OUP 2010) 281. The author sees the issue of multiple attribution through the lens of the principle of independent responsibility. Commentators note that 'the existence of parallel international responsibility as between an international organization and one or more of its members ... continues for the present to be of a purely hypothetical kind', see P Klein, 'The Attribution of Acts to International Organizations' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 307.

⁹¹ See also DARIO Commentary on Article 3 para 6.

⁹² On the role of expanding international authority see A Orford, *International Authority and the Responsibility to Protect* (CUP 2011).

⁹³ C Ryngaert and H Buchman, 'Member State responsibility for the acts of international organizations' (2011) 7 *Utrecht Law Review* 131. According to Article 61 of DARIO: '... a State member of an international organization is responsible for an internationally wrongful act of that organization if: a) It has accepted responsibility for that act; or b) It has led the injured party to rely on its responsibility', UN Doc A/64/10 (2009).

⁹⁴ See on this issue S Yee, 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership' in M Ragazzi (ed) *International Responsibility Today – Essays in Memory of Oscar Schachter* (Martnus Nijhoff Publishers 2005) 435 at 453.

a collective obligation by subsequent customary law developments going beyond the scope of that Convention, it can be concluded that the ensuing responsibilities must be fairly shared between the ‘most connected’ states, the international community as represented by the United Nations and the other member states of that community, failing to meet their respective obligations of preventative cooperation.

4.2. Joint omission and shared responsibility: shift of focus to the role of a broader international community?

In the case of Rwanda, it was not clear whose primary responsibility had to be engaged for the prevention of genocide and who the most ‘responsible’ entity was – a certain state or the entire international community as represented by the United Nations? Commentators regarded it as a failure of the international community and the United Nations; others argued that the veto powers in the SC failed to take preventive action.⁹⁵ Even in the case of Srebrenica, where the ICJ authoritatively determined that Serbia was primarily responsible for its failure to prevent genocide, the UN acknowledged its share of [political] responsibility.⁹⁶ Thus, a likely scenario is that there will always be a number of actors interlinked and questions of their ensuing (legal and political) responsibilities will arise.

It can be argued in this context that the responsibility regime for genocide prevention should be based on a *different* conceptual approach – on the recognition of a fundamental responsibility of the international community to protect its members from genocide.

It would be difficult to argue, however, that the UN bears an obligation of result; it would rather constitute an obligation of conduct (to prevent genocide), which must be exercised as effectively as possible. It can be argued that a way of implementing this obligation is entailed in Article 39 (in conjunction with Article 24 UNC), which enshrines the competences of the SC for the upholding of international peace and security.⁹⁷ However, this cannot be regarded as an exclusive (though in certain circumstances the most effective) way of implementing the obligation to prevent.⁹⁸

The capacity to cast a veto of the permanent members of the SC is a problematic issue in this context. It may affect not only the capability of the UN to prevent genocide but also the

⁹⁵ R Dallaire, K Manocha and N Degnarain, ‘The Major Powers on Trial’ (n 6) 861.

⁹⁶ Report of 15 November 1999, A/54/549.

⁹⁷ A Nollkaemper and D Jacobs, *Shared Responsibility in International Law* (n 20) 61.

⁹⁸ See A/66/874-S/2012/578 Responsibility to protect: timely and decisive response (Report of the Secretary-General).

ability of the member states to implement their own legal obligations of prevention. Would the member states of the SC under certain circumstances be obliged not to use their veto powers? This is linked to the nature of the veto which has been seen by some observers as belonging to the political realm and qualified by others as a procedural right⁹⁹ with certain legal implications.¹⁰⁰ For example, *Anne Peters* submits that there is a procedural obligation to give reasons for a veto in R2P cases.¹⁰¹ The ICISS Report (2001) suggested that the member states of the SC should not use the veto in the face of a humanitarian crisis and when their vital interests are not at stake.¹⁰² The High-level Panel also asked the Permanent Members of the SC ‘to refrain from the use of the veto in cases of genocide and large-scale human rights abuses’.¹⁰³ Some observers interpreted this statement ‘as an attempt to cast doubt on the legitimacy of such a veto’.¹⁰⁴ However, they do not mention possible legal consequences. States expressed controversial views in General Assembly while debating on the concept of the responsibility to protect. Furthermore, five small states - Costa Rica, Jordan, Lichtenstein, Singapore and Switzerland – drafted a resolution aimed at enhancing the accountability, transparency, and effectiveness of the Security Council.¹⁰⁵ One of the measures recommended for consideration by the SC permanent members was to explain the reasons for resorting to a veto and to refrain from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.¹⁰⁶ However,

⁹⁹ A Peters, ‘The Security Council’s Responsibility to Protect’ (2011) 8 *International Organizations Law Review* 15; see also A Peters, ‘The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and its Members’ in U Fastenrath, R Geiger, D-E Khan, A Paulus, S von Schorlemer and C Vedder (eds), *From Bilateralism to Community Interests – Essays in Honour of Judge Bruno Simma* (OUP 2011) 297. See also L Arbour, ‘The responsibility to protect as a duty of care in international law and practice’ (n 44) 445.

¹⁰⁰ Cf. B Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International 1998) for earlier attempts in this regard. For a critical assessment see a book review by A Paulus (1999) 10 *EJIL* 209-211.

¹⁰¹ A Peters, ‘The Security Council’s Responsibility to Protect’ (n 99) 15; this issue has been discussed as part of a debate on the reformation of the Security Council, see M E O’Connell, ‘The Counter-Reformation of the Security Council’ (2005-6) 2 *Int’l L & Int’l Rel.* 109. See also International Law Association, *Accountability of International Organizations* (2004) 13: ‘Organs of an IO should state the reasons for their decisions or particular courses of action whenever necessary for the assessment of their proper functioning or otherwise relevant from the point of view of their accountability’.

¹⁰² ICISS, *Responsibility to Protect* (n 16) para 8.29.

¹⁰³ Panel Report (n 8) para 256. See also the SG Report *Implmeneting the responsibility to protect* (2009) UN Doc A/63/677 para 61.

¹⁰⁴ A Buchanan and RO Keohane, ‘Precommitment Regimes for Intervention: Supplementing the Security Council’ (2011) 25 *Ethics and International Affairs* 41 at 50.

¹⁰⁵ A/66/L.42/Rev.1.

¹⁰⁶ *ibid.*

Switzerland withdrew the draft resolution to avoid political controversy in General Assembly.¹⁰⁷

According to the present positive international law, there is no procedural obligation of the Permanent Members of the SC to give reasons for veto¹⁰⁸ in R2P cases. Practice suggests that states often refuse to provide any explanation for a vote¹⁰⁹; moreover, public explanations for casting a veto do not necessarily reflect the real picture. Thus, the legal basis for such obligation is rather unclear. Furthermore, in the majority of cases, if the Permanent Member does not support a resolution, there will probably be no voting on it (because of the so-called 'hidden veto'). In such cases, the procedural obligation to give reasons for a veto would not have any impact.¹¹⁰

Thus the concept of responsibility to protect does not really call into question the wide discretion of the SC Permanent Members in legal terms. However, it can be argued that the R2P debate raised the probability of undesirable political consequences for those Council Members that block the SC action in the face of large-scale atrocities through the use of their veto powers. Whether this will also have any impact on the ongoing discussion about a possible increase in the accountability of the veto¹¹¹ remains to be seen. This conclusion, however, does not call into question the general responsibility of the United Nations (and its organs) to act in the face of genocide¹¹² irrespective of its internal veto struggles. At the same time, the SC Member States are not absolved of their obligations to prevent genocide. As *Ian Brownlie* noted regarding the UN human rights obligations, '[t]his discipline is no less applicable when Member States are discharging their responsibilities as members of the Security Council'.¹¹³

¹⁰⁷ UN Dep. of Public Information, 'Switzerland withdraws draft resolution in General Assembly aimed at improving Security Council's working methods to avoid "politically complex" wrangling', GA/11234 (16 May 2012).

¹⁰⁸ J Wouters and T Ruys, *Security Council Reform: A New Veto for a New Century?* (Royal Institute for International Relations, Brussels 2005) 9.

¹⁰⁹ See, however, the Russian position with respect to a Draft Resolution on Syria. The Russian Delegate stated: 'The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. ... These types of models should be excluded from global practices once and for all'. S/PV.6627, 4 October 2011, 4.

¹¹⁰ It remains equally questionable whether such obligation could be applicable to an informal threat of a veto.

¹¹¹ B Fassbender, *UN Security Council Reform and the Right of Veto* (n 100).

¹¹² The UNSC can be regarded as bound by certain principles of the Charter (see Articles 1 and 24(2) UNC).

¹¹³ I Brownlie, 'The Decision of Political Organs of the United Nations and the Rule of Law' in RJ Macdonald (ed) *Essays in Honour of Wang Tieya* (Martinus Nijhoff 1993) 91 at 102.

5. Conclusion

It can be concluded that a collective failure of the international community to prevent genocide may produce a presumption of a joint (shared) omission. The focus of the ensuing legal analysis should accordingly be on the role and responsibility of the international community for the prevention of genocide, and what the international community could have achieved had they cooperated effectively [preventively] with a view to preventing genocide. Such allocation of responsibilities will accordingly be based not only on the criteria of power and capabilities but also on the criteria of fundamentality of the obligation to prevent genocide and on the assumption of a special responsibility of the United Nations for such prevention.

Such an approach does not exclude a fair distribution of responsibilities between the multiplicities of actors involved in a collective omission to prevent genocide. The ‘most connected’ states and the states, failing to meet their obligations of preventative cooperation, will also bear their share of responsibilities. This means that the focus of the legal analysis may shift to pay more attention to the cooperative responsibilities of states and the responsibility of the international community represented through the United Nations. This broadening of the circle of possible actors would not allow any black and white solutions; it would, however, better reflect the essence of shared understandings with regard to emerging cooperative obligations and collective responsibilities to avert the scourge of genocide.