

Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era?

How its Third Pillar Ought to be Applied

Jeremy Sarkin¹

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Abstract

This article explores the Responsibility to Protect (RtoP) in the post-Libya era to determine whether it is now an accepted norm of international law. It examines what RtoP means in today's world and whether the norm now means that steps will be taken against states that are committing serious human rights violations. The building blocks of RtoP are examined to see how to make the doctrine more relevant and more applicable. It is contended that the responsibility to react should be viewed through a much wider lens and that it needs to be more widely interpreted to allow it to gain greater support. It is argued that there is a need to focus far more on the responsibility to rebuild and that it ought to focus on the transitional legal architecture as well as transitional justice. It is contended that these processes ought not to be one-dimensional, but ought to have a variety of constituent parts. It is further argued that the international and donor community ought to be far more engaged and far more directive in these projects.

1. Introduction

Many people around the world remain surprised when the international community fails to act when massive human rights violations are occurring in a country.² “Never again”³ became the catchphrase in the years following the

¹ Extraordinary Professor of Law University of South Africa (UNISA); Chair-Rapporteur of the United Nations Working Group on Enforced or Involuntary Disappearances. He writes in his personal capacity. Email: JSarkin@post.harvard.edu

² On the issue of public opinion see MacFarlane, S. N., Thielking, C. J., & Weiss T. G., “The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?”, *Third World Quarterly*, 25 (2004) 977-992. See also Wheeler, N. J., & Bellamy, A. J., “Humanitarian Intervention in World Politics”, in Baylis, J., & Smith, S., ed., *The Globalization of World Politics*, Oxford University Press, Oxford, 2005, 564-565, and Sobel, R., & Shiraev, E., *International Public Opinion and the Bosnia Crisis*, Lexington Books, Lanham, 2003.

³ Originally coined by the Jewish Defense League (Friedman, R. I., *Rabbi Meir Kahane: From FBI Informant to Knesset Member*, Lawrence Hill & Co, New York, 1990, 12.), the phrase has since been used

Holocaust.⁴ After the Nazis exterminated at least 12 million people, 6 million of whom were Jewish, the world awoke to the horror of genocide and vowed to never let crimes of such a magnitude take place again. The Nazis were among a long line of perpetrators who correctly assumed that an international culture of impunity would shelter them from accountability.⁵ Today impunity still exists in many parts of the world in spite of the many international, regional, sub-regional, and domestic legal instruments devoted to ending it.⁶ The axiom “never again” should more appropriately be phrased “again and again.”⁷

Carnage continues to occur in places around the world.⁸ Despite the adoption of the Genocide Convention in 1948, and a number of other human rights and humanitarian instruments and processes, about 50 genocides⁹ have occurred since then.¹⁰ 170 million people have been killed as a result of 250 conflicts that have occurred since World War II.¹¹ While the level of civilian casualties during World War I was only about 5 per cent, in the 1990s civilian casualties accounted for about 90 per cent of the total conflict related fatalities.¹² In the 1990s, 160 million Africans lived in countries consumed by civil war and three million people were killed.¹³ There were 29 on-going armed conflicts globally at the end of 2009.¹⁴ It is believed that about 740,000 men, women, and children are killed every year because of conflict.¹⁵ In 2010, millions of

in the wake of many atrocities, from the Holocaust to Argentina’s Disappeared People, where it was in the title of the report “*Nunca Mas (Never Again), The Report of the Argentine National Commission on the Disappeared (1984)*”, to swear that such atrocities will never be permitted to happen again.

⁴ See further Lemarchand, R., “Disconnecting the Threads: Rwanda and the Holocaust Reconsidered”, *Journal of Genocide Research*, 4(4) (2002) 499-518. See also Barff, B., “No Lessons Learned from the Holocaust: Assessing the Risks of Genocide and Political Mass Murders since 1955”, *American Political Science Review*, 97 (2003) 57-73.

⁵ Schabas, W. A., *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, 1.

⁶ On the role of regional human rights institutions see Sarkin, J., “The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People’s Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and Organisation of American States.” *Inter-American and European Human Rights Journal*, 1 (2009) 199-242.

⁷ See Askin, K.D., “‘Never Again’ Promise Broken Again. Again. And Again”, *Cardozo Law Review*, 27 (2005-2006) 1723.

⁸ *Ibid.*

⁹ Harff, B., “No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955”, *American Political Science Review*, 97 (2003) 57-73 and Bauer, Y., “Comparisons of Genocides.” in: Chorbajian, L. and Shirinian, J., eds., *Studies in Comparative Genocide*, St Martin’s Press, Inc, New York, 1999.

¹⁰ See Valentino, B. A., *Final Solutions: Mass Killing and Genocide in the Twentieth Century*, Cornell University Press, New York, 2004 and Levene, M., “Why Is the Twentieth Century the Century of Genocide?”, *Journal of World History*, 11 (2000) 305-336.

¹¹ Bassiouni, M. C., “The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities”, *Transnational Law and Contemporary Problems*, 8 (1998) 203.

¹² Chesterman, S., *Civilians in War*, Lynne Rienner Publishers, Boulder, 2001, 2. See also Eck, K. and Hultman, L., “One-Sided Violence Against Civilians in War: Insights from New Fatality Data”, *Journal of Peace Research*, 44 (2007) 233-246.

¹³ Kibble, S., “Conflict, Peace and Development: Rights and Human Security in Africa”, *Pambazuka News*, 27 (2003), available online at <<http://www.pambazuka.org/en/category/features/13660>> (accessed 15 April 2012).

¹⁴ Amado, P., Arestizábal, P., Ariño, A, Ariño, M., Armengol, V., Aspa, J., Chevalier, M., Francesch, M., García, J., *Alert 2010! Reports on Conflicts, Human Rights and Peacebuilding*, Escola de Cultura de Pau, Barcelona, 2010, 13.

¹⁵ Krause, K., Muggah, R., and Wenmann A., *Global Burden of Armed Violence*, Geneva Declaration Secretariat, Geneva, 2008.

people including women and children suffered various serious human rights abuses.¹⁶ Millions were killed, raped, sexually abused,¹⁷ displaced, or suffered various forms of harm. In 2010, 2,777 civilians died in Afghanistan, while in Somalia 2100 people died in the capital Mogadishu alone. Sudan has had roughly 5 million internally displaced persons (IDPs), with 532,000 people newly displaced in 2010, while 280,000 were displaced in Columbia in the same year.¹⁸

Little was done to halt these horrific casualties. The international community has frequently failed to respond appropriately to incidences of genocide, crimes against humanity, and other gross human rights violations.¹⁹

In an attempt to reduce these casualties, and the huge number of human rights violations that often accompany them, the concept of the Responsibility to Protect (RtoP) was developed to ensure that states protect their own populations and where they do not the international community has a responsibility to play its part.²⁰ It was widely expected to become the doctrine that would ensure that states would be unable to perpetrate such acts again. However, while RtoP was supposed to be humanity's panacea from the ills of states who committed such gross human rights violations, the last few years has shown that the political context within which the doctrine has to operate has severely limited its operation.

The debate about RtoP, and when it can be applied, must be understood in the milieu of a tremendous reluctance by some, particularly states whose human rights records have long been subject to criticism, to accept RtoP. As former US Secretary of State Madeline Albright noted in 2008:

The notion of national sovereignty as sacred is gaining ground ... some governments will oppose any exception to the principle of sovereignty because they fear criticism of their own policies. Others will defend the sanctity of sovereignty unless and until they again have confidence in the judgement of those proposing exceptions.²¹

Some states deeply opposed to RtoP have argued that it will be used as a "pretext for political or military domination, or selective enforcement for discriminatory or political motives, and that as a result it could compound a humanitarian crisis."²² Some link RtoP

¹⁶Freedom House, Paddington, A., *Freedom in the World 2011: The Authoritarian Challenge to Democracy*, 2011, available online at <<http://www.freedomhouse.org/report/freedom-world/freedom-world-2011>> (accessed 17 April 2012) and Amnesty International, Cordone, C., *Amnesty International Report 2010: The State of the World's Human Rights*, 2010, available online at <<http://refugee.int/node/25353>> (accessed 15 April 2012).

¹⁷See further Chandler, R.M., Fuller, L. K. and Wang, L., *Women, War and Violence*, Palgrave Macmillan, New York, 2010.

¹⁸Cooper, H., Hagon, K., Wijeyaratne, S., Vercken, N. and Yermo, F., *147 Oxfam Briefing Paper; Protection of Civilians in 2010 - Facts, Figures, and the UN Security Council's Response*, Oxfam International, Oxford, 2011.

¹⁹See further Kiernan, B., *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur*, Yale University Press, New Haven, 2007.

²⁰Sarkin, J., "The Responsibility to Protect and Humanitarian Intervention in Africa", *Global Responsibility to Protect 2* (2010) 371-387.

²¹Albright, M. K., *The End of Intervention*, New York Times, 11 June 2008, available online at <<http://www.nytimes.com/2008/06/11/opinion/11albright.html>> (accessed 15 April 2012).

²²Barbour, B. and Gorlick, B., "Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims", *International Journal of Refugee Law*, 20 (2008) 533-550.

to the military interventions in Kosovo in 1999²³ and Iraq in 2003,²⁴ which occurred without Security Council authorisation. Others see it as a pretext for regime change.

In this context many people argue that the North Atlantic Treaty Organisation's (NATO) intervention into Libya in 2011, in the name of responsibility to protect, signalled the doctrine's time had arrived. Some see the Libyan intervention as the defining event that turned the tide in favour of RtoP. In this regard, the United Nations Secretary General Ban Ki-moon noted that "In 2011, history took a turn for the better. The responsibility to protect came of age; the principle was tested as never before. The results were uneven, but at the end of the day, tens of thousands of lives were saved."²⁵

Those who believe that RtoP is ascending argue that this trajectory began in 2001 with its acceptance by the International Commission on Intervention and State Sovereignty (ICISS). They also claim that if the international community did not previously accept RtoP as a norm, the Libyan intervention has shifted the tides. Others, however, argue that the intervention in Libya did not signal the operationalising of the responsibility to protect, but rather the false application of humanitarian intervention, without the requisite authority. They contend that if the necessary authorisation was obtained, it was acquired under false pretences, maintaining further that the responsibility to protect has never been accepted or truly applied, and will never be used.

Many argue that, in any case, humanitarian intervention is not a part of the responsibility to protect, and that humanitarian intervention is getting a bad name as a result of attempts to link it to RtoP.

This article explores RtoP, its origins, and its status in the post-Libya era, to determine whether it is now an accepted norm of international law, or whether it has arrived only in rhetorical form. It also examines what RtoP means in today's world and whether the range and breadth of the norm means that steps—specifically the use of force—will be taken against states that are committing serious violations against their inhabitants. The intention is to show that the status of the norm is not a simple matter, but rather intimately connected to international relations and the status and power of regional blocs and certain key, powerful states.

As past behaviour is a good predictor of future conduct, the article will also examine what lessons can be identified from steps taken by the Security Council, especially the five permanent members who have the veto, and what likely will occur when a similar situation arises. It is argued that RtoP in practice may not be as important as some claim, and that it will be rarely used to permit the use of force without state consent.

The article further explores the three building blocks of RtoP, and what they ought to mean in practice. Also explored is how to make the doctrine more relevant and more applicable in the twenty-first century. This is examined because, while RtoP has three component parts: to prevent, to react, and to rebuild, most people, particularly

²³ Damrosch, L.F., "The Inevitability of Selective Response? Principles to Guide Urgent International Action", in: Schnabel, A. and Thakur, R., eds., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship*, United Nations University, Press, Tokyo, 2000. See also Henkin L., "Kosovo and the Law of 'Humanitarian Intervention'", *American Journal of International Law*, 93 (1999) 824-826.

²⁴ Wheeler, N. J. and Morris J., "Justifying the Iraq War as a Humanitarian Intervention: the Cure is Worse Than the Disease", in: Thakur R. and Sidhu, W., eds., *The Iraq Crisis and World Order*, UN University Press, Tokyo, 2006, 460.

²⁵ Ban, K. *Responsibility to Protect Came of Age in 2011, Secretary-General Tells Conference, Stressing Need to Prevent Conflict before It Breaks Out; Address to the Stanley Foundation Conference on the Responsibility to Protect (RtoP)*, United Nations, 18 January 2012, available online at <<http://www.un.org/News/Press/docs/2012/sgsm14068.doc.htm>> (accessed 15 April 2012).

those against RtoP, believe RtoP is about the responsibility to react – for them - humanitarian intervention. For those who favour RtoP, or want to down play down the reactive role, far too often the focus has been on prevention.

This article outlines the need to focus far more on the third pillar of RtoP: the responsibility to rebuild. This is not to discount the absolute need for prevention and reaction, but some do not want to mention reaction, while others overemphasise prevention. There is too little attention given to rebuilding. The article contends that the responsibility to react should be viewed through a much wider lens.

It is also reasoned that the responsibility to react needs to be more often, and publicly, more widely interpreted to allow RtoP to gain greater support in the wider community but also by those who are not supporters of it. It ought to be delineated to include all aspects of what the various players at international, regional, sub-regional, and national levels can accomplish by non-force means: by using political, economic, social, diplomatic, and other means to ensure that the state desists from the conduct it is engaged upon.²⁶ It is further contended that the substantive issues of the responsibility to rebuild ought to be broadly focused on two areas: the transitional legal architecture and transitional justice.

As far as the democratic project is concerned, it is argued that that the international community has a large role to play in ensuring that violence is halted, that security is provided, and that a democratic, inclusive constitution that protects rights and draws on the lessons from the past is drafted by society as a whole. New, independent, and well-resourced institutions must be established, staffed by people appointed in, as far as possible, an independent, non-political process. This ought to occur in a whole range of institutions, especially the judiciary.

It is also argued that the design of such processes ought to take into account the demography and socio-political makeup of the country. This will ensure that all groups feel included, and believe that the democratic project will benefit them as well. The link between poverty and conflict also ought to be understood and dealt with. It is further argued that the responsibility to rebuild obligates the international community to play a directing role on these issues, and that it can do this by using aid, and other means, as carrot and stick.²⁷ It is contended that for a multiplicity of reasons, including long-term costs, the international community ought to be far more engaged in rebuilding. That responsibility ought to ensure that when aid is provided it is given with obligations to reach measurable results and with large penalties where there is non-compliance.

By using aid with strings attached to grants and other assistance, donors and others can ensure that the state establishes laws and processes to achieve the desired goals. If this is not the case the democratic gains may be short-term only. It is also important that donor assessments and interventions be made on the basis of proper research, analysis, risk assessment, benchmarking, and other processes. Skilled personnel should also be used to determine the best course of action, and to ensure that the best results are achieved.

As far as transitional justice is concerned, this article contends that dealing with the past is a vital and critical component of the responsibility to rebuild. The various strands of transitional justice are examined. It is contended that these processes ought not to be one dimensional, but ought to have a variety of constituent parts, including

²⁶See Lund, M. S., *Preventing Violent Conflicts: A Strategy for Preventive Diplomacy*, US Institute of Peace Press, Washington D.C., 1996.

²⁷See further Boyce, J., *Investing in Peace: Aid Conditionality After Civil War*, Oxford University Press, Oxford, 2002.

retributive justice, truth mechanisms, strategies for providing reparations, processes to advance reconciliation, and policies that aim to guarantee non-repetition of conflict.

2. What is RtoP?

Traditional notions of state sovereignty cabin the domestic affairs of a state within the purview of that state, regardless of its misconduct—no matter how atrocious—towards its people.²⁸ Yet sovereignty has undergone drastic changes on the international stage.²⁹ For centuries, states have involved themselves in each other's affairs. While the principle of state sovereignty has not been discarded entirely, it has in recent years eroded. National sovereignty shifts with shifting state obligations. Thus, states limit their sovereignty by ratifying international treaties and joining international organisations. National sovereignty today is therefore ever-changing, while historically the concept had been rather fixed. Regardless, certain states fight to protect their sovereignty even though on a regular basis they do so implicitly in the actions they take, for example joining treaties or other institutions which gives that institution the ability to take decisions affecting that state.

In this context, RtoP stems from the idea that each state is sovereign and has the responsibility to protect its own population from horrific crimes.³⁰ Thus, the concept of RtoP “reflects a profound shift in international law, whereby a growing sense of global responsibility for atrocities is increasingly encroaching upon the formerly sanctified concept of state sovereignty.”³¹ This shift in international legal framework may be best summarised by a shift away from the notion of a “state-sovereignty-oriented-approach,” where the states are bound only through their consent, and towards a “human-rights-oriented approach.”³² It has been seen as a “revolution in consciousness in international affairs,” “a departure in the relationship between sovereignty and human rights”³³ and “[i]t has taken the world an insanely long time, centuries in fact, to come to terms conceptually with the idea that state sovereignty is not a license to kill.”³⁴

RtoP challenges previous notions that sovereignty meant non-interference in the domestic affairs of a state. The responsibility to protect means that sovereignty comes with responsibility; if a state does not meet its responsibility in this regard others must ensure that the doctrine is met.

A central pillar of RtoP is that a “state's sovereignty is inseparable from its responsibility to protect the people living in its territory and cannot be merely a form of control, and that the international community has a duty to take appropriate action

²⁸ See further Cranstom, A. *The Sovereignty Revolution*, Stanford University Press, Stanford, 2004.

²⁹ Bartelson, J., *A Genealogy of Sovereignty*, Cambridge University Press, Cambridge, 1995.

³⁰ Barbour, B. and Gorlick, B., “Embracing the ‘Responsibility to Protect:’ A Repertoire of Measures Including Asylum for Potential Victims”, *International Journal of Refugee Law*, 20 (2008) 533.

³¹ Turner, M., “UN Must Never Again be Found Wanting on Genocide”, *Financial Times*, 15 September 2005, available online at <http://www.ft.com/intl/cms/s/545f929a-2618-11da-a4a7-00000e2511c8,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F545f929a-2618-11da-a4a7-00000e2511c8.html&_i_referer=#axzz1sSn4rDQz> (accessed 16 April 2012).

³² *Supra* note 29.

³³ Lindberg, T., *Protect the People*, *Washington Times*, 27 September 2005, available online at <<http://todlindberg.net/?p=404>> (accessed 16 April 2012).

³⁴ Evans, G., *Delivering on the Responsibility to Protect: Four Misunderstandings, Three Challenges and How To Overcome Them*, Stiftung Entwicklung und Frieden (Development and Peace Foundation) Symposium, 30 November 2007, available online at <<http://www.gevans.org/speeches/speech243.html>> (accessed 19 April 2012).

when the responsibility is neglected or violated.”³⁵ In 2010 the Security Council noted that “States bear the primary responsibility to respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction as provided for by relevant international law.”³⁶ In certain circumstances however—where the state fails to protect its own citizens—the international community has the responsibility to protect these populations.³⁷ RtoP recognises that nation states have a “positive obligation” inherent in the concept of sovereignty, which is a “substantial leap forward in international law” with implications that are still uncertain and up for debate.³⁸

The ICISS Commission in 2001 saw that over time there had been a re-conceptualised view of sovereignty—no longer as a right, but now as a responsibility that each state has to protect their citizens from vulnerability. The ICISS report frames RtoP as: “[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”³⁹ There are three primary principles embodied in RtoP:

- 1) The responsibility to prevent, (to tackle the causes of conflict and other human-created crises),
- 2) The responsibility to react, (to take appropriate action where there are compelling circumstances, including coercive steps such as sanctions or even military intervention as a last resort where there are reasonable prospects of success, taking due regard of the issue of proportionality)⁴⁰; and,
- 3) The responsibility to rebuild (after an intervention, to provide assistance in dealing with the causes of the conflict, and to assist in reconstruction, reconciliation, and so forth).

In spite of widespread acceptance of these principles of RtoP, the content and extent of the norm remain ambiguous. One of the most significant questions is when to apply RtoP.⁴¹ Many argue that it applies only when genocide, war crimes, ethnic cleansing, or crimes against humanity are occurring. However, this is a very narrow interpretation of RtoP. In addition, the test now to be applied when RtoP is supposed to occur means that RtoP is tougher to invoke. The primary test utilised now advocated is whether a state’s inability or unwillingness to protect its citizens has become a “manifest failure.”⁴² Thus, the threshold when RtoP comes into operation became when the “national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing

³⁵ *Supra* note 29.

³⁶ UNSC Presidential Statement 25 (2010), UN Doc S/PRST/2010/25.

³⁷ *Supra* note 29.

³⁸ *Ibid.*

³⁹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001, available online at <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> (accessed 16 April 2012).

⁴⁰ Sarkin, J., “The Responsibility to Protect and Humanitarian Intervention in Africa”, *Global Responsibility to Protect*, 2 (2010) 371.

⁴¹ On the question of who decides when to intervene see: Agular, M., “Who Should Determine the Just Cause of Humanitarian Intervention?”, *Third World Quarterly*, 24 (2005) 17.

⁴² Bellamy, A., *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Polity Press, Cambridge, 2009, 90.

and crimes against humanity.”⁴³ This conceptualisation of RtoP aptly has been named “RtoP lite.”⁴⁴

RtoP has therefore been diluted by ostensible pragmatism. Some of those who have supported and believed in RtoP felt that they had to make a choice. They assumed achieving consensus on RtoP would require agreeing on a lesser version of the concept. As a result, questions such as when RtoP applies, when RtoP begins, who has the responsibility to protect, and who should exercise it, all remain clouded in controversy and ambiguity.

A significantly vexing question is when RtoP can be used. The circumstances laid out by the ICISS as to when RtoP ought to be invoked were: the right authority, just cause, right intent, last resort, proportional means, and reasonable prospects.⁴⁵ The problem however is how these issues ought to be measured and when they ought to be applied. As these are somewhat subjective deductions a more objective methodology needs to be found to determine when RtoP ought to occur. Louise Arbour argues for a proportionality test that “could be broken down into three components. First, it would require that the threat to civilian lives be grave and imminent; second, that the least intrusive means capable of having a real chance of protecting civilians be employed; and finally that the negative consequences of military action not outweigh the anticipated benefits.”⁴⁶

The proportionality test, if accepted, would help to reduce the role of politics in the decision making, although probably not entirely, as states would in all likelihood argue even these issues, although their inarticulate premise may be other (political) factors.

3. The Origins of RtoP

In the mid-1990s as a result of the events in former Yugoslavia and Rwanda,⁴⁷ a reassessment began of the role and obligations of the **international community**.⁴⁸ This occurred when it was seen that **it** as a whole, and the Security Council in particular, had not been responsive to massive human rights abuses⁴⁹ This was particularly so with regard to human rights abuse, especially when occurring inside a state. A reformulation

43 United Nations General Assembly, *2005 World Summit Outcome*, 15 September 2005, available online at <<http://www.who.int/hiv/universalaccess2010/worldsummit.pdf>> (accessed 16 April 2012). Also SC Resolution 1674, 26 April 2006.

44 Weiss, T. G., *Humanitarian Intervention: Ideas in Action*, Polity Press, Cambridge, 2007, 116–117.

Bellamy, A., “The Responsibility to Protect and the Problem of Military Intervention”, *International Affairs*, 84 (2008) 615.

45 *Supra* note 38, at 32.

46 Arbour, L., *The Rise and Fall of International Human Rights*, Lecture on the Occasion of the Sir Joseph Hotung International Human Rights Lecture 2011, 27 April 2011, available online at <<http://www.crisisgroup.org/en/publication-type/speeches/2011/the-rise-and-fall-of-international-human-rights.aspx>> (accessed 16 April 2012).

47 Barnett, M., *Eyewitness to Genocide: The United Nations and Rwanda*, Cornell University Press, 2003. Agbakwa, S. C., “Genocidal Politics and Racialisation of Intervention: From Rwanda to Darfur and Beyond”, *German Law Journal*, 6 (2005) 513.

48 Thakur, R. and Weiss, T. G., “RtoP: From Idea to Norm—and Action?”, *Global Responsibility to Protect*, 1 (2009) 22.

49 Evans, G., “The Responsibility to Protect: An Idea Whose Time Has Come ... and Gone?”, *International Relations*, 22 (2008) 283. Weiss, T. G., “The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era”, *Security Dialogue*, 35 (2004) 135.

of the issue of sovereignty thus came to the fore to ensure that the international community had a framework to “prevent and respond to gross and systematic violations of human rights where the sovereign state is either unwilling or unable to do so...”⁵⁰ As former Secretary-General Kofi Annan stated in 1999,⁵¹ “when we read the [UN] Charter today we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.”⁵²

RtoP as a concept was given a tremendous boost when it was adopted in 2001 by the International Commission on Intervention and State Sovereignty.⁵³ RtoP was included in the 2004 UN High-Level Panel on Threats, Challenges and Change Report: *A More Secure World: Our Shared Responsibility*.⁵⁴ The Panel stated, “The Security Council has been neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all.”⁵⁵ There was even greater fanfare when RtoP was adopted unanimously as part of the World Summit Outcome document in 2005.⁵⁶ The fact that the then UN Secretary General Kofi Annan⁵⁷ proposed using the doctrine in his *In Larger Freedom*⁵⁸ reform package and that RtoP was included, at least implicitly, in various Security Council⁵⁹ Resolutions in 2006, 2007 and 2008,⁶⁰ amongst others, resulted in many seeing it as a doctrine whose time had come.

As a result of these recent developments most argue that RtoP as a concept is new.⁶¹ However, it has roots at least in the nineteenth century.⁶² It can be detected in the Martens Clause—contained in the Hague Conventions of 1899 (II) and 1907 (IV)—which codified the legal principles of “laws of humanity, and the requirements of the public conscience.”⁶³ It provides additional legal protection to individuals and groups during war and peace. RtoP is also to be found in the 1948 Genocide Convention, an instrument that imposes upon states a duty to “prevent and punish.”⁶⁴ This can be interpreted as a mode of RtoP because it obligates states to protect possible genocide victims and to punish genocidal perpetrators. Edward Luck, the Special Adviser of the

⁵⁰ *Supra* note 29.

⁵¹ Annan, K., “Two Concepts of Sovereignty”, *The Economist*, 18 September 1999, 49. Chandler, D., “The Responsibility to Protect? Imposing the ‘Liberal Peace’”, *International Peacekeeping*, 11 (2004) 1.

⁵² *Ibid.*

⁵³ *Supra* note 38.

⁵⁴ Secretary-General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our shared Responsibility*, United Nations, 2004, available online at <<http://www.un.org/secureworld/report2.pdf>> (accessed 16 April 2012).

⁵⁵ *Ibid.*, at 202.

⁵⁶ UNGA Resolution 60/1 (24 October 2005) UN Doc A/Res/60/1.

⁵⁷ *Supra* note 50.

⁵⁸ Report of the Secretary-General, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (2005) UN Doc A/59/2005.

⁵⁹ See further Welsh, J. M., “Implementing the Responsibility to Protect: Where Expectations Meet Reality”, *Ethics & International Affairs*, 24 (2010) 415.

⁶⁰ SC Resolution 1674, 28 April 2006. SC Resolution 1755, 30 April 2007. SC Resolution 1828, 31 July 2008.

⁶¹ Sarkin, J. and Patterson, M., “Introduction to Special Issue for GR2P: Africa’s Responsibility to Protect”, *Global Responsibility to Protect*, 2 (2010) 339.

⁶² On the historical context see Orford, A., *International Authority and the Responsibility to Protect*, Oxford University Press, Oxford, 2011.

⁶³ Sarkin, J., “The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and International Law: Their Application from at least the Nineteenth Century”, *Human Rights and International Legal Discourse*, 1 (2007) 125.

⁶⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 UNTS 277, Article 1.

United Nations Secretary-General on the Responsibility to Protect, has recently stated that the “1948 Convention was an early embodiment of the commitment to protect vulnerable populations worldwide from mass atrocities.”⁶⁵ Article 8 of the Convention empowers states to call upon the UN to take appropriate action under the Charter in situations of impending genocide. Given that the prohibition of genocide, war crimes and crimes against humanity at least qualify as *jus cogens* norms, it follows that, in their prevention, RtoP can and should be invoked.

4. The implications for RtoP of the intervention into Libya in 2011

2011 was a dramatic year for global politics and the development of democracy in many parts of the world. What is now called the “Arab Spring” had a momentous effect not only in the Middle East but globally. The Arab Spring presented new possibilities to many both internationally and domestically. This was especially true for RtoP. As a result of the UN Security Council resolution on Libya⁶⁶ and the decision to take action, it is argued that RtoP is now an accepted concept in international law.

Emboldened by these events and the intervention in Libya, statements have been made indicating that there is greater support for RtoP. During 2011 there were greater public calls for RtoP to be applied more often and in more circumstances. Thus, UN Secretary-General Ban Ki-moon in a report in July 2011 called for a concerted international effort on the responsibility to protect, so that the history of the twenty-first century would not be “written in the blood of innocents.”⁶⁷ This he argued after action had been taken in Libya, in a report entitled “*The role of regional and sub-regional arrangements in implementing the Responsibility to Protect*.”⁶⁸ The title of this report makes its message clear. As Mona Rishmawi has argued, RtoP can be useful as a concept if it can rally political support for human rights protection.⁶⁹

An alternative view would be that RtoP may be applied if political support for it, in a particular context, can be obtained. Without regional support, RtoP will not likely be applied again in that part of the world. The reason that UN Security Council resolution 1973,⁷⁰ allowing “all necessary means” in Libya,⁷¹ developed was that the

65 Office on Genocide Prevention and the Responsibility to Protect Press Release, *Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Contemporary Relevance of the Commitment to Prevent Genocide and Related Crimes Office of the Special Adviser for the Prevention of Genocide 9 December 2011*, available online at <<http://www.un.org/en/preventgenocide/adviser/pdf/Anniversary%20of%20the%20Convention%20Statement%20FINAL.pdf>> (accessed 16 April 2012).

66 UNSC Resolution 1973, 17 March 2011.

67 Ban, K., *Remarks to General Assembly Informal Interactive Dialogue on the Responsibility to Protect*, United Nations, 12 July 2011, available online at <<http://www.un.org/sg/statements/index.asp?nid=5410>> (accessed 15 April 2012).

68 UN Security Council, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect: Report of the Secretary-General*, United Nations, 28 June 2011, available online at <<http://www.unhcr.org/refworld/docid/4e7713912.html>> (accessed 15 April 2012).

69 Rishwami, M., “The Responsibility to Protect and Protection of Civilians: the Human Rights Story”, *Favorita Papers*, 1 (2010) 87.

70 *Supra* note 1. The resolution was adopted by a vote of ten to none, with five abstentions: Brazil, China, Germany, India, and Russia; see UN Security Council, *Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions*, United

region broadly supported action against Libya. Publically, the Gulf Cooperation Council (GCC) called for all available means to be used against Libya on 8 March 2011. Shortly thereafter the support of the Organization of the Islamic Conference (IOC) followed. As a result of these developments in Libya, the role of the regions, and the need to get them on board before any action can be contemplated in a specific part of the world, is now accepted as an imperative before applying RtoP moving forward.

In his 2011 report the Secretary-General argued that, "We need to sharpen our tools for prevention and for protection."⁷² It is interesting to note that in the report of the interactive dialogue the mood change is very apparent. In this regard a summary of that meeting notes, "A majority of statements pointed to the evolution of RtoP from what was seen as a controversial concept when endorsed in 2005 to an evolving norm that had in the last year become an "operational reality."⁷³ However, many states are still opposed to RtoP and seek to limit its expansion. In spite of this, there does seem to be a greater tolerance for RtoP. At the end of 2011 the UN Secretary-General noted:

The Responsibility to Protect has been gaining wider and wider support among Member States ... I'm encouraged that [there has] been gaining momentum on this principle. I know that there are some concerns expressed by certain countries. That is why this process has been -- even though it has been time-consuming, we've been very patient in getting support, so that there should be no misunderstandings on the principle of this and the application of this principle.⁷⁴

While 2011 might appear to be a watershed moment for RtoP, the global situation ensures that this is probably not going to be the case. The future of RtoP does not look rosy. The commitment that recurs in the wake of the genocide to never let such events occur again⁷⁵ has never been completely in tune with the political will to do so. Events seem to have bypassed the notion of RtoP becoming the norm it was destined to be. If RtoP is to become a practical and realisable goal then much needs to be done by those who support it.

The role, acceptance, and application of RtoP must be understood in the context of an international human rights system which remains largely dependent on voluntary state compliance, and where enforcement, even when there are massive human rights atrocities, remains limited.⁷⁶ Within this milieu, it is important which institution is able to wield authority, and determine when steps are taken to prevent human rights abuse. The institution responsible for authorising the use of force has been the Security Council,

Nations, 17 March 2011, available online at <<http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>> (accessed 15 April 2012).

⁷¹ Similar language had been used for the intervention in Somalia in 1992.

⁷² Remarks to General Assembly Informal Interactive Dialogue on the Responsibility to Protect, see *Supra* note 2.

⁷³ World Federalist Movement - Institute for Global Policy, *General Assembly Holds Third Interactive Dialogue on the Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, 13 July 2011, available online at <<http://www.wfm-igp.org/site/general-assembly-holds-third-dialogue-rtop-focuses-role-regional-organizations>> (accessed 15 April 2012).

⁷⁴ Ban K., *Year-End Press Conference*, United Nations, 14 December 2011, available online at <<http://www.un.org/sg/offthecuff/?nid=2137>> (accessed 15 April 2012).

⁷⁵ Menon, R., "Pious Words, Puny Deeds: the 'International Community' and Mass Atrocities", *Ethics and International Affairs*, 23 (2009) 235.

⁷⁶ Penrose, M. M., "Lest we Fail: the Importance of Enforcement in International Criminal Law", *American University International Law Review*, 15 (2000) 321.

which remains a highly politicised institution whose composition reflects the world as it was in 1945. Its five permanent members wield veto power, frequently to protect their own interests, at the expense of preventing massive human rights violations. Thus, Security Council politics are the major factor determining when and what steps are taken where massive human rights violations occur.

The ability to achieve consensus on taking action is often lacking. If full consensus is necessary, a single state can prevent action. Historically, one or two states stand in the way, depending depends on the forum. For example, within the Security Council only one country's veto is necessary to prevent action, while in the Human Rights Council or elsewhere more countries are necessary to block resolutions. Thus, for some, the replacement of the UN Human Rights Commission by the Human Rights Council has done little to advance a less politicised human rights process. The fact that member states drive the process inevitably means it is a political process, as has been argued:

The derailment of international mass atrocity responses can be distilled to a single force: states' self-interest. States' self-interested political, economic, resource and security considerations stall responses to mass atrocities in the best of circumstances and completely block them in the worst of circumstances. All states—weak and strong—view the possibility of responding through a myopic lens focused on how such actions will affect their self-interests as either the acting or recipient state.⁷⁷

For that reason, UN reform is essential. Within such reform, the issue of one state veto is critical. But the issue is in fact much larger than simply reforming the Security Council.⁷⁸ As Louise Arbour notes:

It seems self-evident that the duty-bearers (states) should not have the monopoly over the adjudication of whether they adequately discharge their obligations. In democratic national systems, in fact in almost all legal regimes, democratic or not, this is what courts do, for better or worse... But there is no International Human Rights Court. And the Human Rights Council is certainly not a court. It is a forum of states—a political body—that purports to be guided by legal principles. The body of human rights law that the Human Right Council is designed to protect and promote deals with issues that are at the heart of the relationship between a government and its people. Not surprisingly, states on the whole do not welcome that kind of external scrutiny. For the most part they are either deferential to other states, hoping for the same treatment when their turn comes; or, they side with their friends, for the same unprincipled reasons.⁷⁹

If reform does occur, it will present many questions, including how large the Security Council will be, how many countries will be permanent members, which countries they

⁷⁷ Dastoor, N. F., "The Responsibility to Refine: the Need for a Security Council Committee on the Responsibility to Protect", *Harvard Human Rights Journal*, 22 (2009) 26.

⁷⁸ On Security Council reform see Security Council Report, *Security Council Transparency, Legitimacy and Effectiveness*, 18 October 2007, available online at <http://www.securitycouncilreport.org/site/c.gKWLLeMTIsG/b.3506555/k.DA5E/Special_Research_ReportbrSecurity_Council_Transparency_Legitimacy_and_Effectivenessbr18_October_2007_No_3.htm> (accessed 15 April 2012).

⁷⁹ *Supra* note 46.

will be, and crucially, who will have veto power? The issue of whether the permanent five will continue to have the veto will be decisive. This issue is most likely to hold up any agreement on reform. If agreement is reached on reform, the new composition of the Security Council and the powers that these states have will play a critical role in shaping the developing of RtoP, and the international community's response to massive human rights violations.

However, it is unlikely that a shift in the membership of the Security Council will bring greater support for RtoP, nor ensure that it is employed more often. Critically, the positions taken on RtoP by the non-permanent members of the Security Council are important. Brazil for example has noted that:

The protection of civilians is a humanitarian imperative. It is a distinct concept that must not be confused or conflated with threats to international peace and security, or with the responsibility to protect. We must avoid excessively broad interpretations of the protection of civilians, which could link it to the exacerbation of conflict, compromise the impartiality of the United Nations or create the perception that it is being used as a smokescreen for intervention or regime change. To that end, we must ensure that all efforts to protect civilians be strictly in keeping with the Charter and based on a rigorous and non-selective application of international humanitarian law.⁸⁰

Therefore, it is likely that the rhetoric of RtoP will continue to be contained in SC resolutions, and referred to often. However, recent events indicate that the political will to utilise RtoP through action is not sufficiently widespread.

Prior to 2011, some proponents and supporters of RtoP were backtracking. A number of enthusiasts of RtoP saw that its acceptance universally was in decline. They believed that limiting the scope of RtoP, and narrowing the criteria for applying it, was in the long term interests of ensuring its viability, even if in a more limited form.

While some people interpret the intervention in Libya as indication that RtoP is now an accepted part of the international legal lexicon and that the international community has shown that its application will become the norm, time will tell whether this is the case. However, the intervention in Libya, rather than extending the opportunities for RtoP to be applied, may have had the opposite effect. In this regard, various countries, including India, China, Brazil, Russia, and South Africa, have argued that the case of Libya has given RtoP a bad name.⁸¹ While the actions and comments of those states that have always opposed RtoP are unsurprising, what may be problematic is the fact that countries such as Brazil and South Africa may be unwilling to support future RtoP initiatives.

Global politics, the strategic (and particularly commercial) interests of members of the Security Council—particularly the permanent five, and the politics between members of the Security Council, are important factors. These states fear the future implications of the use of RtoP for them and their allies. In a very telling statement, Lindiwe Zulu, South African President Jacob Zuma's special adviser on foreign

⁸⁰ UN Security Council, *Eruption of Crises Drives Home Need to Implement Resolutions on Protecting Civilians in Armed Conflict, Security Council Told*, UN Press Release SC/10245, 10 May 2011, available online at <<http://www.un.org/News/Press/docs/2011/sc10245.doc.htm>> (accessed 15 April 2012).

⁸¹ Bolopion, P., *After Libya, the Question: To Protect or Depose?*, Los Angeles Times, 25 August 2011, available online at <<http://articles.latimes.com/2011/aug/25/opinion/la-oe-bolopion-libya-responsibility-t20110825>> (accessed 15 April 2012).

relations, stated regarding South Africa's abstention on the resolution on Syria: "We did the right thing. This is because of complications arising from global politics. We weighed our options. But this does not mean we condone what's happening in Syria."⁸²

In fact, responses to the massive human rights violations taking place in Syria during 2011 help to shed light on the future of RtoP. While long discussions about what to do took place, recollections of the situation in Libya were palpable. Members of the Security Council could not agree on what to do. A vote on a resolution did not occur until 4 October 2011. When the vote did occur, China and Russia double vetoed it. Nine countries supported the resolution (Bosnia and Herzegovina, Colombia, France, Gabon, Germany, Nigeria, Portugal, the United Kingdom, and the United States), which would not have imposed any measures on Libya. Most importantly South Africa, India, Brazil, and Lebanon abstained on the resolution. Thus, the power of the newest global body BRICS (Brazil, Russia, India, China, and South Africa) must not be underestimated in general, and for RtoP in particular.

On 4 February 2012 Russia and China once again double vetoed the Security Council resolution to condemn Syria for its violent suppression of anti-government demonstrations. This resolution was, in particular, a reaction to a shelling of the city of Homs, which killed hundreds of people. This was part of the violent crackdown on demonstrators by the regime over a number of months in which the state killed possibly five thousand people and many disappeared. All 13 other members of the Security Council voted in favour of the resolution. Once again, the veto was most likely used, at least in part, due to fears about what steps the Security Council may have taken if the resolution was adopted. Thus, it is likely that Libya's legacy is, at least, partly responsible for the veto related to Syria.

The determination to forgo intervention in cases such as Burma (Myanmar), Zimbabwe, and Syria indicate that the possibility of RtoP being realised, in full form, is slim. Of course some cataclysmic event may again shift support towards the international community taking action where massive human rights violations are occurring. Presently however, such events do not seem sizeable enough to warrant RtoP in the form of humanitarian intervention.⁸³ When the Security Council decides to undertake such an intervention in a part of the world where its members hold a keen interest, or in a first world country, RtoP truly will have arrived.

5. The Content of the Responsibility to Protect

This section of the article examines and analyses the three core components of RtoP: to prevent, to react, and to rebuild. Following an examination of these three elements of RtoP, this section argues that while reaction and prevention are critical components, in the past they have been either over-emphasised or deemphasised by different actors for different reasons. It is argued that significantly more attention ought to be paid to the responsibility to rebuild, while not ignoring the other two aspects. At times, the three pillars overlap. For example, rebuilding is also about prevention, a noteworthy point

82 Molele, C., *SA Defends 'Ambivalent' Stance on Syria*, Mail and Guardian Online, 8 October 2011, available online at <<http://mg.co.za/article/2011-10-07-sa-defends-ambivalent-stance-on-syria>> (accessed 15 April 2012).

83 See further Sarkin, J. and Fowler, C., "The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learnt from the Role of the International Community and the Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia", *Suffolk Transnational Law Review*, 33 (2010) 35.

since many think of RtoP primarily as the responsibility to react, arguing that at its core lies humanitarian intervention.⁸⁴ However this article argues that rebuilding (including aspects of prevention) is probably the most important aspect of RtoP from a pragmatic point of view. While humanitarian intervention has its place and is necessary at times, it is a very limited component of RtoP, which should, and does, occur seldomly. The scope of RtoP is often limited to this aspect for either positive or negative reasons. The responsibility to react does have a fundamental role to play; RtoP must include reaction and, specifically, the use of force where necessary to ensure that the violence is halted.⁸⁵ Yet prevention and rebuilding are the most important and viable aspects of RtoP. It is therefore a necessity for all three parts of RtoP to be ready, willing, and available; they are all part of the whole.

As noted by the ICISS, RtoP is about a “a continuum of intervention, which begins with preventive efforts and ends with the responsibility to rebuild, so that respect for human life and the rule of law will be restored.”⁸⁶ In spite of this, and despite the fact that the 2001 ICISS report specifically stated that the responsibility to prevent has the utmost importance, noting, “Prevention is the single most important dimension of the responsibility to protect,”⁸⁷ as prevention is now really what RtoP means for many in practice. For example, in 2010 UNSG Ban Ki-moon told the General Assembly’s Interactive Dialogue on the Responsibility to Protect that discussion of RtoP had to be done on the basis of early warning and assessment.⁸⁸ While the Secretary-General’s report in 2009 was entitled *Implementing the Responsibility to Protect*,⁸⁹ in 2010 it was entitled *Early Warning, Assessment and the Responsibility to Protect*.⁹⁰ In his 2010 speech he noted “Today, we are gathered to exchange views on early warning and assessment. This is the right place to start for several reasons.”⁹¹ In other words, the focus ought to be on prevention and not on reaction.

The message was clear: let’s deal with the less-contentious issues and not the more difficult ones, at least for now. The emphasis on the prevention was reflected by the

⁸⁴ See Sarkin, J., “The Role of the United Nations, the African Union and Africa’s Sub-Regional Structures in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect”, *Journal of African Law*, 53 (2009) 33.

⁸⁵ See further Fletcher, G. P. and Ohlin, J. D., *Defending Humanity: When Force is Justified and Why*, Oxford University Press, New York, 2008.

⁸⁶ *International Commission on Intervention and State Sovereignty, The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*, International Development Research Council, December 2001, 67, available online at <<http://www.bits.de/NRANEU/docs/ICISS1201supplement.pdf>> (accessed 15 April 2012).

⁸⁷ *Supra* note 39, at XI.

⁸⁸ UN General Assembly, *Early Warning, Assessment and the Responsibility to Protect. Report of the Secretary - General*, United Nations, 14 July 2010, available online at <[http://globalr2p.org/media/pdf/2010_A.64.](http://globalr2p.org/media/pdf/2010_A.64.864.pdf)

864.pdf> (accessed 15 April 2012).

⁸⁹ UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary -General*, United Nations, 12 January 2009, available online at <<http://www.unhcr.org/refworld/docid/4989924d.html>> (accessed 15 April 2012).

⁹⁰ *Supra* note 88.

⁹¹ Ban, K., *Remarks to the General Assembly: Informal Integrative Dialogue on ‘Early Warning, Assessment, and the Responsibility to Protect (RtoP)’*, International Coalition for the Responsibility to Protect, 23 July 2010, available online at <<http://www.responsibilitytoprotect.org/Secretary%20General%20--Speech%20to%20the%20General%20Assembly,%20dialogue%20on%20early%20warning%20and%20RtoP.pdf>> (accessed 15 April 2012).

UNSG's suggestion at a conference to call 2012 'the year of prevention'. He urged states to be willing to take 'proactive, decisive, and early action' before conflict occurs.⁹²

Thus, there has been, and still is, an overemphasis on prevention. Many see RtoP in the practical sense, of what it is on a daily basis, as being about the responsibility to prevent. This occurs for a variety of reasons. These include a concern about costs as it is believed that prevention costs less than reaction or rebuilding.⁹³ It is also argued that prevention is morally superior to either reaction or rebuilding. However, for many the focus on prevention is also about avoiding the contentiousness of intervention. Focussing on prevention avoids dealing with humanitarian intervention or the use of force.⁹⁴

It is also clear that the three parts of RtoP are not divided in clear and unambiguous ways. For example there is overlap in the responsibilities to prevent and to react. Thus, the responsibility to react must also deal with the causes of the conflict and why human rights violations occurred which is part of the responsibility to prevent.⁹⁵ What occurs in the aftermath of conflict plays a critical role in determining whether there will be peace or whether conflict is likely to reoccur and thus it is preventive as well.⁹⁶ In other words rebuilding is also about prevention. In fact prevention should be all that is needed in most cases. If it is successful there would be no need to react and no need rebuild.

Thus, the emphasis of this article is on the responsibility to rebuild, although the other two pillars are also important and ought to be considered as part of the whole. Using only one aspect of RtoP is to undermine RtoP as a whole. Using all three pillars can only benefit RtoP and what is aimed at achieving as a totality. For this reason all three pillars are examined, but the emphasis in this article is placed on the responsibility to rebuild. It is an important aspect of RtoP and has the potential to be the innovative aspect of RtoP.⁹⁷ It is therefore focused on here not because it is more important, but because it has not been given the attention it deserves and ought to be playing a larger role for a variety of reasons as will be discussed.

5a. The Responsibility to Prevent

There has been much debate about the theoretical and practical questions surrounding the responsibility to prevent. This has included what issues fall under its umbrella. Some have argued that to include too much under it will be to make it lose its political clout.⁹⁸

⁹² Heaton, L., *The UN Standard to Prevent Genocide, 10 Years Later*, Christian Science Monitor, 23 January 2012, available online at <<http://www.csmonitor.com/World/Africa/Africa-Monitor/2012/0123/The-UN-standard-to-prevent-genocide-10-years-later>> (accessed 15 April 2012).

⁹³ Chalmers, M., "Spending to Save? The Cost-Effectiveness of Conflict Prevention", *Defence and Peace Economics*, 18 (2007) 1.

⁹⁴ Norwegian Institute of International Affairs, Stamnes, E., "Operationalizing the Preventive Aspects of the Responsibility to Protect", 2008, available online at <<http://www.nupi.no/content/download/8501/85020/version/3/file/R2P-1-Stamnes.pdf>>. See also Bellamy, A. J., *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Polity Press, Cambridge, 2009, 98.

⁹⁵ See further Ramcharan, B. G., *Conflict Prevention in Practice*, Martinus Nijhoff Publishers, Leiden, 2005.

⁹⁶ Knox, C. and Quirk, P., *Peace Building in Northern Ireland, Israel and South Africa: Transition, Transformation, Reconciliation*, St. Martins Press, New York, 2001.

⁹⁷ Fleck, D., "The Responsibility to Rebuild and Its Potential for Law -Creation: Good Governance, Accountability and Judicial Control", *Journal of International Peacekeeping*, 16 (2012) 86.

⁹⁸ *Supra* note 94, at 21.

There are many facets and component parts of what constitutes RtoP in the context of prevention.⁹⁹ At its core, the responsibility to prevent addresses “both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.”¹⁰⁰ The Carnegie Commission on Preventing Deadly Conflict found that effective preventive strategies need to be based on three pillars: “early reaction to signs of trouble; a comprehensive, balanced approach to alleviate the pressures, or risk factors, that trigger violent conflict; and an extended effort to resolve the underlying root causes of violence.” This is similar to what the ICISS found when it noted that prevention was about “early warning and analysis” “root cause prevention” and “direct prevention.”¹⁰¹

Thus, a range of steps ought to be taken to ensure sufficient capacity and resources to deal with such issues.¹⁰² These should include sufficient early-warning capability, sufficient multilateral capacity to respond, sufficient member-state oversight and input, ensuring that sufficient strategic partnerships are in place, and conducting sufficient research into the questions.¹⁰³ A lot more work is needed to understand the causes of violence without which it is difficult to ascertain what steps ought to be taken to address those issues.¹⁰⁴

It is therefore clear that prevention, addressing conflict where it occurs (including punishment) and taking steps after conflict must be part of the responsibility to protect.

More discussion on prevention will occur in the section on rebuilding, as rebuilding is also, at least in part, about prevention.

5b. The Responsibility to React

Broadly speaking, the responsibility to react means “to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.”¹⁰⁵ But more importantly, it is also about political, social, economic, and diplomatic measures, as well as other types of reactions. It is meant to be result oriented. It is meant to see steps being taken to halt what is occurring.¹⁰⁶

Reaction is however seen by most people to be about humanitarian intervention or the use of force without the State in questions’ authorisation.¹⁰⁷ Reaction can also be the use of force with state sanction. For this reason, the most controversial aspect of

⁹⁹ Bellis, M. A. et al., *Preventing and Reducing Armed Violence: What Works?*, United Nations Programme of Action, April 2010, available online at <http://www.poa-iss.org/kit/2010_What-works.pdf> (accessed 15 April 2012).

¹⁰⁰ *Supra* note 39, at XI.

¹⁰¹ Carnegie Corporation of New York, *Preventing Deadly Conflict: Final Report*, 1997, xviii and *Supra* note 39 as cited in *Supra* note 94, at 21.

¹⁰² See further Ackermann, A., “The Idea and Practice of Conflict Prevention”, *Journal of Peace Research*, 40 (2003) 339.

¹⁰³ International Peace Institute, “Conflict Prevention and the Responsibility to Protect”, *IPI Blue Papers*, 7 (2009).

¹⁰⁴ *Ibid.* On causes see Woolf, L., and Hulsizer, M., “Psychosocial Roots of Genocide: Risk, Prevention, and Intervention”, *Journal of Genocide Research*, 7 (2005) 101.

¹⁰⁵ *Supra* note 94.

¹⁰⁶ See Pace, W. R. and Deller, N., “Preventing Future Genocide: A Responsibility To Protect”, *World Order*, 36 (2006) 16.

¹⁰⁷ Orford A., *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law*, Oxford University Press, Oxford, 2003.

RtoP concerns this aspect of the responsibility to react.¹⁰⁸ Intervention is the Achilles heel of RtoP in the sense that it is both the key issue and the most controversial aspect of RtoP. For this reason, some do not support RtoP.

The ICISS found that States hold the primary responsibility for the wellbeing of their citizens. It found that if the State fails to provide the necessary protection and wellbeing and, if steps to prevent harm and non-coercive processes fail, then humanitarian intervention, in certain circumstances, is legitimate.¹⁰⁹ The ICISS report states that military intervention should only be warranted when there is a “serious and irreparable harm occurring to human beings, or imminently likely to occur” that would result in a large scale loss of life or large scale ethnic cleansing.¹¹⁰ They argued that this could occur when there was:

Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect of inability to act, or a failed state situation; or large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.¹¹¹

The Commission held that the responsibility to react applies with “no distinction between those abuses occurring wholly within state borders, with no immediate cross-border consequences, and those with wider repercussions.”¹¹²

To try and overcome the perception that RtoP is only, or largely, about humanitarian intervention, the UNSG in 2008 argued: “RtoP is not a new code for humanitarian intervention. Rather, it is built on a more positive and affirmative concept of sovereignty as responsibility.”¹¹³ Therefore, if reaction is meant to be meaningful and not simply an interventionist strategy, turning the rhetoric of RtoP into action needs to occur in spite of the serious challenges this presents.¹¹⁴ But, at the same time, RtoP is not solely about military intervention. As Gareth Evans noted, “it is an absolute travesty of the RtoP principle to say that it is about military force and nothing else.”¹¹⁵

While the World Summit Outcome document states that the Security Council can use military force, such force should be the last resort after other more peaceful means have proved inadequate.¹¹⁶ However, there is a fear by some that RtoP will be used in practice as a “pretext for political or military domination, or selective enforcement for discriminatory or political motives, and that as a result it could compound a humanitarian crisis.”¹¹⁷

¹⁰⁸ Pattison, J., *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?*, Oxford University Press, Oxford, 2010.

¹⁰⁹ Roberts, A., *The Price of Protection*, Oxford University Press, Oxford, 2002, 157-161.

¹¹⁰ *Supra* note 94.

¹¹¹ *Ibid.*, at 4.19.

¹¹² *Ibid.*, at 4.23.

¹¹³ Ban, K., *Secretary-General Defends, Clarifies, “Responsibility to Protect” at Berlin Event on “Responsible Sovereignty: International Cooperation for a Changed World”*, United Nations Department of Public Information, 15 July 2008, available online at <<http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>> (accessed 08 April 2012).

¹¹⁴ *Supra* note 103.

¹¹⁵ *Supra* note 34.

¹¹⁶ UNGA Resolution 60/1 (24 October 2005) UN Doc A/Res/60/1, 139.

¹¹⁷ Barbour B. and Gorlick B., “Embracing the ‘Responsibility to Protect’: A Repertoire of Measures Including Asylum for Potential Victims”, *International Journal of Refugee Law*, 20 (2008) 550.

As for when military action should occur, it is clear that it should be done with the right intention. This is better assured with multilateral operations and supported by regional opinion or the victims concerned.¹¹⁸ It should also only be used as a last resort, when every non-military option has been explored.¹¹⁹ The planned military intervention should also be proportional, as in the minimum necessary to secure the protective objection, and should have reasonable prospects, as in likely to succeed in averting suffering.¹²⁰

Today, the challenge is not so much about the theory of the responsibility to react, but rather people's beliefs on how and where the theory is to be implemented. In many cases, calls for RtoP intervention by international organisations have been extremely controversial.¹²¹ Generally speaking, the responsibility to react in the narrow form of humanitarian intervention has to be available in case it is needed. As then-UN Secretary General Kofi Annan stated in 2000:

If military intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?... Few would disagree that both the defense of humanity and the defense of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.¹²²

RtoP should thus be an option available if required. The best approach should be to leave all cards on the table and use what options are available when needed. Obviously, reaction, in the sense of intervention, ought not to be used as the first choice. But, it always ought to be a choice available and used depending on the circumstances. To ensure that it is not available as a choice ensures that its potential use has been removed from the arsenal of options of persuasion. In that case persuasion is likely to be less successful. Persuasion is dependent on those subjected to it being willing to take up the inducements being offered. Carrots are useful to induce improved behaviour, but the stick can ensure that the inducement process is more likely to secure positive results. Where it is known that behind the carrot is the stick, the carrot is more likely to have a positive outcome. Thus, a stick in tandem with a carrot is much more likely to be an effective tool and more likely to have a successful outcome.

¹¹⁸ *Supra* note 39.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Such was the case after an August 2007 speech in which International Commission on Intervention and State Sovereignty (ICISS) Chair Gareth Evans declared Sri Lanka to be an example requiring RtoP, which evoked heated letters in the Sri Lankan press, as well as a lengthy, point-by-point response from the Sri Lankan Secretariat explaining "Why Sri Lanka is NO RtoP situation." See Permanent Mission of Sri Lanka – Geneva – Switzerland, *Why Sri Lanka is NO RtoP Situation – SL Peace Secretariat Head*, available online at <<http://www.lankamission.org/other%20pages/News/2007/July/2007-07-31SGSCOPP.htm>> (accessed 8 April 2012). See also Mahindapala, H. L. D., *Radhika & Jayantha Promotes the anti-Sri Lankan RtoP*, Asian Tribune, available online at <<http://www.asiantribune.com/index.php?q=node/8635>> (accessed 8 April 2012).

¹²² United Nations, Annan, K. A., *We the Peoples: The Role of the United Nations in the 21st Century*, 27 March 2000, available online <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf>> (accessed 17 April 2012).

5.c Responsibility to Rebuild

The responsibility to rebuild provides that there should be assistance with recovery, reconstruction, and transitional justice issues (including reconciliation), and to address the causes of what occurred.¹²³ Thus, the overlap between prevention and rebuilding can clearly be seen. The content of what constitutes, or could constitute, component parts of the responsibility to rebuild is enormous. For this reason only some of the issues can be touched on. The intention is to examine some of the issues to give a greater understanding about what the responsibility to rebuild is about and what ought to be done by various actors both domestically and internationally to give greater meaning and value to it.

The importance of rebuilding is to be seen in the fact that one and a half billion people live in conflict-affected and fragile states and that in 70 percent of these countries there has been conflict since 1989.¹²⁴ In all these places RtoP can have, and should have, a role to play to avoid further conflict and set in motion processes to rebuild and prevent further violence and human rights abuse. This is important as the benefits of peace and stability are clear from a number of vantage points. Increasingly, role-players have come to recognise the integral role that political, cultural, social and economic reform plays in securing peace and entrenching stability in divided societies.¹²⁵

While the responsibility to protect is often allied with civil and political rights, RtoP must also be as applicable to socio-economic rights as well.¹²⁶ If significant economic growth can occur during the transition then peace and stability are more likely.¹²⁷ From an economic point of view, states with a US\$ 250 GDP per capita have a 15 percent chance¹²⁸ of being a warzone, while countries where the GDP is US\$5000 the chances are less than 1 percent.¹²⁹ The cost can also be seen in the statistic that 30 percent of official development assistance is disbursed in fragile and conflict-affected areas.¹³⁰

A critical part of ending violence and seeing that it has little chance of reoccurring is to ensure the provision of security. This entails a number of issues including making the area safe so as to allow refugees and internally displaced people to return.¹³¹ It is also about disarmament, demobilisation and reintegration (DDR) of all armed forces occur.¹³²

¹²³ *Supra* note 39.

¹²⁴ International Dialogue on Peacebuilding and Statebuilding, *A NEW DEAL for engagement in fragile states*, OECD, available online at <<http://www.oecd.org/dataoecd/35/50/49151944.pdf>> (accessed 08 April 2012).

¹²⁵ François, M. and Sud, I., “Promoting Stability and Development in Fragile and Failed States”, *Development Policy Review*, 24 (2006) 141.

¹²⁶ Miller, Z., “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice”,

¹²⁷ Arbache, J. and Page, J., *More Growth or Fewer Collapses?*, World Bank Policy Research Working Papers, November 2007, available online at <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/11/09/000158349_20071109102535/Rendered/PDF/wps4384.pdf> (accessed 17 April 2012). See also Alesina, A., Ozler, S., Roubini, N. and Swagel, P., “Political Instability and Economic Growth”, *Journal of Economic Growth* 1 (1996) 189.

¹²⁸ On the link between low GDPs and conflict see Collier, P. and Hoeffler, A., “Greed and Grievance in Civil War”, *Oxford Economic Papers* 56 (2004) 563.

¹²⁹ Collier, P. and Hoeffler A., “On the Incidence of Civil War in Africa”, *Journal of Conflict Resolution*, 46 (2002) 13.

¹³⁰ *Supra* note 124.

¹³¹ Fleck, D., “The Responsibility to Rebuild and Its Potential for Law-Creation: Good Governance, Accountability and Judicial Control”, *Journal of International Peacekeeping*, 16 (2012) 89.

¹³² Muggah, R., “No Magic Bullet: A Critical Perspective on Disarmament, Demobilization and Reintegration (DDR) and Weapons Reduction in Post-conflict Contexts”, *The Round Table*, 94 (2005) 239.

Integrating all forces into one national force, if done in a way that does not give rise to the perception by some that they have been unfairly treated, will go a long way in ensuring security. If processes do not occur in a way that is deemed fair and transparent by all, the potential for violence remains high. Steps need to be taken to ensure civilian oversight over the security services and that the necessary measures are put into place to allow complaints against individuals to be handled effectively and independently.

But reducing violence is also about understanding and implementing measures that take account of the link between poverty and conflict.¹³³ Reducing poverty has marked effects on levels of violence and conflict.¹³⁴ It has been estimated that a 25 percent reduction in violence around the world would result in an extra US\$2 trillion in economic benefits.¹³⁵ For this reason development and poverty alleviation must also form part of the responsibility to RtoP. It should be a critical part of the responsibility to prevent, as well as the responsibilities to react and rebuild. Access to a range of socio-economic rights, including healthcare, clean water, and education (inclusive of human rights education) must also be a priority as developing those rights and with greater access to resources should see a concomitant fall in violence as a result of competition for those assets. As is noted in the 2011 World Bank Development Report on Conflict, Security and Development, justice and employment are fundamental to security in states.¹³⁶ Service delivery on a range of issues is important.¹³⁷

Dealing with the problems in societies by ensuring that these issues are properly dealt with can help to stabilise those countries. As has been noted by Francis Deng addressing inequalities “through early and sustained engagement to prevent inter-group tensions from escalating is essential to save lives and build tolerant and equitable societies, in which human rights are respected and all citizens can participate on an equal footing”¹³⁸ can only benefit peace and stability. Addressing inequities is important as it is likely that in states where there has been violence that violence will reoccur.¹³⁹ There are many issues that can play a role in preventing or limiting violence.

5ci Ensuring Peace and Stability – Establishing the Democratic Structure of the State

Once levels of violence have been reduced, a sound methodology for ensuring that peace continues is essential. A well-functioning democratic government, a business environment that inculcates economic opportunity, fair distribution of resources, human rights education, processes of reconciliation, freedom of information, access to education

¹³³ Grindle, M., “Good Enough Governance: Poverty Reduction and Reform in Developing Countries”, *Governance: An International Journal of Policy, Administration and Institutions*, 17 (2004) 525.

¹³⁴ See generally Crook, R. “Decentralisation and Poverty Reduction in Africa: The Politics of Local - Central Relations in Africa”, *Public Administration and Development*, 23 (2003) 77.

¹³⁵ The Institute for Economics and Peace, *2011 Global Peace Index*, Vision of Humanity, 2011, available online at <www.visionofhumanity.org/info-center/global-peace-index-2011> (accessed 08 April 2012).

¹³⁶ The World Bank, *Conflict, Security, and Development*, *World Development Report*, 2011, available online at <<http://wdr2011.worldbank.org/fulltext>> (accessed 8 April 2012).

¹³⁷ McLoughlin, C. and Batley, R., “Engagement with Non-State Service Providers in Fragile States: Reconciling State-Building and Service Delivery”, *Development Policy Review*, 28 (2010) 131.

¹³⁸ *Supra* note 65.

¹³⁹ See further Marc, A., *Making Societies More Resilient to Violence: A Conceptual Framework for the Conflict, Crime, and Violence Agenda*, World Bank Social Development Department, 1 October 2008, available online at <http://siteresources.worldbank.org/EXTCPR/Resources/CCV_Framework_Note.pdf> (accessed 17 April 2012).

and a range of other issues, needs to occur. These and other issues need to be constantly monitored and corrected where there is a problem.¹⁴⁰

The cost of not getting the transformation from conflict societies to democratic rights entrenching the rule of law, good governance, and a range of other issues is enormous.¹⁴¹ Without setting up the framework, constitution,¹⁴² laws (including a criminal law and procedural code), institutions, and other issues in a manner which is widely acceptable and achieves results acceptable to all will mean that it is likely that the peace will not hold and a slide back into conflict. This may take a number of years to occur. A democratically drafted Constitution is fundamental¹⁴³ in that gives all ethnic groups the feeling that their needs have been met. However, a constitution that:

is based exclusively on ethnic group rights is likely to freeze relations between groups, promote chauvinism, entrench group privileges, punish individuals who seek to straddle or transcend group policies and frustrate social inter-actions based on individual interests.¹⁴⁴

A legitimate drafting process is thus crucial as an accepted and popular constitution can constitute a major force for national unity. It can assist in nation building and assist in achieving national reconciliation. Inclusivity can inspire a sense of national ownership, whereas a constitution resulting from a non-inclusive process can be a source of tension and further division. Thus a carefully planned, inclusive constitutional drafting process must be designed. It must, as far as possible, seek to obtain consensus. All sections of the community need to feel that they have been included in the process. If not, they will believe that whatever the outcomes are it is not theirs. One of the major issues in many states around the world is the need to provide protection for minorities. Without the protection afforded by a bill of rights, unrestrained majoritarianism could harm minorities or members of minority groups and therefore a check on the power of the majority is essential.

Processes to transform the state must also take into account what transpired in the past. It will be present in many facets of a transition. It can play a negative or positive role depending on what occurs and how those issues are handled. If the faults and reasons for division and conflict can be found then the past can be used as a means to find solutions and build a new state that attempts to deal with problems of the past.

Developing the transitional state's democratic architecture and building blocks needs to be undertaken. A new constitution is often necessary. Constitutional provisions that take into account what occurred in the past are important to ensure that the past is not repeated. Thus, a whole range of issues need to occur to deal with division, exclusion, polarisation, difference. This should not only take into account the issues that separate and divide but also the issues that are perceived to do so.

¹⁴⁰ Institute for Economics and Peace (IEP), *PEACE: Structures of Peace: Identifying What Leads to Peaceful Societies*, 2011, available online at <http://www.humansecuritygateway.com/documents/IEP_Structures_ofPeace.pdf> (accessed 19 April 2012).

¹⁴¹ Forsvarets forskningsinstitutt (Norwegian Defence Research Establishment), Hansen, A., *Supporting the Rule of Law in War-Torn Societies. Tasks and Comparative Advantages of Civilian Police and Military Forces*, 2005, 65, available online at <<http://rapporter.ffi.no/rapporter/2005/02099.pdf>> (19 April 2012).

¹⁴² See further Foweraker, J. and Landman, T., "Constitutional Design and Democratic Performance", *Democratization*, 9 (2002) 43.

¹⁴³ Choudhry, S., (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford University Press, Oxford, 2008.

¹⁴⁴ Bangura, Y., *The Search for Identity: Ethnicity, Religion and Political Violence*, United Nations Research Institute for Social Development, Geneva, 1994, 39.

Allied to developing a state's constitution and legal framework is institutional building or rebuilding. When the institutions and symbols of one state have broken down, as a result of war, revolution, occupation or otherwise, the new government's most formidable challenge is to create new institutions and symbols that will unite the people and sow the seeds of peace and stability for the future. Thus, a new or reformed state needs to rebuild its judiciary, its civil service, as well as other institutions that inspire confidence and trust. It is critical that the appointments to public institutions, including the judiciary and national human rights institutions, are made as independently as possible, and with as little political involvement as possible.

Often those well connected, politically, socially or by some other connection, are appointed to these bodies undermining their true independence and making them less likely to be a bulwark against the state. If these bodies are independent in legal status, independent in composition and independent in operation they could have real and important roles in their societies. Thus, ensuring that appointments come from the full complement of groups in the country, as well as being representative of geographical and other issues will assist the institutions to be seen to be legitimate and non-biased. If the institution is seen to be partisan and representing the interests of one or a few groups, the institution will not be supported and whatever it does or whatever decisions it takes will not be seen to be credible.

Free and fair elections are also one of the major determinants of peace and stability in a society.¹⁴⁵ Not only must the process be free and fair, but it needs to be seen to be so. Political equality entails the right to vote and to participate in the political life of the nation on the same basis as others. What voting system is implemented is crucial.¹⁴⁶ It has however also got to do with resources and access to voter education and the ability of political parties to get their message out in a way they feel has not been compromised by other parties competing in the same areas for the same voters.

For that reason the African Charter on Democracy, Elections and Governance entered into force on 15 February 2012 after the 15th country, Cameroon,¹⁴⁷ ratified it. Understanding Africa's history of unfair elections and the violence that has resulted from them,¹⁴⁸ the Charter promotes and protects participatory democracy, the rule of law, good governance, anti-corruption, regular free-and-fair elections, human rights, gender equality, multi-party systems, judicial independence, access to information, and freedom of the press. In the recent past there have been a number of examples of election results not being accepted leading to violence, including the Ivory Coast in 2011. In this regard, trust is a key issue which in tandem with perceptions of the other can lead to dire consequences. As Stavenhagen has commented "it is precisely when a democratic system is perceived by one ethnic group to work to its disadvantage that ethnic conflict can emerge."¹⁴⁹

Thus, a major issue is control of political power, especially where it is controlled by one group,¹⁵⁰ whatever the makeup of that group, and other groups are excluded or

¹⁴⁵ Snyder, J., *From Voting to Violence: Democratization and Nationalist Conflict*, Norton Books, New York, 2000.

¹⁴⁶ Fraenkel, J., and Grofman, B., "Does the Alternative Vote Foster Moderation in Ethnically Divided Societies? The Case of Fiji", *Comparative Political Studies*, 39 (2006) 623.

¹⁴⁷ The other states that ratified are Burkina Faso, Cameroon, Chad, Ethiopia, Ghana, Guinea, Lesotho, Mauritania, Niger, Nigeria, Rwanda, Sierra Leone, Guinea-Bissau and Zambia.

¹⁴⁸ See Bogaards, M., "Electoral Choices for Divided Societies: Multi-ethnic Parties and Constituency Pooling in Africa", *Journal of Commonwealth and Comparative Politics*, 41 (3) 2003, 59.

¹⁴⁹ Stavenhagen, R., *Ethnic Conflicts and the Nation-State*, Palgrave Macmillan, Basingstoke, 1996, 278.

¹⁵⁰ On the need for power-sharing see Mehler, A. "Peace and Power Sharing in Africa: A Not So Obvious Relationship", *African Affairs*, 108 (2009) 453.

feel excluded.¹⁵¹ In this regard the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, noted in December 2011 that “many of the conflicts that have erupted over this past year stem from long-standing grievances and inequalities between national, ethnical, racial, or religious groups.”¹⁵² An enormous problem is that differences between groups are used as a means to gain political support particularly around election time.¹⁵³ These issues are exacerbated and greater polarisation occurs when communities believe that with political power comes economic advantage. For this reason violence can remain an option for them to attain economic objectives. Finding ways of allowing all to benefit would ensure that the democratic process is resorted to rather than using conflict as means to secure redress.

Giving groups a say in the issues they believe are important can be achieved to some degree by providing for the protection of minorities, rights in general and rights that are specific to the issues that caused conflict in the past. It is also about restraining power, ensuring accountability, having checks and balances on the various arms of government by having separation of powers, and as noted above, designing new independent and well-resourced institutions to deal with problems, and to allow complaints.

A critical issue to be considered is decentralisation. This may be achieved by adopting some form federal system. This will be important in places where people have been excluded in the past and ways need to be found for them to be accommodated in some fashion for them to believe that the democratic option is available to them and is likely to yield optimum results. This may be important to deal with minorities’ issues or a range of other issues that show a demand for localised authority.¹⁵⁴ It may be important where it is more important to ensure full and complete participation by all sectors of a society. Without inclusive processes that are perceived to be so, it is possible that the new system will be short-lived. A power sharing structure may need to be established to overcome perceptions of illegitimate exclusion.¹⁵⁵ If this is the case, real or imagined, the system may fail. At that point all the processes will need to start over and all the gains will be for naught. It makes much more sense to try and get it right the first time even though with such processes there are no guarantees.

It is critically important to work in fragile states.¹⁵⁶ They often have cleavages based on a range of differences, which are often used by those seeking political power it is extremely hard to sustain the gains made over time.¹⁵⁷ All should be done to make it difficult for spoilers to undermine the system by finding more faults with the system in place. Of course, elections and politicking is dependent on finding fault and placing blame for what is supposedly going wrong, but the ability to do so and undermine the system as a whole ought to be reduced. It should be made difficult to delegitimise the

¹⁵¹ See generally Demmers, J., *Theories of Violent Conflict: an Introduction*, Routledge, London, 2010.

¹⁵² *Supra* note 65.

¹⁵³ See further Höglund, K., “Electoral Violence in Conflict-Ridden Societies: Concepts, Causes, and Consequences”, *Terrorism and Political Violence*, 21 (2009) 412.

¹⁵⁴ Brancati, D., *Peace by Design? Managing Intra-state Conflict through Decentralization*, Oxford University Press, Oxford, 2009.

¹⁵⁵ Norris, P., *Driving Democracy: Do Power-sharing Institutions Work?*, Cambridge University Press, Cambridge, 2008. See also Hartzell, C. and Hoddie, M., *Crafting Peace: Power-sharing and the Negotiated Settlement of Civil Wars*, Pennsylvania State University Press, University Press, 2008.

¹⁵⁶ See Department for International Development, *Why We Need to Work More Effectively in Fragile States*, January 2005, available online at <http://www.jica.go.jp/cdstudy/library/pdf/20071101_11.pdf> (accessed 19 April 2012).

¹⁵⁷ *Supra* note 125.

system as a whole. Nations in transition are precarious and therefore major events such as elections must be planned and organised with utmost caution.

It is a truism of transitional politics that elections and violence go hand in hand. Thus, getting the system right in the post-conflict era is the best assurance that a return to conflict is less likely. If this process fails, the cost will be a recurring one unless mechanisms are put in place to make sure that these processes or institutions actually work, and are credible and legitimate. Without this being done, as can be seen by the fact that ongoing problems continue in many places where conflict has occurred.

5cii. Transitional Justice

The responsibility to rebuild must at times also mean taking precise measures to address transitional justice issues¹⁵⁸ such as retributive justice, truth, reparations, reconciliation and instituting guarantees of non-repetition.¹⁵⁹

It is clear that prevention, addressing conflict where it occurs (including punishment) and taking steps after the close of the conflict must be part of the responsibility to protect.

Transitional justice and the responsibility to rebuild are also about providing victims with more realisable rights in practice. This would go a long way in advancing a human rights agenda. This is crucial, as while there have been major advances over the last two decades on international criminal justice,¹⁶⁰ victims' rights have not been advanced to the same degree.¹⁶¹ While victims have been given some role in the new institutions such as the *ad hoc* tribunals and especially at the ICC,¹⁶² little is afforded to them to advance their rights to truth or reparation in practice.¹⁶³ Much more ought to be done to provide reparations especially to groups that have suffered injustice. Furthermore, far more ought to be done to promote issues which will have long term beneficial effects such as truth discovery, providing reparations (at least symbolically), and reconciliation.

5ciii1. Retributive Justice

At times, States introduce transitional justice mechanisms, but they are designed to promote the cause mainly for selected elements of that society. While the processes are promoted as ones that benefit everyone, often they achieve benefits for very few. That few often come from selected communities or from those connected to the political elites. After the conflict, or when one of the groups is able to control the country and embarks on a process of prosecuting people for their role in the conflict, these differences between groups are at times the basis of deciding who ought to be prosecuted. Justice is then directed at those who lost the conflict, or those excluded from the new political

¹⁵⁸ *Supra* note 39, at 5.10.

¹⁵⁹ Laplante L. J., "Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework", *The International Journal of Transitional Justice*, 2 (2008) 331.

¹⁶⁰ Ryngaert, C. (ed.), *The Effectiveness of International Criminal Justice*, Intersentia, Antwerp, 2009.

¹⁶¹ See further Letschert, R.; Haveman, R.; de Brouwer, A.-M and Pemberton, A. (eds.), *Victimological Approaches to International Crimes: Africa*, Intersentia, Antwerp, 2011.

¹⁶² McGonigle Leyh, B., *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia, Cambridge, 2011.

¹⁶³ On the ICC Trust Fund see Rombouts, H. and Parmentier, S., "The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims", *International Review of Victimology*, 16 (2009) 149.

establishment. Justice needs to occur but it needs to be delivered in an even-handed fashion and not a version of victor's justice. If justice is perceived as being done for political reasons or is seen to be biased against one group or another it will be illegitimate and will not be accepted.

Ensuing that at least some trials occur, that reparations in some form or another are provided, and that reconciliation between all groups occurs, regardless of political or other affiliation should have major long term beneficial effects.

At times it must be about taking other steps where it is a state that has committed the violations.¹⁶⁴ It must involve punishing leading offenders found on the territory of other states, as well as other courses of action, such as assisting victims in a variety of ways. States that harbour former leaders or assist these individuals in hiding their ill-gotten gains must be seen to be in violation of RtoP. Action must be taken to deal with these situations. Action ought to be taken against these states. The onus to prevent and react should also be placed on those states that have important relationships with violator states. Where these states fail to use their influence they are also failing their obligations.

As far as steps to be taken inside the concerned state, often the post conflict society sees the winners make decisions on how to deal with the past in ways that do not sufficiently promote the transitional justice issues of truth, justice, reparations and reconciliation for all. This is particularly critical as many societies where massive human rights violations occur have cleavages based on religious, cultural, racial, ethnic, linguistic or other differences.

Impunity for crimes committed by state agents or under the cover of the state does not only entail the failure to punish the persons responsible for those crimes.¹⁶⁵ An inseparable component of such impunity is the failure to carry out any investigation, the cover-up, and even the falsification of the facts to protect the persons responsible. There is no doubt that the discovery of the truth, which is the responsibility of independent persons, destroys that element which, while not useful in itself for eradicating impunity, fulfils at least a dual function. First, it is useful for society to learn, objectively, what happened in its midst, which translates into a sort of collective catharsis. And second, it contributes to creating a collective conscience as to the need to impede the repetition of similar acts. It shows those who are capable of doing so that even if they may escape the action of justice, they are not immune from being publicly recognised as the persons responsible for very grave attacks against other human beings. In this regard, even though these do not constitute punitive mechanisms, they may perform a preventive function that is highly useful in a process of building peace and the transition to democracy.

Sciii2. Learning the Truth about the Past

Establishing truth is often a key concern of a transitional state. Since the first truth commissions of the 1970s, many countries have established processes and institutions to try and learn the truth about the past. These processes and institutions have various roles to play including reducing deniability about past crimes. Victims can receive public acknowledgement about their suffering. By attaining official recognition of what has

¹⁶⁴ Sang, H. B. and Ott, A. F., "Predatory Behavior of Governments: The Case of Mass Killing", *Defence & Peace Economics*, 19 (2008) 107.

¹⁶⁵ See further Balint, J., "Dealing with International Crimes: Towards a Model of Accountability and Justice", in: Smeulers, A. and Haveman, R. (eds.), *Supranational Criminology: Towards A Criminology of International Crimes*, Intersentia, Antwerp, 2008, 311.

occurred to them, victim may be able to have their legal status issues addressed and other problems resolved. If there has been a disappearance, it should be possible to obtain a presumption of death certificate which would allow the persons financial affairs to be dealt with. Truth in its wide, or in its narrow form, also benefits from such processes. Truth discovery at the macro level allows the society at large to learn about the bigger picture - what was done; by whom was it done; to whom was it done; and why did this occur. Thus, an historical narrative is drawn up which allows for fuller version of the history to be reclaimed and settled. At the same time, the smaller accounts of what occurred are collected, as well as the individual accounts in order to paint the macro version of what occurred. In this way, the idea that it was rogue elements embarking on unsanctioned activities becomes very hard to justify. A public report, drafted by a credible legitimate and diverse process can be a long term benefit to that society and help to prevent violence and rebuild the state.

However, if the process is tainted by perceptions of bias, lack of representivity, or an understanding that the process was not thorough or was insufficient in some way, the process itself might not be enough for people to believe that the issues have not been adequately dealt with. Thus, there might be a demand in the future for the issues to be dealt with again. The understanding may be in, at least some, quarters that the pain of the past has not been addressed properly. As a result, violence and conflict may occur. While many believe that time heals the passing of time does not mean that people forget. It does not allow the issues to be erased. In many parts of the world there are those who seek answers for events that happened decades and/or even centuries ago.

Sciii3. Reconciliation

A variety of transitional justice strategies need to be embarked upon. Using singular methods, of focusing on one strand can be detrimental to the long term health of the society. Various processes, which need to be balanced against each other, need to occur.¹⁶⁶

Long term reconciliation efforts, especially in deeply divided societies, are fundamental to ensuring a peaceful and stable society. This is important because divided societies are divided precisely because one group denies the other, or in some cases many other groups, equal access to human rights, the right to housing, employment, education, protection against arbitrary arrest and detention, and in the worst cases, the right to life. One group secures these rights for themselves but not for others. These issues take on greater significance when the issues of identity are deep seated and have been used in the past for divide-and-rule purposes.¹⁶⁷ The fact of these deprivations is often more significant for the victims than the fact that they ostensibly occurred for reasons of identity,¹⁶⁸ although in some societies the issues become so intertwined and interrelated over time that the reasons for the conflict become lost in the whole host of issues that have over time become part of the conflict.

For reconciliation to take root, the various constituencies of the state must agree to cooperate within a single political structure. Cooperation, in turn, depends largely on the willingness of partisans to see each other, —and treat each other— as equals, enjoying equal measures of power and entitled to equal measures of respect. Cooperation is also

¹⁶⁶ Kingston, J., “Balancing Justice and Reconciliation in East Timor”, *Critical Asian Studies*, 38 (2006) 271.

¹⁶⁷ Anstey, M.; Meerts, P. and Zartman, I. W. (eds.), *The Slippery Slope to Genocide: Reducing Identity Conflicts and Preventing Mass Murder*, Oxford University Press, Oxford, 2012.

¹⁶⁸ See Moshman, D., “Us and Them: Identity and Genocide”, *Identity*, 7 (2007) 115.

about the acceptance of the right to disagree, but, at the same time the acceptance of the right to be heard and to take legitimate and legal steps to resolve the differences in views— specifically as far as the exercise of power is concerned.

For those seeking to promote reconciliation, the major task for a new government, particularly in a polarised and divided society where the divisions run deep, is to develop a system that creates, fosters, or encourages both real and apparent equality among all members of the polity.¹⁶⁹ This also concerns the legacy of past inequality and exclusion. Thus, reconciliation has both a backwards and forwards dimension. Both the past and future need to be dealt with.

It is, however, not only the role of the state that is crucial. Thus, space for public dialogue and the promotion of a range of activities that build trust must be the order of the day. Simply having a dialogue does not necessarily mean that positive results occur. Facilitating those processes are important and ensuring that the processes are well managed is fundamental to success. There can always be unintended consequences. Signs of negative unintended consequences ought to be watched for and dealt with as they arise. Training in such processes is important, and the role players involved ought to be assisted as they play their part. Issues that complicate the process need to be resolved. At the same time there ought to be a monitoring of the public space for signs and tones that may indicate a regression of group tolerance.

Similarly, as occurs in South Africa, a reconciliation barometer is a useful means to measure and take corrective steps where reconciliation is needed. This is useful to ensure that a watchful eye is kept on issues that may retard the advances that have been made. Where such indications are seen, prompt interventions are essential. Quick reactive steps ought to be planned in advance, and ought to be ready to be deployed at a moment's notice. Having a well prepared plan of action, with the knowledge of how to deploy such a plan is essential. However, it is also, and probably mostly, about implementation. In this regard the President of the UN General Assembly on 29 December 2011 noted that: "Though much has been done to share lessons and improve systems of alert and quick response around the world, we must do more to implement policies and measures that can mitigate the impact of natural disasters and also address or prevent man-made catastrophes."¹⁷⁰

5ciii4. Reparations

The issue of reparations has become so important for victims because reparations are seen as fulfilling at least three functions: most importantly, victims are able to cope with the financial deprivation that they have suffered; secondly, they allow for an official recognition of the past; and, finally, reparations deter future perpetrators from committing similar violations. There is also a dimension of dignity in the sense that those abused in the past believe that some degree of assistance to reclaim their dignity ought to occur.

Reparations, symbolic or otherwise, can serve as focal points in the grieving process. This can aid recovery by allowing individuals to focus exclusively on their grief. Reparation can encompass a variety of concepts including damages, redress, restitution,

¹⁶⁹ See further Stewart, F. (ed.), *Horizontal Inequalities and Conflict: Understanding Group Violence in Multi-ethnic Societies*, Palgrave Macmillan, Houndsmills, 2008.

¹⁷⁰ General Assembly of the United Nations President of the 66th Session Marking the End of Year (2011), *Ushering in the New Year (2012): GA President Urges Greater Consensus Among UN Member States in 2012*, United Nations Press Release, 31 December 2011, available online at <<http://www.un.org/en/ga/president/66/news/PRStatements/ps311211.shtml>>.

compensation, rehabilitation, and satisfaction. Although they are often used as general terms to encompass all the different types of remedies available to a victim, each of these concepts has a unique meaning

A way that reparations can be usefully achieved in transitional societies is for them to address prospective, broader societal aims such as reconciliation, reconstruction of societal bonds, rebuilding civic institutions, and reforming social and political structures. Thus, rehabilitation and satisfaction are the primary focuses. Such a conception of reparations can address some of the inherent limitations of a judicial approach and even an individualistic approach.

5ciii5. Guarantees of Non-Repetition

The right to non-repetition requires that a State remedy not just the extant instances of the violations but work to remove the situation that allowed the violations to occur in the first place. This would ensure that similar events did not occur again in the future. This is vital not only in ensuring the future safety of victims, but in preventing more people from becoming victims at all.

Basically, all issues relating to prevention and rebuilding are about trying to guarantee non-repetition. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006) describe various forms of remedies including satisfaction. Satisfaction as a remedy includes the cessation and non-continuation of violations.

As noted at the beginning of this article, “Never Again” has been used often to posit that such atrocities should not be allowed again. This axiom has been used many times since the Holocaust. A number of processes to discover the truth have adopted the title “*Nunca Mas*” (never again).¹⁷¹ Never again refers to non-repetition. Many issues fall within its domain including building a new state, dealing with the past through various transitional justice strategies, and achieving reconciliation at various layers in the state.

5.d. Implementing the Responsibility to Rebuild: the Responsibility of External Role Players

The responsibility to protect is not only about what states do inside their borders and their responsibilities in that regard. RtoP is also about the responsibilities of the international community and, in some cases, other individual States to take action where necessary. Thus, a range of role players in the international community have a role to play. RtoP means, at times, that these responsibilities are duties.

5di. The Role of the International Community in Halting Violence

Those in the international community should have, and often do have, an interest and commitment to ensuring that violence ends, and that the democratic project in transitional states is supported and is successful.¹⁷² The importance of these issues—at

¹⁷¹ These include processes in Argentina, Brazil, Uruguay and Paraguay.

¹⁷² See further Finkel, S. E., Perez-Linan, A. and Seligson, M. A., 2005. “Final Report: Effects of US Foreign Assistance on Democracy Building: Results of a Cross-National Quantitative Study” United States Agency for International Development (USAID), 12 January 2006, available online at <http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/impact_of_democracy_assistance.pdf> (accessed 17 April 2012).

least in the rhetorical sense—can be seen in the fact that, since 2004, the Security Council has made references to the rule of law and transitional justice in at least 160 resolutions.¹⁷³ If this does not occur, the future in that country is likely to be as violent now as in the past. If this occurs, the international community will be back to square one and forced to play a role in finding ways to resolve the issues again. It is also important to note that it is estimated that basic governance transformation takes between 20 and 40 years.¹⁷⁴ For this reason it is more economical and politically advantageous for the international community to play a more interventionist and critical role.

Intervening in conflict needs to be based on better assessments of risk.¹⁷⁵ It needs to become more systematic and more scientific in the approaches it uses. The use of scientific data, such as the dataset of third party measures taken in armed conflicts at low intensity, should be used regularly and uniformly.¹⁷⁶ This database created by the Uppsala Conflict Data Program (UCDP) and the Folke Bernadotte Academy covers all low-level armed conflicts from 1993 to 2004.¹⁷⁷ 3018 events in 122 armed conflicts are included.¹⁷⁸ All types of interventions should be regularly evaluated independently and the results used by those who will be embarking on similar projects. A centralised repository, accessible by as many organisations as possible, will ensure a greater knowledge base and informed approaches to the interventions. Thus, studies which review projects or interventions should be used to determine effectiveness and lessons learned.¹⁷⁹ The 2007 Principles for Good International Engagement in Fragile States ought to be followed and further developed.¹⁸⁰ Promoting democratic processes and the rule of law in practice should ensure that States where that have emerged from conflict do not reverse the gains they have made. Thus, as will be argued later, the international community should take steps to prevent a slide back by such States into situations of chaos.¹⁸¹ This is crucial as UNSG Ban has noted:

It is increasingly recognized that States marked by ineffective governance, repressive policies, poverty, high rates of violent crime and impunity pose significant threats to international peace and security. Deep capacity deficits in State justice and security institutions, exacerbated by widespread corruption and political interference, lead to diminishing levels of citizen security and economic opportunity. Resentment, distrust or outright hostility towards the Government grows. Radicalized ideological movements often stand ready to harness these sentiments, inciting

¹⁷³ UNSC ‘Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’ (2011) UN Doc S/2011/634.

¹⁷⁴ *Supra* note 124.

¹⁷⁵ Carment, D., Gazo, J. and Prest, S., “Risk Assessment and State Failure”, *Global Society* 21 (2007) 47-69.

¹⁷⁶ *Supra* note 172.

¹⁷⁷ Melander, E., Möller, F and Öberg, M., “Managing Intrastate Low -intensity Armed Conflict 1993-2004: A New Dataset”, *International Interactions* 35 (2009) 1-28.

¹⁷⁸ Möller, F., “Identifying Conflict Prevention Measures: Comparing Two Approaches”, *UCPD Papers* 5 (2010).

¹⁷⁹ See for example Wallensteen, P. et al., *Peacekeeping Operations: Global Patterns of Intervention and Success, 1948-2004*, 2nd ed., Folke Bernadotte Academy Publications, Sandö, 2005.

See further Cox, M. and Hemon, K., *Engagement in Fragile Situations: Preliminary Lessons from Donor Experience - A literature review*, DFID Department for Internal Development, January 2009, available online at <<http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/aboutdfid/performance/files/engage-frag-liter-review.pdf>> (accessed 17 April 2012).

¹⁸¹ See further McAdams, J. A., *Transitional Justice and the Rule of Law in New Democracies*, University of Notre Dame Press, Notre Dame, 1997.

marginalized groups, unemployed youth and criminal elements to challenge the established order through violent means. Transnational organized crime emerges in parallel with increasing instability, stoking new forms of violence, while further undermining the legitimacy and competence of State institutions.¹⁸²

A much greater international community commitment and provision of resources, to deal with societies in the wake of violence, needs to occur. While this does occur already to some degree, it needs to be done much more frequently and with greater impact. Many measures and processes are needed to ensure that conflict which is occurring is halted or prevented from reoccurring if it has been stopped. As Louise Arbour has stated:

The ultimate form of protection of civilians lies in the prevention, mitigation and resolution of deadly conflict. This can be achieved primarily by political initiatives and the development of systems of good governance, but humanitarian considerations play a large part, as do issues of responsibility and accountability. Indeed the RtoP doctrine includes – in line with the genocide convention – an obligation to punish when prevention has failed. The pursuit of all three desirable goods – peace, safety, justice – must therefore be choreographed to maximize the saving of civilian lives. And this, in turn, requires preserving to the maximum the integrity of all three processes: humanitarian, judicial and political.¹⁸³

Far too often what happens domestically is left for that society to determine. This is especially true concerning prosecutions or a lack thereof.

Various mediation initiatives to prevent or end conflict have played a useful role.¹⁸⁴ This is an area where a range of actors have a useful role to play. For this reason a number of initiatives exist.¹⁸⁵ The UN in 2008 established a Mediation Support Unit (MSU) in the Department of Political Affairs (DPA). The MSU delivered assistance to mediation processes that were occurring.¹⁸⁶ The EU Concept on Mediation and Dialogue Capacities has played a significant role in the Great Lakes region of Africa¹⁸⁷ and has significant influence. However, it has not played such a strong role in other places—such as Sudan—because it is not clear on the role it wants to play¹⁸⁸ and is not positioned to play such a dynamic role.¹⁸⁹

¹⁸² *Supra* note 176.

¹⁸³ *Supra* note 46.

¹⁸⁴ On other mediation issues in Africa see Maundi, O. M., Zartman, I. W., Gilbert, M. K. and Nuamuh, K., *Getting In: Mediators' Entry into the Settlement of African Conflicts*, United States Institute of Peace Press, Washington, D. C., 2006, 57-84.

¹⁸⁵ On mediation steps taken elsewhere see Wolpe, H. in: Francis, D. (ed.), *Mediating Deadly Conflicts. Lessons from Afghanistan, Burundi, Cyprus, Ethiopia, Haiti, Israel/Palestine, Liberia, Sierra Leone & Sri Lanka*, World Peace Foundation Reports, Cambridge, 1998. See also *Supra* note 187.

¹⁸⁶ See Middleton, R., Melly, P. and Vines, A., *Report for the European Parliament's Committee on Foreign Affairs; Implementing the EU Concept on Mediation: Learning from the Cases of Sudan and the Great Lakes*, European Union Directorate-General for External Policies, June 2011, available online at <http://www.chathamhouse.org/sites/default/files/0611eu_sudan.pdf> (accessed 18 April 2012).

¹⁸⁷ See further Davis, L., *Small Steps, Large Hurdles: The EU's role in Promoting Justice in Peacemaking in the DRC*, IFP Mediation Cluster, 1 May 2009, available online at <<http://ictj.org/sites/default/files/ICTJ-DRC-EU-Peacemaking-2009-English.pdf>> (accessed 18 April 2012).

¹⁸⁸ Davis, L., "The European Union: Time to Further Peace and Justice", *Egmont Security Policy Brief*, 22 (2011) 1.

¹⁸⁹ *Supra* note 188.

A report reviewing the role of the EU in this regard notes that the EU in situations where it does not have the ability to mediate should play a supportive role and provide resources to those that are able to do so.¹⁹⁰ The report argues that in such situations the EU should support the labours of other role players who are able to provide such assistance imaginatively, and ensure that they do not duplicate or complicate other initiatives.¹⁹¹ The lessons to be learned for other role players—such as international, regional, and sub-regional institutions—who play, or want to play, such roles is clear: coordination, communication, flexibility, adaptation where necessary, and working where there it has the necessary strengths to do so are fundamental to achieving positive results—especially in a world where austerity is the name of the game.

5dii. The Role of the International Community in the Democratic Project

While much done in the area of rebuilding it is often supportive of what the state wants, these processes are often insufficiently critical of what the state is doing and wants to do. Far too often such assistance leaves the decision making processes of what measures to put in place to the state to determine. Too little serious, high powered or senior level engagement on such issues occurs to the detriment of the results.

It is a problem is that donors, and others, including many large NGOs in the human rights field, do not want to be too hard on such governments. They believe that they will lose their leverage position and possibly no longer be able to remain in that country. Officials do not want to strain their relationships. They hope that long term gains can be achieved even if short term objectives are not met. An additional problem is that the state undergoing the transition believes that it can put off meeting the objectives it agreed to by promising that these goals will be met at a later point in time. Therefore, much more therefore ought to be done to comply with the Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008).¹⁹²

Processes ought not to paper over of problems as presently happens in many of these projects. It is necessary to take active roles to ensure that the right institutions, mechanisms, processes, laws and other steps are taken in an inclusive and fair manner to avoid the pain of more conflict later.

Much greater pressure ought to be placed on transitioning societies to establish mechanisms which are much more democratic in effect. The key questions should be how will the system work in practice; will the process will be equally applied; will there be equal access to such processes and will it achieve equal results? There ought to be very strict strings attached to any donor assistance provided.¹⁹³ Control ought to be applied not only to the specific project that the donor aid is given for, but for all assistance provided by a donor. This should be the case for all donors regardless of whether the grantor is a state, an international agency, or any other type of provider. Coordination is essential, and all funding should be channelled through a vetting agency that establishes benchmarks and ensures compliance with those before additional funding is released for

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² See further Anderson, M. B., *Do No Harm: How Aid Can Support Peace-or War*, Lynne Rienner Publishers, Boulder, 1999.

¹⁹³ It has been argued that donors such as the EU do not always fully use their leverage position obtained through financing lots of projects. See Oslo Forum, Gentz, S., *EU Influence in Conflict: Power to Mitigate or to Mediate?*, 2007, 54, available online at <<http://www.hdcentre.org/files/EUinfluenceinconflict.pdf>> (accessed 19 April 2012).

anything. The “carrot and stick”¹⁹⁴ should be used far more effectively and severe penalties in financial terms should be employed for missed targets without exception. Far too often promises are made but seldom kept with little sanction for such transgressions.

It is also critical to ensure that funds given to such States are managed and controlled effectively. Ensuring that corruption is avoided is essential. Thus, ensuring that systems are in place to ensure transparency and control public funds is essential. A public finance management system¹⁹⁵ and other systems to keep a proper watch on such funds, and the processes of spending from the state fiscus, are essential to limit the possibility of corruption.

Aid processes also need to be effective, speedily available and flexible where necessary with home-grown solutions.¹⁹⁶ Finance, in general, is a critical issue.¹⁹⁷ Many human rights organisations in the global south, if not elsewhere, are in great jeopardy because of the on-going financial crisis in the world. Many are closing their doors, others have funding left for only a short period of time. Providing resources to such organisations is critical to ensuring that human rights concerns and issues are continually raised in a systematic and organised way.

While there have been tremendous democratic advances, because of the Arab spring, newly democratised states and organisations at the forefront of these developments need assistance with monitoring, research,¹⁹⁸ publications, and advocacy from organisations with the requisite expertise. More assistance with fundraising efforts should also be provided by larger organisations that have the ability to assistance with information on sources of funding, provide templates of requests to donors, and provide information on useful strategies to get traction for funding requests. Longer term planning and availability of funding for longer periods of time would also ensure sustainability of NGOs, especially in the global South. In fact, generally speaking, donors are more often funding state institutions.¹⁹⁹ Donors also prefer making larger grants. But lots of small grants to lots of local NGOs on the ground in countries where conflict is occurring will have lots of direct effect for little cost.²⁰⁰

While donors do not like making small grants—especially to those with no bookkeeping ability, auditing capacity, or the necessary infrastructure—the benefits of such grants to an organisation with almost no overheads would be enormous. It would

¹⁹⁴ See generally Cardenas, S., *Conflict and Compliance: State Responses to International Human Rights Pressure*, University of Pennsylvania Press, Philadelphia, 2007.

¹⁹⁵ Carnahan, M. and Lockhart, C., “Peace-Building and Public Finance” in: Call, C. T. and Wyeth, V. (eds.), *Building States to Build Peace*, Lynne Rienner Publishers, Boulder, 2008.

¹⁹⁶ *Supra* note 183. See also Fritz, V. and Rocha-Menocal, A., “Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda”, *Development Policy Review*, 25 (2007) 531.

¹⁹⁷ *Supra* note 195.

¹⁹⁸ See for example Fair, J. E., “29 Years of Theory and Research on Media and Development: The Dominant Paradigm Impact”, *Gazette*, 44 (1989) 129.

¹⁹⁹ See Berghof Research Center for Constructive Conflict Management, Boege, V., Brown, A., Clements, K. and Nolan, A., “On Hybrid Political Orders and Emerging States: State Formation in the Context of Fragility”, *Berghof Handbook Dialogue*, 8 (2008), available online at <http://www.berghof-handbook.net/documents/publications/boege_etal_handbook.pdf> (accessed 15 April 2012).

²⁰⁰ Association for Women’s Rights in Development (AWID), Clark C. and Sprenger, E., *Where is the Money for Women’s Rights? Assessing the Resources and the Role of Donors in the Promotion of Women’s Rights and the Support of Women’s Rights Organizations*, February 2006, 42, available online at <http://www.awid.org/content/download/23392/301964/file/1st_fundher_report.pdf> (accessed 30 April 2012). See further Santiso, C., “International Co-operation for Democracy and Good Governance: Moving toward a Second Generation?”, *European Journal of Development Research*, 13 (2001) 154-80, 159. See also Barreiro, V., Hussels, M. and Richards, B., *On the Frontiers of Finance. Scaling up Investment in Sustainable Small and Medium Enterprises in Developing Countries*, World Resources Institute (WRI), Washington, DC, 2009.

also give a boost to the esteem of such organisations and give them much needed recognition. As it is unlikely that such grassroots organisations will approach donors, the donors should reach out to such organisations. Supporting such groups will help to build civil society, which is critical to building a robust and vibrant democracy.²⁰¹ An engaged and effective civil society is a very useful role player in a society where human rights violations have occurred and where democratic principles are emerging. It is beneficial to ensuring accountability of the state and state institutions. Civil society can be a check-and-balance on state power and thus critical to the effectiveness of the emerging democracy.²⁰² Civil society needs to be supported in many ways, including political support. Ensuring that civil society has the space to operate is fundamental to the promotion and protection of human rights. However, other institutions also need to be supported to play such a role, including the courts, the Church, the media, business, as well as a host of other actors.²⁰³

It must be clearly laid out by donors and others that resources will be provided if, for example, proper independent structures and independent appointment processes to staff State institutions are established. Thus, state institutions need to be supported in a range of ways, but not at any cost. Far too often they are places for the ruling party to provide jobs to their supporters, regardless of qualification, experience, and skill. Donors and state representatives in these countries have a responsibility to protect, and, therefore, an obligation to ensure that these institutions are credible and impartial that—without fear or favour—carry out their mandates effectively. There also ought to be pressure placed on the state to find the right balance between independence of the institution, and support by the state for the institution, as far as resources and carrying out the recommendations of these bodies is concerned. This is a difficult but completely necessary task. Even if independence is guaranteed in the Constitution or legislative framework, and even if the appointment process ought to lead to independent candidates --and, therefore, an independent institution—this often does not work out in practice.²⁰⁴ Independence of such institutions is a key hallmark of democratic societies.

The same is true for the courts. Problematically, however, in many places newly established courts, or new positions on the courts, are filled by those who come from one political party or one group, which often intersects. This limits their independence. It ought to be an absolute requirement that laws and processes achieve their independence as far as possible, which is often not the case. Much more needs to be done to achieve the goals of the rule of the law, good governance²⁰⁵, anti-corruption, and a host of democratic reforms which otherwise see issues from the past continue to remain a blight on the democratic landscape. If the courts are not independent then the other goals are also not likely to be attained. This is so because the courts are meant to play a role in

²⁰¹ See further Belloni, R., “Civil Society in War-to-democracy Transitions”, in: Jarstad, A. K. and Sisk, T. D. (eds.), *From War to Democracy: Dilemmas of Peacebuilding*, Cambridge University Press, Cambridge, 2008, 182.

²⁰² See generally Danish Institute for International Studies and Organisation Internationale de Droit du Développement (International Development Law Organization), Albrecht, P., Harper, E., Isser, D. and Kyed, H. M., *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, 26 September 2011, available online at <http://www.idlo.int/Publications/DIIS_Book.pdf> (accessed 15 April 2012).

²⁰³ *Supra* note 83.

²⁰⁴ See further Noel, S. (ed.) *From Power Sharing to Democracy: Post-conflict Institutions in Ethnically Divided Societies*, McGill-Queen’s University Press, Montreal, 2005.

²⁰⁵ See further Andrews, M., “The Good Governance Agenda: Beyond Indicators without Theory”, *Oxford Development Studies*, 36 (2008) 379.

ensuring accountability. If they are not independent, this will not occur if the courts have judicial review powers.

A clear and accurate methodology to determine what is being done and whether it meets the needs of the transitional society ought to be part of donor grant making. Accurate information is needed to make assessments about what ought to be supported. For this reason benchmarking must be built into grant making using an independent measurement tool. This is critically important as decisions on humanitarian aid remain largely based on anecdotes rather than on evidence. This process should be enhanced by greater development of evidence systems of data collection, scrutiny, and reaction.²⁰⁶ Use of methodologies and indexes such as the Escola de Cultura de Pau's Human Rights Index would enhance such processes and make them less susceptible to individual whims. This specific tool measures state compliance to various human rights and humanitarian law issues. This is evaluated by looking at issues including: armed conflicts, socio-political crises, peace processes, humanitarian crises, human rights and transitional justice, and the gender dimension²⁰⁷ to peace-building.²⁰⁸ Another tool is the Cingranelli-Richards Human Rights Data Project.²⁰⁹ This project measures government human rights practices; has disaggregated measures of specific human rights practices, allows anyone to reapply its coding rules to other cases; and allows users to save their customised datasets to allow easy updating. These assessments ought to be done regularly as part of the process with clear penalties for failure. Donors should be doing this collectively so as to have more sway when the performance is not what was called for.

Various international and regional institutions also have critical roles to play in rebuilding. There are many useful examples of this. Two will be focused: on one in the international sphere and one in a regional context to show what is occurring and the roles that can be played.

In the international context,²¹⁰ the establishment of the Peacebuilding Commission²¹¹ by the UN in 2005 was seen as a crucial step in supporting peace efforts in countries emerging from conflict.²¹² It is a useful addition to supporting the international communities' capacity in assisting peace processes.²¹³ At present it works in Burundi, Sierra Leone, Guinea, Guinea-Bissau, Liberia, and the Central African Republic. It is meant to bring together all role players, marshal resources, and counsel on

206 Benelli, P., Gupta, H., Mazurana, D. and Walker, P., *Sex and Age Matter: Improving Humanitarian Response in Emergencies*, Feinstein International Center, August 2011, available online at <http://www.scribd.com/fullscreen/62432037?access_key=key-szdwu2wrbizkauf48in> (accessed 14 April 2012).

207 See further Caprioli, M., "Primed for Violence: the Role of Gender Inequality in Predicting Internal Conflict", *International Studies Quarterly*, 49 (2005) 161. See also Buckley-Zistel, S. and Stanley, R. (eds.), *Gender in Transitional Justice*, Palgrave Macmillan, Basingstoke, 2011.

208 *Supra* note 14.

209 Cingranelli, D. and Richards, D., *The Cingranelli-Richards Human Rights Dataset*, CIRI Human Rights Data Projects, 2010, available online at <<http://ciri.binghamton.edu>> (accessed 14 April 2012).

210 See further MacGinty, R., *International Peacebuilding and Local Resistance: Hybrid Forms of Peace*, Palgrave Macmillan, Basingstoke, 2011.

211 UNGA Resolution 60/180, 1 August 2005 and UNSC Resolution 1645, 20 December 2005.

212 UNGA Explanatory Note by the Secretary General 59/2005/Add.2 on the Peacebuilding Commission, Addendum to Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, 23 May 2005, UN Doc A/59/2005/Add.2.

213 For general information, see the United Nations Peacebuilding Commission, whose website can be found at <<http://www.un.org/en/peacebuilding>> (accessed 14 April 2012).

peace building²¹⁴ and recovery efforts. It has been argued by the Commission itself that “despite committed and dedicated efforts, the hopes that accompanied the founding resolutions have yet to be realised.”²¹⁵ Such an institution fits in with the international community’s obligations under RtoP and ought to be supported. However, more work is needed to strengthen the commission in a range of ways to make it able to reach the objects set for it.

Allied to the Peace Building Commission is the United Nations Peacebuilding Fund (PBF), established in 2006. It is currently supporting 193 projects in 22 countries.²¹⁶ By mid-2010 it had raised \$357.3 million from 48 donors. In the period July 2009 to July 2010 it allocated some \$63 million in 16 countries. These funds were used for security sector reform; disarmament, demobilisation and reintegration; youth employment; national reconciliation; good governance; and the rule of law.²¹⁷ More resources are needed for the Fund to play an increased role in the states where it presently works, as well as in a range of other places that could use its services.

In Africa an AU mechanism charged with various tasks including peace building is the Peace and Security Council (PSC).²¹⁸ The establishment of the PSC heralded a supposedly more robust system for the early detection of crisis and conflict. It is empowered to take steps to prevent such problems,²¹⁹ and promoting and developing a strong “partnership for peace and security” between the AU and the UN and its organs as well as other international organisations.²²⁰ It is also assigned to develop policies and actions that will ensure the compliance of external initiative in peace and security on the continent with AU objectives and priorities. It is also meant to undertake peace-making and peace-building functions; resolve conflicts; and authorise, deploy, and set guidelines for peace operations. The PSC is charged with examining progress made towards democratic practices, good governance, the rule of law, protection of human rights and fundamental freedoms, respect for the sanctity of human life, and international humanitarian law by member states.²²¹ Crucially from an RtoP point of view the PSC may recommend that the AU Assembly authorise an article 4(h) intervention into a member state where “grave circumstances” exist. Upon the approval of the assembly, in the terms of article 4(j) of the AU Constitutive Act, the PSC must approve the “modalities” of the chosen intervention.²²² Within sufficient support and resources, the PSC should achieve these goals.

6. Conclusion

The real problem in the world concerning on-going human rights violations is not that the world does not have the tools or have the concepts to take the necessary steps.

²¹⁴ On peacebuilding see Barnett, M. et al., “Peacebuilding: What is in a Name?”, *Global Governance: Review of Multilateralism and International Organizations*, 13 (2007) 35.

²¹⁵ Security Council Review of the United Nations Peacebuilding Architecture S/2010/393, 21 July 2010.

²¹⁶ United Nations Peacebuilding Fund, available at <<http://www.unpbf.org/>> (accessed 14 April 2012).

²¹⁷ UNGA Report of the Secretary General on the Peacebuilding Fund 65/353, 9 September 2010, UN Doc A/65/353.

²¹⁸ African Union Protocol Establishing the Peace and Security Council, 9 July 2002, Article 2.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*, at Article 7(k).

²²¹ *Ibid.*, at Article 7(m).

²²² *Ibid.*, at Article 7(f).

The real problem is often a political unwillingness²²³ to take the necessary steps. Today, how and when RtoP can be, or should be, applied is curtailed in practice by the operations of the international relations regime, which sees dominant states determine when and where RtoP can be applied. This mostly means that it is applied where they have no interests.

It must be remembered that RtoP was diminishing in importance in the years between 2005 and 2011. While some have seen the norm on the ascendancy since 2011 because of the UN Security Council resolution on Libya²²⁴ and the decision to take action in that country, it remains to be seen whether Libya reflects the ascendancy of RtoP, or whether Libya was a rare application of the norm in practice. Whether it is the exception to the rule or the application of the rule remains to be seen. It is certainly too early to make definitive predications.

World events, and the way things play out at various institutions, especially at the Security Council, will determine whether RtoP is a norm whose time has come,²²⁵ or whether it has attained little status. Time will tell whether the steps taken in Libya in 2011 were the start of a new trend, something not to be repeated, or something that will only really be used again in very exceptional circumstances. It is probably only likely to be used in the humanitarian intervention sense where global interests intersect or there is an event in a part of the world where the global powers have few interests.

The way that RtoP develops will be critically affected by processes to reform the Security Council.²²⁶ It does remain to be seen if this occurs, and, if it does, how it will affect these issues and RtoP in particular. However, what has occurred after the events in Libya indicate that signs are not positive for a repeat of what occurred in Libya. That intervention is in all probability not the beginning of a trend towards the regular and sustained use of RtoP but rather an exceptional application of RtoP in its clearest form. While it is likely that the linguistic usage of RtoP is likely to increase by those who advocate its use, those who are opposed to are likely to be further galvanised into action to limit its practice to ensure that it does not attain greater status in the years to come. The refusal to intervene in Syria despite massive human rights violations over many months seems to indicate that those who advocate for the application of RtoP in that form will have a difficult time ensuring that that will be the case. The fact that various attempts to take even limited action in 2011 against Syria were blocked in various forums seem to indicate that applying that type of RtoP might occur in very rare circumstances.

Whatever happens, one of the critical challenges is how to publicise, promote, and overcome opposition to RtoP, especially with regards to sovereignty and how best to frame those efforts. Thus, it has been stated that: “Despite the many human-rights and humanitarian commitments that states have accepted, a substantial number of governments continue to believe that sovereignty entitles them to block international scrutiny, even in the face of massive human rights violations and acts of genocide.”²²⁷

²²³ Chesterman, S., *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, Oxford, 2003.

²²⁴ UNSC Resolution 1973, 17 March 2011.

²²⁵ Mattheus, M. W., “Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur”, *Boston College International and Comparative Law Review*, 31 (2008) 137.

²²⁶ See further Slaughter, A., “Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform”, *American Journal of International Law*, 99 (2005) 619.

²²⁷ See Pace, W. R. and Deller, N., “Preventing Future Genocide: A Responsibility To Protect”, *World Order*, 36 (2006) 16.

Much more needs to be done to make RtoP palatable to those opposed to Rtp by showing that RtoP is much more than humanitarian intervention. It has to be clearly shown that RtoP is not about regime change. This is necessary as, although those who oppose RtoP are relatively small in number, they wield considerable power and influence. They are also able to influence others on many occasions to join their positions.

The various pillars of RtoP need to be relied on and used to indicate the width and breadth of RtoP. This is especially so for the responsibility to rebuild with all its component aspects. Peace-building, although a complex and time consuming process needs to be given much more attention. It has to be done carefully and scientifically. Often those involved in the process want quick cheap interventions that give immediate results. In most places this is not possible. What is possible is to begin the process fairly quickly, but on-going engagement is crucial. Where assistance is given donors need to be far more involved in ensuring that what is planned will meet the long term needs of the state. If the democratic project is allowed to deviate and not achieve a state that belongs to all, and all feel that their issues are taken into account and have been dealt with, the international community may have to start over again when the system unravels. While this will be difficult, and the transitional state will despite “interference in domestic affairs,” the “obligation to protect” and the responsibility to rebuild obligate all actors to pursue the goals in spite of the difficulties in achieving them.

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