Prevention of genocide under International law

Ruvebana, Etienne

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An analysis of the obligations of states and the United Nations to prevent genocide at the primary, secondary and tertiary levels

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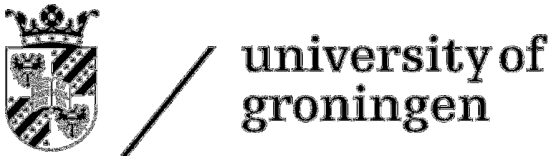

Prevention of Genocide under International Law

An analysis of the obligations of States and the United Nations to prevent genocide at the primary, secondary and tertiary levels

PhD thesis

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by

Etienne Ruvebana

born on 15 April 1977
in Kalehe, Congo

Supervisor

Prof. M.M.T.A. Brus

Co-supervisor

Dr. A.J.J. de Hoogh

Assessment committee

Prof. R.M. Letschert

Prof. C.I. Fournet

Prof. F.A. Nelissen

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Groningen, May 2014

[1] John F. Kennedy, Proclamation 3560 : Thanksgiving day by the President of the United States of America a proclamation, November 5, 1963, available online at <http://www.pilgrimhall.org/ThanxProc1960.htm> (visited on 19 September 2013).

TABLE OF CONTENTS

List of Abbreviations

ARSIWA	Articles on the Responsibility of States for International Wrongful Acts,
AU	African Union
CAT	Convention Against Torture
CDR	*Coalition pour la Défense de la République* (Coalition for the Defence of the Republic) (Rwanda)
DRC	Democratic Republic of Congo
e.g.	*Exempli gratia* (for example)
ECHR	European Convention of Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community for West African States
ECtHR	European Court of Human Rights
Ed (s)	Editor (s)
et al.	*et alii/aliae* (and others)
etc.	*et cetera* (and so on)
EU	European Union
FAR	*Forces Armées Rwandaises* (Rwandese Armed Forces)
FPG	Fund for the Prevention of Genocide
FRY	Federal Republic of Yugoslavia
GA	General Assembly

List of abbreviations

HRC	Human Rights Council
i.e.	*id est* (that is)
IAEA	International Atomic Energy Agency
Ibid.	*Ibidem* (in the same place)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMTN	International Military Tribunal of Nuremberg
IPEP	International Panel of Eminent Personalities
M23	*Mouvement du 23 Mars* (Movement of the 23rd March)
MRND	*Mouvement Republicain National pour le Development*(National Republican Movement for the Development)
NATO	North Atlantic Treaty Organisation
No	Number
OAU	Organisation of African Unity

OHCHR	Office of the United Nations High Commissioner for Human Rights
Op.cit.	*Opere citato* (in the work cited)
OPCAT	Optional Protocol to the Convention Against Torture
OPG	Organisation for the Prevention of Genocide
P(p).	Page (s)
Para(s)	Paragraph
R2P	Responsibility to Protect
Res.	Resolution
RPF	Rwandese Patriotic Front
RTLM	*Radio Television Libre des Mille Collines(*Independent Radio and Television of Mille Collines)
SC	Security Council
SG	Secretary-General
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNEP	United Nations Environmental Program
UNGA	United Nations General Assembly
UNPREDEP	United Nations Preventive Deployment

UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
US/USA	United States
USSR	Union of Soviet Socialist Republics
v.	*versus*
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WHO	Word Health Organisation
WSOD	World Summit Outcome Document

Chapter I. General Introduction

1. Research context

Since the adoption of the Genocide Convention in 1948 until the early 1990s, this Convention has been idle.[2] The response of the world on it has been absent. Moreover, even in the 1990s, the pace in the response on it was very slow. The content of the obligation to prevent genocide was largely neglected. This is linked to the fact that the concept of prevention itself is not clarified in the Genocide Convention. Not only the meaning of this concept of prevention is not clarified in the Genocide Convention, but also there is not much indication on the content of this concept in international law in general. The literature has not done much to fill that gap either. In fact, for many years, no legal research has been undertaken on the obligation to prevent genocide enshrined in the Genocide Convention and on prevention itself. Most academic research on the prevention of genocide has been undertaken by historians, philosophers, and social scientists.[3] The latter have rightly shown the necessity to prevent genocide from the perspectives of their disciplines, but of course they could not suggest concrete legal measures. Later international law research on the prevention of genocide has rather concentrated on the late stages in the process to genocide, *i.e* when acts of genocide are or have been committed, leaving aside the earlier stages in the process to genocide. Even at those late stages, such research has suffered from an acute lack of concrete measures to put an end to genocide. Moreover, even supposing that measures were there to put an end to genocide, the fact that they intervene at late stages of the process to genocide makes the aim of prevention not only difficult to be achieved, but also the spirit of prevention loses its meaning.

Another factor that has contributed to the lack of clarity about the prevention of genocide and the legal obligation thereof is that for very long, there have been not many legal proceedings related to it before competent courts. Except for the 1951 ICJ advisory opinion on the issue of reservations,[4] it was only until the 2000s that there was the first ICJ decision related to the

[2] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260(III)A of the United Nations General Assembly on 9 December 1948, available at< http://www.un.org> (visited 12 July 2009).

[3] Reference to those researches is made in chapter III of this work. Also noted by Schabas, A. William, *Genocide in International Law, the Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, p. 8.

[4] Reservation to the Convention on Genocide, Advisory Opinion: I.C.J. Reports1951, p. 15-30.

obligation to prevent genocide.[5] The Court clarified certain aspects related to the content of the obligation to prevent genocide, but given the fact that its power is limited to the case before it, it did not (and it could not) solve all the questions surrounding this obligation.[6] Also, the relatively new concept of the Responsibility to Protect did not solve the questions related to the obligation to prevent genocide. Instead, there is a danger that it may absorb the legal obligation to prevent genocide. Moreover, as the legal status of the Responsibility to Protect is more uncertain than the legal status of the prevention of genocide the result may be a weakening of prevention of genocide.

Given these problems, it is not surprising that since the Holocaust a number of other tragic situations of genocide have occurred. The tragedies in Cambodia, Rwanda, Bosnia and Darfur are other most horrible instances of genocide that have shocked the conscience of mankind, and there is a fear that the list may grow even longer in the future if prevention of genocide is not clarified and taken seriously.

What is paradoxical is that, while for other tragedies it is generally not easy to foresee them before they happen and therefore difficult (or even impossible) to prevent them, genocide is preceded by factors and clear signs that it may or is about to happen. That would logically provide enough opportunities to take measures to prevent those factors from leading to genocide. In fact, even when it has not been prevented from happening, it can still be clear to everyone that it is happening and can therefore be stopped at its start. Two of the instances of genocide (Rwanda and Bosnia) may help to show that paradox. Several years before the genocide in Rwanda occurred, there existed factors and signs that a genocidal conflict could potentially break out. For instance, the permanent distinction between the ethnic groups introduced during the colonisation in the 1930s and the consequent discrimination contributed to the antagonism of the Hutu population which had been underprivileged for long time. This contributed to the hatred that exploded in 1959 when the killing of thousands of Tutsi by Hutu extremists occurred, followed by others in the 1960s and 1970s. The hate ideology and propaganda against the Tutsi population continued for many years. It increased in 1990 with the invasion of the Tutsi-led rebel

[5] International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v. Serbia- Montenegro), (Case No. 91) Judgment, 26 February 2007.
[6] For more about this see Seibert-Fohr, Anja, "State responsibility for genocide under the Genocide Convention", in Gaeta, Paola (ed.), *The UN Genocide Convention, A Commentary*, Oxford University Press, Oxford, 2009, p. 361.

group known as the Rwandese Patriotic Front (RPF). Some weekly newspapers like Kangura supported by the government and military figures carried out open hate-propaganda against Tutsis. It published in 1990 the infamous ten Hutu commandments in which there were instructions to mistreat and discriminate Tutsis.[7] This propaganda increased much more in 1993 by the "*Radio-Television Libre de Milles Collines*" (RTLM) which began broadcasting shortly before the signing ceremony of Arusha Accords between the Rwandan government and the Rwandese Patriotic Front.[8]

In his report of March 1993, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions alerted the international community that genocide against the Tutsi population was being prepared.[9] The alert was also given four months prior to the real beginning of the massacres by the commander of United Nations Mission for Rwanda (UNAMIR), Canadian General Romeo Dallaire, when he sent a coded cable to the Peacekeeping Operations department of the United Nations Secretariat warning of a plan for the extermination of the Tutsi population.[10] He mentioned that he suspected that the lists of Tutsis which were being established were for their extermination. He revealed that various and several arms had been stockpiled in secret locations.[11] These arms were the ones which were used to exterminate Tutsi four months later.

On 6 April 1994, the airplane of the Rwandan president was shot and it exploded in the skies above Kigali. Within hours of the plane crash, the Presidential Guard, the army, the *Interahamwe*, and the *Impuzamugambi* mounted roadblocks and killings spread quickly throughout the whole county, ordered and commanded by the Government through its army, Gendarmerie, militias, and individuals. This was the beginning of the genocide. The Hutu Prime Minister Madame Agathe Uwiringiyimana who was known for being moderate was assassinated the day after the presidential air crash.[12] Ten Belgian soldiers who were in charge of her security

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[7] Melvern, Linda., *A People Betrayed: The Role of the West in Rwanda's Genocide*, 2nd ed., Zed Books, London and New York, 2000, p. 72.

[8] Idem, p. 71. The Arusha Peace Agreement was signed on the 4th of August 1993.

[9] Report of the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on the mission he conducted in Rwanda from 8 to 17 April 1993, in UN DOC E/CN.4/1994/7/Add.1 of 11 August 1993, paras.78-79.

[10] Schabas, A. William, *Genocide in International Law, the Crime of Crimes*, Cambridge University Press, Cambridge, 2000, p, p. 475.

[11] Melvern, Linda, *op.cit*. p. 64, 65. For more details see also Scheffer J. David, "Lessons from the Rwandan Genocide", *Georgetown Journal of International Affairs*, Summer/Fall 2004, pp. 125-132.

[12] Dallaire, Romeo, *Shake Hands with the Devil, the Failure of Humanity in Rwanda,* Arrow Books, London, 2004,

were killed by the Rwandan army as well.[13]

At that beginning of the killings, the French government decided to fly in a well-equipped armed force of paratroopers, Operation Amaryllis with the objective to evacuate French nationals and other westerners, and members of President Habyarimana's family. The evacuation was done by French, together with Italian and Belgian soldiers.[14]

At that time, the number of the UN peacekeeping force was 2548. General Dallaire made a request of reinforcement of UNAMIR to put an end to the genocide that had just started. For instance he sought the Security Council to increase the number of UNAMIR troops and to give the enforcement power under Chapter VII of the Charter to UNAMIR for it to stop the genocide.[15] In the meantime, the Belgian contingent (a battalion) in the UNAMIR got a message around the 9th of April 1994 ordering it to pull out from Rwanda.[16] By that time, ninety soldiers of that Belgian battallion commanded by Lieutenant Luc Lemaire were at "*Ecole Technique Officielle*" of Kicukiro in Kigali.[17] In this school, there were more than two thousand people (from 8 April) who had fled the killings. They sought the protection from the Belgians, which they got only until 11 April, when the Belgian battalion pulled out.[18] Likewise, in another location in Kigali known as the "*Centre des Pères Salésiens de Kimihurura*", there were some troops of UNAMIR (Belgians) and around 600 people had sought their protection until 11th April when they abandoned them and they were killed by Hutu extremists.[19]

Ten days after this withdrawal and at the urging of the United States,[20] the Security Council

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pp. 221-262. See also Ruvebana, Etienne, "Victims of the Genocide Against the Tutsi in Rwanda", in Letschert, Rianne et al., *Victimological Approaches to International Crimes: Africa*, Intersentia, Antwerpen, 2011, p. 95.

[13] Dallaire, Romeo, *op.cit*, pp. 221-262.

[14] Heidenrich, G. John, *How to Prevent Genocide: A Guide for Policymakers, Scholars, and Concerned Citizen*, Westport, Connecticut London: Praeger, 2001, p.199

[15] Kenneth, J. Campbell, *Genocide and the Global Village*, Palgrave, New York, 2001, p. 78.

[16] Schabas, A. W., *Le Genocide Rwandais et la Responabilité de Casques Bleus*, Communication presentée lors des Ateliers pour la pratique du droit international public et du droit international humanitaire ONU mecanique, Geneve, le 23 Avril 1998, p. 3, available at <http://129.194.252.80/catfiles/1215.pdf> (visited 17 September 2009). See also Testimony of Colonel Luc Marchal on 15 May 2007 in the Case Prosecution v. Major Ntuyahaga Bernard, available at < http://www.lesoir.be/> (visited 16 September 2009). The Belgian Colonel Luc Marchal was second-in-command for UNAMIR (1993-1994) until the Belgium contingent pulled out on the 11th April 1994.

[17] Melvern, Linda, *op.cit*, p. 2.

[18] Idem, pp. 1-3.

[19] Melvern, Linda, *op.cit*, *p. 2.*

[20] Kenneth, J. Campbell, *op.cit, p. 78.*

adopted Resolution 912,[21] in which it decided to withdraw 90 per cent of the rest of UNAMIR troops and the remaining 270 were to be used only for the evacuation of foreigners and to act as intermediary between the parties in an attempt to secure their agreements.[22]

All along those days, General Dallaire kept seeking the UN to ask the US to shut down the radio RTLM which was a direct instrument of genocide. However, after a study of the request by the Pentagon, it was recommended not to grant that request due *inter alia* to the high cost ($ 8.500 an hour for a jamming aircraft over the country) and the legal argument that jamming a national radio station would violate the international law principle of sovereignty of states.[23] Upon the proposal of France, on the 22 June 1994, the Security Council adopted resolution 929 in which it authorised France to conduct the operation Turquoise for humanitarian objectives.[24] However, this operation did not put an end to genocide.

As a result of Rwanda's lack of will to put in place measures to prevent genocide and the absence of concrete actions by other actors to prevent genocide, an estimate of 800,000 lives were lost in only one hundred days before it was ended as a result of the military victory of the RPF. It is the fastest and most vicious genocide yet recorded in human history.[25] Yet, as observed later, this genocide could have been prevented if each actor had taken preventive measure tailored to each phase.[26] It is generally recognized that states and the UN have failed to prevent it from happening.[27] Indeed, not only a number of measures could have been taken at

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[21] Security Council Resolution 912 of April 21, 1994, available at <http://www.un.org> (visited on 5 September 2009).

[22] Kenneth, J. Campbell, *op.cit*, p. 78.

[23] Dallaire, Romeo, *op.cit*, p. 375.

[24] See Security Council Resolution 929 of 22 June 1994, available at <http://www.un.org> (visited on 5 September 2009).

[25] Letschert, Rianne et al.(eds), *Victims of the Genocide Against the Tutsi in Rwanda, in Victimological Approaches to International Crimes: Africa*, Intersentia, Antwerpen, 2011, p. 621

[26]International Panel of Eminent Personalities, *Preventable Genocide,* Statement by members to the media on the release of their report, July 7 2000, available at < http://www.theperspective.org/rwanda.html>, (visited on 5 September 2009). Schabas, A. William, *Genocide in International Law: the Crimes of Crimes*, Cambridge University Press, Cambridge, p. 475, p. 477.

[27] Boutros Boutros-Ghali, the then UN Secretary-General challenged the Security Council, saying it was afraid to use the word ""genocide"" in presidential statements and resolutions because this would have required it to prevent the crime being committed. Kofi Annan went to Rwanda in 1998 where he acknowledged that the international community and the UN failed Rwanda at the time of evil. The US and Belgium later presented their *mea culpa* acknowledging their failure to do something to prevent that tragedy. In 1998 President Clinton visited Rwanda and he issued something of an apology. He said: "*We in the United States and the world community did not do as much as we could have done to try to limit what occurred. It may seem strange to you here, but all over the world there*

early phases to prevent it from starting, even at later phases, genocide could have been averted or halted.

The discussion on the second instance of genocide will focus on the late phases. Similarly to what happened in Rwanda, the genocide in Srebrenica occurred while the Dutch peacekeepers were there. The Dutch troops were in the Balkans as part of the UN Protection Force (UNPROFOR) to shield civilians during the bloody wars that pitted Bosnian Serbs against Bosnian Croats and Muslims. This peacekeeping force at Srebrenica, which was composed of nearly 400 men, was meant to protect the refugees and residents of that Bosnian town, designated a safe haven by the UN in 1993. The UN units were stationed in the Safe Areas in order to deter an attack.[28] But this signified little more than a symbolic presence and they offered little or no resistance to the Serb attack.[29] UN Undersecretary-General Kofi Annan had already written to the then Force Commander Wahlgren on the establishment of the Safe Areas that the demilitarisation of Srebrenica only meant that UNPROFOR itself took on a "moral responsibility" for the safety of the Safe Area but that he realized that UNPROFOR did not possess the military resources to guarantee safety. Annan stated that a small number of peacekeepers could not be expected to ward off a large-scale invasion by Bosnian Serbs. UNPROFOR would seek cover when fired at, like everyone else. It was up to the warring factions to treat Srebrenica as a Safe Area.[30] The Rules of Engagement for peacekeeping remained in force, unchanged. These rules landed the UN troops in a vulnerable situation because they were of a reactive nature and did not allow for offensive operations. The rules were not geared to an overt attack on a Safe Area.[31] As a result of a lack of will by actors involved in the conflict to take preventive actions as well as others outside it, an estimated 8,000 men and

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were people like me sitting in offices, day after day after day, who did not fully appreciate the depth and the speed with which you were being engulfed by this unimaginable terror". The Belgian Prime Minister did also apologize first in 2000 and in 2004 for the second time. He acknowledged that Belgian conduct caused the loss of many human lives. All referred to in Schabas, W.A, *op.cit.* p. 477, Barnett, M., *Eyewitness to a Genocide, the United Nations and Rwanda*, Cornell University Press, Ithaca and London, 2002, p.154, Power, Samantha, ""*A Problem from Hell*"": *America and the Age of Genocide*, Harper Parennial edition, New York, London, Toronto, Sydney 2007, p. 386.

[28] See Security Council Resolution 836 of June 4 1993, available at<http://www.un.org> (visited on 5 September 2009).

[29] Institute for War and Peace reporting, Dutch Peacekeepers to return to Srebrenica, available at <http://iwpr.net/?p=tri&s=f&o=325295&apc_state=henh>, (visited on 19 August 2009).

[30] UNNY, DPKO, UNPROFOR. Code Cable Annan to Wahlgren, 23/04/93, No. MSC-676) as cited by the Netherlands Institute for War Documentation in its report in 2002 on Srebrenica, available at <http://www.niod.knaw.nl/nl/srebrenica-rapport/rapport> (visited on 19 October 2009).

[31] Netherlands Institute for War Documentation, Report on Srebrenica, 2002.

boys at Srebrenica were killed in July 1995.

These two genocides, as well as others, happened while the Convention on the Prevention and Punishment of the Crime of Genocide and other sources of international law on the prevention of genocide were in force. However, the obligation to prevent genocide has been extremely vague and almost non-existent in practice.

2. Research question

When the ICJ ruled for the first time on the obligation to prevent genocide, it confirmed the existence of that obligation where it noted that: "The Contracting Parties have a direct obligation to prevent genocide".[32] However, it neither gave the meaning of prevention nor does it provide clear mechanisms on what the obligation to prevent genocide entails. Given the nature of genocide and the nature of measures to be taken to prevent it, different actors may be necessary for that prevention. These may include territorial states,[33] non-territorial states,[34] and the UN. But the Convention did not make such a classification. Furthermore, even where such classification of actors might be correct, it is not clear what each actor should do to prevent genocide.

Also, the rules on the prevention of genocide may clash with some other rules of international law. For instance, the Genocide Convention was adopted three years after the adoption of the UN Charter which prohibits the UN from interfering in affairs that are within the domestic jurisdiction of any state.[35] Likewise, the same Charter prohibits member states from threatening to use or using force in other states.[36] A number of UN General Assembly resolutions followed

[32] International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v. Serbia- Montenegro), (Case No. 91) Judgment, 26 February 2007, para. 162.

[33] For the purpose of this work, I refer to a territorial state as any state as defined in international law and in relation to what it should do to prevent genocide within its territorial boundaries.

[34] In this work, I refer to a non-territorial state as any state as defined in international law and in relation to what it should do to prevent genocide outside its territorial boundaries.

[35] See Charter of the United Nations of June 26, 1945, available at <http://www.un.org>, (visited on 18 August 2009). Article 2(7) reads: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[36] See Charter of the United Nations. Article 2(4) reads: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, in any other manner inconsistent with the purposes of the United Nations."

to confirm these rules. [37] This was reiterated by the ICJ in Nicaragua case which confirmed that: "The principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states."[38]

In view of the foregoing, the main question of this work is:

What does the obligation to prevent genocide in international law entail for states and for the UN?

The aim of this question is to investigate what the obligation to prevent genocide may entail for its bearers at every level of prevention. This research thus investigates the scope of that obligation, its bearers and preventive tools available to them. It examines who among the bearers of the obligation to prevent genocide should do what, when, where and how in fulfilling that obligation at each phase of the process to genocide.

In the process to find answers to the main question of this research, a number of sub questions will need to be answered. They include the following:

- *What does the concept of prevention mean in different fields and how does its meaning in those fields relate to the prevention of genocide in general?*
- *What does prevention mean in international law related to genocide and what does the obligation to prevent genocide entails for territorial states, non-territorial states and the UN? What are the tools available to them in concreto? In other words, what possibilities do the existing rules of international law provide for the prevention of genocide, what is missing and how should it be improved for the future?*

3. Objective of the research

Genocide is the crime of crimes which shocks the human conscience. Given the lack of clarification of the content of the obligation to prevent genocide or even the doubt on its

[37] UN General Assembly Resolution 375 (1949) of 6 December 1949 on the rights and duties of states, available at <http://www.un.org>, (visited on 18 August 2009), UN General Assembly Resolution 2131(1965) of 21 December 1965 on the inadmissibility of intervention, available at <http://www.un.org>, (visited, September 09, 2009), UN General Assembly res. 2625, 24 October 1970 on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the UN, available at < http://www.un.org>, (visited, September 09, 2009).

[38] International Court of Justice, Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 27 June 1986, para. 205, available at <http://www.icj-cij.org>, (visited, September 09, 2009).

existence, it is worth investigating the role of international law in attempts to effectively prevent this crime. The questions posed in this work arise on the basis of the sad experiences in some places in the world including my own state Rwanda. In different places where genocide has occurred, there have been factors and phases through which the risk to destroy people on the ground of race, ethnicity, religion or nationality could be foreseen and indeed those factors were followed by genocide. The field of prevention of genocide in international law has suffered from embarrassing insufficiencies of clarity on what the obligation to prevent genocide entails. There is actually no existing "accepted canon" of theories in international law on how to prevent genocide. This work aims at providing some, and therefore contributing to filling that deep vacuum. Indeed, the aim in this work is to contribute to the clarification of the international legal regime applicable to the prevention of genocide. It is limited to the obligation of states and the UN to prevent genocide and it does not treat questions related to their responsibility in case of the breach of that obligation.

If answers to questions formulated above are provided, this research will contribute to the advancement of international law as far as the prevention of genocide is concerned. It will help to establish whether and to what extent states and the United Nations have the obligation to prevent genocide and how this should work and be improved *in concreto*. Therefore, this investigation aims at contributing to avoid such tragedies in the future. More clearly, this work is undertaken for the purpose of promoting the cause of humanity in general and human rights in particular. Indeed, genocide is itself not only a violation of human rights but the whole process to genocide is full of many human rights violations and therefore its commission involves those violations to a large extent. Looking at it from this perspective leads to assuming that clarifying the obligation to prevent genocide in the whole process leading to genocide can contribute to promoting the cause of humanity and human rights.

4. Sources of the research

This research is not limited to specific states as a case study. Though in the investigation I refer to some examples of states in which genocide has happened in order to verify the theoretical arguments, I do not do this with a particular region or state in mind. Genocide is a global issue and therefore the research is global.

I start this research with the assumption that there is a real vacuum in research on how the prevention of genocide should be carried out in international law. The content of the obligation to prevent genocide has been obscure for many years. This research aims at contributing to the filling of this gap in international law that has not been addressed properly in the academic discourse on the subject. It endeavours to give meaning to prevention and the obligation to prevent genocide and to suggest concrete measures. Much of the work consists of the elaboration of the meaning and scope of the concept of prevention as well as the means, tools and methods that are available to states and the UN to prevent genocide during the whole process to genocide, *i.e* before and during the genocide.

In doing so, the appropriate method is the analysis of general literature and legal materials. Indeed, general literature on the concept of prevention will be used in order to clarify the meaning and scope of that concept in general. Academic research in various fields, including public health, criminology, economics, environment and sociology, will be used. Moreover, since the ordinary meaning of terms is relevant in interpreting international law, using this general literature is useful because it will contribute to elucidating the meaning and scope of the concept of prevention and the obligation to prevent genocide in international law in the various stages in the processes leading to genocide. Legal sources as enshrined in article 38(1) of the Statute of the International Court of Justice will be analysed in order to show the scope of the legal obligation to prevent genocide.[39] According to this article, sources of international law are: international conventions, international custom, general principles of law recognised by civilised nations, judicial decisions and legal doctrine.[40] Key international conventions used in this work include the Genocide Convention and the Charter of the United Nations. They will be investigated in order to show the "*ratio legis"*, the content of the obligation to prevent genocide, its structure as well as its limits. Customary international law related to the obligation to prevent genocide will also be analysed in order to determine the bearers of the obligation to prevent genocide. As subsidiary means for the determination of rules of law, case-law will be also used to show how those international legal instruments have been interpreted and applied by courts in relation to the obligation to prevent genocide. More specifically, the case of Serbia-Montenegro v. Bosnia-Herzegovina will occupy the most important place since the Court ruled on many legal

[39] See article 38(1) of the Statute of the ICJ, available at <http://www.icj-cij.org>, (visited, September 09, 2009).
[40] Ibidem.

questions about the application of the Genocide Convention. Legal doctrine will be used to clarify rules and principles of international law related to the prevention of genocide which have not been sufficiently defined in related international conventions. Other legally relevant sources will also be used and analysed. For instance, resolutions of competent organs of the UN related to genocide will be analysed to show the extent to which they may have contributed to the development of international law in the field of prevention of genocide. Furthermore, such resolutions, reports of competent organs of the UN as well as other relevant documents related to genocide and its prevention will be used to show and discuss the practice of states and the UN in taking measures to prevent genocide. This will help to identify legal, institutional, and practical barriers to the prevention of genocide and to suggest how they could be solved for the future.

5. Structure of the research

In searching for legal answers to the questions involved, this work will be divided in nine chapters. Chapter I (the present one) is a general introduction which consists of an explanation of the context of this research, the research question, the interest of the research and its approach.
Since an analysis of the content of the obligation to prevent genocide (which is core in this work) calls first and foremost for the understanding of the meaning and scope of the concept of prevention itself, Chapter II discusses the notion of prevention in different fields. The purpose and process of prevention in those fields will be explained. Chapter III discusses prevention of genocide in general. It discusses the factors that contribute to leading to genocide as well as the phases in the process to genocide. It also discusses how prevention can be applied to those factors and phases in the whole process to genocide.
These chapters are followed by five chapters on the obligation to prevent genocide in international law. Indeed, Chapter IV discusses this obligation under both international conventions and customary law. It first outlines the origin and process of the drafting of the Genocide Convention. It also explains how prevention is understood in international law, the meaning and scope of the obligation to prevent genocide, the bearers of the obligation to prevent genocide under the Genocide Convention and customary international law, and the temporal divisions in the application of the obligation to prevent genocide. Chapter V discusses how to apply the rules on the prevention of genocide to territorial states. It examines what that obligation entails to territorial states at each temporal division. Likewise, while Chapter VI discusses what

that obligation entails to non-territorial states, Chapter VII examines whether and to what extent the UN is obligated to prevent genocide. In these chapters, some serious challenges to the prevention of genocide are identified. That is why Chapter VIII discusses whether and to what extent the (relatively) new concept of the responsibility to protect addresses them and whether and to what extent it contributes to the prevention of genocide.

Finally, recognizing the crucial weight of the prevention of genocide in the whole work, Chapter IX concludes by summarizing the work and giving recommendations on mechanisms for future and better prevention of genocide and how they should be operationalized.

Chapter II. The concept of prevention as understood in various fields

Introduction

Law as a discipline is not a closed vehicle of ideas and thoughts. It is conceived and written in connection with other disciplines. This means that it cannot stand alone and it therefore needs other disciplines for not only its formulation and understanding but also its certainty. As simple example, law does not have its own language and the rules are formulated in different languages which are also used in other disciplines and one needs to know what the terms used mean from their ordinary or contextual meaning to understand their scope.

In this respect, before seeking to understand what prevention of genocide means in international law, this chapter explains that concept of prevention from different fields. Indeed, the understanding of the meaning of the concept of prevention and actions to be taken as well as the time to take them will help to understand what the prevention of genocide might entail and when actions are needed and can be taken. Thus, the understanding of this concept from other fields will be useful to the thinking or conceptualization of prevention of genocide. In other words, drawing from this chapter will help to understand and clarify what the prevention of genocide may entail or what it ought to entail. It should be understood however that the aim of this chapter is not to develop all fields that use prevention but rather to provide some examples that help to understand the meaning and the scope of the concept of prevention in order to see how far these theories can shape the methods and techniques useful for the prevention of genocide. This chapter will be limited to five different fields which are prevention in public health, prevention of the proliferation of nuclear weapons, prevention in criminology, prevention in international environmental law and the prevention of torture. The choice of these five fields is mainly dictated by the relatively frequent use of prevention and the development of that concept as it will be demonstrated in each of them.

1. Prevention in public health

It is believed that the concept of prevention was first developed in the field of public health.[41]

[41] Brotman, Richard and Suffet, Frederic, "The Concept of Prevention and its Limitations", *ANNALS of the American Academy of Political and Social Science*, Vol. 417, 1975, p. 53.

This concept is an essential element in public health and since it is strongly developed within this area, it is a most relevant area to start with in the investigation on the concept of prevention. This will be done in two subsections. First, the meaning of prevention is explored. In the second subsection this will be illustrated with some examples.

1.1. Meaning of prevention in public health

An English proverb much commonly used in the field of health says: "Prevention is better than cure" which means that it is better to stop a bad thing from happening rather than try to deal with the problem after it has happened.[42] In the field of public health, prevention has been understood as the fact of averting the development of a pathological state by putting in place and applying measures that limit the progression of disease at any stage of its course".[43] In other words, prevention in public health is the action to avoid occurrence or development of a health problem and/or its complications.[44] The World Health Organization did not go far from this explanation. Indeed it defined prevention as a concept entailing measures not only to prevent the occurrence of disease, such as immunization or disease vector control or anti-smoking activities, but also its progress and the reduction of its consequences once established.[45] In other words, disease prevention would cover measures not only to prevent the occurrence of disease, such as *risk factor* reduction, but also to arrest its progress and reduce its consequences once established.

This concept of prevention has historically been divided into three main levels of prevention namely: primary, secondary, and tertiary.[46] The primary prevention consists of interventions that are directed at individuals prior to the onset of any signs of behavioural or medical disorder.[47]

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[42] Sally, Wehmeier et al., *Oxford Advanced Learner's Dictionary*, 7th edition, Oxford University press, 2005, p. 78.

[43] Clark, Duncan W, MacMahon, Brian., *Preventive medicine*. Boston, MA: Little, Brown & Co, 1967, cited by Starfield, Barbara, "The Concept of Prevention: A good idea gone astray"? *Journal of Epidemiology and Community Health*, December 2007.

[44] Bentzen, Niels (ed.), "Wonca International Dictionary For General/Family Practice", available at <http://www.ulb.ac.be/esp/mfsp/quat-en.html> (visited on 06 May 2010).

[45] World Health Organization, Glossary of terms used in the "Health for all", Geneva, 1984.

[46] Tarter, Ralph, "Applying Prevention Theory to the Prevention Practice", Centre for Education and Drug Abuse Research, University of Pittsburgh, available at <http://www.pitt.edu/~cedar/forum/tarter.html> (visited on 06 May 2010). See also Jaime Correia de Sousa, "Quaternary Prevention", available at <http://www.drmed.org/javne_datoteke/novice/datoteke/603-QuaternarycPreventioncJCScshort.pdf> (visited on 06 May 2010).

[47] Tarter, Ralph, "Applying Prevention Theory to the Prevention Practice", Center for Education and Drug Abuse Research, University of Pittsburgh, available at <http://www.pitt.edu/~cedar/forum/tarter.html> (visited on 06 May 2010).

The goal of the primary prevention is to protect healthy people from developing a disease or experiencing an injury in the first place.[48] The World Health Organisation as well as Brantingham observed that at the primary level, measures are taken with the aim to abate the environmental conditions that cause diseases.[49] Indeed, the action taken are those capable of avoiding or removing the cause of a health problem (disease) in an individual or a population before it arises, including health promotion and specific protection prior to the development of disease or injuries.[50] These measures may include the mosquito extermination, vaccination, job-safety engineering, personal hygiene education.[51] They may also include education about good nutrition, the importance of regular exercise, and the dangers of tobacco, alcohol and drugs, education and legislation about proper seatbelt and helmet use, regular exams and screening tests to monitor risk factors for illness, immunization against infectious disease, controlling potential hazards at home and in the workplace.[52] The preventive measures and actions thereof usually emanate from the *health sector*, dealing with individuals and populations identified as exhibiting identifiable *risk factors,* often associated with different *risk behaviours*.[53]

The secondary prevention consists of interventions directed at individuals who demonstrate early or prodromal signs of a disorder.[54] The interventions at this level seek to arrest or retard existing disease and its effects through early detection and appropriate medicine.[55] In other words, it

[48] Institute for Work and Health, Primary, Secondary and Tertiary Prevention, available at <http://www.iwh.on.ca/wrmb/primary-secondary-and-tertiary-prevention> (visited on 14 May 2013).

[49] See World Health Organization, Glossary of terms used in the "Health for all", Geneva, 1984 and Brantingham, Paul J, and Faust, Frederic, L, "A Conceptual Model of Crime Prevention", *Crime Delinquency*, Vol. 22, 1976, p. 288.

[50] Starfield, Barbara, "The Concept of Prevention: A Good Idea Gone Astray"? *Journal of Epidemiology and community Health*, December 2007. See also Nightengale, Elena O, Cureton M, Lalmar V, et al., *Perspectives on Health Promotion and Disease Prevention in the United States. Washington, DC: Institute of Medicine, National Academey of Science, 1978*. See also Bentzen, Niels (ed.), "Wonca International Dictionary For General/Family Practice", available at <http://www.ulb.ac.be/esp/mfsp/quat-en.html> (visited on 06 May 2010).

[51] Brantingham, P.J and Faust F.L, *op.cit*, 288.

[52] Institute for Work and Health, Primary, Secondary and Tertiary Prevention, available at <http://www.iwh.on.ca/wrmb/primary-secondary-and-tertiary-prevention> (visited on 14 May 2013).

[53] World Health Organization, Health Promotion Glossary, Don Nutbeam, WHO Collaborating Centre for Health Problem, Department of Public Health and Community Medicine, University of Sydney, Australia, 1998.

[54] Ralph, Tarter, "Applying Prevention Theory to the Prevention Practice", Center for Education and Drug Abuse Research, University of Pittsburgh, available at <http://www.pitt.edu/~cedar/forum/tarter.html> (visited on 06 May 2010).

[55] World Health Organization, Health Promotion Glossary, Don Nutbeam, WHO Collaborating Centre for Health Problem, Department of Public Health and Community Medicine, University of Sydney, Australia, 1998.

identifies groups or individuals who have high risk of disease or who have incipient cases of disease and intervenes in their lives with special treatments designed to prevent the risk from materializing or the incipient case from growing worse.[56] This may include special diets for overweight executives and chest x-rays in poor neighbourhoods.[57] It may also include telling people to take daily, low-dose aspirin to prevent a first or second heart attack or stroke, recommending regular exams and screening tests in people with known risk factors for illness, providing suitably modified work for injured workers,[58] etc. Prevention at this level is the action taken to detect a health problem at an early stage in an individual or a population, thereby facilitating cure, or reducing or preventing its spreading or its long-term effects (e.g. methods, screening, case finding and early diagnosis).[59] Interventions at this level consist of measures that halt or slow the progression of a disease or its sequelae at any point after its inception,[60] *i.e* to detect disease in early (asymptomatic) stages and act accordingly.[61] And like for the primary level, the preventive measures and actions thereof emanate from the public health sector.[62]

Tertiary prevention consists of interventions, more commonly called treatment, that are directed at individuals who manifest the disorder.[63] Interventions at the tertiary prevention seek to arrest or retard existing disease and its effects through appropriate treatment; or to reduce the occurrence of relapses and the establishment of chronic conditions through, for example, effective rehabilitation.[64] The rehabilitation is a treatment designed to facilitate the process of recovery from injury, illness, or disease to as normal a condition as possible (it is an integral part of convalescence which may include proper food, medication, hygiene and suitable exercise

[56] Brantingham, J. Paul, and Faust, L. Frederic, *op.cit*, p. 288.
[57] Ibidem.
[58] Institute for Work and Health, Primary, Secondary and Tertiary Prevention, available at <http://www.iwh.on.ca/wrmb/primary-secondary-and-tertiary-prevention> (visited on 14 May 2013).
[59] Bentzen, Niels (ed.), "Wonca International Dictionary For General/Family Practice", available at <http://www.ulb.ac.be/esp/mfsp/quat-en.html> (visited on 06 May 2010).
[60] Starfield, Barbara, "The Concept of Prevention: A good Idea Gone Astray"? *Journal of Epidemiology and Community Health*, December, 2007, p. 580.
[61] Nightengale, O. Elena, *Perspectives on Health Promotion and Disease Prevention in the United States,* Institute of Medicine, National Academy of Science*, Washington, D,C 1978*.
[62] World Health Organization, Health Promotion Glossary, Don Nutbeam, WHO Collaborating Centre for Health Problem, Department of Public Health and Community Medicine, University of Sydney, Australia, 1998.
[63] Ralph, Tarter, "Applying Prevention Theory to the Prevention Practice", Center for Education and Drug Abuse Research, University of Pittsburgh, available at <http://www.pitt.edu/~cedar/forum/tarter.html> (visited on 06 May 2010).
[64] World Health Organization, Health Promotion Glossary, Don Nutbeam, WHO Collaborating Centre for Health Problem, Department of Public Health and Community Medicine, University of Sydney, Australia, 1998

which provides the physical basis for recovery and assisting the patient to compensate for deficits that cannot be reversed medically).[65] Prevention at the tertiary level is concerned with the identifying individuals with advanced cases of disease and intervenes with treatment to prevent death or permanent disability and to prevent the reoccurrence of the disease by dealing properly with the recovery process. This may include the stomach pumping for poisoning, open-heart surgery for defective heart valves and radiation therapy for some forms of cancer.[66] So, tertiary prevention aims at reversing or arresting the progression of disease,[67] and like for the other levels, this is done by the public health sector.[68]

To some up this subsection, the common and important thing to notice is the different moments the prevention is needed and the interventions needed to address the issue. While the first moment is before the manifestation of any medical disorder which requires preventive measures directed to the whole population, the second one is when there are first signs of the disorder which requires a selective prevention targeting individuals who demonstrate the risk of disorder. And the third moment is when the disorder is already clearly high which needs an intervention or a treatment. What makes this third moment different from the second one is the degree of seriousness of disorder and the methods or medicine to be used to fix the problem. As far as these levels of prevention and the intervention are concerned, it is worth explaining them through some examples in the next subsection.

1.2. Understanding prevention in public health through examples

Two examples are worth giving here in order to show how prevention may work in practice in the field of public health. While the first concerns the prevention of malaria, the second is about the prevention of international spread of disease.

1.2.1. Prevention of malaria

[65] Rehabilitation. (n.d.) *Gale Encyclopedia of Medicine*, (2008), available at <http://medical-dictionary.thefreedictionary.com/Rehabilitation> (visited on 14 May 2010).
[66] Brantingham, J. Paul and Faust L. Frederic, *op.cit*, p. 288.
[67] Nightengale, Elena O, *Perspectives on Health Promotion and Disease Prevention in the United States,* Institute of Medicine, National Academey of Science*, Washington, D,C 1978*.
[68] World Health Organization, Health Promotion Glossary, Don Nutbeam, WHO Collaborating Centre for Health Problem, Department of Public Health and Community Medicine, University of Sydney, Australia, 1998.

Malaria is a common and life-threatening disease in tropical and subtropical countries.[69] It is therefore not only a health risk to the populations of these countries, but also to travellers who visit those malaria regions. Thus, a need to prevent this health risk to both the populations and the travellers in the said countries is clear. Some examples on preventive measures suggested by the South African ministry of health are worth summarizing here because of their fitting in the scheme explained above. They are: the awareness of malaria risk, avoidance of mosquitoes bite, Chemoprophylaxis (taking preventive medicines if you are travelling to or living in a malaria region), early detection and effective treatment.[70]

From this, it can be noticed that in most countries where malaria is an issue, the first thing to do by States in line with the prevention of malaria is to raise the awareness of the population about the risk. In this respect for instance, the population needs to be sensitized on the danger of inhabiting near marshy areas. Likewise the population is advised to clean the place surrounding their houses in order not to allow unnecessary grasses around the house which can serve as a reproductive area for mosquitoes.

Furthermore, in line with avoiding mosquito bite, some measures are necessary. These include having mosquito nets and make sure they are regularly insecticide-treated with the capability of killing mosquitoes around them. Mosquito nets are used to cover the beds in order to prevent mosquito bite while users are sleeping. The use of repellent cream on exposed skin is also important as well as the use of appropriate preventive medicine that keeps the populations and travellers able to resist the infection even in case of mosquito bite.

In all these measures mentioned above and the need to comply with the preventive measures, raising the awareness of the population on the danger of the disease is important in order to make the prevention possible. The population must be educated on how to use and apply the methods and techniques of prevention. But also the state makes sure that not only it has to train enough doctors who are capable of treating this disease and deploy them in each hospital but also must ensure that there are enough and efficient equipment to diagnose this disease as well as appropriate and efficient medication to treat it. These preventive measures are naturally taken before the infection/disorder and thus fall in the primary prevention level.

When none of the above mentioned measures has been taken or despite them the mosquito could

[69] South African Ministry of Health, Guidelines for the prevention of Malaria in South Africa, 2009, available at <http://www.doh.gov.za> (visited on 11 May 2010).

[70] Ibidem.

still bite someone, then new measures are needed to suppress the disease. For instance when a person has the symptoms of malaria (mostly Fever –although common, fever may be absent in some cases, Rigors, Headache, Sweating, Fatigue, Myalgia (back and limbs), Abdominal pain, Diarrhea, Loss of appetite, Nausea and vomiting[71]), the person must immediately get early detection and medication to avoid getting worse. These preventive measures are taken after the infection/disorder and thus fall in the secondary prevention level. When these measures have not been able to stop the disorder from getting worse, the hospital must act as quickly as possible to first give the medication that stop the fever, but also to provide with strong medication capable of suppressing the disease to avoid that the person's situation (health) leads to death. At this level also, measures that deal with the consequences that the disease has caused must be taken in order to avoid the relapse into that disease. These measures fall in the tertiary prevention level.

The non- malaria states also needs to proceed the same way with regard to people who travel from and to them. In other words, though the prevention of Malaria is much needed in malaria regions, preventive measures to combat it in non-malaria regions are also needed in order to give advice to persons who wish to travel to malaria regions and also to intervene in case there are persons who may come with that disease from the malaria region (regardless of the nationality).

1.2.2. Prevention of international spread of disease

The WHO Constitution[72] confers upon the World Health Assembly the authority to adopt regulations "designed to prevent the international spread of disease".[73] Pursuant to this Constitution, some International Health Regulations have been adopted and successively amended by the WHO Assembly.[74] The last amendment of the International Health Regulations was adopted in 2005 and entered into force in 2007.[75] According to the latter instrument, the

[71] Idem, p. 21.

[72] The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representative of 61 States (Off. Rec. Wld Hlth Org., 2, 100, and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Twenty-ninth and Fifty-first World Health Assemblies (resolutions WHA26. 37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and incorporated in the present Constitution available at <http:// www.who.int> (visited on 20 May 2010).

[73] Articles 21(a) and 22 of the WHO Constitution.

[74] International Health regulations were first adopted in 1969 (See WHO Official Records, No. 176, 1969, resolution WHA22.46 and annex I). It was amended in 1973 and 198

[75] World Health Organisation, International Health Regulations (2005), 2nd edition, Reprinted in Switzerland, 2008, available at <http://www.who.int> (visited on 19 May 2010).

purpose and scope of these international health regulations are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.[76] In doing so, states parties to the regulations are obligated to take measures as provided in these international health regulations.

Moreover, in the implementation of these regulations, states are to be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease.[77] The measures to be taken by states parties include the quick development, strength and maintenance of the capacity to detect, assess, notify and report events in accordance with these regulations.[78] In the annex I of those regulations states are obligated to utilize existing national structures and resources to meet their core capacity requirements under these regulations, including reporting, notification, verification, response and collaboration activities, and their activities concerning designated airports, ports and ground crossings.[79] So, states parties have the obligation to develop certain minimum core public health capacities.[80] These capacities include the ones to detect events involving disease or death expected levels for the particular time and place in all areas within the territory of the State Party; and to report all available essential information immediately to the appropriate level of healthcare. Essential information includes: clinical descriptions, laboratory results, sources and type of risk, numbers of human cases and deaths, conditions affecting the spread of the disease and the health measures employed.[81] The capacities also include the one to implement preliminary control measures immediately.[82]

Furthermore, the state must develop its capacities in public health response which include being able to determine rapidly the control measures required to prevent domestic and international spread; to provide support through specialized staff, laboratory analysis of samples (domestically or through collaborating centres) and logistical assistance (e.g. equipment, supplies and

[76] Idem, article 2.
[77] Idem, article 3.
[78] Idem, article 5(1).
[79] Idem, Annex 1, A(1).
[80] Idem, article 13 (1).
[81] Idem, Annex A (4), a,b.
[82] Idem, Annex A (4), c.

transport).[83] Likewise, state party must be able to provide on-site assistance as required to supplement local investigations; to provide, by the most efficient means of communication available, links with hospitals, clinics, airports, ports, ground crossings, laboratories and other key operational areas for the dissemination of information and recommendations received from WHO regarding events in the State Party's own territory and in the territories of other states Parties.[84] It must also be able to establish, operate and maintain a national public health emergency response plan, including the creation of multidisciplinary/multisectoral teams to respond to events that may constitute a public health emergency of international concern; and to provide the foregoing on a 24-hour basis.[85] States therefore develop and implement plans of action to ensure that these core capacities are present and functioning throughout their territories.[86] Pursuant to the explanation in the previous sub section, these measures correspond to the primary prevention level.

If, despite all these preventive measures, they did not prevent a public health concern from happening, further levels of prevention intervene. Hence, states will comply with the obligation to notify the WHO of those events that may constitute a public health emergency of international concern according to defined criteria.[87] The determination of a "public health emergency of international concern" and issuance of corresponding temporary recommendations[88] is done by the Director-General, after taking into account the views of an Emergency Committee; the establishment of national IHR focal points and WHO IHR contact points for urgent communications between states parties and WHO.[89] In case states concerned do not report to the WHO, the regulations have provisions authorizing WHO to take into consideration unofficial reports of public health events and to obtain verification from States Parties concerning such events.[90] If the state does not accept to cooperate with the WHO for the verification of the report on events that may constitute a public health emergency of international concern, the WHO may, when justified by the magnitude of the public health risk, share with other States Parties the

[83] Idem, Annex 1(6), a-h.
[84] Ibidem.
[85] Ibidem.
[86] Idem, Annex 1, (A), 2 11. See also Annex 1 (B) for other measures related to States capacities.
[87] Article 6 of the WHO regulations.
[88] Article 15 and 16 of the International Health Regulations (2005), 2nd edition, Reprinted in Switzerland, 2008, available at <http://www.who.int> (visited on 19 May 2010).
[89] Idem, article 4(1).
[90] Article 9(1) and 10 (1-3) of the WHO regulations.

information available to it,[91] and shall send to all States Parties and, as appropriate, to relevant intergovernmental organizations, as soon as possible and by the most efficient means available, in confidence, such public health information which it has received, necessary to enable States Parties to respond to a public health risk.[92] And depending on the level of the magnitude of the public health risk, the preventive measures may correspond to either the secondary or tertiary level.

1.3. Preliminary conclusions

In summing up this section, what can be noticed from this discussion is that the prevention in public health is understood as a continuous one. The temporal division in the three levels: primary, secondary and tertiary ones, explains well this concept in public health and its continuous character. The prevention of disease is done in a way that tackles its root causes (primary level), addresses the early symptoms (secondary level) and treats the sickness and deals with its consequences (tertiary level). This means that when preventive measures aiming at the eradication of the causes has not been successful, the disease can still be prevented by addressing the symptoms from the early stage and later at a critical stage with robust treatment (if not successful at early stage) as well as dealing with the consequences (recovery process) in order to avoid the relapse into the same disease or related ones. The World Health Organisation provides an example of an international institutionalized governance model to deal as effectively as possible with prevention at all three levels.

2. Prevention of proliferation of nuclear weapons

The question to be treated here is how prevention is understood in the prevention of proliferation of nuclear weapons and how it is used in practice. It is proceeded in two subsections. The first is about the understanding of the concept of prevention through the rules on the non-proliferation of nuclear weapons and the second is about the role of the International Atomic Energy Agency in the prevention of proliferation of nuclear weapons.

[91] Article 10(4) of the WHO regulations.

[92] Art 11 of the International Health Regulations (2005), 2nd edition, Reprinted in Switzerland, 2008, available at <http://www.who.int> (visited on 19 May 2010).

2.1. Understanding prevention through the rules on non-proliferation of nuclear weapons

As the UN was aware that the discovery of atomic energy also included the capacity to produce nuclear weapons,[93] a creation of the International Atomic Energy Agency (IAEA) was initiated as one of the mechanisms to regulate and make good use of atomic energy but also to prevent the development of nuclear weapons.[94] According to its Statute, this agency was created with the objectives of seeking to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world and ensuring, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.[95]

However, it was clear that the Statute was not by itself adequate to prevent the proliferation of nuclear weapons and the treaty on the Non-Proliferation of Nuclear Weapons was adopted in 1968.[96] Both instruments complemented each other in furthering safeguards to stop the spread of nuclear weapons and to work towards their eventual elimination.

With regard to the prevention of the diversion of the atomic energy into nuclear weapons, the agency has been given the power to put in place an international safeguards system. Article III. A. 5 of the Statute and article III of the Non-Proliferation Treaty assign to the agency the function to establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a state, to any of that state's activities in the field of atomic energy.[97] Likewise, under the Treaty on the Non-Proliferation of Nuclear Weapons, state

[93] See for instance the General Assembly Resolution 1 of 24 January 1946 on the establishment of the commission to deal with the problems raised by the discovery of Atomic Energy, available at <www.un.org> (visited on 12 May 2010).

[94] See Fischer David, History of the International Atomic Energy Agency: the first forty years Vienna, 1997 available at <http://www-pub.iaea.org/MTCD/publications/PDF/Pub1032_web.pdf> (visited on 12 May 2010)

[95] Article II of the Statute of the International Atomic Energy Agency adopted on 23 October 1956 at the Headquarters of the United Nations and entered into force on 29 July 1957, available at <http://www.iaea.org> (visited on 12 May 2010).

[96] Treaty on the Non- Proliferation of Nuclear Weapons adopted at the headquarters of the UN in New York on 12 June 1968, entered into force on 5 March 1970, available at <http://www.iaea.org> (visited on 12 May 2010).

[97] Art III. A. 5 of the Statute of the International Atomic Energy Agency adopted on 23 October 1956 at the

party undertakes to accept safeguards for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.[98] This provides the legal basis for the IAEA to conclude agreements with states, and with regional inspectorates, for the application of safeguards. These agreements are of three main types: (i) comprehensive safeguards agreements, (ii) item-specific safeguards agreements, and (iii) voluntary offer agreements.[99]

In the comprehensive safeguards agreements with the Agency, states undertake to accept Agency safeguards on all sources or special fissionable material in all peaceful nuclear activities within the territory of the state, under its jurisdiction, or carried out under its control anywhere. With this, the Agency's increased ability to detect such facilities reduces the possibility that they may exist undetected.[100]

As for item-specific safeguards agreements, the Agency is required to ensure that the nuclear material and other specified items are not used for nuclear weapons or other nuclear explosive devices or in such a way as to further any military purpose.[101] And although the NPT does not require the five nuclear-weapon states (China, France, Russia, UK, USA) to accept safeguards provided for in that Treaty, they have all concluded safeguards agreements under which they have voluntarily offered nuclear material and/or facilities from which the Agency may select to apply safeguards.[102] It appears that the IAEA plays a crucial role in the supervision/monitoring of states" compliance with the rules on the non-proliferation of nuclear weapons and there is a need to show it much more concretely.

2.2. The IAEA role in the prevention of proliferation of nuclear weapons

Concretely, in order to fulfil its functions, the agency carries out some activities which include

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Headquarters of the United Nations and entered into force on 29 July 1957, available at <http://www.iaea.org> (visited on 12 May 2010).

[98] Article III. 1 of the Treaty on the Non- Proliferation of Nuclear Weapons adopted at the headquarters of the UN in New York on 12 June 1968, entered into force on 5 March 1970, available at <http://www.iaea.org> (visited on 12 May 2010).

[99] International Atomic Energy Agency, "The Safeguards system of the International Atomic Energy Agency", available at <http://www.iaea.org> (visited on 12 May 2010).

[100] Ibidem.

[101] Ibidem.

[102] Ibidem.

but are not limited to furthering the establishment of safeguarded worldwide disarmament and in conformity with any international agreements entered into pursuant to such policies[103] and establishing control over the use of special fissionable materials received by the Agency, in order to ensure that these materials are used only for peaceful purposes.[104] It allocates its resources in such a manner as to secure efficient utilization and the greatest possible general benefit in all areas of the world, bearing in mind the special needs of the under- developed areas of the world.[105]

Furthermore, the agency is bound by an obligation to submit reports on its activities annually to the General Assembly of the United Nations and, when appropriate, to the Security Council: if in connection with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security.[106]

The UN Security Council has so far dealt with the matter of nuclear weapons and has acted accordingly. For instance, after reports of the IAEA, the Security Council has adopted several resolutions either condemning some states for the acts of non-compliance with their obligations under international law related to the non-proliferation of nuclear weapons or has provided for sanctions in this regard and has requested states to take preventive measures.[107] One of those resolutions adopted by the Security Council in line with the prevention of the proliferation of nuclear weapons is the resolution 1540 of 2004 requesting states not only to take effective measures to prevent the proliferation of weapons of mass destruction but also to enforce them.[108]

Under this resolution 1540, all states have some primary obligations: to prohibit support to non-State actors attempting to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;[109] to adopt and enforce

[103] Art III. B. 1. of the Statute of the International Atomic Energy Agency adopted on 23 October 1956 at the Headquarters of the United Nations and entered into force on 29 July 1957, available at <http://www.iaea.org> (visited on 12 May 2010).

[104] Article III. B.2. of the Statute of the IAEA.

[105] Article III. B. 3. of the Statute of the IAEA.

[106] Art III. B. 4 of the Statute of the International Atomic Energy Agency.

[107] UNSC Resolutions 687, section C of 3 April 1991, 707 of 15 August 1991, 715 on 15 October 1991, 1060 of 12 June 1996, 1284 of 17 December 1999, 1540 of 28 April 2004, 1696 of 31 July 2006, 1737 of 27 December 2006 , 1747 of 24 March 2007, 1803 March 2008 and 1718 of 14 October 2006, 1874 of 12 June 2009 available online at <http://www.un.org> (visited on 01 June 2010).

[108] UNSC Resolution 1540 of April 28 2004, available at <http://www.un.org> (visited on 01 June 2010).

[109] UNSC Resolution 1540, (1).

effective laws prohibiting the proliferation of such items to non-state actors, and prohibiting assisting or financing such proliferation; and to take and enforce effective measures to control these items, in order to prevent their proliferation, as well as to control the provision of funds and services that contribute to proliferation.[110] This resolution requests states to adopt effective measures to establish domestic controls to prevent the proliferation of nuclear weapons, including by establishing appropriate controls over related materials. In doing so, states are obligated to develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport; developing and maintaining appropriate effective physical protection measures.[111]

2.3. Preliminary conclusions

What can be understood here is that the concept of prevention in this field has not been very much used in all these legal instruments. However, it is not completely absent. Moreover, from the procedure and purpose of the rules of non-proliferation of nuclear weapons, it can be argued that the rationale of the creation of the International Atomic Energy Agency (IAEA) was to prevent the development of nuclear weapons. The international safeguards system put in place by the IAEA shows the phases through which this prevention is carried out. The primary, secondary and tertiary levels explained in the previous section are not used in the field of prevention of proliferation of nuclear weapons but the explanation of the procedure shows that this prevention is done in different phases as well. The relatively recent development in that field where states are requested to adopt effective measures to establish domestic controls to prevent the proliferation of nuclear weapons, including by establishing appropriate controls over related materials has even demonstrated much more that the prevention has to be done from the early stage but also continues at further steps. Another interesting thing in this regard is the establishment of this organisation that supervises the implementation of the rules on the non-proliferation of nuclear weapons. Its role through the procedure explained above is primordial for the prevention of development of nuclear weapons.

[110] UNSC Resolution 1540, (2).
[111] UNSC Resolution 1540, (3).

3. Prevention in criminology

The question to be treated here is how prevention is understood in the field of criminology. To start with, Criminology is a discipline that, among other things, looks at the root causes of crime and about its prevention which involves measures that deter the occurrence of crime.[112] It is about tackling the causes of crimes and work on them. This section does not go into details about causes of crimes. Instead, it focuses on the scheme of prevention applied in criminology which is of course done by tackling those causes.[113]

A definition of prevention in criminology has been proposed by Brantingham and Faust that it is "any activity by an individual or a group, public or private, that precludes the incidence of one or more criminal acts".[114] They also referred to the three levels of prevention proposed in the public health field which are the primary, secondary and tertiary prevention. Crime prevention was hence conceptualized as operating at these three levels: The primary prevention which is directed at modification of criminogenic conditions in the physical and social environment at large. In other words, the primary crime prevention identifies conditions of the physical and social environment that provide opportunities for or precipitate criminal acts in order to alter those conditions so that crimes are less likely to occur.[115] Secondary prevention is directed at early identification and intervention in the lives of individuals or groups in criminogenic circumstances, and tertiary prevention is directed at prevention of recidivism.[116]

For each of the three levels of crime prevention, the authors proposed some prevention modes of interventions. Measures to be taken at the primary crime prevention level may include the general deterrence through the presence of the police and through education of citizens.[117] The measures may also include the adoption of laws which define crimes in a clear manner and which provide for exemplary sentences for each crime. These laws may also be such that they do not allow the opportunity for crimes. Basing on the old saying that "opportunity makes the thief", scholars have defined criminal opportunities as those arrangements or situations that individuals or groups encounter that offer attractive potential for criminal reward, largely

[112] Garner Bryan A (ed.), *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minnesota, 1999, p. 374

[113] For details about causes see Ken, Pease, "Crime Reduction", in M. Maguire, R. Moran and R. Reiner (eds), *The Oxford Handbook of Criminology* , 3rd ed., Oxford University Press, Oxford 2002, p. 948.

[114] Brantingham, J. Paul, and Faust, L. Frederic, *op.cit*, pp. 284.

[115] Idem, p. 290.

[116] Idem, p. 284.

[117] Idem, p. 294.

because they are accompanied by little apparent risk of detection or penalty.[118] Among the examples there is the widespread availability of handguns in the United States of America which result in a high rate of homicide and aggravated assault.[119] From the view of the authors, the fact that the homicide rate in the United States is many times higher than in Britain and in other European nations it is not because the United States is a more criminal society than others, it is rather because there is an opportunity for that.[120] Since criminal opportunities play an important role in causing crimes (root causes of crimes), it is therefore extremely important to reduce the opportunities, for the crime prevention to be successful.[121] This would for instance include the adoption of a strict legislation on gun control. Likewise, putting in place a legislation that requires multiple signatories and independent auditors helps to prevent larger frauds within organizations.[122] Also, installing lights where needed and locking houses and stores as well as not exposing things to avoid tempting thieves, may help to prevent property crimes. It is possible to add that addressing the issues such as poverty and unemployment can be a way of reducing a root cause of crimes because it is axiomatic that these can be causes of certain crimes. Brantingham and Faust added that measures that reduce the opportunities may require citizens to take part in household and business security precautions. Schools are required to give general education; religious and social agencies provide moral training, family education and general social work.[123] These measures at the primary level are needed and they may play the biggest role in creating the environment that reduces the opportunities and incentives for crimes. This may be achieved through clear rules which will have to be enforced by the police or other enforcement mechanisms.

At the secondary level of prevention measures comprise mainly of those undertaken by the police, prosecution and courts. At this level the police put in place social service operations such as family crisis units and sensitivity training. It also takes measures of patrol and peace-keeping

[118] Shover, Neal and Wright John Paul, *Crimes of Privilege, Reading in White Collar Crime*, Oxford University Press, New York, Oxford, 2001, p. 96. See also Marcus Felson and Clarke, Ronald V, *Opportunity Makes the Thief, Practical Theory for Crime Prevention*, Research, Development and Statistics Directorate, London, 1998, pp. v-13.
[119] Marcus, Felson and Clarke, V. Ronald, *op.cit*, p. 11.
[120] Ibidem.
[121] Idem, pp. v-13.
[122] Idem, p. 12.
[123] Brantingham, J. Paul and Faust L. Frederic, *op.cit*, p. 295.

actions as well as intervention and diversion (e.g: drunk detoxification, juvenile supervision).[124] Providing a large police presence in areas known to suffer from property crimes is another example of measures at the secondary level.[125] As for the courts, they take pre-adjudication diversion (provisional measures).[126] Furthermore, measures may require private citizens in places where there is manifestation of delinquency to undertake some social activities aiming at discouraging it,[127] such as parenting education programmes that remind children right from wrong.[128] Schools intervene with specific educational programs[129] like cognitive and social skills training to teach children to consider the consequences of their behaviour.[130] In this respect, while giving the example of how to prevent hate crimes, Nick Tilley says that the prevention of hate crimes is a longer-term one because it involves the education of young children in schools about diversity as well as efforts to tackle behaviour such as bullying which is often directed against people who are perceived as "different".[131]

At the tertiary prevention level, the police and the prosecution arrest and prosecute offenders. They are put in custody as it is a key means to prevent reoffending.[132] The courts adjudicate and therefore offenders are incapacitated through sentence.[133] And once incapacitated they are prevented from continuing to commit crimes. For instance, in hate crimes, not only the offender will not be able to continue to commit them himself, but also, he will be prevented from inciting others to commit them. Measures at the tertiary level involve private citizens and schools. The latter act as correctional volunteers by denouncing the offenders, planners or policy makers put in place institutional design aiming at rehabilitating the offenders in order to prevent recidivism. Religious and social agencies provide aftercare service.[134]

To sum up, the discussion in this section shows that prevention of crimes needs the three levels

[124] Idem, p.294.
[125] Barker, Marry et al., *The Prevention of Street Robbery*, Police research group, Crime prevention Unit, Series paper No. 44, London, 1993.
[126] Ibidem.
[127] Ibidem.
[128] Hughes, Gordon, McLaughlin, Eugene and Muncie, John, *Crime Prevention and Community Safety*, New Directions, Sage Publications, London, Thousand Oaks, New Delhi, 2002, p. 147.
[129] Brantingham, J. Paul and Faust L. Frederic, *op.cit*, p. 295.
[130] Hughes Gordon, McLaughlin Eugene and Muncie John, *op.cit*, p. 148.
[131] Tilley, Nick, *Handbook of Crime Prevention and Community Safety*, Willan Publishing, cullompton…, 2005, p. 549.
[132] Hughes Gordon, McLaughlin Eugene and Muncie John, *op.cit*, p. 145.
[133] Brantingham, J. Paul, and Faust, L. Frederic, *op.cit*, 294.
[134] Idem p. 295.

said in the public health field. The primary level is meant to identify conditions of the physical and social environment that provide opportunities for or precipitate criminal acts in order to alter those conditions so that crimes are less likely to occur. This may include the adoption of laws that criminalise certain conduct and provide for punishment in order to dissuade potential offenders. The secondary prevention is about the early intervention in the lives of individuals or groups in criminogenic circumstances in order to discourage any plan for the crime before it is committed. At the tertiary level, the police and the prosecution arrest and prosecute the offenders before competent courts which punish them and therefore prevent them from continuing their criminal acts. Prevention in criminology focuses on both root causes and procedure through which crimes are committed. This means that prevention is understood in criminology as continuous as well. It is a process and each level is important for the prevention.

4. Prevention in international environmental law

"*Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident*".[135]

The question here is about how prevention is understood in international environmental law. This section is divided in two subsections. While the first is about understanding the meaning and purpose of prevention and the preventive measures in international environmental law, the second confronts prevention with the lack of scientific certainty on the occurrence of the environmental damage as well as the lack of certainty on the power to prevent.

4.1. Understanding the meaning and purpose of prevention and the preventive measures in environmental law

Under this subsection, the meaning and purpose of prevention in environmental law will be explained and the preventive measures through some international conventions and case-law related to the environment will be given.

4.1.1. Understanding the meaning and purpose of prevention in environmental law

[135] ILC Draft Articles on Prevention of Transboundary Harm from Hazardous activities with commentaries, 2001, Report of the International Law Commission on work of its fifty-third session, para. 2, available at <http://untreaty.un.org/ilc/texts/instruments/English/commentaries/9_7_2001.pdf> (visited on 12 January 2011).

The meaning and purpose of prevention in international environmental law have been considered by the ILC as a duty which deals with the phase prior to the situation where significant harm or damage might actually occur.[136] Indeed as it has also been affirmed in literature, the purpose of this principle is to prevent a specific harm such as alteration of the environment, damage to people or the environment, the overload of the assimilative capacity of the environment, from arising.[137] In other words this would mean that prevention consists of taking measures that are susceptible of avoiding the occurrence of environmental harm. According to De Sadeleer, preventive measures do not depend on the appearance of ecological problems; they anticipate damage or, where it has already occurred, try to ensure it does not spread.[138] For him, common sense dictates timely prevention of environmental damage to the greatest extent possible, particularly when it is likely to be irreversible or too insidious or diffuse to be effectively dealt with through civil liability or when reparation would be extremely expensive. By requiring the adoption of measures intended to prevent such damage from arising, prevention forms a prudent complement to the polluter-pays principle, which does not necessarily compel polluters to reduce their pollution by requiring them to internalize their costs.[139]

This is different from curative measures which, although capable of remediating environmental damage, come too late to avert it.[140] Philippe Sands shares this view by saying that it is no longer primarily a question of repairing damage after it has occurred.[141] He thus argues that prevention is not only about prohibiting activities that cause or may cause damage to the environment, but also requires that actions be taken by states to protect the environment at an earlier stage.[142] The question about what kind of measures may be taken will be answered next.

4.1.2. Understanding preventive measures through some international conventions and case-law

[136] Ibidem.
[137] Iwama, Tom, "Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm" in Edith Brown Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions*, The United Nations University Press, 1992, available at <http: //www.unu.edu> (visited on 12 January 2011).
[138] De Sadeleer, Nicolas, *Environmental Principles: from Political Slogans to Legal Rules*, Oxford University Press, Oxford, 2002.
[139] Ibidem.
[140] Ibidem.
[141] Sands, Philippe, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2003, p. 247.
[142] Ibidem.

Given the seriousness of the environmental damages that the world has been experiencing in recent years, there has been a popular concern at international, regional and local levels about the mechanisms to avert the environmental harm before it occurs.

There are treaties and related instruments that provide for prevention in international environmental law such as those related to pollution, toxic waste and the depletion of ozone layer. Without purporting to mention all relevant legal instruments in this area, it is worth mentioning some examples related to measures aiming at the prevention of environmental harm.

They include but are not limited to the London Convention on the Prevention of Marine Environment, which in its article 1 provides *inter alia* that states pledge themselves especially to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.[143] Although this convention does not expressly define prevention, it suggests what to do to prevent pollution by dumping of wastes. Indeed, this convention provides that states take effective measures individually, according to their scientific, technical and economic capabilities, and collectively, to prevent marine pollution caused by dumping and shall harmonize their policies in this regard.[144]

In the same respect, the United Nations Convention on the Law of the Sea, while emphasizing that states have the obligation to protect and preserve the marine environment,[145] obliges states to do so by taking measures to prevent, reduce and control pollution of the marine environment.[146] According to this convention, the measures to be taken shall deal with all sources of pollution of the marine environment which include, *inter alia*, those designed to minimize to the fullest possible environmental damage, such as measures dealing with the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; those measures limiting the pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety

[143] Article 1 of the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, London, Mexico City, Moscow, Washington, 29 December 1972, available at <http://www.admiraltylawguide.com> (visited on 20 December 2010).

[144] Idem, article 2.

[145] Article 192 of the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, available at <http://www.admiraltylawguide.com> (visited on 20 December 2010).

[146] Idem, article 194.

of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels.[147]

Prevention appears also to be the fundamental concept behind international legal instruments regulating the generation, transportation, treatment, storage, and disposal of hazardous waste. Prevention was the foundation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal under which states are bound to take preventive measures to minimize the production of hazardous waste.[148]

Likewise, art 2 of the 1985 Vienna Convention for the Protection of the Ozone Layer[149] provides that states shall take appropriate measures to protect the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. Among those measures, this article puts that states shall adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should they find that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer.[150]

While commenting on article 3 of its Draft Articles on prevention of transboundary harm from hazardous activities which reads "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof", the ILC explained what should be understood by appropriate measures and it stated that they may include "formulating policies designed to prevent significant transboundary harm or to minimize the risk thereof and, secondly, implementing those policies".[151] It added that "such policies are first expressed in legislation and administrative regulations and then implemented through various enforcement mechanisms".[152]

The United Nations Framework Convention on Climate Change stresses that states should take

[147] Idem, article 194, 3 (a), (b).

[148] Basel Convention on the Control of Transboundary movements of hazardous wastes and their disposal, 1989, available at <http://www.basel.int> (visited on 20 December 2010).

[149] Vienna Convention for the Protection of the Ozone Layer of 1985, available at <http://anped.org> (visited on 21/12/2010).

[150] Idem, art 2(2).

[151] Commentary on art 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous activities with commentaries, 2001, Report of the International Law Commission on work of its fifty-third session, available at <http://untreaty.un .org/ilc/texts/instruments/English/commentaries/9_7_2001.pdf> (visited on 12 January 2011).

[152] Ibidem.

measures to prevent or minimize the causes of climate change and mitigate their adverse effects,[153] and it obligates all states parties to it to formulate and implement national or regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change. [154] Likewise, the Kyoto protocol to this convention provides for concrete measures to be taken by states in order to prevent the climate change with the objective to reach the sustainable development.[155]

Preventive measures that can be taken by states may include those related to the environmental impact assessment which is the process of identifying the future consequences of a current or proposed action or project.[156] The ICJ noted in the case concerning Pulp Mills that it is "a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[157]

International (arbitral) courts have contributed in the clarification of the content and purpose of prevention as well as to the confirmation of the existence of the obligation thereof in international environmental law and it is worth giving some examples. In the case between the

[153] Article 3 (3) of The United Nations Framework Convention on Climate Change, 1992, available at <http://unfcc.int> (visited on 21/12/2010).

[154] Idem, art 4, 1 (b).

[155] See art 2 of the Kyoto Protocol on the Framework Convention on Climate Change, 1998, available at <http://unfcc.int/resource/docs/convkp/kpeng.php> (visited on 21/12/2010). These measures include but are not limited to the enhancement of energy efficiency in relevant sectors of the national economy, protection and enhancement of sinks and reservoirs of greenhouse gases, promotion of sustainable forest management practices, afforestation and reforestation, research on, and promotion, development and increased use of new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies.

[156] See International Association on Impact Assessment, available at <http://www.iaia.org/> (visited on 3 March 2013).

[157] Case Concerning Pulp Mills on the River Uruguay (Argentina V. Uruguay), Judgment of 29 April 2010, ICJ reports 2010, para. 204, available at http://www.icj-cij.org/docket/files/135/15877.pdf (visited on 3 April 2013). In this case, the ICJ recognized the environmental impact assessment as a practice that has become an obligation of general international law applicable to the international environmental law in situations like those in that case.
See more on Environmental Impact Assessment in Alan Boyle, "Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention", *Review of European Community & International Environmental Law*, Vol. 20, No.3, 2011, pp. 227-231. See also Gillespie, Alexander, Environmental impact assessments in international law, *Review of European Community & International Environmental Law*, Vol., 17, No. 2, 2008, pp. 221-233.
See also Cymie R. Payne, "Pulp Mills on the River Uruguay: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law", available at <http://www.asil.org/files/insight100422pdf.pdf> (visited on 3 March 2013).

US and Canada, the Arbitral court ruled in 1938 that Canada had an obligation to stop the pollution caused by a smelter plant through the adoption of regulatory measures aiming at preventing environmental damage.[158] Likewise, although it did not use the word prevention *per se*, the ICJ implied it by confirming in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons that "…the existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment."[159] More explicitly, the ICJ subsequently observed in the case of Gabcikovo-Nagymaros project (Hungary v. Slovakia) that "…in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[160]

The case-law has also touched the situation where the environmental damage has occurred by reiterating that international law provides for remedies which, to some extent may be a preventive measure in that they may not only deter other states from doing the same, but also may discourage the authors from continuing or repeating their acts. The PCIJ has confirmed in the case Chorzow Factory that in international law, states are responsible for violations of public international law and are obligated to compensate the indirectly or directly affected states for the damage caused.[161] It is indeed a principle of international law that every breach of an international obligation creates a duty to make reparation in an adequate form.[162] The ICJ later noted again that in case a state has caused an injury by a breach of its international obligations, it is responsible for the damage and the reparation is therefore the indispensable consequence of a failure to apply a convention without the necessity for this to be stated in the convention itself.[163]

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[158] Trail Smelter Case, (United States, Canada) award of 16 April 1938 and 11 March 1941, available at <http://untreaty.un.org/cod/riaaa/cases/vol _III/1905-1982.pdf> (visited on 21/12/2010).

[159] Advisory Opinion on Legality of the threat or use of Nuclear Weapons (International Court of Justice, 8 July 1996) (I.C.J report 1996 p. 66), para. 29.

[160] Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ reports 1997, para. 140. This case was dealing with the impact of the construction of dams in Danube River on the environment.

[161] Case Chorzow Factory (Germany v. Poland), Permanent Court of International Justice, report of 1927, p.30 available at <www.icj-cij.org> (visited on 11 January 2011).

[162] Shelton Dinah, "Righting the Wrongs: Reparation in the Articles of States Responsibility", *American Journal of International Law*, Vol. 96, No 4, 2002, pp. 833-856.

[163] Reparation for injuries suffered in the service of the United Nations, Advisory opinion, 1949, para 184, available at http:www.icj.cij.org (visited on 11 January 2011).

From this, it is to be said that, since the obligations under international law are owed to states, a breach of binding obligations under international environmental law engages the responsibility of the state that has breached it. The ILC draft principles on the allocation of loss in the case of transboundary harm arising from hazardous activities[164] have confirmed this in even clearer terms. Principle 4 says: "Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control."[165] However, the difficulty arises in determining the responsibility of state in case of the environmental damage especially in how to know the exact time the breach of the obligation to prevent the harm occurs as well as the extent of this breach and consequence to the environment. For instance in case of pollution that has contributed to global warming, how to know which state contributed to it, from when and to which extent? These are however questions that go beyond the scope of this sub-section and a deep analysis on them is not done here. Instead, the questions that need consideration here are whether the scientific certainty that a given damage will occur as well as the certainty that the preventive measures to be taken will fully prevent that damage are required before taking preventive measures.

4.2. Prevention principle v. the lack of certainty of the occurrence of environmental damage and of the power to prevent

Clearly as I have endeavoured to demonstrate above, prevention principle in international environmental law has been treated with much attention on the international scene in order to prevent the occurrence of environmental damage. It is worth questioning here whether in doing so, the scientific certainty that the damage will occur is required before the preventive measures have to be taken. Another question is whether certainty that preventive measures to be undertaken would totally prevent the occurrence of the environmental damage is required.

For the first question, article 3.3 of the United Nations Convention on Climate Change seems to give a negative answer. It states that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-

[164] ILC Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006 available at <http://untreaty.un .org> (visited on 11 January 2011).
[165] Idem, principle 4.

effective so as to ensure global benefits at the lowest possible cost…" Also for the prevention of the environmental damage in general, the Rio Declaration used almost the same words that "…where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".[166] This declaration confirmed the relevance of the precautionary principle in the protection of the environment by states.[167] This principle implies that governments are not to refrain from taking action against possible damages, even if the causal link between the human behaviour and those damages is not 100% clear.[168] In other words, it requires controlling an activity susceptible of causing environmental damage even where there is no exact scientific certainty on causes and on what the consequences could be. It is commonly agreed that it is impossible to know, for instance how a certain level of air pollution will result in a particular increase in mortality from respiratory disease, when a certain level of water pollution will affect a healthy fish population, or whether oil development in an environmentally sensitive area will significantly disturb the native wildlife on the long term.[169]

The need to take preventive measures even in case of absence of scientific uncertainty on the environmental consequences has been also shown by the United Nations Environment Program (UNEP). It asserted that even in the case of doubt as to the effects on the environment, preventive and remedial action should be taken.[170] This means that preventive or remedial action does not have to await the presentation of conclusive scientific evidence of detrimental effects for the environment; instead, preventive or remedial action is to be taken if scientific evidence

[166]Principle 15 of the Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, available at <http://www.un.org> (visited on 21 December 2010).

[167] Ibidem.

[168] Wybe, Th. Douma*, The Precautionary Principle,* T.M.C. Asser Institute, The Hague, The Netherlands, updated and amended version of an article that appeared under the same title in the *Icelandic Legal Journal Úlfljótur*, Vol. 49, nrs. 3/4, 1996, p. 417-430). For more on the Precautionary Principle see also Wybe, Th. Douma, *The Precautionary Principle, Its Application in International*, European and Dutch Law, PhD Dissertation, University of Groningen, 2002, pp. 1-2, 55-190, Stevens, Mary "The Precautionary Principle in the International Arena", *Sustainable Development Law and Policy*, Spring/Summer 2002, pp. 13-15. See also Ambrus, Monika, "The Precautionary Principle and a Fair Allocation of the Burden of Proof in International Environmental Law", *Review of European Community & International Environmental Law, Vol.* 21, No. 3, 2012, pp. 259-270, Trouwborst, Arie, *Precautionary Rights and Duties of States*, PhD Dissertation, University of Utrecht, 2006, pp. 21-284.

[169]Wybe, Th. Douma, *The Precautionary Principle, Its Application in International*, European and Dutch Law, PhD Dissertation, University of Groningen, 2002, pp 22-26.

[170] UNEP, Relevance and application of the Principle of Precautionary Action to the Caribbean Environmental Programme. CEP Technical Report No.21. UNEP Caribbean Environment Programme, 1992.

makes it sufficiently plausible that detrimental effects to the marine environment may result.[171] So, according to UNEP, policy makers cannot hide behind the uncertainties inherent in the conclusions of scientific research and that they have to take decisions on the basis of probabilities and uncertainties.[172] Some other conventions on international environmental law also confirmed the same.[173]

On the question whether certainty that preventive measures to be undertaken would totally prevent the occurrence of the environmental damage is required, the answer seems to be also negative. The ILC stated that "…the obligation of the state of origin to take *preventive* or *minimizing* measures is one of due diligence which entails reasonable efforts by a state to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them.[174] So, according to the ILC, the due diligence is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the state of origin is required to exert its best possible efforts to minimize the risk.[175] States must behave in such a way as to ensure that no damage will occur to the environment of other states or other areas, as a result of the activities under their jurisdiction and control.[176] The state is therefore under the obligation not only to refrain from damaging the environment but also under the obligation to take measures that protect it.

4.3. Preliminary conclusions

To sum up this section it can be said that the content and purpose of prevention in environmental law is the avoidance of environmental damage by putting in place measures that avert it. The temporal divisions used in public health and in criminology are not explicitly mentioned in the rules and literature on international environmental law. However, the explanations given in

[171] Ibidem.
[172] Ibidem.
[173] See for example article 8.7(a) of the Stockholm Convention on Persistent Organic Pollutants of May 22, 2001 and the preamble of the Convention on Biological Diversity of June 29, 1992 available respectively at <http://chm.pops.int/> and at <http: www.cbd.int/> (visited on 12 January 2011)
[174] ILC Draft Articles on Prevention of Transboundary Harm from Hazardous activities with commentaries, 2001, Report of the International Law Commission on work of its fifty-third session, available at <http://untreaty.un .org/ilc/texts/instruments/English/commentaries/9_7_2001.pdf> (visited on 12 January 2011).
[175] Ibidem.
[176] Koivurova, Timo, *Due Diligence*, Max Planck Institute for Comparative Public Law and International Law, Heiderberg and Oxford University Press, pp. 6-9, available at <www.mpepil.com> (visited on 25 February 2013).

different texts as mentioned in this section do not exclude the application of that division in this field as well. Indeed, preventive measures in environmental law do not only anticipate damage (primary level) but also avert the spread where it has started to occur (secondary level) and deal with its consequences where it has already occurred (tertiary level).[177] Understood this way, it is possible to infer that the temporal division may be applicable in international environmental law as well. Several preventive measures have been indicated. Although it was not intended (and it was impossible) to give each and every single preventive measure that is susceptible of preventing environmental damage/degradation, the examples contribute to the understanding of the concept of prevention and the measures needed at different stages. Though one of those measures may be to undertake the environmental impact assessment before launching a given activity which might have effect on the environment, it was explained that prevention does not require full scientific certainty on the consequences on the environment. In fact, the precautionary principle requires that measures be taken to control activities that are susceptible of causing environmental damage even where there is no full scientific certainty on possible environmental damage. Lastly, the certainty on success in the prevention is not required. States need not to be sure that the measures will successfully prevent the environmental damage. All they need is to use their reasonable efforts to inform themselves on the potential environmental risks and to take appropriate measures, in timely fashion, to address them.[178]

5. Prevention of torture

Torture, being one of the worst violations of human rights, has been nowadays treated with attention on both international and regional level in order to eradicate it. Under this section, the prevention of torture which has been singled out among other violations of human rights especially because of some relationship it has with the prevention of genocide, will be discussed in order to clarify its meaning as far as torture is concerned and to see not only the role states may play in that prevention but also the obligation of states in this field and the consequences of the non-compliance with that obligation by states. This will be done through two subsections.

[177] De Sadeleer, Nicolas, *Environmental Principles: from Political Slogans to Legal Rules*, Oxford University Press, Oxford, 2002.

[178] ILC Draft Articles on Prevention of Transboundary Harm from Hazardous activities with commentaries, 2001, Report of the International Law Commission on work of its fifty-third session, available at <http://untreaty.un.org/ilc/texts/instruments/English/commentaries/9_7_2001.pdf> (visited on 12 January 2011).

The first examines the prevention of torture at the international level and the second examines it at the regional level. In both subsection the aim is to explain the structure of prevention of torture.

5.1. Prevention of torture at the international level

It was in 1948 that the Universal Declaration of Human Rights, the first international legal instrument outlawing torture was adopted.[179] It states in its article 5 that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[180] The International Covenant on Civil and Political Rights also provided in its article 7 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[181] In these instruments above, it is apparently clear that the first thing was to outlaw torture and it was outlawed indeed.

Some other instruments were also adopted and, while on their turn they also outlawed torture, they also (and particularly) focused on its prevention. These are the Convention Against Torture (CAT) of 1984 and its Optional Protocol of 2002.[182] However, none of these international instruments managed to give a clear definition of the concept of prevention. That is why it has been difficult to clearly understand what the concept of prevention exactly means. Nonetheless, some provisions in the rules related to torture need to be analysed to see what the meaning of this concept of prevention of torture could be.

For instance, article 2(1) of the CAT states that "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its

[179] Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December, 10, 1948, available at <http://www.un.org/en/documents/udhr/index.shtml#ap> (visited on 21 January 2011).

[180] See article 5 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December, 10, 1948, available at <http://www.un.org/en/documents/udhr/index.shtml#ap> (visited on 21 January 2011).

[181] International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A(XXI) of 16 December 1966, available at <http://www2.ohchr.org> (visited on 26 January 2011).

[182] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (visited on 21 January 2011). Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 by the UN General Assembly Resolution A/RES/57/199, available at <http://www2.ohchr.org> (visited on 26 January 2011).

jurisdiction".[183] This article obligates states to take effective legislative, administrative, judicial or other measures to prevent acts of torture. Although it is not clearly shown in this article what kind of measures have to be taken by states to effectively prevent torture, some provisions in this convention do mention some. Among them, article 4 of the CAT obligates states to criminalize acts of torture and to provide for appropriate penalties against the torturers in its legislation. Also, article 10(1) of the CAT obligates states to ensure that education and information regarding the prohibition of torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

In 2008, the Committee against Torture, which has been created by the CAT,[184] tried to put some light on how the prevention of torture under article 2(1) should be understood.[185] The Committee explained that states parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.[186] In trying to recommend specific actions for preventing torture, the Committee explained that certain basic guarantees include, *inter alia*, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right to promptly get independent legal assistance, independent medical assistance and to contact relatives, the need to establish impartial mechanism for inspecting and visiting places of detention, and the availability to detainees and persons at risk of torture of judicial and other remedies.[187]

Likewise, recognizing that the obligation to take preventive measures transcends the items enumerated in the CAT, the Committee added that it is important that the general population be educated on the history, scope and necessity of the non-derogable prohibition of torture as well as that law enforcement personnel receive education on recognizing and preventing torture. Also,

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[183] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (visited on 21 January 2011).

[184] See articles 17-24 of the CAT which created the Committee against torture, sets the functions of that Committee as well as the procedure of the reporting system.

[185] UN Committee Against Torture, General Comment No. 2, implementation of article 2 by States parties, 24 January 2008, UN Doc. CAT/C/GC/2 available at <http://www.unhcr.org> (visited on 27 January 2011).

[186] Idem, paragraph 4.

[187] Idem, paragraph 13.

in the reporting obligation of states, the Committee suggested that they provide detailed information on their implementation of preventive measures.[188]

In the same context, while commenting on article 2 of the CAT, Nowak and McArthur gave examples on what states have to do in preventing the occurrence of torture.[189] According to their interpretation, the emphasis of article 2(1) is to put on the positive obligation of States Parties to fulfil, which means to enact laws, to provide an effective remedy and procedural guarantees, to establish relevant legal institutions and other legislative, administrative, political or judicial measures.[190] In the opinion of the authors, article 2(1) can be seen as an umbrella clause encompassing all the specific obligations to prevent torture as laid down in the CAT such as article 3 on the non-refoulement and the obligation of states to make torture a criminal offence, article 10 on education and training of law enforcement and other personnel, article 11 on the systematic review of interrogations, article 12 on *ex officio* investigation for torture cases, article 13 on investigations of allegations by torture victims, article 14 on compensation to victims of torture which can constitute a deterrent measure for the future and article 15 on the non-admissibility of evidence extracted by torture in any proceedings.[191]

More concretely, the authors find that the most effective measures to prevent torture is to create independent national commissions with the power to carry out unannounced visits to all places of detention, to have access to the prison registers and all other relevant documents, to interview all detainees in private and to subject them to medical examinations.[192]

On this monitoring system to places of detention and in the spirit to make article 2 of the CAT about measures aiming at preventing torture more effective, while recalling that efforts to eradicate torture should first and foremost be concentrating on prevention, the Optional Protocol to the CAT established a preventive system of regular visits to be undertaken by independent international and national bodies to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. [193] With that objective, this Protocol created an

[188] Idem, para 25.

[189] Nowak Manfred and McArthur Elizabeth, *The United Nations Convention Against Torture, A commentary*, Oxford University Press, Oxford, 2008, pp. 87-125.

[190] Idem, p. 112.

[191] Idem, p. 113.

[192] Idem, p. 115.

[193] See Preamble and article 1 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 by the UN General Assembly Resolution

opportunity to establish a Subcommittee on prevention of torture (article 2) as well as one or several visiting bodies for the prevention of torture at national level (article 3). On the international level, this Subcommittee shall have the mandate *inter alia* to visit the places where persons are deprived of their liberty and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture (art 11(a)), advise and assist States Parties in the establishment of national preventive mechanisms and in the evaluation of needs and means necessary for the strengthening of the capacity to prevent torture (article 11(b)).

In order to fulfil its mandate, this Subcommittee will be given unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention and to all information on their treatment and conditions of detention as well as unrestricted access to the installations and facilities of the places of detention. The Subcommittee will also have opportunity to conduct private interviews with persons deprived of their liberty and therefore the liberty to choose the places to visit and the persons it wants to interview (art 14).

After the visit, the Subcommittee shall communicate its recommendations to the state concerned, and if relevant to the national prevention mechanism and may publish the report whenever requested by the state concerned (Art 16(1,2)). However, if the state concerned refuses to cooperate or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture to which the Subcommittee presents a public annual report on its activities, may, at the request of the Subcommittee, decide, after the state concerned has been given the opportunity to make its views, to make a public statement of the matter or publish the report of the Subcommittee (art 16(3,4)).

As for the national level, this protocol obligates states to establish independent national preventive mechanisms for the prevention of torture at the domestic level and to make available necessary resources for the functioning of this mechanism as well as giving them access to all information and to grant them power to visit persons deprived of their liberty and examine their treatment and recommend to the relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty and to prevent torture from occurring (art 19).

In addition to this, this protocol also introduced means to implement the recommendations from the Subcommittee. A special fund shall be set up to help finance the implementation of the recommendations made by the Subcommittee on Prevention (after the visit to a State Party) as

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A/RES/57/199. It interred into force in 2006, available at <http://www2.ohchr.org> (visited on 31 January 2011).

well as education programmes of the national preventive mechanisms.[194]

When torture occurs despite the above mentioned measures, measures aiming at punishing the perpetrators and at compensating the victims are taken. Indeed, under articles 4 to 8 states are obligated to take measures related to the prosecution and punishment of the perpetrators of torture. It might appear that these articles concern only perpetrators of torture and not the state that fails to prevent it. However, the comments on article 2(1) in as far as the scope of state obligation and responsibility is concerned suggest that the responsibility of States may be incurred when it fails to prevent its public authorities from committing torture. This Committee against Torture has observed that states are obligated to adopt measures to prevent public authorities and other persons acting in an official capacity from committing, inciting, encouraging, acquiescing to acts of torture and concluded that states parties are in violation of the CAT when they fail to fulfil their obligation to prevent torture.[195]

Furthermore article 14(1) of the CAT which obligates states parties to it to ensure in their legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible is the basis not only for the punishment of the perpetrators but also for the compensation to the victim. Even though article 14 of the CAT does not *prima facie* appear like one of the preventive measures as provided for in article 2(1), it has been interpreted as having preventive character. For instance, Nowak and McArthur observed that it has a deterrent effect aimed at preventing torture in the future because the torturers will not only be punished but also be held accountable to pay full compensation for all long-term rehabilitation costs of the torture victims. [196] This view was also taken by the Committee against Torture in the case *Guridi v. Spain*,[197] in which the Committee against Torture did not only confirm that States have the duty to guarantee compensation for the victim of an act of torture, but also that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation

[194] See article 26 of the OPCAT cited above.

[195] UN Committee Against Torture, General Comment No. 2, implementation of article 2 by States parties, 24 January 2008, UN Doc. CAT/C/GC/2 available at <http://www.unhcr.org> (visited on 09 February 2011).

[196] Nowak Manfred and McArthur Elizabeth, *op.cit*, p. 113.

[197] See Guridi v. Spain (Communication No. 212/2002), Decision of the UN Committee against Torture under article 22 of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment of 17 May 2007, Thirty-fourth session, CAT/C/34/D/212/2002, para. 6.8

of the victim, as well as measures to guarantee the non-repetition of the violations.[198] The Committee therefore concluded that the absence of appropriate punishment is incompatible with the duty to prevent acts of torture.[199] This simply means that, in the view of the Committee too, the obligation to give appropriate punishment and to provide compensation is one of the measures to prevent future torture.

The prevention of torture has been not only operated at this international level but also at regional level. The next subsection will give a short explanation on how this concept is conceived and practiced at the regional level.

5.2. Prevention of torture at the regional level

The prevention of torture has been paramount at regional level as well. Since there is no substantial difference between the model of prevention of torture on international level and the prevention of torture in the European and American systems, and since the aim in this subsection on the prevention of torture is not to have a comparative analysis between the systems, it will not be necessary to go into all details about this. It is instead preferred to give a brief summary on how the prevention of torture is understood on the regional level and since the European and American systems are relatively much more developed than others, this subsection will be limited to them.

5.2.1. Prevention of torture at the European level

The European Convention on Human Rights states in article 3 that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[200] The European Convention for the Prevention and Punishment of Torture provides in its article 1 that there shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[201] Like for the Subcommittee for the Prevention of Torture on international level seen above, this committee shall, by means of visits, examine the treatment of persons deprived

[198] Ibidem.
[199] Idem, para. 6.6.
[200] Article 3 of the European Convention on Human Rights and fundamental freedoms of 1950 as amended by protocols Nos 11 and 14, available at <http://www.echr.coe.int> (visited on 25 January 2011).
[201] Art 1 of the European Convention for the prevention of Torture, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession on 26 November 1987, available at <http://conventions.coe.int> (visited on 26 January 2011).

of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.[202]

In facilitating the task of this Committee, each party has the obligation to give access to its territory and the right to travel without restriction, to give full information to it on all places where people are deprived of their liberty and to let it interview any person of their choice without restriction (article 8). After the visit, the Committee writes a report containing all recommendations it considers necessary and the report is transmitted to the state concerned. If the state concerned does not cooperate or if it refuses to improve the situation of persons deprived of their liberty in the light of the Committee's recommendations, the Committee may decide to make a public statement on the matter (art 10). Further, the Committee shall every year submit to the Committee of Ministers, a general report on its activities which has to be transmitted to the Consultative Assembly and to any non-member State of the Council of Europe which is a party to the Convention, and made public (art 12).

This Committee provides a non-judicial preventive mechanism which contributes in strengthening the protection of individuals deprived of their liberty from torture. It is in fact a complement to the judicial one already created through the adoption of the European Convention on Human Rights which established the European Court of Human Rights.[203] Indeed, having prohibited torture in its article 3, and having created the said court with the power to render judgments on any violation of human rights provided in that convention, it follows that the Court decides on cases involving States Parties to this convention which have breached the prohibition of torture.[204]

5.2.2. Prevention of torture at the American level

The Inter-American Convention to Prevent and Punish Torture states in article 1 that the States Parties undertake to prevent and punish torture.[205] Accordingly, article 6 provides that States Parties shall take effective measures to prevent and punish torture within their jurisdiction and ensure that all acts of torture and attempts to commit torture are offenses under their criminal law

[202] Ibidem.

[203] The European Court of Human Rights was created by the European Convention on Human Rights. See its articles 38-56.

[204] For an in-depth analysis see Cassesse Antonio, "The Human Dimension of International Law"- Selected Papers, Oxford University Press, New York, 2008, pp. 338-373.

[205] Article 1 of the Inter-American Convention to Prevent and Punish Torture, adopted at Cartagena de Indias, Colombia, on 12 September 1985 available at <http://www.oas.org> (visited on 26 January 2011).

and shall make such acts punishable by severe penalties that take into account their serious nature.

Among the preventive measures, article 7 asserts that States Parties shall take measures such as the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom. Special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The Inter-American Court of Human Rights has given more examples on measures to prevent torture in its explanation of the duty to prevent torture by saying that:

> "The duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages."[206]

The Inter-American Court of Human Rights has found violations by states of the duty to prevent as enshrined in articles 1, 6 and 7 or 8 of the Convention. For instance, in the Tibi case, the Court found Ecuador responsible for the violation of the duty to prevent torture as provided in art 1, 6 and 8 of the Convention on the Prevention of Torture under which states are placed under the obligation to take preventive measures.[207] After the Court found that Tibi had suffered serious injuries while he was detained at the Penitenciaría del Litoral by police officers where he was burned and suffocated several times by police officers in the period of custody,[208]and while expressing a requirement of a training campaign for prison, police, and judicial officials, as well as for doctors and psychologists on how to prevent torture and document allegations of torture, it concluded that Ecuador failed to take such effective measures as may be necessary to prevent and punish all acts of torture under its jurisdiction.[209] The Court has taken the same approach in other similar cases.[210]

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[206] Velasquez-Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C) para. 175

[207] See Tibi v. Ecuador, Judgment of September 7, 2004, Inter- American Court of Human Rights,(Serie C) No. 114, para. 159, available at <www.corteidh.or.cr> (visited on February 16, 2011).

[208] Ibidem.

[209] Ibidem.

[210] See for example the cases *Bamaca-Velasquez v. Guatemala, Judgment* of November 25, 2000 Inter-American Court of human Rights, (Ser. C) No 70, para. 220, 221, 223 and *Gomez-Paquiyauri Brothers v. Peru,* judgment of July 8, 2004, Inter-American Court of human Rights, (Ser. C) No 110, para. 114, available at <www.corteidh.or.cr> (visited on February 16, 2011).

The Inter-American Commission on Human Rights has also contributed to the clarification of the prevention of torture. In strengthening the mechanism to prevent torture, this Commission on Human Rights adopted in 2008 the principles and best practices on the protection of persons deprived of their liberty[211] in which, like other instruments seen above, it was affirmed that:

> "…regular visits and inspections of places of deprivation of liberty shall be conducted by national and international institutions and organizations, in order to ascertain, at any time and under any circumstance, the conditions of deprivation of liberty and the respect of human rights".[212]

In all these instruments shown above and explanations thereof, no detailed list of prevention measures to be taken in preventing torture is provided. They only give examples and it is impossible to give that list as the Inter-American Court of Human Rights has said in Vélasquez-Rodriguez that:

> "It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party…"[213]

5.3. Preliminary conclusions

To conclude this section, it can be said that, like the prevention in public health for instance, it is possible to distinguish phases of prevention in the prevention of torture. It is clear that at the primary level (phase) states are obligated to build up safeguards against torture by adopting legislative, administrative and judicial measures aiming at preventing torture. At this level other measures may include the training of police and security personnel for example as well as the education of the general population on the history, scope and necessity of the non-derogable prohibition of torture. They include also the creation of national preventive measures.

At the secondary level, one might say that states are obligated to implement those safeguards, allowing the visits to places of detention by independent international and national prevention

[211] Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the commission in March 2008, available at http://www.cidh.oas.org (visited on February 17, 2011).

[212] Principle XXIV of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American commission on Human Rights in March 2008, available at http://www.cidh.oas.org (visited on February 17, 2011).

[213] Velasquez-Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C) para. 175.

bodies. At the tertiary level, it might be said that states are obligated *inter alia* to punish the torturers and to make sure that victims of torture get compensation for the damage suffered.

Conclusion

The aim in this chapter was to explain the concept of prevention from different fields and where applicable, to see (to some extent) legal obligations pertaining to it. This approach was chosen in order to have an understanding on what this concept means in general that can be helpful in understanding what it may entail in particular in the field of genocide. In other words, the investigation about the meaning of the concept of prevention as well as its methods and techniques and obligation of states thereof in different fields has aimed at understanding what the concept means and what the actions ought to be taken in order to prevent a harm from occurring.

To summarize what has been discussed in this chapter, two important elements that form a scheme of prevention need to be mentioned here. The first is about the meaning and purpose of the concept of prevention and the second is about the preventive measures at different temporal divisions.

With regard to the first element, it is possible to say that the meaning and purpose of prevention are the same in all the fields discussed above. The meaning of prevention is to stop something bad (harm) from happening, *i.e* to forestall its occurrence and its purpose is to avoid the consequences of that harm. In fact, although sometimes there can be compensation in case of harm (which can itself have preventive effect), early prevention is a preferred policy since it avoids the occurrence of the harm instead of dealing with its consequences. In most cases, the compensation may not even be able to restore the situation prevailing prior to the occurrence of the harm.

Regarding the second element, prevention will naturally involve timely measures aiming at avoiding the occurrence of harm. For prevention of anything from happening, there is a need of preventive measures to be taken to avoid that the harm starts. However, this does not mean that once the harm has started it is no longer possible to prevent it. Some different phases of prevention were discussed in this chapter. It is commonly accepted that there are three important levels of prevention. These are the primary, the secondary and the tertiary ones. Each level needs measures tailored to it. Not all fields discussed above used this categorisation of levels *per se,* but these levels are implied in the explanation of measures to be taken in the process of

prevention for all the discussed fields.

At the primary level which is a very important phase as it aims at putting in place measures that may pre-empt the start of the harm, there is a need to put in place several measures aiming at avoiding the occurrence of the harm and this involves tackling the root causes of the harm and creating an environment that does not allow any harm from emerging or developing. This also means the establishment of conditions that do not create opportunity for the occurrence of the harm. It will therefore include the adoption of laws that not only prohibit the harm but also put in place mechanisms that ensure the prevention of that harm.

The preventive measures aiming at avoiding the start of the harm may be unsuccessful but this does not mean that the prevention journey ends there. Other measures can still be needed and taken to stop the development of the harm. This is the secondary prevention level at which there is a need to take measures to deal with the harm after it has started. At this level, depending on the nature of the harm in question, measures tailored to the situation are taken in order to prevent the risk from materializing or the situation from growing worse. These measures intervene at early stage to prevent the spread of the risk.

If, by any reason whatsoever, these measures have not been successful; there is still a possibility for further actions. And this is the tertiary level at which robust measures are needed to put an end to the harm. But since this may intervene when the harm has had its consequences on the victims, then there are also measures which provide for remedying the situation. These measures which may include the reparation are aimed at preventing the reoccurrence of the harm in the future. In other words, the tertiary prevention level also deals with those consequences in order not only to repair the damage but also to avoid the reoccurrence of the harm.

From the discussion in this chapter and without ignoring the supremacy of the primary level, given the nature, relevance and essence of prevention, it is worth concluding that prevention is a continuous process which involves several actions at different levels.

Furthermore, some characteristics of the prevention which are arguably common for the five fields discussed in this chapter have been given attention. These are about the irrelevance of the scientific uncertainty of the risk as well as the irrelevance of the uncertainty on the result of the preventive measures as an exemption from taking preventive measures. Measures would still have to be put in place and taken even without conclusive evidence that harm would occur. And the fact that there cannot be guarantee that measures would still not prevent the occurrence of the

harm cannot be an excuse because prevention is a due diligence duty which entails reasonable efforts to address the situation in order to avert the occurrence of the harm. Another important characteristic is that in most cases the creation of international and national preventive mechanisms is indispensable to make the prevention effective.

The question is whether the conclusions from different fields on the concept of prevention are applicable to the prevention of genocide as well? The next chapter will address this question in examining whether the prevention of genocide is understood in the same way as seen above (as requiring doing it in different temporal levels of the development of the risk).

Chapter III. The concept of prevention in the field of genocide in general

Introduction

In the previous chapter, it was concluded from the fields examined that prevention is a continuous process that is aimed at avoiding the occurrence of something harmful by tackling the causes of the harm prior to it and at each phase of the process to its occurrence and after. It is now time to examine in this chapter whether this understanding is the same for the prevention of genocide and if so to show what may be needed to destabilize the process to genocide in order to prevent genocide. In fact, it would be a capital mistake to try to discuss the prevention of genocide before showing the process through which it passes before it is committed. Taking into account the sources and contributions from other disciplines than law, it is essential to determine the existence of factors in the process to genocide. In doing so, the theories will be confronted with the reality of genocide on the ground, in order to leave the confinement in the abstract and understand what can (or is to) be done concretely to prevent genocide. This means that the factors as well as phases in the process to genocide will be taken into consideration in attempting to show when the prevention of genocide is needed.

As generally known, genocide is not something that happens overnight. For genocide to happen there is a number of factors that precede and make possible the actual genocide. They create the conditions or the opportunity for genocide to occur. Hence, for it to be prevented, one needs first to understand the whole process to genocide from the early stage until the end. This is not to say however that this chapter will be able to give a linear process identical to all genocides, but with some examples, the explanation on common factors and phases of genocide will serve as a good basis to understand the phenomenon of its prevention. For this reason, the first section explains the factors in the process to genocide. The second section summarises the phases in the process to genocide (confronting them to the realities on the ground). The third (and last) section discusses prevention of genocide in general and from a temporal perspective before seeing how international law deals with the prevention of genocide at those phases in the next chapters.

1. Understanding the factors[214] in the process to genocide

Factors are used here as they are defined in their ordinary meaning as elements that contribute to a result, *i.e* ones that actively contribute to an accomplishment, result, or process of something.[215] Many factors have been discussed in literature on genocide. However, there is no consensus on a definitive list of factors that are present in all genocides. The intention here is not to identify all the factors that may contribute to genocide. Nor is it to enter in the whole debate on all factors that may lead to genocide. The aim is to illustrate with some of the common factors in the process that may lead to genocide. It is assumed that for the prevention of genocide to be successful, one needs to understand the process to genocide in order to know what to do, at which moment and by which means.

Authors from various disciplines such as psychology and sociology have written that genocide occurs in societies with different racial, ethnic, national or religious groups,[216] meaning that genocide is based on identity. Some other factors that have been identified include the situation in which a state has a totalitarian or authoritarian government and where only one group controls power (political problems).[217] These factors create an environment that is favourable to the emergence of other factors that may contribute to a situation that may lead to genocide. These

[214] In that way, words such as "precondition" or "cause" that are frequently used in literature are deliberately avoided here in order to avoid the confusion they may lead to. In fact, the use of the word precondition which is defined as a condition that must exist or be established before something can occur or be considered (a prerequisite), and "cause" defined as a condition that makes something occur may lead to the understanding that where they exist, genocide must occur and that where they do not exist, genocide is not possible. The choice of the word "factor" lies in the fact that it is understood as an element that may contribute to making genocide happen. It means that some factors may exist but not result into genocide and that genocide may happen even where a given factor is not present.

[215] See Factor. *The American Heritage® Dictionary of the English Language, Fourth Edition*. (2003), available at <http://www.thefreedictionary.com/factor> (visited on April 15 2013) ; Lesley, Brown, (ed.), *The New Shorter Oxford English Dictionary*, Vol. 1, Clarendon Press, Oxford, New York, 1993, p. 356.

[216] Fein, Helen, "Scenarios of Genocide: Modes of Genocide and Critical Responses", in the Israel, W. Charny, *Toward the Understanding and Prevention of Genocide*, Westview Press, Boulder and London, 1984, pp. 2-14. See also Kuper, Leo, "Types of Genocide and Mass Murder", in Israel, W. Charny, *Toward the Understanding and Prevention of Genocide*, Westview Press, Boulder and London, 1984, pp. 32-44. See also Staub, Ervin, "The Origins and Preventions of Genocide, Mass Killing and Other Collective Violence", *Journal of Peace Psychology*, Vol. 5, No 4, 1999, pp. 303-336. See also Efforts of the United Nations system to prevent genocide and the activities of the Special Adviser to the Secretary-General on the Prevention of Genocide, Report of the Secretary-General, 18 February 2009, A/HRC/10/30, paras 3- 10, available at <http://www.un.org> (visited on 31 January 2012).

[217] United Nations Secretary-General Ban Ki-Moon, "Never Again": Preventing Genocide and Punishing those Responsible", 2007, available at <http://www.un.org (visited> (visited on 31 January 2012)

include difficult life conditions due to economic problems, deprivation or inequalities in the allocation of resources, discrimination in various forms. Other factors may be impunity for violation of human rights which may lead to violent (armed) conflicts that pave the way to genocide or cover it. These factors will be discussed in the following categories: differences in identity (1.1), difficult life due to economic problems (1.2), deprivation or inequalities in the allocation of resources (1.3), political problems (1.4), armed conflicts (1.5) and human rights violations in an atmosphere of impunity (1.6).

1.1. Genocide as an identity-based phenomenon

In his report of 2009 on the efforts of the UN system to prevent genocide, the Secretary-General suggested a framework of analysis in determining risks of genocide in which he noted eight core questions organised in accordance with the increasing imminence of genocide.[218] One of those questions is whether there are national, ethnic, racial or religious groups - a prerequisite for genocide to be possible.[219] The experience shows that genocides that have happened up to now have been committed within multi-racial, multi-ethnic or multi-religious societies. This explains why the drafters of the Genocide Convention mentioned the national, ethnic, racial or religious groups in the definition of genocide as protected groups.[220]

In this regard, and although much emphasis was put on Africa, Ricardo Rene Laremont[221] observes that ethnic and racial differences may be causes of conflict that may lead to genocide. Leo Kuper said that "the plural society provides the structural base of genocide, the presence of a diversity of racial, ethnic and/or religious groups being structural characteristic of the plural society, and genocide a crime committed against these groups".[222] The Holocaust, the Cambodia, Rwanda and Bosnia genocides are illustrations of this and there is no controversy on that.

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[218] Efforts of the United Nations system to prevent genocide and the activities of the Special Adviser to the Secretary-General on the Prevention of Genocide, Report of the Secretary-General, 18 February 2009, A/HRC/10/30, paras 3- 10, available at <http://www.un.org> (visited on 31 January 2012).

[219] Ibidem.

[220] Article II of the Convention on the prevention and punishment of the crime of genocide adopted by resolution 260(II)A of the United Nations General Assembly on 9 December 1948, available at <http: www.un.org> (visited on 16 March 2011).

[221] Laremont, Ricardo Rene, *The Causes of Warfare and the Implications of Peacekeeping in Africa*, Heinemann, Portsmouth, 2002, pp. 3-5.

[222] Kuper, Leo, *Genocide*, *its Political Use in the Twentieth Century*, Yale University Press, New Haven and London, 1981, p. 57.

On the question whether this mean that the existence of different races, ethnic, religious groups in a given society is in itself a cause of genocide, Leo Kuper noted that it should not be understood that genocide is inevitable in plural societies, but only that those plural societies offer the necessary conditions for domestic genocide.[223] It cannot be said that the existence of different races or ethnic groups alone is in itself a sufficient factor that may cause genocide. Genocide is not possible where there is no difference among the population in a state but this difference itself cannot cause genocide if not combined with other factors. In other words, by definition, genocide is not possible without different groups but the presence of various groups cannot explain genocide. That is why genocide does not happen everywhere (given the fact that there is no state which has population composed of one racial group, with no difference in ethnicity, religion).

1.2. Difficult life conditions due to economic problems

Ervin Staub has observed that the frustration caused by difficult life conditions leads to psychological processes in individual and social processes in groups that even though might not lead directly to genocide, can result in turning against and harming members of another group[224] which, combined with other factors, may grow into a genocide. Among the things that may cause the difficult life conditions Ervin Staub and Barbara Harff give the example of poverty.[225] Smith also argues that economic problems may lead to genocide in what he calls material scarcity.[226] According to him, the material scarcity is that of material goods, resources, employment.[227] Among other scholars in the field of economics, Frances Stewart argues that genocide tends to be high in low and middle income states.[228] She bases this on the fact that perpetrators of genocide may use mass killings against a group that stands in their way, in order to acquire wealth.[229] And

[223] Idem, p. 84.
[224] Staub, Ervin, "The Origins and Preventions of Genocide, Mass Killing and Other Collective Violence", *Journal of Peace Psychology*, Vol. 5, No.4, 1999, pp. 303-336, p. 305.
[225] Ibidem. See also Harff, Barbara, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955", *American Political Science Review,* Vol. 97, No. 1, 2003, p. 64.
[226] Smith, W. Roger, "Scarcity and Genocide", in Dobkowski, Michael N and Wallimann, Isidor (eds), *The coming Age of Scarcity, Preventing Mass Death and Genocide in the Twenty-first Century*, Syracuse University Press, New York, 1998, p. 202.
[227] Ibidem.
[228] Stewart, Frances, "Economic and Political Causes of Genocidal Violence: A comparison with Findings on the Causes of Civil War", MICROCON Research Working Paper 46, Brighton: MICROCON, 2011, pp. 20, 21& 34, available at <http://www.microconflict.eu/publications/RWP46_FS.pdf> (visited on 8 April 2013).
[229] Ibidem.

because of the high rate of unemployment among youth, it becomes easy for the perpetrators to mobilise the youth to accomplish their objective.[230] Harff added that leaders of low income countries are more likely to calculate that they can eliminate unwanted groups without international repercussions because of their low degree of interdependence with others.[231] This has been also affirmed by the Genocide Prevention Task Force which noted that mass atrocities and genocide almost always occur in the context of violent conflict or in the wake of major political instability, and that these factors are most prevalent in impoverished countries where ordinary citizens lack economic opportunities.[232]

While the economic problems may indeed be a factor that may contribute to leading to genocide, they may need other associated problems to play a big role in that.[233] In fact, no one has shown that genocide is always possible in poor states and impossible in rich ones. Being poor itself does not make genocide possible. But it certainly creates a favourable environment to other associated problems that may add their contribution to the process to genocide. Those associated problems may include the deprivation or inequalities in the allocation of resources.

1.3. Deprivation or inequalities in the allocation of scarce resources

It has been argued in literature that economic scarcity leads to economic inequality between individuals and groups.[234] Manus I. Midlarsky explains that scarcity and inequality are strongly linked in that the greater the scarcity of commodities, the greater the inequality among potential recipients,[235] hence the greater the contraction of socioeconomic space, the greater the inequality

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[230] Ibidem.

[231] Harff, Barbara , "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955", *American Political Science Review*, Vol. 97, No. 1 February 2003, p. 65.

[232] Madeleine K. Albright**,** Cohen**,** William S , "Preventing Genocide, A Blueprint for US Policy-Makers, Genocide Prevention Task Force", published in 2008 by the United States Holocaust Memorial Museum**,** p. 36 available at **<**http://www.ushmm.org/genocide/taskforce/pdf/report.pdf> (visited on 23 June 2012).

[233] Heidenrich G. John, *How to Prevent Genocide: A guide for Policymakers, Scholars, and Concerned Citizen*, Westport, Connecticut London: Praeger, 2001, p. 80. Though this author agrees that there is a relationship between economic problems and genocide, he finds that their causality to genocide is not always straight forward. More specifically, he does not agree with those who base this notion of causality on the idea that if Germany's Weimar Republic had not suffered through hyperinflation and then the Great Depression, leaving Germans desperate enough to seek a radical change in their lives, the Nazis might never have been elected to power. For him, Hitler achieved power as much through luck and political tactics as he did through economics.

[234] Midlarsky, I. Manus, *The Killing Trap: Genocide in the Twentieth Century*, Cambridge University Press, 2005, p. 264.

[235] Idem, p. 265.

between haves and have-nots.[236] When this inequality is based on the differences in racial, ethnicity grounds, *i.e* when some groups are given many more privileges than others or when a group is totally excluded (deprived) from the access to the resources, it may create tensions that may lead to other problems that may soon or late lead to genocide. That is why, Ervin Staub argues that poverty itself is not primarily instigator of violence that might lead to genocide, but when some groups of people are rendered poor through deprivation and injustice, it can be more important[237] and this can contribute to the development of the sentiment of animosity that might lead to conflict (armed or not) that can on its turn lead to genocide. In fact, this can be practiced up to a level that members of a privileged group may find themselves superior to other groups and treat other groups like inferior and the logical consequence from that is that there will be an antagonism between the groups. The frustration of the unprivileged groups may cause them to react against the privileged group and this may lead to genocidal conflict.[238]

At this point it is again clear that when the differences in identity mentioned before have implications for example on how some groups access to basic needs, access to services and employment etc, the risk of genocide becomes even higher. But again this may not itself lead to genocide if not associated with others. And even where there is no scarcity of resources, other factors like political scarcity may create inequalities in the distribution of those resources as it will be explained below.

1.4. Political scarcity

It has been argued in literature that political problems may play a big role in creating an environment favourable to genocide. For instance Smith explained political problems in what he qualified as political scarcity.[239] According to him, this means that there may be sufficient resources to meet everyone's needs, but the allocation of resources favour certain groups and

[236] Ibidem.

[237] Staub, Ervin, "The Origins and Preventions of Genocide, Mass Killing and Other Collective Violence", *Journal of Peace Psychology*, Vol. 5,No. 4, 1999, pp. 303-336, p. 305.

[238] For extensive analysis see for instance Stewart, Frances., "Economic and Political Causes of Genocidal Violence: A Comparison with Findings on the Causes of Civil War". MICROCON Research Working Paper 46, Brighton: MICROCON, 2011, pp. 20, 21, 27, 30.

[239] Smith, W. Roger, "Scarcity and Genocide", in Dobkowski Michael N. and Wallimann, Isidor (eds), *The coming Age of Scarcity, Preventing Mass Death and Genocide in the Twenty-first Century*, Syracuse University Press, New York, 1998, p. 202.

discriminates against other groups.[240] So, no matter how wealthy or poor a country might be, some groups may be singled out and deprived of resources because of their membership of a certain group. Helen Fein and Frances Stewart have argued that authoritarian governments are most likely prone to committing genocide compared to democracies which are least likely.[241] Some of the means that authoritarian regimes use is the exclusionary ideology. On this political system, Barbara Harff wrote for instance that Elite ideologies are crucial determinants of their choices that may lead to genocide.[242] She explained that episodes of genocide become more likely when the leaders of regimes and revolutionary movements articulate an exclusionary ideology, a belief system that identifies some overriding purpose or principle that justifies efforts to restrict, persecute, or eliminate certain categories of people.[243] Other sources have mentioned other political motivation for political leaders in given states to encourage divisions among national, ethnic, racial or religious groups. The example is where a political party's access to political power and its retention of that power are facilitated and even dependent upon the party maintaining a voter constituency through the use of racist policies that divide groups of the population from each other.[244] But the access to power may come also from any other means like revolutionary war; military coups etc.[245] In any case what is important here is the power dominance of one group over other groups. The source of the risk of genocide may be twofold. First, that the dominant group may intend to eliminate other groups in order to have the guarantee of continuation of dominance. Second, the underprivileged group may feel discriminated and find their way to get to power by any means. In both cases, the most means that they tend to use is the war which might be itself another factor susceptible of leading to genocide. That is how it went in Bosnia and Rwanda. In Bosnia, it appears that the object of the war on at least one side was to kill or expel the majority of a group in order to create an

[240] Ibidem.
[241] Fein, Helen, "Civil Wars and Genocide: Paths and Circles", *Human Rights Review*, April-June 2000, pp.49-61. See also Stewart, Frances., "Economic and Political Causes of Genocidal Violence: A comparison with findings on the causes of civil war". MICROCON Research Working Paper 46, Brighton: MICROCON, 2011, p. 34.
[242] Harff, Barbara, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955", *American Political Science Review,* Vol. 97, No. 1, 2003, p. 63.
[243] Ibidem.
[244] Efforts of the United Nations system to prevent genocide and the activities of the Special Adviser to the Secretary-General on the Prevention of Genocide, Report of the Secretary-General, 18 February 2009, A/HRC/10/30, paras 3- 10, available at <http://www.un.org> (visited on 31 January 2012).
[245] Harff, Barbara, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955", *American Political Science Review,* Vol. 97, No. 1, 2003, p. 62.

ethnically pure state. In Rwanda, the genocidaires aimed for total transformation of their society by killing all the Tutsis which would have guaranteed the Hutu to stay on power all the time.[246] In the discussion below, this link between war and genocide will be explained further.

1.5. Armed Conflicts

The presence of underlying conditions of stress due *inter alia* to deprivation of resources, power inequalities or other inequalities and other factors shown above based on ethnic, religious or racial differences[247] may lead to an armed conflict. Helen Fein gives an interesting explanation on the linkage between war and genocide. She wrote that genocide virtually always occurs within a context of war, and sometimes triggers war or the renewal of war. [248] She explains this in two ways: First, the war releases aggression, allows the perpetrator to mask the crime and to blame the victim for the war; indeed, the victim group may be the enemy.[249] Second, wars lead to crises that destabilize society and may lead to the rise of revolutionary elites with genocidal ideologies which seek to reconstruct the society to fit the new order imposed by the state.[250] As confirmed in subsequent sources, such armed actors may claim to be fighting to defend the population group, turn against other population groups or armed forces.[251] As the past can tell, the existence of such armed actors has served as a motivation and excuse for human rights violations, including killings, arbitrary arrest and discrimination, committed against the civilian population that the armed actor claims to represent. Also, refugees from genocide may become warriors determined to overthrow the government in order to go home again like in the case of Rwanda.[252]

Indeed, when such wars occur especially in the context where other risk factors mentioned above

[246] Fein, Helen, "Civil Wars and Genocide: Paths and Circles", *Human Rights Review*, April-June 2000, pp.49-61, p. 49.

[247] Chandra, Lekha Sriram and Wermester,Karin, *From Promise to Practice, Strengthening UN Capacities for the Prevention of Violent Conflict*, Lynne Rienner Publishers, Boulder, London, 2003, p. 21.

[248] Fein, Helen, "Civil Wars and Genocide: Paths and Circles", in *Human Rights Review*, April-June 2000, pp.49-61, p. 49

[249] Ibidem.

[250] Ibidem.

[251] Efforts of the United Nations system to prevent genocide and the activities of the Special Adviser to the Secretary-General on the Prevention of Genocide, Report of the Secretary-General, 18 February 2009, A/HRC/10/30, paras 3- 10, available at <http://www.un.org> (visited on 31 January 2012).

[252] Fein, Helen, "Civil Wars and Genocide: Paths and Circles", *Human Rights Review*, April-June 2000, pp.49-61, p. 49.

are present, genocide becomes much likely. Manus I Midlarsky also affirmed this link by giving the examples that it was during wars that the Ottoman Empire during World War I, Germany during World War II, and Rwanda in 1994 engaged in the most destructive form of identity conflict, genocide, respectively against the Armenians, Jews, and Tutsi.[253] Bosnia in 1995, Cambodia in the 1970s and allegedly Darfur in the 2000s are other examples.

1.6. Human rights violations in an atmosphere of impunity

It is generally agreed by many scholars and observers that genocide is always preceded by successive human violations which are marked by impunity. Those human rights may be of any kind but the rights violated in such contexts are mostly related to the right to equality and to life. The consequence of impunity in case of violations of human rights violations is not only that it makes it impossible to prevent their continuation but also that when they continue to occur and remain unpunished they may grow and lead to a big conflict either armed or not and likely lead to genocide especially when they are ethnically, racially, religiously or nationally based. To show the link between impunity and conflict that may lead to genocide Otto Trifferer recalled Adolf Hitler's argument to convince his commanding generals in early 1938 to accept his plan, to occupy foreign territories like Czechoslovakia in order to gain more space for the development of the So-called "Aryan race".[254] Hitler argued against his commanders" objections that "Who after all thinks of the Armenians?"[255] He was recalling correctly that the world at the time of the peace treaties of Sèvres (1920) and Lausanne (1923) and even when he presented and started to execute his plans, was not ready to investigate and prosecute genocide committed by states respectively by their organs.[256] He referred to the case of acts committed against Armenians whose authors had not been punished to convince his generals to accept his plan. In Rwanda, it is generally agreed that the culture of impunity of perpetrators of human rights violations based on ethnicity that characterised the colonial period and the two regimes that followed has played a leading role in the genocide that occurred in 1994. The episodes of unpunished massacres committed against the Tutsi ethnic group that happened in 1959, 1963-1964, 1973, 1990-1993

[253] Midlarsky, I. Manus, *op.cit*, p. 91.
[254] Otto, Trifferer, "Genocide, its Particular Intent to Destroy in Whole or in Part", *Leiden Journal of International Law*, Vol. 14, No. 2, 2001, 399-408, p. 400.
[255] Ibidem.
[256] Ibidem.

did not only pave the way to genocide but also contributed to its magnitude in that it made the public participation high because of the then assurance that no prosecution would follow.[257]
The role of the elite and leaders in denying the enjoyment of human rights to some groups and in the impunity before and during armed conflicts is an important factor that creates opportunity for tensions to emerge which may soon or late result into genocide.[258]

1.7. Preliminary conclusions

To sum up this section, let it be said that genocide is only possible where there exist different groups (racial, national, religious and ethnical). Since there is no place in the world where a population is composed of people who share everything, this factor exists everywhere. But it cannot be a cause of genocide alone. It serves as a source from where other factors draw their emergence. Those other factors include a situation of difficult life due to economic problems. In low or middle income states it becomes easier for the perpetrators to mobilise people on the national, ethnic, racial or religious ground, to resort to mass killings in order to acquire wealth. But regardless of the economic situation, leaders in some states may resort to the deprivation of resources or the injustice/inequalities in the allocation of those resources even where the state is wealthy. This usually happens in states in which political scarcity is present. In fact, authoritarian governments are most likely prone to committing genocide compared to democracies especially when elites/leaders use divisions based on the differences among the population in order to dominate other groups and to stay on power. These kinds of regime types often result in armed conflicts which may provide an environment favourable to genocide. In all these situations, the impunity of human rights violations becomes an incentive for potential genocide perpetrators. This atmosphere in which the rule of law is absent becomes a womb in which the development

[257] See for example Melvern, Linda, *op.cit*, p. 18 and Lugan B., *Histoire du Rwanda, De la Préhistoire à nos Jours*, Bartillat, 1997, pp. 434-435, Ruvebana, Etienne, "Victims of the Genocide Against the Tutsi in Rwanda", in Letschert, Rianne et al.(ds), *Victimological Approaches to International Crimes: Africa*, Intersentia, Antwerpen, 2011, pp. 89-93. The massacre of 1959 occurred in what was called the Hutu Social Revolution. The massacres of 1963, 1964 followed some attacks by Tutsi refugees. The massacre of 1973 occurred after a putsch by General Habyarimana and the slaughters of 1990, 1991, 1992, 1993 followed the attack by the RPF.
[258] A study by the Jacob Baulstein Institute in cooperation with the Office of the Special Adviser on the prevention of genocide elaborated much more on these risks and special circumstances with very much emphasis *inter alia* on human rights violations. See Compilation of Risk Factors and Legal Norms for the Prevention of Genocide, Study by the Jacob Blaustein Institute for the Advancement of Human Rights, in cooperation with the Office of the Special Adviser on Prevention of Genocide, United Nations, 2011, available at <http://www.jbi-humanrights.org/files/jbi-compilation-on-genocide-prevention.pdf> (visited on 31 January 2012).

of genocidal germ easily and healthily grows. The lawless environment that permits massacres can also lead to genocide because when those massacres are unpunished, it serves as a motivation to go on and on.

Having shown above some of the factors in the process to genocide the idea has not been of course to say that there is a uniform formula of the development of all conflicts that lead to genocide because each society might have its particularities and the factors may not be identical for all conflicts. Likewise, no single factor among those shown above can be cause of genocide alone. And also it cannot be concluded that where there are those factors, genocide becomes an absolute result. Concluding that way would mean for instance that all poor states will commit genocide and that genocide is not possible in rich states (yet Germany was not a poor country but the holocaust happened.). It would also mean that wherever there is no democracy, good governance and rule of law, genocide is inevitable and wherever there is democracy, good governance or rule of law genocide can never happen. However, it is logical to say that if no genocide would be likely where the said factors are inexistent then it follows that those factors are susceptible of causing genocide. The illustration of drinking alcohol as a cause of accident given by Bellamy is relevant to explain this. He said that "drinking and driving does not make a specific car crash inevitable, but it makes it much more likely. As such, it can safely be said that alcohol causes car crashes that would not occur otherwise."[259] Likewise, for genocide, there might be no single direct factor to cause it but since for it to happen it is preceded by those factors, it is correct to say that they may contribute to causing genocide. The factors of genocide are complementary in leading to genocide. In consideration of these factors, the next section explains the risks of genocide at different phases.

[259] Bellamy, Alex J. and Sara, E. Davies, *Global Politics and the Responsibility to Protect: From Words to Deeds*, Routledge, London and New York, 2010, p. 95. Another metaphor that can explain this is the one used by the Institute for Work and Health in what was called *going upstream*: "Imagine you are standing beside a river and see someone drowning as he floats by. You jump in and pull him ashore. A moment later, another person floats past you going downstream, and then another and another. Soon you are so exhausted; you know you will not be able to save even one more victim. So you decide to travel upstream to see what the problem is. You find that people are falling into the river because they are stepping through a hole in a bridge. Once this is fixed, people stop falling into the water". Though this hole may not be the only factor causing the fall (there may be other contributing factors like the carelessness and darkness), but it may play a big role in that. Institute for Work and Health, Primary, Secondary and Tertiary Prevention, available at <http://www.iwh.on.ca/wrmb/primary-secondary-and-tertiary-prevention> (visited on 14 May 2013).

2. Understanding the risks of genocide in different phases[260] of the process to genocide

Gregory H. Stanton has suggested an analytical model for the process to genocide. He explained it through eight stages viz., classification, symbolization, dehumanization, organization, preparation, polarization, extermination and denial.[261] This model is the main basis for this section. However, basing on the analysis of other sources related to the process to genocide, this model will be adjusted to the development and context of this work. Some stages will be fused while others will be added to explain the process to genocide much more comprehensively. This section shows the risk of genocide in nine phases of the process to genocide. Explaining this process in those phases will later help in the determination of the moment (period), means and person to prevent genocide at each phase. These are social categorisation (which fuses classification and symbolisation of Stanton's model), discrimination (not in Stanton's model), dehumanisation, propaganda for the elimination (not in Stanton's model *per se*), preparation, targeted massacres (not in Stanton's model), elimination (genocide), absence of or late intervention to halt genocide(not in Stanton's model), and the denial and impunity of genocide.

2.1. Social categorisation

As observed by Leo Kuper, since genocide is a crime against a collectivity, it logically implies an identifiable group as victim.[262] Numerous other scholars from genocide studies, sociology and social psychology have argued that the social categorisation is a phase that may lead to genocide.[263] Among them, Gregory Stanton has written that at this phase people are classified

[260] For the purpose of this work, phase and stage means exactly the same and may be used interchangeably.

[261] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996. Stanton, H. Gregory is the James Farmer Professor of Human Rights, The University of Mary Washington, Fredericksburg, Virginia, President, Genocide Watch, Chairman, The International Campaign to End Genocide, Director, The Cambodian Genocide Project, Vice- President, International Association of Genocide scholars, available at <http://www.genocidewatch.org> (visited on 24 April 2011).

[262] Kuper, Leo, *Genocide, its Political Use in the Twentieth Century*, Yale University Press, New Haven and London, 1981, p. 53.

[263] See for example M. Deutsch, "Justice and Conflict", in M. Deutsch& P.T Coleman(eds.), *The Handbook of Conflict Resolution*, San Francisco, Jossey-Bass, 2000, pp 41-64, R.D, Crelinsten &A.P. Schmid, *The Politics of Pain, Torturers and their Masters*, Leiden, 1993, P.Glick, "Sacrificial Lambs Dressed in Wolves"Clothing", in L.S Newman &R. Erber(eds), *Understanding Genocide: The Social Psychology of the Holocaust*, Oxford University press, 2002, pp. 113-142, N. Haslam, "Dehumanisation: An Integrative Review", *Personality and Social Psychology*

into ""us and them" by ethnicity, race, religion, or nationality: German and Jew, Hutu and Tutsi.[264] For instance, in 1933 (during the colonization in Rwanda), the Belgian administration organised a census and teams of bureaucrats who measured the people's height, the length of their noses, the shape of their eyes and then everyone was classified either Tutsi, if s/he is tall and slim or Hutu if s/he is shorter and broader.[265] Identities cards were issued to each individual mentioning the ethnicity. It may not be deduced that this census was meant to incite Hutu to commit genocide against the Tutsi, but this permanent line put between the groups and the implications related to that, contributed to the antagonism between the two groups that later, combined with other things, led to genocide. That means that this phase alone would naturally not lead to genocide if not given effect by (an) other phase(s), but it may for instance lead to discrimination which is among other phases as explained next.

2.2. Discrimination

As Ulrich Wagner wrote, the social categorisation which gives the basis for defining groups may be followed by devaluation of some groups, intensified by intergroup injustice in the allocation of resources as well as the injustice on how the participation in decision making process is distributed which increases even much more the devaluative and hostile behaviour between groups.[266] When there is that ideology on distinction between different groups, the underprivileged group will be discriminated in different sectors by the leaders who are themselves produced by the society with the same ideology or who come to power through a revolution or military coup, after having been victims of a similar treatment in the past or who are just bad. For instance, during the colonisation in Rwanda and especially after the census of 1933, Hutu masses that were considered as inferior were subjected to forced labour and discrimination in all walks of life.[267] A study by the Jacob Baulstein Institute in cooperation with the Office of the Special Adviser on the prevention of genocide elaborated much more on

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Review, Vol. 10, No. 3, 2006, pp. 252-264, p. 252, Safferling, Ch. And Conze, E., *The Genocide Convention Sixty Years After its Adoption*, T.M.C Asser Press, The Hague, 2010, pp. 99-107.

[264] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).

[265] Melven, Linda, *op.cit*, p. 11

[266] Wagner, Ulrich, "Genocide Prevention and the Dynamics of Conflict", in Ch. Safferling and E. Conze, *The Genocide Convention Sixty Years After its Adoption*, T.M.C Asser Press, The Hague, 2010, pp. 101-102.

[267] Ibidem.

these risks and special circumstances with very much emphasis *inter alia* on discrimination.[268] Since these practices of discrimination against some targeted groups are either done by state leaders or are supported by them, they grow and lead to other phases that may lead to genocide. In some cases, the "Us v. Them" grows bigger even to the level of dehumanisation. However, though discrimination may precede dehumanization, it may continue with it.

2.3. Dehumanisation

Wagner qualifies dehumanisation as an extreme or strong kind of bias in the process of which one group and its members are no longer perceived by another as being humans.[269] According to Stanton, dehumanisation is a denial of the humanity of others and is the step that permits killing with impunity.[270] In other words, it is a denial of human status, the denial of human individuality and significance of the members of the targeted group.[271] There is a belief or an ideology that says the targeted group is less than human.[272] This ideology "dehumanizes" members of that group and justifies violence against it.[273] Victims are not considered as belonging to the same human race as the oppressors.[274] Glick also notes that more often, dehumanisation is a collective process during which societies make ideologies available that classifies a certain group as infrahuman.[275] Victims are treated as less than human, given disgusting names. Nazi propaganda called Jews "rats" or "vermin"; Rwandan Hutu hate radio referred to Tutsis as "cockroaches." The targeted group is often likened to a "disease", "microbes", "infections" or a "cancer" in the body politic. That is what explains why later when genocide happens; bodies of genocide victims

[268] For details see the Compilation of Risk Factors and Legal Norms for the Prevention of Genocide, Study by the Jacob Blaustein Institute for the Advancement of Human Rights, in cooperation with the Office of the Special Adviser on Prevention of Genocide, United Nations, 2011, available at <http://www.jbi-humanrights.org/files/jbi-compilation-on-genocide-prevention.pdf> (visited on 31 January 2012).
[269] Wagner, Ulrich, *op.cit*, p. 201
[270] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).
[271] Ibidem.
[272] United Nations Secretary-General Ban Ki-Moon, "Never Again": Preventing Genocide and Punishing those Responsible, 2007, available at <http://www.un.org> (visited on 31 January 2012).
[273] United Nations Secretary-General Ban Ki-Moon, "Never Again": Preventing Genocide and Punishing those Responsible, 2007, available at <http://www.un.org> (visited on 31 January 2012)
[274] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).
[275] P. Glick, "Sacrificial Lambs Dressed in Wolves" Clothing", in L.S Newman &R. Erber (eds), *Understanding Genocide: The Social Psychology of the Holocaust*, Oxford University press, 2002, pp. 113-142. See also Wagner, Ulrich, *op.cit*, p. 102.

are often mutilated to express this denial of humanity.[276] Furthermore, not only are these groups perceived as infrahuman, but scholars have found that they are also, in some cases, perceived as security threat to the perpetrators (existential threat to them). [277] Both situations produce the same result (genocide).

Dehumanisation is an important phase in the process that leads to genocide because ideologically, the genocidal group claims to purify the society as a justification. So the ideology grows deeper to convincing one group that another deserves nothing but death and this is an ideological legitimation to kill. As was observed by Leo Kuper, the ideological legitimation is a necessary pre-condition for genocide.[278] Though it cannot be concluded that where this phase has been reached the genocide will definitely happen, where there is dehumanization, genocide becomes more likely. But again, it cannot be said that wherever there is dehumanisation there must be genocide or that genocide cannot happen without dehumanisation. The availability of the dehumanising ideology is important in the process to genocide but may not be enough to cause genocide if it is not followed by further actions. As it will be seen next, it might need a campaign to spread the ideology out for it to successfully lead to genocide.

2.4. Propaganda for the elimination of the targeted group(s)

In fact, for the dehumanisation to have its effect, it needs propaganda to spread out the hate ideology done either by leaders themselves or authorised, condoned or supported by them. Indeed, this is an important phase in the whole process because it helps the elite members of the eliminating group to disseminate the dehumanising ideology and to make other members of that group believe in that hatred which is a motivating prior factor to act ruthlessly. The rapid and most effective way of spreading out the hate ideology is through hate speeches that are of course expressed in words.[279] The ICTR has given an explanation on the dangerosity of hate speech,[280]

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[276] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).

[277] Waever, Ole, "The EU as a Security Actor, Reflections From a Permistic Constructivist on Post-Sovereign Security Orders", in M. Kelstrup&M.C. Williams (eds.), *International Relations Theory and the Politics of European Integration*, Routledge, London , 2000, p. 251, Wagner, Ulrich, *op.cit*, p. 103.

[278] Kuper, Leo, *Genocide, its Political Use in the Twentieth Century*, Yale University Press, New Haven and London, 1981, p. 84.

[279] See Austin, John Langshaw, *How to Do Things With Words*, Oxford University Press, Oxford, 1962. In his speech act theory, Austin rightly demonstrated how people do things by words.

[280] International Criminal Tribunal for Rwanda, Prosecutor v. Ferdinand Nahimana, Jean Bosco Barayagwiza and

(which can apply to any hate messages as well):

> "hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm."

The hate speeches and other hate messages are spread out through the media or at rallies ("hate media" and "hate messages"),[281] or through any other way of communication such as internet, social media and telephone calls and text messages.

I will focus here on the role of the media. This role of the media in spreading out the hate messages has been shown in literature. One of the prominent examples of such propaganda is about the Nazi anti-Semitic doctrine that was disseminated through *Der Stuermer* newspaper and other publications, as well as in the speeches and public declarations of other Nazi leaders.[282] For instance, in a September 1938 diatribe in *Der Stuermer*, editor Julius Streicher described the Jew "as a germ and a pest, not a human being, but a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind".[283]

In May 1939 an article by him again was proclaimed in *Der Stuermer* that:

> "A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect: Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch".[284]

He also published: "If the danger of the reproduction of that curse of God in the Jewish blood is finally to come to an end, then there is only one way the extermination of that people whose

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Hassan Ngeze, Case No. ICTR-99-52-T, 3 December 2003, para. 1072, available at <http://www.ictr.org/69.94.11.53/default.htm> (visited on 16 March 2011)

[281] United Nations Secretary-General Ban Ki-Moon, "Never Again": Preventing Genocide and Punishing those Responsible, 2007, available at <http://www.un.org> (visited on 31 January 2012).

[282] France et al. v. Goering et al., (1996) 22 IMT 203, p. 492, cited by Schabas, William, *Genocide in International Law: the Crimes of Crimes*, Cambridge University Press, Cambridge, 2000, p. 40.

[283] Ibidem.

[284] Ibidem.

father is the devil." No defence could justify these remarks!"[285]

Another prominent example is about the famous newspaper *Kangura* in Rwanda as well as the "*Radio Television Libre des Mille Collines (RTLM)*". In an article entitled Appeal to the Conscience of the Hutu in which the Hutu were urged to cease feeling pity to the Tutsi, *Kangura* published in December 1990 in its No. 6 its ten Hutu Commandments.[286] These Ten Commandments for instance directly portrayed the Tutsi woman as a femme fatale, and the message that Tutsi women were seductive agents of the enemy were also conveyed repeatedly by RTLM after it was created.[287] Other publications by *Kangura* include an article which stated that,

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[285] Sean, O'Brien, "International Human Rights Law", Case materials, Summer 2008, p. 51, available at <http://www1.law-umkc.edu> (visited on 16 March 2011)

[286] These commandments were entirely recalled in the Nahimana et al. case, paras. 138- 139.They are the following:

1. Every Hutu male should know that Tutsi women, wherever they may be, are working in the pay of their Tutsi ethnic group. Consequently, shall be deemed a traitor:
   - Any Hutu male who marries a Tutsi woman
   - Any Hutu male who keeps a Tutsi concubine
   - Any Hutu male who keeps a Tutsi his secretary or protégé
2. Every Hutu male must know that our Hutu daughters are more dignified and conscientious in their role of woman, wife and mother. Are they not pretty, good secretaries and more honest!
3. Hutu woman, be vigilant and bring your husbands, brothers and sons back to their senses.
4. Every Hutu male must know that all Tutsi are dishonest in their business dealings. They are only seeking ethnic supremacy. Shall be consequently considered a traitor, any Hutu male:
   - who enters into a business partnership with Tutsi
   - who invests his money or State money in a Tutsi company;
   - who lends to, or borrows from a Tutsi;
   - who grants business favours to Tutsi (granting of import licenses, bank loans, building plots, public tenders…)
5. Strategic positions in the political, administrative, economic, military and security domain should, to a large extent, be entrusted to Hutus
6. In the education sector, (pupils, students, teachers) must be in the majority Hutu
7. The Rwandan Armed forces should be exclusively Hutu. That is the lesson we learned from the October 1990 war. No Hutu must marry a Tutsi woman.
8. Hutus must cease having any pity for the Tutsi
9. The Hutu male, wherever he may be, should be united, in solidarity and be concerned about the fate of their Hutu brothers:
   - The Hutu at home and abroad must constantly seek friends and allies for the Hutu Cause, beginning with their Bantu brothers
   - They must constantly counteract Tutsi propaganda
   - The Hutu must be firm and vigilant towards their common Tutsi enemy.
10. The 1959 social revolution, the 1961 referendum and the Hutu ideology must be taught to Hutus at all levels. Every Hutu must propagate the present ideology widely. Any Hutu who persecutes his brother for having read, disseminated and taught this ideology shall be deemed a traitor.

[287] RTLM: Radio Télévision Libre des Mille Collines was the Hate radio in Rwanda that was used by Hutu extremists before and during the genocide to incite the majority Hutu ethnic group to wipe out the minority Tutsi

"A Cockroach Cannot Give Birth to a Butterfly"[288] meaning that if the Tutsi was enemy, his child will be not different and should have no different treatment.

The link between the hate propaganda and the occurrence of genocide has been shown in case-law. For instance, in the Media case, the ICTR has rightly recalled the jurisprudence of the Streicher case in 1946 by the International Military Tribunal at Nuremberg which held Julius Streicher directly responsible for crimes against humanity because of his speeches and publications in the Nazi newspaper *Der Stuermer*[289] albeit they were published before the start of the elimination of Jews *per se*. The ICTR joined the IMTN in the opinion that the speeches and publications were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people.[290] For instance, the statement of the Nazi press that : "in the case of the Jews they are not merely a few criminals (as in every other people) but all the Jews rose from criminal roots, and in its very nature it is criminal""[291] contributed in infecting the minds of Germans. Comparing with the role of the media in the genocide in Rwanda the court put that: "In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed,[292] confirming that expressions of ethnic hatred constitute the crime of direct and public incitement to commit genocide.[293] However, depending on the acts committed and situation, some acts may qualify as persecution.

It is clear that the hate propaganda by the media is crucial instruments and means through which the genocide can easily be prepared and committed. It is an important phase that, if not

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ethnic group. See also the letter KA02 1888 of the Rwandan Parliamentarian Rucagu Boniface published by Kangura No 46 of July 1993, pp. 15-16, available at <http://xa.yimg.com/kq/groups/10686316/1650647710/name/Rucagu%20muri%20Kangura.pdf> (visited on 16 March 2011). About the role of the RTLM, Akhavan has written that "without the vital instrument of a radio broadcast at their disposal in the months leading to the mass-murders of 1994, the *génocidaires* would have had great difficulty in creating the necessary context for the extermination of the Tutsi minority". See Akhavan, Payam, "Preventing Genocide: Measuring Success by What Does Not Happen", *Criminal Law Forum,* Vol. 22, 2011, pp. 1–33, p. 7.

[288] Idem, para. 1078.

[289] Nahimana et al. case, para. 1073.

[290] Ibidem.

[291] Goldhagen, Daniel, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, Knopf, New York, 1996, p. 394.

[292] Nahimana et al. case, para. 1073.

[293] Idem, para 107.

addressed, it may lead to genocide. However, the newly available other means of communication may play also a big role in disseminating the hate messages. In fact, if the media has been focused on in literature it is not that it is the only means that may reach a big audience it is because it is the one which was much more available before and during the time the genocides referred to in this work happened. The social media accessed through internet is nowadays accessible to huge number of users and may be available to those who want to disseminate hate messages. The most known of available social media include Facebook, Twitter, Weblogs and Youtube which are accessible thanks to internet. The Arab Spring may serve as a good example of how through the social media, messages can reach a huge number of the population.[294]

The hate ideology propagated through media and other means of communication may continue up to convincing some groups to turn against the targeted groups. But this may need preparation as it will be shown next.

2.5. Preparation

This phase is when some acts susceptible of making genocide possible are performed. Stanton argued that they include identification,[295] *i.e*, for instance, lists of victims are drawn up, houses are marked, maps are made, and individuals are forced to carry ID cards identifying their ethnic or religious group.[296] In Germany, the identification of Jews, defined by law, was performed by a methodical bureaucracy. In Rwanda, despite the fact that identity cards showed each person's ethnicity, lists of Tutsi were drawn up. In his cable to the UN Secretariat four months before the genocide in Rwanda (11 January 1994), the commander of United Nations Mission for Rwanda (UNAMIR), Canadian General Romeo Dallaire, warned of a plan for the extermination of the Tutsi population by indicating *inter alia* that the lists of Tutsis which were being established were for their extermination.[297]

However, identification is not the only form of preparation. There can also be a creation of

[294] For more about the role of the Social Media in the Arab Spring see Philip N. Howard and al., "Opening Closed Regimes, What Was the Role of Social Media During the Arab Spring? Project on Information and Technology and Political Islam", Working Paper 2011, available at <www.pITPI.org> (visited on 20 May 2013).

[295] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).

[296] Ibidem.

[297] Schabas, A. William, *Genocide in International Law: the Crime of Crimes*, Cambridge University Press , Cambridge, 2000, p. 475. See also Heidenrich G. John, *op.cit*, p. 89

gangs, mobs or militias to be used later in genocide. Stanton has made it a distinct stage (phase) that he called organisation but since the acts he mentioned in it constitute preparatory acts as well, they may be put under this phase. These militias are trained to have the capacity to execute mass murders. For instance, in the period before the genocide in Rwanda, Dallaire reported that in twenty minutes the personnel of President Juvenal Habyarimana could kill up to a thousand Tutsis.[298] These personnel included the army, police and the militias.

Another form of preparation may be the purchase of arms to be used in the execution of genocide. In the Dallaire's cable to the UN mentioned above, he reported that arms had been stockpiled in secret locations including pistols, rifles, a half million machetes and hundreds and thousands of hoes, axes, hammers and razor blades.[299] Documents prove that the machetes came from China, supplied between 1992 and 1994 by a company called Oriental Machinery.[300] Some arms were distributed many months before April 1994.[301] By the time the genocide began, 85 tons of munitions are thought to have been distributed, one machete being given to every third adult Hutu male.[302]

Stanton added that in its most extreme form, preparation includes construction of extermination camps as in the Nazi-ruled Europe, or conversion of existing buildings -temples and schools – into extermination centres in Cambodia.[303] In Rwanda also, large holes had been digged to serve as mass graves later in genocide. At this level, the crime of conspiracy to commit genocide as well as other crimes may already be constituted and other crimes may follow.

2.6. Targeted massacres

Literature shows that genocide is almost always preceded by some killings targeting a given group either on some individuals belonging to a given group in different places or on a group at some specific places.[304] For instance, Nzongola- Ntalaja asserted that the 1994 genocide in

[298] Schabas, William A., *Genocide in International Law: the Crime of Crimes*, Cambridge University Press , Cambridge,2000, p. 475.
[299] Melvern, Linda, *op.cit*. p. 64, 65.
[300] Ibidem.
[301] Grúnfeld, Fred and Huijboom, Anke, *op.cit*, p.87.
[302] Melvern, Linda, *op.cit*. p. 64, 65
[303] Stanton, H. Gregory, The Eight Stages of Genocide, 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011). See also examples in Grúnfeld, Fred and Huijboom Anke, *op.cit*, p. 86.
[304] See Grúnfeld, Fred and Huijboom, Anke, *op.cit*, p. 86. See also Heidenrich, G. John, *op.cit*, p.89

Rwanda was a logical outcome of an ideology and a politics of exclusion that had generated earlier episodes of large scale massacres of the Tutsi beginning in 1959.[305] Also, following the killings targeting individual as well as groups of Tutsi at different places in Rwanda and at some specific places that had happened in and before 1993, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions warned in March 1993 about acts of genocide against the Tutsi.[306] Genocide may also be preceded by killings of moderate people because, though not belonging to the targeted group, they are targeted because of their likelihood to obstruct the extermination of that targeted group.[307] This may escalate to a serious level which may lead to the extermination of a group as it will be seen below.

2.7. Elimination (genocide per se)

This is the phase when the actual genocide is being executed. It is when the intent to destroy the targeted group can be seen from what is happening on the ground.[308] As Stanton observed, since the victims are not considered human anymore (are seen as vermin, rats or cockroaches), at this point the purpose becomes to exterminate all the members of the targeted group.[309] Being not considered as persons explains the way targeted members are killed: often including children, their bodies are mutilated, buried in mass graves or burnt like garbage.[310]

2.8. Absence of action to halt genocide

It has been extensively argued in literature that the assurance that no external force would obstruct the perpetrators of genocide constitutes one of the incentives to committing genocide.

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[305] Nzogola-Ntalaje, Georges, "Civil War, Peacekeeping and the Great Lakes Region", in Ricardo, Rene Laremont, *The Causes of Warfare and the Implications of Peacekeeping in Africa*, Heinemann, Portsmouth, 2002, p. 91.

[306] Report by the Special rapporteur on extrajudicial, summary arbitrary executions on the mission he conducted in Rwanda from 8 to 17 April 1993, in UN DOC E/CN.4/1994/7/Add.1 of 11 August 1993 paras. 78-80. For further details see also Schabas, W A., *Genocide in International Law: the Crime of Crimes*, 2nd edition, Cambridge University Press , Cambridge, p. 9

[307] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).

[308] It is for instance when the "final solution" began in Germany or when genocide started to be committed in the whole country in Rwanda.

[309] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).

[310] Ibidem.

The examples of Rwanda and Bosnia are among the telling ones.[311] Numerous scholars and observers have argued for instance that had there been action by the international community in Rwanda or in Bosnia, genocide would have not occurred or it would have at least been halted at its start, thus mitigating the consequences.[312] In the case of Rwanda, it is believed that the Belgian withdrawal of its troops from Rwanda and the Security Council decision to significantly reduce the number of UNAMIR troops gave a green light to the perpetrators of genocide since they became assured that no one would obstruct their plan.[313]

2.9. Denial of genocide and impunity of its perpetrators

The aftermath of genocide is a very fragile situation with high risk of a new conflict due to many problems caused by the genocide. It is characterized by cessation of hostilities but also with a high risk of a new conflict due to large number of refugees and internally displaced persons…and a vast security apparatus on one or more sides that threatens to reignite conflict.[314] The risk may be even higher if that genocide is denied and therefore unpunished or not denied but unpunished.

The denial of genocide is not only a destruction of the truth but is also likely to cause its repetition.[315] The analogy with the example of disease may be helpful to explain the consequences of denial on future genocide. When someone is recovering from a disease, there is a need of a strong mechanism to fight its consequence instead of hiding that it occurred, to avoid the relapse. When such a mechanism is absent, there is a risk of reoccurrence.

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[311] Grúnfeld, Fred and Huijboom, Anke, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders*, Martinus Nijhoff Publishers, Leiden, 2007, Verschave, Francois-Xavier, *La Complicité de Genocide? La Politique de la France au Rwanda,* La Decouverte, Paris, 1994, Wallis, Andrew, *Silent Accomplice: The Untold Story of France's Role in Rwandan Genocide*, I. B Tauris, 2006, Des Forges, Alison, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, 1999, Dallaire, Romeo., *Shake Hands with the Devil, the Failure of Humanity in Rwanda,* Arrow Books, London, 2004.

[312] Grúnfeld, Fred and Huijboom, Anke, *op.cit*, p. xi. See also International Panel of Eminent Personalities, *Preventable Genocide,* Statement by members to the media on the release of their report, July 7 2000, available at <http://www.theperspective.org/rwanda.html> (visited on 26 February 2013). See Parliamentary commission of inquiry regarding the events in Rwanda, Belgian Senate Session of 1997-1998, December 6 1997 available at <http://www.senate.be/english/index.html> (visited on 07 July 2012). See also The Netherlands Institute for War Documentation (NIOD) report on Srebrenica, 2002.

[313] See for instance Grúnfeld, Fred and Huijboom, Anke, *op.cit*, pp. 179-218

[314] Heidenrich, G. John., *op.cit*, p. 85

[315] Stanton, H. Gregory, "The Eight Stages of Genocide", 1998, originally presented as briefing paper at the US State Department in 1996, available at <http://www.genocidewatch.org> (visited on 24 April 2011).

With regard to the impunity of genocide, it has also been argued in literature that it may lead to repeating genocide. For instance John Heidenrich argued that the fact that the perpetrators of past genocides in a given society are rewarded by being punished lightly or not at all is an indicator that it may be committed again.[316] Others added that this growing acceptance of violations of the targeted group's human rights (where there is history of genocide) gives violators and abusers a sense that if the perpetrators of the earlier crimes got away with it, they will get away with their abuses this time.[317]

2.10. Preliminary conclusions

To summarise this section it must be said that genocide does not happen overnight. For genocide to happen there are always risks that can be seen at different phases of the whole process. Indeed, the social categorisation is the phase where people are classified into "us and them" by ethnicity, race, religion, or nationality. Depending on the circumstances in each situation, this may be followed by discrimination in which the "them" get underprivileged status compared to the "Us". This can be followed by a dehumanising ideology in which potential victims of genocide are no longer considered as belonging to the same human race as the oppressors. When this is spread out, it increases the risk of genocide even much more. When that ideology is successfully spread out, it makes it easy for the planners to make preparations for it, a phase which is mostly followed by testing through targeted massacres. These massacres may reach a high intensity from which the intent to destroy the whole group can be clearly seen. In such a situation, when no action is taken to stop it, it makes the perpetrators of genocide be assured that there will not be repercussion on them and this is a big incentive in the execution of their plan. No matter how the genocide ends, when it is followed by the denial and impunity of the perpetrators, there is a risk that it may reoccur.

It must be said however that this is not a mathematical division of phases, nor is it a formula followed in all genocides. There is no linear process to genocide but there is no genocide that can just happen. It may happen in different ways, each having its particularities. What is common to all genocides is that they are all preceded by long-standing risks that if not eradicated, may

[316] Heidenrich, G. John., *op.cit*, p. 85.

[317] United Nations Secretary-General Ban Ki-Moon, "Never Again": Preventing Genocide and Punishing those Responsible", 2007, available at <http://www.un.org> (visited on 31 January 2012)

amount to genocide. Hence, together with the factors, these phases show how for genocide to happen it passes through a process. This gives an idea on what period is important for the prevention and what could be done at each phase (once that phase is there). The next section will discuss the prevention of genocide in the perspective of factors and phases of the process to genocide.

3. Understanding prevention in the process to genocide

"We have learned from those experiences that the very step in preventing genocides is to address the conditions that permit them to occur",[318] *Kofi Annan*

After the explanation above, it is now time to see how this understanding of the process to genocide may help to understand prevention of genocide in that process. This section is limited to examining prevention in its temporal divisions. It does not therefore examine the types of measures needed at each temporal division because this will be done in the next chapters. The aim here is to confront the factors and phases in the process to genocide to the need of prevention at each level. It is possible to group factors and phases within the three temporal divisions discussed in the previous chapter. This will be discussed in subsections 3.1 to 3.3. Subsection 3.4 will discuss prevention of genocide when there is uncertainty on the occurrence of genocide and on the power to prevent.

3.1. Primary prevention of genocide

For the purpose of this work, some factors may be grouped at this early level. In the previous chapter it has been concluded that the prevention at the primary level is understood as consisting of measures aiming at creating an environment that reduces the risk that a given event will occur. Some factors such as differences in identity and difficult conditions due to economic problems may already be present and the prevention of genocide at this level deals with these existing factors of genocide by putting in place measures that do not allow the emergence of the risks related to them. One might say for instance that all measures aiming at promoting the economy and the equitable sharing of available resources, democracy, and the rule of law and respect of

[318] The Prevention of Armed Conflict, Report of the Secretary-General of the United Nations to the General Assembly and the Security Council of the United Nations, A/55/985 – S/2001/574, 7 June 2001, p. 35, available at <http://www.un.org> (visited on 31 January 2012).

human rights are needed. This view is supported by the Secretary-General of the UN in his report of 2009 on the efforts of the UN system to prevent genocide.[319] Among the things to consider when assessing and addressing the risk of genocide, he suggested to look at structural and institutional frameworks in the country - including domestic legislation, an independent judiciary and an effective police force - to protect people from genocide.[320] He also suggested taking into consideration factors such as illiteracy or geographic isolation that make it difficult for a vulnerable population group to benefit from a domestic protection capacity and opined that addressing these weaknesses through appropriate measures is essential to the prevention of genocide.[321]

In fact, since genocide is a process, prevention of genocide would mean to tackle it at very early stage: creating an environment that does not favour the development of the genocide germ that could lead to genocidal conflict. When the primary preventive measures are unsuccessful, then the need to take other measures may arise.

3.2. Secondary prevention of genocide

Prevention of genocide at this secondary level is necessary in two situations. First in case a state has not adopted measures at the primary level and secondly in case the measures adopted before did not prevent the risks of genocide from developing. Preventive measures at this level must therefore address the risk factors and the phases of genocide before the start of genocide *per se*.

This level concerns the period in which there are symptoms of genocidal conflict but before the start of the commission of genocide. That is the time the bridge from the normal situation has been crossed. For instance it is a period when in a given state, there is a presence of a totalitarian ruler and an authoritarian form of government which, as noted by Linda M. Woolf and Michael R. Hulsizer[322] is "one key characteristic of genocidal states". The two authors emphasise that "it is not coincidental that only non-democratic nations in the twentieth century committed

[319] Efforts of the United Nations system to prevent genocide and the activities of the Special Adviser to the Secretary-General on the Prevention of Genocide, Report of the Secretary-General, 18 February 2009, A/HRC/10/30, paras 3- 10, available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/10/30> (visited on 31 January 2012).

[320] Ibidem.

[321] Ibidem.

[322] Woolf, M. Linda and Hulzer, R. Michael, "Psychosocial Roots of Genocide: Risk, Prevention and Intervention", *Journal of Genocide Research*, Vol. 7, No. 1, 2005, pp. 101- 128, p. 106.

genocide."[323] For instance those kinds of regimes create a climate that allows the deprivation of resources that targets a specific group. They also allow discrimination targeting a specific group as well as dehumanization of that group. They may give rise to a period in which there is hate propaganda against that group, characterized by impunity of the perpetrators of crimes related to this. A period in which an armed conflict may occur which is either ethnic, racial, religious oriented or can create a favourable environment in which the distinctions between groups get worse or as Fein noted can "obscures genocidal killing"".[324] Symptoms and risks that may fall within the secondary level include human rights violations such as killings, disappearances, torture, rape and sexual violence, abduction, ethnic cleansing, forced population transfer or displacement, segregation, isolation or concentration of a group, expropriation, destruction of property, destruction of subsistence food supply, denial of water or medical attention and hate speech.[325] They can also point to specific actions that need to be immediately taken if genocide is to be averted.[326] In the action plan to prevent genocide launched by the UN Secretary-General in 2004, he insisted on addressing the causes of conflicts and to pay attention to the gathering signs of disaster.[327] He mentioned some of what he called roots of genocide: hatred, intolerance, racism, tyranny, and the dehumanizing public discourse that denies whole groups of people their dignity and their rights.[328] At this level there is a need to take preventive actions that are tailored to it.

3.3. Tertiary prevention of genocide

When the measures at the secondary level fail (or have never been taken) and the actual genocide

[323] Ibidem.
[324] Fein, Helen, "Models of Genocide and Critical Responses," in Israel, W. Charny, *Toward the Understanding and Prevention of Genocide: Proceedings of the International Conference on the Holocaust and Genocide*, Westview Press, Boulder and London, 1984, pp. 3–31. See also Reva N. Adler and al., "Prevent, React and Rebuild, Health Research and the Prevention of Genocide", *Health Service Research*, Vol. 39, No. 6, 2004, p. 2.
[325] Efforts of the United Nations system to prevent genocide and the activities of the Special Adviser to the Secretary-General on the Prevention of Genocide, Report of the Secretary-General, 18 February 2009, A/HRC/10/30, paras 3- 10, available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/10/30> (visited on 31 January 2012).
[326] Ibidem.
[327] United Nations Secretary-General Kofi Annan's Action Plan to Prevent Genocide, Press Release SG/SM/9197 AFR/893 HR/CN/1077, Geneva, 07 April 2004, available at <http://www.un.org> (visited on 31 January 2012).
[328] United Nations Secretary-General Kofi Annan's Action Plan to Prevent Genocide, Press Release SG/SM/9197 AFR/893 HR/CN/1077, Geneva, 07 April 2004, available at <http://www.un.org> (visited on 31 January 2012).

starts, measures at the tertiary level are needed in order to respond to the final phases of genocide, *i.e* the actual execution of genocide. They will constitute measures aiming at stopping the genocide.

At this level, there is also a need to put in place measures that deal with the aftermath of genocide in a way that prevents the reoccurrence of genocide which may also have preventive effects elsewhere.

While the necessity to take preventive measures at this level (and early ones) is clear, it is noteworthy that there are some difficulties that may affect the motivation to take preventive measures at those levels. The first is related to the lack of certainty that the presence of factors at different phases may amount to genocide and the second is the uncertainty on whether the preventive measures to be taken can prevent genocide.

3.4. Prevention v. the lack of certainty of the risk of genocide and of the power to prevent

Two questions need some consideration here. The first is whether certainty that genocide will occur is needed before the preventive measures will be taken. The second is whether certainty that preventive measures will prevent the occurrence of genocide is needed.

Regarding the first question, it must be said that the certainty from the existing factors and risks at early phases that they will amount to genocide may be difficult to get. Even at advanced phases the degree of certainty of occurrence may still not be there. The process to genocide cannot be understood as an exact science. That is why it may be argued that the answer to the first question may be negative. Before taking preventive measures, one cannot wait until there is certainty that genocide will happen. In fact, by the time this is clear, it might be too late to prevent it from happening and too difficult to do it without causing other problems. The analogy with the prevention of environmental damage which does not require full scientific certainty can help to understand the uncertainty of the occurrence of genocide. Like in environmental law, lack of certainty should not be a reason not to take preventive measures.[329] The fact that there may not be a linear process to genocide that is identical everywhere is a big challenge. Another important challenge is that there is no institution that assesses the factors and phases in order to determine

[329] Principle 15 of the Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, available at <http://www.un.org> (visited on 31 January 2012).

who takes which measures, when to take them and how and where to implement them.
On the question whether certainty that preventive measures to be taken would totally prevent the occurrence of genocide is needed, the answer is negative as well. As it will be developed further in this work, given the nature of prevention and the process to genocide, it would be not logical if the preventer would need to be sure beforehand that the preventive measures to be taken will definitely prevent the occurrence of genocide.

3.5. Preliminary conclusions

To sum up this section, it must be said that the prevention of genocide needs to take into consideration all the factors and phases through the three levels of prevention: primary, secondary, and tertiary. These three levels refer to the period before the beginning of a conflict that may lead to genocide (primary level), during a conflict that may lead to genocide (secondary level), and during and after the actual genocide (tertiary level).
Thus, to prevent genocide would mean to tackle all those factors which, as shown earlier, give chances to the likelihood of genocide. In the previous chapter it was concluded that prevention is continuous and therefore needs measures at every level. This conclusion is equally valid for the prevention of genocide. In other words, like for the prevention of diseases for instance, for the prevention of genocide there is also a need to take preventive measures at all three levels.
At every level there is a risk that may lead to genocide. So, all factors at each level need to be addressed. If prevention is done at only last levels (when the risk of occurrence of genocide is high), the risk of failure to avert the occurrence of genocide is high. This is not to say that at that level there is no more need to take actions. Even at an advanced level of risk of genocide, prevention is possible and needed. Genocide is never inevitable.[330]

Conclusion

The aim in this chapter was to explain the factors and risks (in phases) in the process to genocide and ultimately what the concept of prevention of genocide could mean in that process.
Six factors discussed in this chapter (differences in identity, difficult life due to economic

[330] Smith, W. Roger, "Scarcity and Genocide", in Dobkowski N. Michael and Wallimann, Isidor (eds.), *The Coming Age of Scarcity, Preventing Mass Death and Genocide in the Twenty-first Century*, Syracuse University Press, New York, 1998, p. 201.

problems, deprivation or inequalities in the allocation of resources, political problems, armed conflicts and human rights violations in the atmosphere of impunity) have been given as illustrations and are far from constituting an exhaustive list of factors of genocide. Some of these factors may be of course more determinant in contributing to causing genocide than others, but each factor is important in its way. Though no single factor among those shown above can neither be a cause of genocide alone nor could it be said that wherever there are those factors genocide becomes a necessary result, it was argued that no genocide can occur where none of the said factors exist. It thus followed that those factors are susceptible of contributing to causing genocide. These factors are a womb from which genocidal germ, safely, rapidly (or sometimes slowly) and healthily grow.

In addition to the said factors, it has been argued that for genocide to happen it passes through different phases in the process to genocide. Indeed, what is common to all genocides is that they are all preceded by risks at various phases that, if not addressed, may lead to genocide.[331] For instance where the social categorisation exists, there is a risk that the discrimination of some of the groups may follow. The situation may grow up to the dehumanisation and the propaganda for their elimination. The metaphor used by a witness before the ICTR in describing how the hate radio played a role in making the genocide possible in Rwanda applies for the whole process. The witness said that the radio had "spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country".[332] In her comment on this, Professor Suzan Benesch[333] noted that the witness implied that the crime that matters most is spreading the petrol, not striking the match. This implies that the phases prior to genocide *per se* are important to make it happen and need to be addressed. Indeed, the petrol was poured and spread in the whole country even long before the creation of the hate radio as shown above and the radio came to pour more and more. In this climate, the preparation of genocide becomes easier and some grave crimes targeting a given group (which may include the incitement to commit genocide) may be committed. Since in this climate these crimes are not punished (impunity), it creates good incentives to those who want to wipe out the targeted group(s). This is the final phase:

[331] See Shaw, Martin, "The General Hybridity of War and Genocide", *Journal of Genocide Research*, Vol. 9, No. 3, 2007, pp. 461-473. His main point on this is that genocide is a result of combination of various factors.
[332] Nahimana et al. case, para. 436.
[333] Benesch, Susan, "Vile Crime or Inalienable Right: A Reply to Drumbl and Keitner", *Hague Journal of the Rule of Law*, available online at <http://opiniojuris.org/author/susan-benesch/> (visited on 21 February 2012).

elimination (genocide as such). When no action to halt it is taken, it is successfully committed. The whole process may be coupled with the denial which continues even after the genocide. Yet, denial of genocide is not only deeply offensive to survivors and their descendants as Professor Roger W. Smith[334] has observed, but also if it is successful, it can be a signal that genocide will be committed with impunity.[335] Then the lesson that can be drawn from it is: commit genocide and deny it.[336] Like for some diseases that need a favourable environment for their development, genocide also needs a favourable environment in which its germ will grow and expand to reach its final phase. It is important to note therefore that factors and phases in the process to genocide are very much interconnected in the sense that they create together an environment from which genocidal germ reproduces.

However, the process to genocide through the said phases does not mean that there is a linear process. All depends on particularities of each place and situation. It should also be understood that in all these phases, the factors do not disappear but continue to exist. For instance, discrimination may continue until the last phase. Likewise, dehumanisation and propaganda for the extermination may continue until the last phases (extermination and even after it).

As for the prevention of genocide in the process to genocide, it has been argued that the prevention of genocide requires addressing both the factors (favouring environment) and the risks in the phases to genocide. That means that prevention of genocide is a continuous process. Using the temporal divisions of primary, secondary, and tertiary levels was useful in that process because it gave an idea on what periods are important for the prevention and what could be done at each level. At the primary level, the prevention of genocide deals with these factors of genocide by putting in place measures that do not allow the emergence of all the risks shown in the previous two sections. At the secondary level, preventive measures susceptible of eliminating those symptoms and risks from the relatively early phases and at every phase of the genocidal conflict are put in place in order to avoid that the situation escalates to genocide. At the tertiary level, robust measures aiming at stopping the genocide are needed. The measures are taken at each level without the certainty that genocide may happen and without certainty that they will absolutely prevent genocide from happening.

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[334] Smith, W. Roger, "Legislating against Genocide Denial: Criminalizing Denial or Preventing Free Speech"? *University of Saint Thomas Journal of Law and Public Policy*, Vol. IV, No. 2, 2010, pp. 128-137.

[335] Ibidem.

[336] Ibidem.

The question is however to know what this process and the levels of prevention of genocide may mean to international law. In other words, the question is whether international law takes care of the process to genocide by requiring preventing genocide through the different levels as discussed in this chapter and what could be the measures at each level. This question will be addressed in the next chapters.

Chapter IV. Prevention of genocide under international law

"*Many hope that there will be no more wars, but we dare not to rely on mere hopes for protection against genocidal practices by ruthless conquerors", Raphael Lemkin*[337]

Introduction

The previous chapter explained the path to genocide and concluded that the prevention of genocide needs to tackle the different factors and phases that contribute to leading to its perpetration. It was argued that every factor and phase of the process is important and needs measures tailored to it. In so doing, given the nature of the process to genocide, it was argued that prevention must be undertaken at three levels. These are the primary, secondary, and tertiary levels. It was questioned if and how the legal framework for the prevention of genocide needs to be adjusted to these levels. This requires the examination of the existing laws on the prevention of genocide. Therefore, this chapter primarily seeks to show the origin and definition of genocide as well as the process of the adoption of the Genocide Convention in order to understand the context in which this convention was adopted which helps in the understanding of the spirit of the convention as far as the scope of prevention of genocide is concerned. This is important to understand before analysing in deep what the scope of the obligation to prevent genocide entails to its bearers in next chapters. Thus, the present chapter explains in its first section the historical context in which the Genocide Convention was drafted and explained at its initial stage.

Furthermore, this chapter examines the legal status of the obligation to prevent genocide in order to answer the question whether it is a legal obligation on its own or a component of the obligation to punish. It also examines who the bearers of the obligation to prevent genocide are under both the Genocide Convention and customary international law and discusses the temporal scope of the obligation to prevent genocide. Finally, it discusses the ICJ test on knowledge of serious risk of genocide.

[337] Lemkin, Raphael. *Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government: Proposals for Redress,* Carnergie Endowment for International Peace, Washington, 1944, p. 92.

1. Origin and definition of genocide: a prevention perspective

It is important to show the context in which the laws on genocide came into existence and to see what can be learned from this for the prevention of genocide. In doing so, this section will examine whether or not the drafting history shows that prevention was understood in the way discussed in the previous chapters.

While describing the Nazi atrocities in Poland in 1940 Winston Churchill, then British Prime Minister, asserted in a radio broadcast: "we are in the presence of a crime without name"".[338] This broadcast was heard by the Jewish Dr Raphael Lemkin and began to think about ways he could combine his knowledge in international law with the aim of preventing such atrocities.[339] Four years later he created the word genocide.[340] Some years before, Lemkin who had been touched by the atrocities against the Armenians, had been working on a draft law aiming at preventing and punishing such killings. This is because he believed that if the killings happened once, they would happen again and anywhere if the international community would not prevent them."[341] With that end, Lemkin started to work on preparing an international draft law that would commit governments to stopping the destruction of ethnic, national, racial or religious groups, qualifying those killings as barbarity and vandalism.[342] He envisaged the creation of two new international crimes: the crime of barbarity, consisting in the extermination of social collectivities,[343] and the crime of vandalism, consisting in destruction of cultural and artistic works of these groups.[344] Lemkin wanted first and foremost to find names to qualify the crimes

[338] Warren, Freedman, *Genocide: A People's Will to Live*, William S. Hein & Co. Inco., Buffalo New York, 1992, p.11.

[339] Power, Samantha, *op.cit*, p. 29.

[340] Idem, p. 29. See also Schabas, A. William, op.cit, p.24. Raphael Lemkin was born in eastern Poland, near the town of Bezwodene. He worked in that country as a Lawyer, prosecutor and university teacher before he fled the country to the US.

[341] Power, Samantha, *op.cit*, p. 19.

[342] *Idem*, p.21.

[343] The formulation in art 1 reads as follow: "Whoever, out of hatred towards a racial, religious or social collectivity or with view of its extermination, undertakes a punishable action against the life, the bodily integrity, liberty, dignity or economic existence of a person belonging to such a collectivity, is liable for offence of barbarity…", in Lemkin Raphael, "Genocide as a Crime Under International Law", *American Journal of International Law,* Vol. 41, No.1, 1947, pp. 145-151.

[344] The formulation in art 2 reads as follow: "Whoever, either out of hatred towards a racial, religious or social collectivity or with the goal of its extermination, destroys its cultural or artistic works, will be liable, for the crime of vandalism…" in Lemkin, Raphael, "Genocide as a Crime Under International Law", *American Journal of International Law,* Vol. 4,1 No.1, 1947, pp. 145-151.

which would lead to putting in place a law that would obligate the international community to prevent and punish them. Unfortunately, in 1933 he was denied by the Polish Government to go to Madrid, where he wanted to present his draft law in the Fifth International Conference for the Unification of the Penal Code. That draft law was presented by the Polish Minister of Foreign Affairs but was not adopted.[345]

At the start of World War II, Poland was invaded by Nazi Germany, and the place in which Raphael Lemkin grew up became a killing zone. As a Jew, Raphael Lemkin was forced to flee, making his way to Sweden first[346] and later to the United States where he became an advisor to U.S. War Department.[347] The Nazis tried to create a more homogeneous empire in Eastern Europe by restructuring the population and carrying out genocidal policies against the Jews.[348] On several occasions in June 1942, Lemkin used this opportunity of working in the War Department to meet Wallace, the U.S Vice- President to introduce his proposal to ban the destruction of people. Later he wrote, "I looked hopefully for reaction, there was none".[349] Parallel to this, in the same year, Raphael Lemkin got an idea of writing *Axis Rule in Occupied Europe*, a book that would be published in 1944.[350] In this book, he would set out his new concept of genocide as the mass murder of national, racial and religious groups and proposed to prosecute the Nazis after the war for genocide as a crime in international law.[351] Even after a disappointing meeting with the then US Vice-President, Lemkin whose people were being systematically exterminated, did not give up. He continued to insist that there must be a law to stop the destruction of Jews and future exterminations. Indeed, he next tried to approach Roosevelt, then U.S President. Later Roosevelt wrote to him that he recognized the danger to groups, but saw difficulties to adopting such a law at that time. He urged patience, but Lemkin was aghast on that and said:

> "Patience is a good word to be used when one expects an appointment, a budgetary allocation or the building of road, but when the rope is already around the neck of the

[345] Power, Samantha, *op.cit, p.* 22.
[346] Schabas, A. William, *Genocide in International Law, The Crime of Crimes,* Cambridge University Press, Cambridge, 2000, p. 24.
[347] Heidenrich, G. John, *op.cit*, p. 3.
[348] Cooper, John, *Raphael Lemkin and the Struggle for the Genocide Convention*, Palgrave MacMillan , 2008, p. 273
[349] Power, Samantha, *op.cit*, p. 28
[350] Cooper, John, *op.cit*, p. 273.
[351] Ibidem.

victim and strangulation is imminent, isn't patience an insult to reason and nature?"[352]

For him, he believed that a double murder was being committed, one by Nazis and another by allies by not publicizing, denouncing and stopping the Hitler's extermination campaign.[353]

At the same time, another Polish Jew and member of Polish National Council in exile in London, Szmul Zygielbojm, was also campaigning for ending the extermination of Jews, emphasizing that it would be a shame to go on living, to belong to the human race, if steps are not taken to halt the worst crime which was being committed by Nazis.[354] In his letter to his government, before he took an overdose of sleeping pills for his successful suicide, he wrote:

> "The responsibility for murdering the entire Jewish population of Poland falls in the first instance on the perpetrators, but indirectly also weights on the whole humanity, the people and allied states which so far have made no effort towards a concrete action for the purpose of curtailing this crime. By passive observation of this murder of defenceless millions and of the maltreatment of children, women, and old men, these countries have become the criminals" accomplices… By my death I wish to express my strongest protest against the inactivity with which the world is looking on and permitting the extermination of Jewish people. I know how life is worth, especially today. But as I was unable to do anything during my life, perhaps by my death I shall contribute to destroying the indifference of those who are able and should act."[355]

Still, the Nazis and their fascist partners were inflicting on the European continent, atrocities so savage, so widespread, and yet so integrated into a monstrous whole that Winston Churchill made his remark on the crime without name.[356] Ever since Lemkin had heard Churchill's radio address, he had been determined to find a new word to replace "barbarity" and "vandalism" which had failed him at the 1933 Fifth Madrid Conference.[357] He constructed the word genocide, i.e the killing of a people, from the Greek word "*genos*" (clan, family or people) and Latin word "*occidio*" (total extinction or extermination,[358] and he wrote:

"The crime of genocide involves a wide range of actions, including not only the deprivation of

[352] Power, Samantha, *op.cit*, p. 28.
[353] Ibidem.
[354] Idem, p.33.
[355] Idem, p.37.
[356] Heidenrich, G. John, *op.cit*, p.3.
[357] Power, Samantha, *op.cit*, p. 40.
[358] Warren, Freedman, *op.cit*, p.11

life and also devices considerably endangering life and health: all these actions are subordinated to the criminal intent to destroy or to cripple permanently a human group. The acts are selected for destruction only because they belong to these groups…"[359]

Lemkin proposed the following definition of genocide:

> "Genocide is …a co-coordinated plan of different actions, aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their own capacity but as members of the national group…"[360]

So, according to Lemkin, genocide did not necessarily imply the immediate destruction of the national or ethnic group, but rather different actions aiming at the essential foundations of the life of the group with the aim of annihilating the group as such.[361] He wrote in the *Axis Rule in occupied Europe*, that "the objective of such a plan would be disintegration of the political and social destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups."[362] He showed that the Nazis had elaborated before, a plan to destroy the targeted groups. He cited Hitler's statement to Rauschning:

> "(…) We favour the planned control of population movements. But our friends will have to excuse us if we subtract the twenty millions elsewhere. After all, all these centuries of whining about the protection of the poor and lowly, it is about time we decided to protect the strong against the inferior. It will be one of the chief tasks of German statesmanship for all time to prevent, by every means in our power, the further increase of the Slav races. Natural instincts bid all living beings not merely conquer their enemies but also destroy them. In former days it was the victor's prerogative to destroy entire tribes, entire peoples. By doing this gradually and without bloodshed, we demonstrate our humanity.

[359] Heidenrich, G. John, *op.cit*, p.3.
[360] Schabas, A. William, *Genocide in International Law, The Crime of Crimes, Cambridge University Press, Cambridge, 2000,* p. 25.
[361] Idem, p. 27
[362] Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government: Proposals for Redress*, Carnergie Endowment for International Peace, Washington, 1944, p.79.

> We should remember, too, that we are merely doing unto others as they would have done to us."[363]

In his mind, Lemkin believed that finding a name and a definition of the crime was a first step along the way to banning such destruction.[364] After having found the name "genocide" and its definition and after having observed that the system of minorities protection created following the First World War had proved to be inadequate, he proposed that there be a multilateral treaty requiring States to provide for the introduction, in constitutions but also in domestic criminal codes, of norms protecting national, religious or racial minority groups from oppression and genocidal practices.[365] Thus, in the suggestion to ban this crime, Lemkin who observed that genocide also represents a violation of specific regulations of the Hague Convention such as those regarding the protection of property, life and honour, did not only focus on its prohibition by international law but also on its prevention.[366]

Following this, during the session of the General Assembly on 30 September 1 October 1946, Cuba, India and Panama asked that the question of genocide be put on the agenda, a matter which was discussed briefly and then referred to the Sixth Committee where, on 22 November 1946, the same three States proposed a draft resolution on genocide.[367]

The draft resolution approved by the Sixth Committee was adopted on 11 December 1946 by the General Assembly, unanimously and without debate, Resolution 96(I) which states *inter alia* that:

> "Genocide is a denial of right of existence of entire human groups, as homicide is a denial of the right to live of individual human beings; such denial of right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of

[363] Idem p. 81, quoting Herman Rauschning, *The voice of Destruction*, New York: G.P. Putman's Sons, 1940, p. 138.
[364] Power, Samantha, *op.cit*, p. 48.
[365] Lemkin, Raphael, *Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government: Proposals for Redress*, Carnergie Endowment for International Peace, Washington, 1944, p. 93.
[366] Idem, p. 94.
[367] UN Doc. A/C.6/SR.22 (Dihigo, Cuba), See also Schabas, A. William, *op.cit.* p. 42.

international concern…".

The General Assembly, therefore

> ""Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable;
>
> Invites the member states to enact the necessary legislation for the prevention and punishment of the crime;

The General Assembly recommended that "international co-operation be organized between States with a view to facilitating speedy prevention and punishment of the crime of genocide."[368]

In this resolution also, the General Assembly requested the Economic and Social Council (ECOSOC) to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.[369]

On its turn, ECOSOC adopted a resolution on 28 March 1947, asking the Secretary-General of the UN to consult all relevant organs and experts in a view to drawing a draft convention on genocide, and submit it to the next session of ECOSOC. The Secretary-General turned to the Secretariat's Human Rights Division for preparation of the draft, and the division consulted experts in the area such as Raphael Lemkin (among others), inventor of the word "genocide".[370]

Meanwhile, the General Assembly adopted later, on 21 November 1947, resolution 180(II) realizing the importance of the problem of combating the international crime of genocide and reaffirming its resolution 96(I) of 11 December 1946 on the crime of genocide. It also declared that genocide is an international crime entailing national and international responsibility on the part of individuals and states.[371]

After many drafts were prepared by different appointed committees, commented on by member states and revised in different sessions of the General Assembly, a final draft was adopted in the third session of the General Assembly on 9 December 1948, one day before the adoption of the

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[368] Schabas, A. William, *Genocide in International Law, The Crime of Crimes,* Cambridge University Press, Cambridge, 2000, p. 45.

[369] General Assembly Resolution 96(I) of 11 December 1946, available at <http://www.un.org> (visited on 28 January 2010).

[370] ESC Res.47(VI), in Schabas, A. William, op.cit, pp. 51-52.

[371] G.A Res. 180(II) of 21 November 1947 available at <http://www.un.org> (visited on 28 January 2010).

Universal Declaration of Human Rights.[372] All the delegates voted yes for the Genocide Convention, none voted no. This marked the first time the United Nations had adopted a human rights treaty.[373]

Article II of this convention which defines the crime of genocide reads as follow: "In the present convention genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) Killing members of group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[374]

And article III enumerates acts which shall be punishable:

(a) Genocide
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide
(e) Complicity in genocide.[375]

Though as it can be noticed from the context and circumstances in which the convention was adopted much emphasis was put on criminalizing genocide and punishing it, the convention also provides for the prevention of that crime. Indeed article I of that convention reads: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".

However, since in the whole process prevention was not very much commented on, there is no clear indication that the initiators of the convention meant to include the very early stages of the process to genocide as discussed in chapter three. Yet, it cannot be concluded either that the

[372] Schabas, A. William, *Genocide in International Law, The Crime of Crimes,* Cambridge University Press, Cambridge, 2000, pp. 68-69.
[373] Power, Samantha, *op.cit*, p. 60.
[374] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, at <http://www.hrweb.org/legal/genocide.html> (visited 12 September 2009).
[375] Ibidem.

initiators excluded those early stages. For instance Raphael Lemkin repeatedly said that the Nazis had planned to eliminate Jews long before the actual elimination started. This is one of other indications that show that prevention was to include the whole process to genocide though it was not clearly structured that way. Indeed, the idea of the initiators of the Genocide Convention was to avoid the occurrence of genocide by preventing it. What lacks though is the indication of details about measures to prevent genocide especially at early stages.

As for further stages of the process to genocide, there is at least much more indication on the stage of action in the prevention. For instance the initiators of the convention suggested that the genocide be stopped. This has been shown above and it can easily be explained by the fact that they were pressed by the then on-going annihilating situation. Given the context, they were rather much closer to the last level: to stop it and punish the authors. Yet, the process to genocide does not start at that level, it passes through other levels.

In summary it can be said that, though the initiators of the Genocide Convention did not structure the convention in the three levels of prevention as such as discussed in previous chapters, nothing shows that some stages were to be excluded either. What is clear though is the fact that they have put more emphasis on the period close to the perpetration of genocide and to the post genocide period (punish). This is fairly explained by the fact that at the time this convention was finally adopted it was in response to the atrocities committed by the Nazis during World War II and the idea was to prevent a similar tragedy from happening again. This idea to avoid that it happens again is what was indeed behind the drafting and adoption of the Genocide Convention with the obligation to prevent it. This obligation to prevent genocide will be discussed in next section in order to show its nature, meaning and scope.

2. The obligation to prevent genocide: meaning, scope and independence vis-à-vis the obligation to punish

This section will answer three questions: What does prevention mean and what does the obligation to prevent genocide entails with regard to the different stages of the process to genocide? What is the standing of this obligation vis-à-vis the obligation to punish genocide? And what is the nature of this obligation?

2.1. Meaning of prevention and the obligation to prevent genocide: Article I of the Genocide Convention

Article I of the Genocide Convention states that "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[376] As it can be seen from this formulation, this article does neither define prevention nor does it clarify what the obligation to prevent genocide entails. It also does not clarify whether or not the obligation to prevent genocide includes the obligation not to commit genocide.

2.1.1. The meaning of prevention in the Genocide Convention

From the discussion on the draft of the convention on the prevention and punishment of the crime of genocide there is not much indication on the meaning of prevention itself. Instead, during those discussions, many states criticized article I not on the issue of the word "prevention" but because according to them, it was a repetition of the Resolution 96(I) of the General Assembly. The discussions were mainly whether to maintain that article or not. Some states thought that it was important to affirm that genocide was a crime under international law, while others saw it as unnecessary and urged its deletion.[377] As William Schabas later noticed, while the final convention has got much to say about punishment of genocide, there is really little to suggest what prevention of genocide really means, because nothing in the debates about article I provides the slightest clue about it.[378] Legal literature did not help much in clarifying it.
It is important to have recourse to methods of interpretation in the endeavour to understand what article I of the Genocide Convention means with regard to prevention. Indeed, according to article 31 of the Vienna Convention,[379] in interpreting a treaty, one must consider the ordinary meaning to be given to the treaty in their context and in the light of its object and purpose. In its ordinary meaning, "to prevent" means to stop something from happening or coming into

[376] See article I of the Genocide Convention.
[377] Schabas, A. William, *Genocide in International Law, The Crime of Crimes,* Cambridge University Press, Cambridge, 2000, p. 72.
[378] Ibidem.
[379] Vienna Convention on the Law of Treaties(VCLT) of May 22, 1969, adopted in a conference convened pursuant to the United Nations General Assembly resolutions 2166(XXI) of 5 December 1966 and 2287(XXII) of 6 December 1967. The convention entered into force on 27 January 1980 in accordance with article 84(1). Officially published in United Nations, Treaty Series, vol. 1155, p. 331.

existence.[380] According to the Oxford dictionary, prevention is the action of stopping something bad from happening,[381] or making impossible an anticipated or intended act.[382] It is an action intended to provide against an anticipated danger.[383] In the case of genocide the bad thing to be prevented from happening is the genocide. This meaning of the concept of prevention is the same as what was found in chapter two and three of this work and there is no other suggested meaning that would contradict it. However, even if we accept this ordinary meaning of prevention, the problem in article I is still not solved. This is because even if to prevent would mean to avert the occurrence of something bad, with the prevention of genocide there is still need to clarify what should be done in averting the occurrence of genocide, the exact time to do it and who should do so and within which territorial limits. This will be addressed later in this work. It is now opportune to examine in general what the obligation to prevent genocide entails.

2.1.2. The meaning and scope of the obligation to prevent genocide

There is generally a distinction between two categories of legal obligations. Some may be positive and others negative. This distinction will be briefly made here in order to show where the obligation to prevent genocide belongs to. The purpose of making the distinction is not linked to particular consequences of each. It serves to show the meaning and scope of that obligation. In other words, what does the obligation to prevent require from the obligation bearers?

2.1.2.1. Is the obligation to prevent genocide a positive obligation?

A positive obligation is an obligation that requires its bearer to take positive acts.[384] The main characteristic of such an obligation is that it requires the bearer to take the necessary measures aiming at fulfilling the obligation concerned. That is what positive obligation means. It requires its bearer to do something.[385] As the literature and case-law illustrates, such positive acts may

[380] Robert, Allen, *The Penguin Concise Dictionary, Penguin Books*, London, 2004, p. 697.
[381] Sally, Wehmeier et al., *Oxford Advanced Learner's Dictionary of Current English*, 7th edition, Oxford University Press, 2005, p. 1194.
[382] The New Shorter Oxford English Dictionary, Thumb index edition, volume 2, N-Z, p. 2348.
[383] Ibidem.
[384] Constantin, P. Economides,"Content of the Obligation: Obligation of Means and Obligations of Result", in Crawford, James et al (Eds), *The Law of International Responsibility*, Oxford University Press, Oxford, 2010, p. 373. Akandji-Kombe, Jean-François, *Positive Obligations Under the European Convention on Human Rights*, Human rights handbooks, No. 7, 2007, p. 7.
[385] For more about the positive obligation see Mowbray, Alastair R, *The Development of Positive Obligations Under*

include the adoption of laws for the implementation of an international obligation in domestic law,[386] the duty to provide resources to individuals to prevent the breach of the obligation concerned,[387] and the duty to "take appropriate care" in the planning and conduct of an operation.[388]

The question whether the obligation to prevent genocide belongs to this category of positive obligation has been given a limited attention in literature. That explains why that obligation has remained unclear for many years. It is only with the first case before the ICJ related to that obligation that some clarification has been given.

Fifty-nine years after the adoption of that convention, the ICJ wrote in the Case Bosnia-Herzegovina v. Serbia-Montenegro that:

> "The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation… It is not merely hortatory or purposive. The undertaking is unqualified …and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention".[389]

It added that

> "Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide".[390]

According to the Court, this obligation to prevent genocide obligates states "to adopt and implement suitable measures to prevent genocide from being committed."[391] The Court added that "the duty to prevent places States under positive obligations, to do their best to ensure that

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the European Convention of Human Rights by the European Court of Human Rights, Hart Publishing, Oxford, 2004, pp. 1-65. See also Xenos Dimitris, *The Positive Obligation of the State Under the European Convention of Human Rights*, Routledge, London, 2011, pp. 57-72.

[386] Constantin, P. Economides,*op.cit* p. 373.

[387] Mowbray, Alastair R, *op.cit*, p. 5.

[388] Inter-American Court of Human Rights, Neira Alegría et al. v. Peru ,Judgment of 19 January 1995, paras. 60-91.

[389] Bosnia v. Serbia case, para. 162.

[390] Idem, para. 165.

[391] Idem, para. 431.

such acts do not occur".[392] In other words, states are under the obligation to prevent the commission of genocide by taking appropriate measures. However, the Court did not go far to suggest each and every measure that must be taken to prevent genocide. It however made it clear that the content of the obligation to prevent genocide is about the appropriate measures that must be put in place by states in order to avoid that genocide occurs. This was lacking in literature prior to the court's decision. It is only after this decision of the ICJ that different scholars have analysed the scope of the obligation to prevent genocide. In most cases though, the discussion has been on either supporting or criticizing the court's decision without adding much on clarifying the scope of the concept itself.[393] For instance, Gattini and Gibney recognize the lack of the indication on the exact meaning in the existing literature in international law on the scope of prevention and notice that the court does not give much explanation of its meaning either.[394] Despite this criticism, the court's ruling on this question is remarkable in the sense that for the first time after the adoption of the Genocide Convention, the obligation to prevent genocide was addressed. The court expressly suggests that this obligation is a positive one which requires states to take necessary preventive actions. This gives a foundation from which the full content of the obligation *in concreto* can be developed, which is the objective of this work. However, it is important to first discuss the question whether the obligation to prevent genocide also requires states not to engage in acts that may lead to genocide themselves.

2.1.2.2. Is the obligation to prevent genocide a negative obligation?

A negative obligation is about what its bearer must not do. It is an obligation that prohibits some

[392] Ibidem.

[393] See for ex Gaeta, Paola, "On What Conditions Can a State Be Held Responsible for Genocide"?, *European Journal of International Law*, Vol. 18, No 4, 2007, pp. 631-648. Gattini, Andrea, "Breach of the obligation to prevent and reparation thereof in the ICJ's Genocide Judgment", *European Journal of International law*, Vol. 18, No 4, 2007, pp.695- 713. See also Gibney, Mark, "Genocide and State Responsibility", *Human Rights Law Review* Vol. 7, No. 4, 2007, pp. 760-773. See also Serena, Fortali, "The Legal Obligation to Prevent Genocide- Bosnia v. Serbia and Beyond", *Polish YearBook of International Law*, 2011, pp. 190-205, Orna, Ben- Naftali, "The Obligation to Prevent and to Punish Genocide", in Paola Gaeta(Ed), *The UN Genocide Convention – A Commentary*, Oxford University Press, Oxford, 2009, pp.33-43, S. Clark Roger, "State Obligations Under The Genocide Convention in Light Of The ICJ's Decision in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide", *Rutgers Law Review,* Vol. 61, No. 1, 2008, pp.103-107.

[394] See Gattini, Andrea, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment", *European Journal of International Law*, Vol. 18, No. 4, 2007, pp.695- 713, Gibney, Mark, "Genocide and State Responsibility", *Human Rights Law Review,* Vol. 7, No. 4, 2007, pp. 760-773.

acts.[395] For instance, the bearer of an obligation that prohibits the violation of people's liberty must refrain from depriving people of their liberty unlawfully or arbitrarily.[396] Another example is the obligation provided in the Articles on the Responsibility of States for International Wrongful Acts (ARSIWA) which prohibits states from recognizing as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law.[397] This obligation also prohibits States from rendering aid or assistance in maintaining such a situation.[398]

The obligation to prevent genocide has not made it clear whether it requires abstaining from acts that may lead to genocide or in acts of genocide. The literature has not addressed either whether the obligation to prevent genocide may fall in the category of negative obligation. That may also be due to the fact that this category of negative obligations is not common in international law. It is worth examining how the ICJ has addressed this and how its ruling could be interpreted with regard to the negative obligation to prevent genocide.

The ICJ wrote that:

> "(…) Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if

[395] Constantin, P. Economides,*op.cit*, p. 373.
[396] European Court of Human Rights, Case of Winterwerp v. Netherlands**,** (*Application No. 6301/73), Judgment of 24 October 1979, para 37.*
[397] See article 41(2) of the ILC Articles on the Responsibility of States for International Wrongful Acts, 2001.
[398] Ibidem.

> States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide".[399]

It added that:

> "Accordingly, having considered the various arguments, the Court affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III…"[400]

This was even strengthened by what the Court added that:

> "…If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated."[401]

The court found that the obligation to refrain from committing genocide was implied in the obligation to prevent genocide. This view of the court has been criticized in literature. For instance, Professor Paola Gaeta argued that the two obligations belong to different "species"[402] : the obligation to prevent genocide being clearly an *obligation of conduct* and the obligation not to commit genocide clearly an *obligation of result*.[403] This makes them independent from each other. She agreed that the source of the obligation to prevent genocide is article I of the Genocide Convention but rejected the view that the obligation not to commit genocide has the same source and therefore argued that the former obligation originates in customary international law.[404] She

[399] See Bosnia v. Serbia case, para. 166.
[400] Idem, para. 179.
[401] Idem, para. 382.
[402] Gaeta, Paola, "On What Conditions Can a State Be Held Responsible for Genocide"?, *European Journal of International Law,* Vol. 18 No. 4, 2007, p. 637.
[403] Ibidem.
[404] Idem p. 642.

reached the conclusion that the court wrongly inferred that the obligation to prevent genocide implies the obligation not to commit it.[405] While the principles referred to in this argument might be correct the conclusion reached is debatable for two reasons. First, while it is true that the obligation not to commit genocide originates in customary law, it is also true that the spirit of the Genocide Convention as a whole and of article I is to prohibit genocide from happening. The Genocide Convention was drafted with this objective and it sets an obligation to prevent it from happening because it is an international crime. Furthermore, as it will be argued later in section three of this chapter, the obligation to prevent genocide is a principle underlying the Genocide Convention with a status of customary international law. So, the fact that both may be customary international rules does not make it impossible to codify them in the Genocide Convention as it seems to be the case. The obligation not to commit genocide may have its source in customary international law that preceded even the adoption of the Genocide Convention but it is argued that this does not mean that it cannot find its place in the Genocide Convention as well. It is not impossible for it to be implied in the obligation to prevent genocide.

Secondly, the argument that the fact that one is an obligation of means and another of result makes them independent from each other might be true, but the nature of some obligations may make them have two faces: the positive side (to do something) and the negative side (to refrain from doing something). To have negative and positive obligations in one provision is not a particularity of the Genocide Convention. There are other international conventions that have a provision with both negative and positive obligations. For instance, article 2(1) of the International Covenant on Civil and Political Rights states that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[406] In its general comment of this article, the committee on this covenant confirmed that the legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant

[405] Ibidem.
[406] See article 2(1) of the ICCPR.

provisions of the Covenant (negative obligation).[407] Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations (positive obligation).[408]

The Court's view that the obligation not to commit genocide is implied in the obligation to prevent genocide makes sense because this obligation to prevent genocide cannot be satisfied by its bearer if the latter commit acts of genocide. The court made it clear that the fact that article I of the Genocide Convention has made genocide an international crime that Parties are obligated to prevent was enough to conclude that it was meant to obligate bearers not to commit it. The obligation to prevent genocide includes the obligation not to commit genocide. This is useful and helps to argue that obligation to prevent genocide as underlined in article I of the Genocide Convention has two faces: a negative one (not to commit genocide) and a positive one (to prevent it by taking measures). The question that arises is however whether this negative face of that obligation includes refraining from engaging in acts that may lead to the commission of genocide.

This question has neither been addressed by the ICJ nor has it been discussed in literature.

Yet, it needs some consideration and it will be discussed in line with the discussion above. The obligation to prevent genocide requires taking actions that may prevent genocide from happening. Logically, it would be absurd if it were not required to refrain from taking actions which would lead to genocide. For instance, if the obligation requires taking action such as adopting laws that would give effect to the Genocide Convention, it would be absurd if it would not imply to prohibit from adopting laws that would allow its preparation and perpetration. Such laws may be like those that were enacted in Germany against the Jews before their extermination.[409] Though such laws may be adopted long before genocide happens (if it does),

[407] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : 26-05-2004. CCPR/C/21/Rev.1/Add.13. (General Comments) available at <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> (visited on 19 March 2012).

[408] Ibidem. See also Seibert-Fohr, Anja, "State Responsibility for Genocide Under the Genocide Convention", in Gaeta, Paola (Ed.), *The UN Genocide Convention, A Commentary*, Oxford University Press, Oxford, 2009, p. 364-365.

[409] On September 15, 1935, Germany adopted the Law for the Protection of German Blood and German Honor which not only emphasized the superiority of Germans over Jews but clearly discriminated Jews by prohibiting marriages and extra-marital intercourse between them and Germans, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/nurmlaw2.html> (visited on 21 March 2012).
Another law was adopted: "The Reich Citizenship Law" which stripped Jews of their German citizenship, available

the prohibition from adopting them may flow from the obligation to prevent genocide that requires adopting laws that prevents genocide. It is argued that the reasoning of the ICJ that obligation to prevent genocide implies also the obligation not to commit genocide may apply to the obligation to refrain from performing acts that may lead to it.

If the Court limited itself to the obligation not to commit genocide it is most probably because it is what it was asked, but nothing indicates that this can be construed to limit the scope at that level (commission of genocide). In fact if the obligation to prevent genocide did not entail the obligation not to act in a way that may lead to genocide or not to commit genocide, this obligation would have a very insignificant utility. If the Genocide Convention obligates the bearers to take measures to prevent genocide from happening it automatically implies that it forbids them from taking measures that makes it happen. By obliging them to prevent genocide it consequently forbids them to perform acts that may cause it. This interpretation can be supported by what the Committee against Torture has said about the obligation to prevent torture. It observed that "States Parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention".[410] Also, if history has shown that genocide has mostly been possible where states (through their authorities) were involved in it, it makes sense to say that the obligation to prevent genocide can make sense if it obligates them to prevent their organs from taking actions that are susceptible of causing genocide.

This argument does not solve all the questions related to the obligation to prevent genocide. For instance the question whether the obligation to prevent genocide is a legal obligation on its own separate to the obligation to punish needs to be answered.

2.2. Obligation to prevent genocide as a legal obligation (separate from the obligation to punish)

The question here is whether or not the obligation to prevent genocide has its own legal status different from the obligation to punish it. Though there are some relations between the obligation to prevent and the obligation to punish, they should not be confused with each other. The

online at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/nurmlaw3.html> (visited on 21 March 2012).

[410] Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).

obligation to prevent requires that its bearer takes appropriate measures aiming at avoiding the occurrence of a breach.[411] This is not uniquely provided in the Genocide Convention. It has been provided also in other international legal instruments. For instance, as it was noted in Chapter two of this work, article 2(1) of the Convention against Torture stipulates that "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".[412]Also, article 22(2) of the Vienna Convention on diplomatic relations provides that the receiving states shall have the obligation "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and prevent any disturbance of the peace of the mission or impairment of its dignity.[413]

What is different from other conventions is that for the Genocide Convention the two obligations were put in one article and could be confusing as some could think that since the obligation to punish would have itself a preventive character, it has absorbed the one to prevent. It has already been said above that in the drafting stage there was more discussion on punishing the perpetrators of genocide than on prevention and this could have contributed to the idea of absorption of the obligation to prevent by the obligation to punish. This was deplored by the ICJ where it gave the following explanation which separates the two obligations:

> "…it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate".[414]

This explanation of the obligation to prevent genocide was needed and it is very important in that it confirmed that the obligation to prevent is independent from the one to punish. This is very important as some had thought and could continue to think that punishing genocide is a sufficient

[411] Constantin, P. Economides, *op.cit*, p. 374.
[412] See article 2(1) of the CAT.
[413] Article 29 of the Vienna Convention on Diplomatic Relations, 18 April 1961, available at <http://www.un.org> (visited on 09 January 2012).
[414] Bosnia v. Serbia case, para. 427.

way to prevent it. The contribution of the court is relevant in this regard since now it can be said that there is a legal obligation to prevent genocide which is a separate legal obligation on its own. This view has been supported by scholars. Among them, Orna Ben- Naftali has observed that this teleological interpretation and broad reading of article I made it possible to reject the view that the main function of the Genocide Convention lies in punishment rather than in prevention.[415] Schabas has also maintained that the obligation to prevent genocide is a legal one, independent from the obligation to punish, subject to the application and sanction by the courts.[416] This coheres even with the title of the convention itself: "convention on the prevention and punishment of the crime of genocide". This title shows that the Convention was created for two things: prevention and punishment of the crime of genocide and not for preventing by punishing the crime of genocide. In other words, the Genocide Convention was meant not only to punish those who have committed genocide but also to prevent its development through different phases.

However, this is not to say that the two obligations have no link between each other. There is a link between the obligation to prevent and the obligation to punish genocide. As already said in Chapter two, indeed the punishment of genocide has deterrent effects on future genocide. And among the measures to be taken in complying with the obligation to prevent genocide, there is the enactment of laws that provides for penalties against potential perpetrators. In this respect, the ICJ did recognize that close link between prevention and punishment by saying that "…It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent".[417]

Another close link is that they both pursue the prohibition of genocide. This evident connection however does not make the two obligations synonymous nor does it make them confusable because even though it was concluded earlier in this work that the obligation to prevent is continuous, it should be understood that it aims at putting in place measures that forestall the occurrence of the harm whereas the obligation to punish intervenes only when the harm has

[415] See also Orna, Ben- Naftali, "The Obligation to Prevent and to Punish Genocide", in Gaeta Paola (Ed), *The UN Genocide Convention – A Commentary*, Oxford University Press, Oxford, 2009, p. 41.
[416] See Schabas, A.William, *Genocide in International Law, The Crime of Crimes,* Cambridge University Press, Cambridge, 2000, p. 524.
[417] Idem, para. 426.

occurred. That is to say that the obligation to punish plays its role when the obligation to prevent has not been complied with but it can have preventive effects on future genocides.[418]

It may be concluded that the interpretation of the ICJ in Serbia v. Bosnia permits to clearly see the obligation to prevent genocide as an independent substantial legal obligation. However, for the purpose of the prevention of genocide it is not sufficient to know that the obligation to prevent is a legal one and that it has its legal standing vis-à-vis the obligation to punish (despite the link), it is also important to show next, the nature of this obligation as this may be useful to knowing the extent to which genocide can or should be prevented.

2.3. The nature of the obligation to prevent genocide: obligation of means not of result?

Before answering the question whether the obligation to prevent genocide is an obligation of means or one of result as well as examining its consequences on the preventability of genocide, it is important to first briefly give their distinction. It is thus worth summarizing here the traditional distinction between obligations of means and obligations of result.

2.3.1. The distinction between the obligation of means and the obligation of result

The obligation of means has been explained by Constantin P Economides as being understood in domestic law as that by which the one who owes it promises to use all possible means and to demonstrate the diligence necessary to perform the contractual obligation, without however committing to performing the obligation or achieving a particular result.[419] To this, Dupuy gives a classic example of the obligation of a doctor in relation to a patient.[420] The former must do everything that a reasonable person and competent physician can do in order to look after the

[418] A remark by Mr Deng Francis in this regard is relevant to mention here. Referring to the judicial organs within the UN system he observed that, "Justice is not only one of our main goals; it is in itself an important means of prevention". See Deng Francis, Special Adviser of the United Nations Secretary-General on the Prevention of Genocide, Opening Statement on "Preventing Genocide, sixty years later", At the OHCHR Seminar on the Prevention of Genocide, 21 January 2009, Geneva, available at <http://www2.ohchr.org/english/events/RuleofLaw/docs/Special_Advisor_Statement_2009-01-21.pdf> (visited on 22 March 2012).

[419] Constantin, P. Economides, *op.cit*, p. 375.

[420] Dupuy, Pierre-Marie, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and the Obligation of Result in Relation to State Responsibility", *European Journal of International Law* Vol. 10, No. 2, 1999, pp. 371-385, p. 375.

patient but he has no obligation, in the strict sense of the term, to heal or cure the patient.[421] Constantin P Economides adds in this case that, even though the doctor assumes the obligation to do everything possible to cure his patient, he cannot guarantee the patient's health.[422] This means that for a doctor to be said that he has breached his obligation, it must be proven that he did not use all appropriate means to perform his obligation and it is always difficult to prove that.[423] This has also been referred to as *l"obligation de s"efforcer* i.e the obligation to endeavour or to strive to achieve a certain result.[424]

It is different from the obligation of result which requires that there be a burden on the person who owes such an obligation to attain a precise result.[425] The person who undertakes an obligation of result commits himself to provide the agreed result and it is easier to find that the result is not achieved.[426] It is in fact an obligation that imposes the one who owes it to achieve the result, *i.e* to succeed. Dupuy gives an example that if he buys a car, the seller has the obligation, after the payment, to provide him with that car.[427]

To date, this traditional concept as explained above remains untouched and it is the one applicable in international law as well,[428] and as the ICJ confirmed.[429] Indeed, the ICJ played a predominant role in qualifying this obligation as an obligation of means/conduct. It concluded on

[421] Ibidem.
[422] Constantin, P. Economides, *op.cit*, p. 375.
[423] Ibidem.
[424] Dupuy, Pierre-Marie, *op.cit*, p. 375.
[425] Ibidem.
[426] Constantin, P. Economides,*op.cit*, p. 375.
[427] Dupuy, Pierre-Marie, *op.cit*, p. 375.
[428] See for example Crawford, James, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, pp. 20- 23, Constantin, P. Economides,*op.cit*, p. 375-376, Dupuy, Pierre-Marie, *op. cit*, p. 377. See also Roberto Ago's attempt to challenge this distinction in article 20 and 21 and commentary thereto as adopted by the Commission on its 29th Session in Yearbook of the ILC(1977,II), Vol. II, 1977, pp. 11-30. While addressing the obligation of means/conduct, the proposed article 20 was only concerned with the obligation which required the adoption of specific conduct by the State. It required the one who owes it to adopt a particular course of conduct which, in concretizing it, may be for instance the adoption of specific legislation. With this provision, a specific conduct is required by the international obligation itself and this provision did not leave any margin of appreciation to the one who owes the obligation which renders it an absolute obligation. In contrast, with regard to the obligation of result, draft article 21 though was concerned with breach of international obligation which guaranteed a specific result, it left the choice of means to the one who owes it and this was an element that constituted the primary characteristic of this type of obligation. This is not the place to discuss in depth the content and criticisms of the Ago proposal. It must be noted however that it was due to the criticisms on the rigidity and impracticability of the Ago's distinction that the 2 articles were deleted and the ILC has not reached any other distinction.
[429] See Bosnia v. Serbia case, para. 427.

this in the Serbia v. Bosnia case that:

> "it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible".[430]

The Court's ruling shows that the obligation to prevent genocide is a positive obligation, *i.e* the obligation to do one's best to ensure that such acts do not occur[431] without promising a specific result. The question that arises is whether this distinction by the Court is absolute when applied to the obligation to prevent genocide.

2.3.2. Does the application of the distinction by the ICJ match the reality and nature of the obligation to prevent genocide?

It is clear that in this case, the court followed the traditional distinction and did not expatiate on what specific conduct is required to prevent genocide. In other words, the measures to be taken by the bearers of the obligation to prevent genocide seem to be left at their appreciation. This leads to the question whether this coheres with the aim of the obligation to prevent genocide. In other words, it is important to see whether this obligation was justifiably qualified as obligation of means or if it should have qualified differently.

In doing so, it is essential to start with examining whether the obligation to prevent genocide is really comparable with the classic example of the obligation of a doctor vis-à-vis his patient for them to be in the same category of obligation. If a medical doctor cannot guarantee the result (to heal the patient), it is due to the fact that for instance some diseases have no medicine so far and are therefore incurable by definition. Moreover, even for diseases that are curable, the level of sickness might have reached a critical stage that whatever means can be used the patient cannot be healed. Even for those curable and early detectable diseases, the doctor cannot guarantee the result because, though he can prescribe the right medicine and other forms of treatment, some diseases may resist medicine or some patients may not take them properly or at all. This obligation of a doctor is indeed one of means because it is impossible for the doctor to guarantee

[430] Ibidem.

[431] See Gattini, Andrea, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment", *European Journal of International law*, Vol. 18, No. 4, 2007, pp. 695- 713. p. 701.

the cure. As Dupuy noted in this regard, the obligation of the doctor is a best effort one which does not require that the end result be achieved. [432]

In contrast, isn't it really conceivable to require result in the prevention of genocide? Let me examine whether the result can be required and achieved in the following two senses: The first sense is related to the prevention at early stages. At this level the bearers are under both the positive and negative faces of the obligation to prevent genocide. Since the positive face requires to put in place measures to prevent genocide, it may be argued that it is not accurate to consider this obligation as an absolute obligation of means because if preventive measures are appropriate and are taken on due time, the result may be expectable and achievable. For the negative face of the obligation to prevent genocide, though I am yet to discuss in next section the bearers of the obligation to prevent genocide, it is important to just say at this level that it would not make much sense to consider that a state has an obligation of means/conduct when it comes to preventing its organs from committing genocide against its own people on its own territory. For instance, it has been shown in literature[433] and in case law,[434] that it is almost impossible for genocide to happen in a state if it is not either prepared and committed or condoned by that state. It should therefore be understood that the state has an obligation to achieve the result of refraining from engaging in acts that may lead to genocide and from committing it itself. In other words, if for the genocide to happen there is generally the role of the state, if the state does not play that role the result required by the obligation to prevent will be achieved. This is the result required for that State, and in this way, the obligation to prevent genocide can be considered as an obligation of result. In fact, if the obligation not to commit genocide can fall within the obligation to prevent genocide, then one may say that the obligation to prevent genocide as far as this is concerned is an obligation of result.

The second sense is about the late stages. When the process to genocide has reached a stage where it is clear that genocide is imminent or is being committed, the result of stopping it can still be achieved and therefore requiring the result in this line is not inconceivable. Of course it depends on the measures taken and on who takes them. The previous chapter of this work

[432] Dupuy, Pierre-Marie, *op.cit*, p. 379.

[433] See for example Cassesse, Antonio,"Is Genocide Policy a Requirement for the Crime of Genocide"?, in Paola Gaeta(Ed), *The UN Genocide Convention – A Commentary*, Oxford University Press, Oxford, 2009, p. 135.

[434] See for example International Criminal Tribunal for Rwanda, Prosecutor v. Kayishema and Ruzindana, Judgment, Trial Chamber, 21 May 1999, para. 94, 281-291.

showed the process to genocide. Even though it concluded that there is no linear process to genocide, it nevertheless showed that no genocide can happen in secret or without prior signs. In fact, even if it might be a bit difficult to be certain that some signs will necessarily amount to genocide, at its final stage (targeted massacre at large-scale) it is clear to everyone that the chances of genocide are high. The result of stopping genocide may be possible if each bearer of the obligation to prevent genocide does its part well. The example of Libya is eloquent. Even though the action by NATO in Libya was not expressly authorized to stop genocide,[435] its operation prevented a possible large-scale massacre against civilians which was highly likely. If the intervention was successful here, there are no reasons to think that it would not be possible for halting genocide as well. This can serve as a good example where the appropriate action taken even at a late stage of the process to genocide can achieve a result. It is the same for the NATO air strikes in the FRY in 1999. This action was not authorized by the UN and here it is invoked to serve as an example exclusively for the purpose of showing how it is practically possible to achieve a result in the prevention of genocide when each member plays its full part. Indeed NATO achieved a result of preventing Serbia from possible genocide against the ethnic Albanian civilians in Kosovo.[436] This would therefore show that to expect and require a result in the prevention of genocide is not inconceivable. In my view, the obligation to prevent genocide can always achieve a result if each bearer plays its full role and employs means which are tailored to the situation. Therefore, making it exclusively an obligation of means is not entirely correct.

Wasn't the court then too traditional to conclude without nuance that the obligation to prevent genocide is purely an obligation of means? In my view the answer is yes. Moreover, there is a danger to conclude exclusively that the obligation to prevent genocide is an obligation of means. It makes the chances of preventability of genocide very low. This means that as long as the obligation to prevent genocide will be understood and considered as an obligation of means/conduct, the success in preventing genocide will hardly be expectable. It weakens that obligation in the way that its bearers might not put in place (all) measures to prevent genocide.

[435] Security Council Resolution 1973 of 17 March 2011 on the Situation in Libya, available at <http://www.un.org> (visited on 15 January 2012).

[436] See Youngs, Tim et al., "Kosovo: NATO and Military action", Research Paper 99/34 of 24 March 1999, International Affairs and Defence, House of Commons Library, pp. 11, 18, 21, available at <http://www.parliament.uk> (visited on 15 January 2012).

James Crawford has opined that not all obligations can be classified as either obligation of conduct or of result because some of them can be hybrids and the obligations of prevention are among them.[437] It may be argued that the reality and nature of genocide dictates that the obligation to prevent genocide should be understood that way and not as an absolute obligation of either way (means or result) because of its nature with regard to measures required and the bearers of that obligation.

2.4. Preliminary conclusions

Since the Genocide Convention does not give a particular meaning to "prevention", this section argued that it is to be understood in its ordinary meaning as explained in the previous chapters. As for the obligation to prevent genocide, it is argued that it obligates its bearers to take positive actions to prevent genocide. It is also argued that that obligation implies the obligation to refrain from engaging in acts (or activities) that may lead to genocide and from committing genocide. Taken that way, this section concluded that it is a legal obligation on its own. It is not absorbed by the obligation to punish. The ICJ interpretation on the legal status of this obligation has contributed to adding more legal force to it. The section also discussed the nature of that obligation and it was noticed that the ICJ and mainstream legal literature so far consider it as an obligation of means. However, it has been argued that this classification does not match the obligation to prevent genocide and may weaken the prevention of genocide. Therefore, there is a need to rethink the qualification of that obligation for the future. For instance, it was argued that the obligation to prevent genocide can also be regarded as an obligation of result.

Having explained the meaning of prevention and the scope and nature of the obligation to prevent genocide, it is now possible to examine who are the bearers of the obligation to prevent genocide, before discussing when the obligation is due and what its bearers have to do in order to comply with it.

3. The bearers of the obligation to prevent genocide

This section first examines who is legally bearer of the obligation to prevent genocide under the

[437] Crawford, James, Second Report on State Responsibility, 1999, para. 80, available at <http://untreaty.un.org/ilc/documentation/english/a_cn4_498.pdf> (visited on 15 January 2013).

Genocide Convention (3.1). Article I of the Genocide Convention is central to this discussion but also reference will be made to other international legal instruments and other sources of international law that are relevant to the discussion on who owes the obligation to prevent genocide. In the second place, this section discusses the bearers of the obligation to prevent genocide under customary international law (3.2).

3.1. The bearers of the obligation to prevent genocide under the Genocide Convention

Article I of the Genocide Convention states that "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".[438] From this provision it might be simple to say that States Parties to this Convention are bearers of the obligation to prevent genocide. However, in order to be systematic, it is essential to say a few words on how and why States Parties to the Genocide Convention are bearers of the obligation to prevent genocide. To do it in a systematic way, it is essential to start with some elementary definitions of those key words as given by some provisions of the Vienna Convention on the Law of Treaties which applies to treaties between states. [439] Since the Genocide Convention is a treaty, it is better to start with the definition in the Vienna Convention of a treaty. According to its article 2(a), "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[440] While the Vienna Convention continues by explaining that contracting state means a state which has consented to be bound by the treaty, whether or not the treaty has entered into force;[441] it also said that ""party"" means a state which has consented to be bound by the treaty and for which the treaty is in force.[442] Moreover, according to the same treaty, the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other

[438] See article 1 of the Genocide Convention.
[439] See the VCLT.
[440] Idem, Art 2(a).
[441] Idem, Art 2(f).
[442] Idem, Art 2(g).

means if so agreed.[443]

Clearly, even though the Vienna Convention did not mention contracting party *per se* as it is phrased in art I of the Genocide Convention, it appears not difficult to understand from what is explained in article 2 of that Vienna Convention that a contracting party is a State that has consented to be bound by the treaty and for which the treaty is in force. In other words, all states that have become parties to the Genocide Convention through whatever means as provided for in article 11 of the Vienna Convention, are parties to the Genocide Convention. As of July 02, 2013, one hundred and forty-two states were parties to the Genocide Convention.[444] All these states are bound by the obligation to prevent genocide enshrined in the Genocide Convention. This is the old customary rule: *Pacta sunt servanda* as also reiterated in article 26 of the Vienna Convention on the law of treaties,[445] according to which every treaty in force is binding upon the parties to it and must be performed by them in good faith.[446]

At this level, it is safe to say that States Parties to the Genocide Convention have the obligation to prevent genocide as provided in article I. In fact, there has been no controversy among scholars[447] on this and the jurisprudence has constantly confirmed the rule that every party to a treaty has to fulfil the treaty obligation.[448]

While there are no difficulties in finding that States Parties to the Genocide Convention have the obligation to prevent genocide, the question is whether they are the only ones bound by that obligation or whether there are other sources of international law which provide for that obligation as well.

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[443] Idem, Art 11.

[444] See <http://treaties.un.org> (visited on May 5 2011).

[445] Article 26 of the VCLT, see <http://treaties.un.org> (visited on May 5 2011).

[446] Ibidem. It must also be noted that the fact that the Vienna Convention on the Law of Treaties interred into force after the adoption of the Genocide Convention should not be a problem as most provisions of the latter were already in existence and article 4 of this convention did recognize and preserve the existence and operation of customary international law. This article provides that: "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states".

[447] See for example Schabas,A. William, *Genocide in International Law, The crime of Crimes*, 2end ed., Cambridge University Press, 2009, p. 520. See also Bellamy, J. Alex and Reike, Ruben, *The Responsibility to Protect and International Law*, Martinnus Nijhoff Publishers, Leiden, Boston, 2011, pp. 88-94.

[448] See for example Interpretation of peace treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J reports 1950, p. 228. See also Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J Reports 1949, p. 174. See also Bosnia v. Serbia case, paras. 162 and 427.

3.2. The obligation to prevent genocide under customary international law and its bearers

Answering the question on who is the bearer of the obligation to prevent genocide goes together with answering the question whether or not the obligation to prevent genocide is a customary international rule.

To determine that the obligation to prevent genocide is a customary rule there is a need to show its general practice and *opinio juris* which are evidence of the existence of international customary law. Doing so needs to start with examining whether the prohibition of the genocide is itself a customary rule. The first resolution on genocide[449] as well as the preamble and article I of the Genocide Convention[450] give an indication on this question by making it a pre-existing international crime. Indeed, in that first resolution on genocide by the General Assembly of the UN, the latter affirmed that genocide is an international crime and that it had happened in the past where either racial, religious or other groups had been destroyed, entirely or in part.[451] Two years later, the preamble of the Genocide Convention refers to the General Assembly resolution of 1946 which qualifies genocide as an international crime and it equally recognizes that "at all periods of history genocide has inflicted great losses on humanity".[452] In addition, article I confirmed that genocide is an international crime. This use of the verb "to confirm" indicates that the crime of genocide existed before the convention codified it. So, if it existed as an international crime before a convention, it means that it was prohibited (as an international crime) and there is no other way it could be so if not by customary law.

In international law, some rules reflect universal values and are owed to the international community as a whole. Such rules evidently have the status of customary international law. It is thus important to see whether the prohibition of genocide is among them.

Article 53 of the Vienna Convention on the Law of Treaties refers to those rules of great importance as peremptory norms of general international law. These norms are accepted and recognized by the international community of states as a whole as a norm from which no

[449] Resolution 96 (I) of The United Nations General Assembly at its fifty-fifth plenary meeting on 11 December 1946, available online at <http://www.un.org> (visited on 16 May 2011).
[450] Preamble of the Genocide Convention.
[451] Resolution 96 (I) of The United Nations General Assembly at its fifty-fifth plenary meeting on 11 December 1946, available at <http://www.un.org> (visited on 16 May 2011).
[452] Preamble of the Genocide Convention.

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[453] In determining rules with such character, the ICJ has explicitly confirmed for the first time in the DRC v. Rwanda case that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*).[454] But the ruling in the Barcelona Traction case, the ICJ had given an indication on the special nature of the prohibition of genocide by observing that it is an *erga omnes* (towards all) obligation of states.[455] It said that the very nature of some obligations including those deriving from the outlawing of genocide are owed to the international community as a whole and therefore are concern of all states.[456]

The prohibition of genocide has also been regarded in literature as one of the few undoubted examples of *jus cogens.*[457] The position of the rules of *jus cogens* is hierarchically superior compared to ordinary rules of international law and they are, as customary international rules, binding upon all states.[458] Another relevant indication of the status of the prohibition of genocide as customary international law is the fact that it has been accepted by many states both by becoming parties to the Genocide Convention[459] and by voting in the UN General Assembly resolutions on the prohibition of genocide.[460] General Assembly resolutions are not binding. However, as confirmed by the ICJ in Legality of Nuclear weapons advisory opinion,[461] they can

[453] See article 53 of the VCLT.

[454] International Court of Justice, Case concerning armed activities on the Territory of the Congo (New application: 2002) Republic of the Democratic of Congo v. Rwanda), (Case No 126), Judgment, 3 February 2006, para. 64, at http://www.icj-cij.org> (visited 11May 2011). See also Cassese, Antonio, " Genocide", in Cassese, Antonio et al.(eds.), *The Rome Statute of the International Criminal Court: A commentary*, Vol. I, Oxford University Press, Oxford, 2002, pp.335-338.

[455] International Court of Justice, Case concerning the Barcelona Traction, Light and Power Company, Limited (New application: 1962) Belgium v. Spain Judgment, 5 February 1970, para. 33 and 34, available at <http://www.icj-cij.org> (visited 18 May 2011).

[456] Ibidem.

[457] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, Cambridge University Press, Cambridge, 2000, p. 445. See also Dominicé, Christian, "The international Responsibility of States for Breach of Multilateral Obligations", *European Journal of International Law*, Vol. 10 No 2. 1999, pp.353-363.

[458] Kamrul, Hossain, "The Concept of *Jus Cogens* and the Obligation Under the UN Charter", *Santa Clara Journal of International Law*, Vol. 3, No 1, 2005, p.73.

[459] By the 26th of February 2014, 144 states are parties to the Genocide Convention. See <http://treaties.un.org> (visited on 26 February 2014).

[460] See Resolution 96(I) of 1946.

[461] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 08 July 1996, para 70, available at <http://www.icj.cij.org> (visited on 18 January 2012). The court observed that "… General Assembly Resolutions, even if they are not binding, may sometimes have normative value. They can, in

provide evidence in the determination of the existence of binding rules and their acceptance by states. Also, the fact that the prohibition of genocide has been included in different historically important legal instruments like the ICTY[462], ICTR,[463]ICC[464] statutes does undoubtedly confirm that it is customary international law.[465]

Given all that is said above, it is safe to conclude that the prohibition of genocide is a peremptory norm under customary international law and all states are bound by that rule. The remaining question is however whether this legal status also extends to the prevention of genocide.

Schabas has argued that "it is uncontroversial to maintain that the duty to prevent genocide is one of customary law, applicable even to states that have not signed or ratified the 1948 Genocide Convention".[466] This argument strongly supports the ICJ advisory Opinion on the reservations to the convention on the prevention and punishment of the crime of genocide. In this advisory opinion the court affirmed that "the principles underlying the Convention are recognised by civilised nations as binding on states even without any conventional obligation... The Contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest".[467] In 1996, in its judgment of preliminary objections in the case Serbia v. Bosnia, the ICJ confirmed that "… the rights and obligations enshrined by the Convention are rights and obligations *erga omnes"*.[468]

There is evidence that shows indeed that the prevention of genocide is a principle underlying the prohibition of genocide. The Genocide Convention (which codified the customary rules on the

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certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at *its content* and the *conditions of its adoption*; it is also necessary to see whether an *opinio juris* exists as to its normative character".

[462] See article 2 of the ICTR Statute

[463] See article 4 of the ICTY Statute

[464] See article 6 of the ICC Statute

[465] See also Ratner, Steven R& Jason S. Abrahams, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy*, 2nd ed., Oxford University Press, Oxford, 2001, pp. 41-42

[466] Schabas, A. William, "Genocide, Crimes Against Humanity, And Darfur: The Commission of Inquiry's Findings on Genocide", *Cardozo Law Review*, Vol. 27, No 4, 2006, 1703-1721, p. 1703.

[467] Reservation to the Convention on Genocide, Advisory Opinion: I.C.J. Reports1951, p. 15-30.

[468] International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v. Serbia- Montenegro), (Case No. 91) Judgment(Preliminary Objections) 11 July 1996, para. 31, available at <http://www.icj-cij.org> (visited on 18 January 2012).

prohibition of genocide) includes prevention in its title.[469] Its preamble says that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world", that "has inflicted great losses on humanity", and that "in order to liberate mankind from such an odious scourge, international co-operation is required".[470] The title and preamble are not binding, but their content can help to understand that the spirit and the objective of the convention is to ban genocide.[471] The substantial part of that convention expressly confirms that genocide *is a crime under international law*[472] which *they undertake to prevent and to punish"*.[473] The prohibition is made possible by the prevention (and punishment). That is what makes the link between the prohibition of genocide and its prevention. One is necessary to achieve the other. Prevention is needed to achieve the aim of the prohibition. Logic dictates that to liberate the mankind from this international crime (the odious scourge), genocide must be prevented from happening. This is supported by the ICJ position the case Bosnia v. Serbia that prevention is stated as a principle in Article I of the Genocide Convention.[474] The ICJ had even done so before in the earlier proceedings concerning this case. Indeed, after it concluded that rights and obligations enshrined in the Genocide Convention are *erga omnes*,[475] it linked that to the obligation to prevent as one of its principles by saying that "the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention".[476] The two obligations are not limited by territory because of their character as *erga omnes* obligations owed to the international community as a whole. Since the aim of the prohibition of genocide in international customary law is the non-occurrence of genocide and the prohibition of genocide requires prevention, the ruling of the ICJ that the prevention of genocide is a principle underlying its prohibition makes sense. This allows the conclusion that the obligation to prevent genocide is also customary law that binds all states, including the non-

[469] See the Title of the Genocide Convention.
[470] See the preamble of the Genocide Convention.
[471] See Article 31 of the VCLT.
[472] Emphasize added.
[473] Emphasize added.
[474] See para. 426 of the Case Bosnia v. Serbia.
[475] International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v. Serbia- Montenegro), Judgment (Preliminary Objections) 11 July 1996, para. 31, available at <http://www.icj-cij.org> (visited on 18 January 2012).
[476] Ibidem.

parties to the Genocide Convention.[477]

3.3. Preliminary conclusions

This section has shown the legal basis for the obligation of states to prevent genocide. It showed the bearers of that obligation under the Genocide Convention and under customary international law. While the Genocide Convention is the legal basis for the states parties to the Genocide Convention, non-parties to that Convention are bearers of that obligation under customary international law. The question whether this conclusion may apply to actors other than states has not been treated in this section because it requires a consideration that is beyond the scope of this section. It will be treated later in this work. However, identifying the bearers of that obligation is one thing, but knowing when this obligation is due is another.

4. The temporal scope of the obligation to prevent genocide

The question here is whether under the Genocide Convention (and international law in general), the bearer of this legal obligation to prevent genocide takes into consideration the process discussed in Chapter three in complying with it. In other words, it will be examined what the process to genocide means to international law in as far as the obligation to prevent genocide is concerned. It is therefore paramount to examine how the temporal issue has been treated in international law and what can come out from that before discussing in next chapters what each bearer of the obligation does concretely.

Since the Genocide Convention is at the centre of the discussion on the prevention of genocide, it is worth examining how it deals with this temporal issue. Article I suggests little as to when to prevent genocide. However, article III supplements it by listing specific acts that are punishable which, to some extent can give an indication on when prevention would be needed. Those are genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.[478] The case-law of international tribunals that have dealt with genocide cases seem to give the same indication but without much clarification.[479]

[477] See also Serena, Fortali, "The Legal Obligation to Prevent Genocide- Bosnia v. Serbia and Beyond", *Polish YearBook of International Law*, 2011, 193-195.

[478] Article III of the Genocide Convention.

[479] In the Tadić case, the ICTY observed that genocide is an organized and not a spontaneous crime. The ICTR later

Although it appears not impossible to deduce from what is provided for in article III that the Genocide Convention does not ignore the existence of a plan and preparation for any genocide to occur, the steps through which genocide passes before it is committed which need to be addressed in preventing its occurrence are not unambiguously shown. Indeed, conspiracy to commit genocide, direct and public incitement to commit genocide and complicity in genocide give some indications on the time to prevent genocide, but this concerns a rather at late stage in the process to genocide. Article III is not enough to indicate fully when activities for the prevention of genocide have to be undertaken, since there are a lot of factors to be addressed in phases long before incitement or conspiracy.

Can the drafting history help to answer this question? During the drafting process, the representative of the Union of Soviet Socialist Republics in the Ad Hoc Committee created by the ECOSOC[480], supported the inclusion of preparatory acts in article III (which was IV in the draft) as punishable acts and suggested that the notion of preparatory acts should be not left unpunished. He stated that they should be defined as:

> a) studies and research for the purpose of developing the technique of genocide;
>
> b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide;
>
> c) issuing instructions or orders and distributing tasks with a view to committing genocide.[481]

This suggestion, which to some extent would give some indications on the time to prevent genocide in early stages of the process to genocide was rejected because the majority of the members of the Ad Hoc Committee voted against it, stressing the difficulty defining or

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confirmed on its turn in Kayishema and Ruzindana case that, "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without a plan or organization." For instance, in showing how the genocide in Rwanda was planned, the ICTR observed that "… a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994." International Criminal Tribunal for Former Yugoslavia, Prosecution v. Tadić (Case No.IT-94-1-T), Opinions and Judgment, 7 May 1997, para. 655, available at <http://www.un.org/icty/Tadić /trialc2/judgment/tad-tsj70507JT2-e.pdf> (visited on 16 May 2010). International Criminal Tribunal for Rwanda, Prosecution v. Kayishema and Ruzindana (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 94, 289- 291, available at <http://www.ictr.org/ 69.94.11.53/default.htm> (visited on 16 May 2010).

[480] The Ad Hoc Committee on genocide was set up by the Economic and Social Council resolution dated 3 March 1948. Mr. Platon D. Morozov from USSR was among the members. See the Report of the Ad Hoc Committee on genocide in Doc E/794 as entirely reproduced in Abtahi, Hirad, and Webb, Pilippa *The Genocide Convention: The Travaux Preparatoires*, Vol. One, Nijhoff, Leiden, 2008, pp. 1112-1160.

[481] Ibidem.

enumerating preparatory acts.[482] Rejecting this proposal however does not mean that prevention should not include preparatory acts. What was rejected was criminalizing them. So like article III, the *travaux préparatoires* do not help much to clarify the exact time the obligation is owed.

Two other provisions in the Genocide Convention may indicate more when the obligation to prevent genocide is owed. These are article V and VIII. Indeed, by stating that "the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III", article V may be understood as indicating that states can do so to avoid that there be signs of genocide which might logically be at the primary level. Furthermore, article VIII states that "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". As it will be detailed later, this may indicate three periods: the period before the start of signs of genocide, when signs are present, and the period when genocide has started. Placing this within the three levels, prevention might fall within the primary and secondary levels and suppression in the tertiary level.

In all the said articles though, even if there are some indications on the time to prevent genocide, there is a lack of clear obligation on states to take action to tackle the factors shown in Chapter three of this work. The Genocide Convention is focused on the period close to the genocide itself as was discussed above. In other words, the Convention does not indicate all the stages/phases in the process to genocide and therefore lacks clarity on when to take preventive action.

Schabas noticed that academic research on the Genocide Convention is dominated by historians and philosophers.[483] This explains why the temporal scope has received little attention. The few legal scholars who treated the issue have tended to focus on the shortcomings[484] of the Convention in general without suggesting much about the scope of the provisions on the prevention of genocide as far as the time to prevent genocide is concerned.

Also, the treatment by the ICJ of this issue suffers from ambiguity of the Genocide Convention

[482] Ibidem.

[483] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, p. 8.

[484] Ibidem.

as far as the temporal issue is concerned. In its endeavours to explain when the obligation to prevent genocide commences within the meaning of Article I of the Convention, the ICJ started by asserting that:

> "It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility: The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation".[485]

However, the Court did not limit itself to this statement which, if not explained in context may lead to insufficiency when it comes to applying it to a particular obligation like the prevention of genocide. Thus, the Court took into consideration the nature of the prevention and added that:

> "This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is under a duty to make such use of these means as the circumstances permit".[486]

The effort of the Court in this regard to try to give an indication on the time the genocide is to be prevented is laudable. However, question on the exact stage/time the prevention is to be undertaken is not accurately answered. Yes, the Court recognizes that the prevention of genocide does not commence when genocide commences itself. However, not only the Court avoided to give details on phases and what states have to do at each phase of the process to genocide, but it also used a criterion that does not help much in solving the question of when prevention is needed and is supposed to commence. According to the Court, "a state's obligation to prevent

[485] Bosnia v. Serbia case, para. 431.
[486] Ibidem.

and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".[487]

The court apparently had in mind the period close to the commencement of genocide when clear signs of the risk of genocide are there. However, the Court does not give any clue on what constitutes a serious risk and this shows the emphasis of the late stage where it is already clear that genocide may be committed. While there may be many reasons for the Court to have put much emphasis in this case on the final stages of the process to genocide, it also recognized that the obligation to prevent genocide is not temporally limited. Saying that the obligation to prevent genocide does not commence at the time genocide starts, but from the time state learns or should have learned about the serious risk of genocide makes it an open norm because as it was seen in Chapter three, there are risks in every stage and factor which, if not addressed, might lead, soon or late, to genocide. The questions that this does not solve include what the criterion of the knowledge of the (serious) risk and the lack of certainty that genocide may happen means.

5. Prevention and knowledge of serious risk of genocide and the lack of certainty of its occurrence

5.1. Prevention and knowledge of the serious risk of genocide

The Bosnia v Serbia case was the first case concerning genocide in which the ICJ decided on the merits,[488] in relation to the obligation to prevent genocide. In its decision, the ICJ came up with the criterion of the knowledge of serious risk of genocide in determining the responsibility of the responsible state. What does this criterion mean with regard to the obligation to prevent genocide?

The Court noted that:

> "In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has

[487] Ibidem.

[488] For instance, one year before the Bosnia v. Serbia case the ICJ had found that it had no jurisdiction to decide the *Case concerning Armed Activities in Congo*. See International Court of Justice, Case concerning armed activities on the Territory of the Congo (New application: 2002) Republic of the Democratic of Congo v. Rwanda), (Case No 126), Judgment, 3 February 2006, available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (visited on 22 February 2013).

> available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit".[489]

The ICJ stressed the fact that the risk of genocide in Srebrenica was known to the authorities of Serbia, including Milosevic, in determining the responsibility of Serbia for the breach of the obligation to prevent genocide. One of the indications given by the ICJ with regard to Serbia is that Serbia was "fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region".[490] Although this explanation of the Court relates to the period close to the occurrence of genocide, it cannot be inferred that the obligation to prevent genocide only arises at that advanced phase of the process to genocide. The place to discuss this in detail is not here; it will be discussed in next chapters in which the obligation to prevent genocide will be analysed at each level of prevention. At this moment, it suffices to maintain that the obligation to prevent genocide is not limited to the time it starts, but is owed from the time there is a risk that it may happen. This risk can be at any phase of the process as it has been shown earlier and will be clarified further in next chapter.

Although it may not be difficult to understand the concept of knowledge of awareness as it simply means to have information on or be acquainted with something,[491] the assessment of the risk and the seriousness thereof may not be easy. In 1993 the ICJ had already indicated that the obligation to prevent genocide imposed Serbia to take all measures to prevent the commission of genocide in the future.[492] This was several months before the genocide was committed in Srebrenica. But at that time, and even before, there were indications that genocide was likely or was even being committed (Bosnia indicated some acts committed from 1992).[493] The ICJ however did not (and maybe was even unable to) clearly show what constitutes a serious risk of genocide. This is not an easy task and even if it had determined it in that very case, it may differ in other cases. As already demonstrated earlier, genocide may occur in a context of war, which to some extent may make it relatively easy to assess the risk depending on the nature of that war).

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[489] See Bosnia v. Serbia, para 431.
[490] See Bosnia v. Serbia, paras. 283, 285, 437, 438.
[491] Garner, A. Bryan (ed.), *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minnesota, 1999, p.879.
[492] Application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), request for the Indications of Provisional Measures, 8 April 1993, para. 52, A(1), (2), available at <http://www.icj-cij.org> (visited on 21 February 2013).
[493] Idem, para 1.

However, it may also occur in peace time and the determination of the risk may be more difficult in such situation. This leads to the question whether knowledge of serious risk of genocide would mean to be certain that genocide will occur if not prevented.

5.2. Obligation to prevent genocide v. the lack of certainty that genocide will happen

The ICJ explained that a State may be found to have violated its obligation to prevent genocide even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.[494] The ICJ noted:

> "In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milosevic´ above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milosevic´'s own observations to Mladic´, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed."[495]

In the context of this judgment, the knowledge (or awareness) of the risk of genocide should not be confused with the certainty that genocide will occur. In other words, for the obligation to prevent genocide to be owed there is no requirement that the state must have the certainty that genocide will occur. That would be absurd and contrary to the purpose of prevention. Though the ruling of the court on this issue focused on the period close to the occurrence of genocide,

[494] See Bosnia v. Serbia, para. 438.
[495] Bosnia v. Serbia, para. 438.

nothing shows that the intention was to limit the application of this obligation to that stage. The court's ruling does not exclude the extension of serious risk to early stages because every stage matters for the prevention of genocide. The court was dealing with one case and had to decide in consideration of the facts in that specific case. It should be recognised however that, in practice there might be many difficulties in determining the exact time a state knows or should know about a risk of genocide and on the determination of its seriousness, at each phase of the process that may lead to genocide.[496]

5.3. Preliminary conclusions

This section concludes that the court gave some indications of what it meant by the knowledge of the serious risks of genocide but it did not clarify whether and how it would apply to early stages of the process to genocide. However, given the seriousness of risks of genocide even at early stages, there is nothing that indicates that the court intended to exclude them. Therefore, this section concludes that the obligation to prevent genocide is not temporally limited and is owed in the three levels discussed in Chapter two and three because if genocide is not prevented at any stage, the risk that genocide may happen becomes serious. Likewise, it does not require certainty that genocide will occur before preventive measures are taken. However this needs a discussion *in concreto* in order to see how this legal obligation is or ought to be exercised by its bearers within the three levels of prevention. The next chapters will discuss what the bearers of the obligation have to do in order to comply with the obligation to prevent genocide at the primary, secondary and tertiary levels.

Conclusion

This chapter started by explaining the origin and adoption of the Genocide Convention before discussing the nature and bearers of the obligation to prevent genocide that it imposes. This approach was chosen because to understand prevention and the obligation to prevent genocide, it is paramount to have recourse to the circumstances under which this convention was adopted, as

[496] Gattini, Andrea, "Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment", *European Journal of International law*, Vol. 18, No. 4, 2007, pp. 695- 713. p. 704. On this issue Gattini observed for instance that with the temporally determinable elements: the presence of a real and serious danger of genocide, "it is doubtful whether the general awareness of a legacy of hatred over the years in a certain place can be equated with a real and present danger of genocide".

well as how it was understood by its initiators. This provides a basis for the discussion on what the Convention entails to its bearers. The explanation of the genesis and drafting process of this convention revealed that the Convention was initiated from the experience of the Armenian genocide and more directly from the Second World War during which the Holocaust occurred. These circumstances not only were determinant in creating that convention but also influenced its content, for instance by putting much emphasis on the last stages of genocide. There is no evidence however that the prevention of genocide at early stages was excluded.

On the prevention of genocide as such, this chapter discussed what the prevention means and what the obligation pertaining to it entails. Since the drafters did not give any specific meaning to this word, prevention is to be understood from its ordinary meaning which is to put in place measures to avoid the occurrence of something harmful, in this case genocide. The obligation to prevent genocide consists of adopting measures that make genocide unlikely and complying with them. The obligation to prevent genocide contained in article I of the Genocide Convention (which reflects customary international law) provides an umbrella obligation that refers to any other rules and measures that are susceptible of having effect to the prevention of genocide.[497]

Furthermore, it was shown that many consider the obligation to prevent genocide to be an obligation of means and not of result, but it was argued that this makes this obligation weak. Therefore this obligation should not be understood exclusively as an obligation of means. For instance, it was argued that this obligation has two faces: positive and negative. The second face of negative obligation (obligation not to engage in activities that may lead to genocide and not to commit genocide) is absolutely an obligation of result.

With regard to the bearers of the obligation to prevent genocide, *prima facie*, they are the states parties to the Genocide Convention. It was shown that the obligation to prevent genocide is inextricably linked to the prohibition of genocide and therefore a customary rule and therewith binding also non-parties to this convention as members of the international community as a

[497] It should be recalled that it would not be unique for this article. The ICTY ruled that "Article 3 constitutes an "umbrella rule", which makes an open-ended reference to all international rules of humanitarian law". Indeed, the ICTY said this in Prosecutor v. Anto Furundzija case, rejecting the argument of the defence of the accused that since torture was not on the list of acts punishable under article 3 of the ICTY, the ICTY lacked jurisdiction in a case of torture. See International Tribunal for the Former Yugoslavia, Prosecutor v. Anto Furundzija, judgment of the Trial Chamber, 10 December 1998, para. 133; available at <www.icty.org> (visited on March 20, 2011).

whole.

Finally, on the questions related to the temporal scope of the obligation to prevent genocide, it was concluded that the obligation is not temporally limited. And this coheres well with what was concluded in previous chapters that prevention is a continuous process. Likewise, the ICJ criterion on knowledge of serious risk of genocide does not limit the obligation to prevent genocide because the risk may be serious even at early stage of the process to genocide. It was also noted that this knowledge does not mean the certainty that genocide will happen.

It cannot be claimed that this chapter has completely answered all questions surrounding the obligation to prevent genocide. Discussing these issues seems to be rather a long way. The chapter nevertheless served as a strong foundation from which other chapters will be built in clarifying what this obligation entails *in concreto*. Hence, it is important to see in next chapter(s) and within different divisions of period, what international law requires and permits in preventing genocide and under what conditions and with which means the obligation to prevent genocide arises. In other words, it is now good time to see *in concreto* what the convention and other legal sources of international law provide on how the legal obligation to prevent genocide is implemented by its bearers. That is to see what each bearer is legally owed, at which moment and with which means, and within which territorial boundaries.

Chap V. The obligation of territorial states to prevent genocide under international law

Introduction

This chapter aims at discussing the obligation to prevent genocide by territorial states in a concrete way: by looking at what they are required to do in preventing genocide on their territory. For the purpose of this work, a territorial state means any state as known in international law with powers and privileges recognized in international law within the boundaries of its borders. This chapter proceeds in four sections. It starts with briefly examining the territorial scope of the obligation to prevent genocide as far as territorial states are concerned (section one). This will be followed by an analysis on what international law requires to territorial states to do in order to comply with their obligation to prevent genocide. This is done at three levels: primary (section two), secondary (section three) and tertiary (section four). Some challenges on prevention common to the three levels will be identified and suggestions to overcome them will be given (section 5). This is a longer-term and more comprehensive approach to prevent genocide and it is argued that it is only when prevention is done through these levels that the chances of its effectiveness become high.

1. Territorial scope of the obligation to prevent genocide

What is the legal basis for territorial states to prevent genocide on their territory? This is the question that will be briefly treated in this section.

Article 29 of the Vienna Convention on the Law of Treaties states that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".[498] Thus, from what is provided in article I of the Genocide Convention, each state has the primary obligation to prevent genocide from being committed to the population on its territory. This has been reiterated in literature. For instance, Sammaruga has written that the prevention of deadly conflicts (genocide being one of the worst of them) and other forms of man-made catastrophes are indeed first the responsibility of sovereign states and

[498] Article 29 of the VCLT.

the communities and institutions within them.[499] This means, as was also observed by Arbour, that States have a responsibility under existing international law vis-à-vis the people on their territory to prevent genocide.[500] Recalling article I of the Genocide Convention, Schabas notes that this article established the duty of states to prevent genocide and to punish the perpetrators[501] and in this, the logic of things would be that they primarily do that on their territory.

In the 2005 World Summit Outcome Document, although the word responsibility was used instead of obligation (the nuance will be discussed later), the primary responsibility of states on their own territories was more or less unambiguously explained. In this document, states agreed in paragraph 138 [502] that:

> "Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it".

There is no reason to go further in this discussion since there is no controversy on this issue. It is safe to conclude that territorial states have the obligation to prevent genocide on their entire territory. However, the content of this obligation as to what states are obligated to do on their territory to prevent genocide needs to be examined in order to show the measures that should be taken at primary, secondary and tertiary levels.

2. Primary prevention of genocide by territorial states.

It was argued in chapter four that the obligation to prevent genocide does not commence when genocide begins as this would be absurd. It is owed long before genocide starts. This means that states are obligated to take measures which aim at preventing genocide at the primary level, *i.e* before there are signs of risk of genocide in order to create an environment that does not give

[499] Sommaruga, Cornelio, *The Responsibility to Protect,* in Lijnzaad Liesbeth and al., *Making the Voices of Humanity Heard*, Martinus Nijhoff Publishers, Leiden/Boston, 2004, p. 360.

[500] Arbour, Louise, "The Responsibility to Protect as a Duty of Care in International Law and Practice", High commissioner for human rights address to the Dublin's Trinity College on November 23, 2007, available at <http://www.ochcr.org>(visited on May 9, 2011).

[501] Schabas, A. William, *Genocide in International Law, The crime of Crimes*, Cambridge University Press, 2000, p. 2.

[502] 2005 World Summit Outcome Document, adopted by the resolution of the United Nations General Assembly 60/1, 14- 16 September 2005 in New York, available at < http://www.un.org/summit 2005> (visited on 10 May 2011).

chance to the risk of genocide to emerge. According to the meaning and aim of prevention, this level is very important as shown in previous chapters. It is important because if prevention is done at this level, genocide is not only prevented from being committed but also from even being started or attempted. This is because this level covers the period before any manifestation of problems that may lead to genocide. The question is about what a state should do on its own territory at this level to comply with the obligation to prevent genocide. Does international law regime concretize this obligation of territorial states at the primary level? Does the Genocide Convention give any indications on that? What about other sources of international law? Who checks whether territorial states prevent genocide at this level? In other words, what are the legal measures envisaged by international law to prevent genocide on this level by territorial states?
This section groups the measures in two categories: The first is about the necessary legislation that give the effect to the Genocide Convention. The second is about measures other than legislation with the same effect.

2.1. Necessary legislation to give effect to the Genocide Convention

2.1.1. Legal basis and meaning

Article I of the Genocide Convention obligates each Contracting Party to prevent genocide but does not suggest how. Article V complements article I by suggesting legislative action: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III".[503] To understand what this article means at the primary level of prevention of genocide it is important to explain some of the words it uses. First, this article uses words like "in accordance with their respective constitutions". Apparently, this might incline the Genocide Convention to the constitution of states and not the other way round. In other words, it might seem to mean that in adopting legislation to give effect to the Genocide Convention, states adopt only those measures that are consistent with their constitution. In his commentary on this article, Robinson argued that this only concerned the procedure to enact laws and not their substantive

[503] See art 5 of the Genocide Convention.

nature.[504] To support his argument, he referred to the French text that: "*s'engagent à prendre, conformément à leurs constitutions respectives*" which, contrary to the English text sounds much more of procedural nature than the substantive one.[505] Indeed, it would have been strange to say that states adopt measures that are in conformity with their internal constitution. The subsequent codification of laws of treaties in international law confirms Robinson's argument. According to the VCLT, when a state has established its consent to be bound by a treaty,[506] that treaty in force is binding upon it[507] and it cannot therefore invoke the provisions of its internal law as justification for its failure to perform a treaty.[508] Given this, it is safe to join Robinson's argument that it was about the procedure of enactment of legislation and not the substantive nature of the legislation in question.

Secondly, like article I of the Genocide Convention, this article also uses the verb "to undertake"[509] which, as already explained, means "to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation."[510] So, it is safe to argue on this that it has created a legal obligation upon contracting parties to enact necessary legislation that gives effect to the Genocide Convention.

Thirdly, this article uses the concept of *necessary legislation*[511] and it is worth examining what it means to the obligation to prevent genocide at the primary level. Obviously, this provision does not specify which legislation is necessary to give effect to the Genocide Convention except where it says that states undertake to provide in their legislation, effective penalties for persons guilty of genocide. But this is just an example among other unspecified possible provisions. The *travaux préparatoires* of the Genocide Convention do not instruct much on this because it seems that the prevention component was not explored enough. The ICJ also does not add much. It only says that states take appropriate measures in complying with their obligation to prevent genocide. However, from its ordinary meaning the concept of *necessary legislation*[512] does not limit states

[504] See Robinson, Nehemiah, *The Genocide Convention, A Commentary*, published by the Institute of Jewish Affairs, New York, 1960, p.75.
[505] Ibidem.
[506] Art 2 (b) VCLT.
[507] Art 26 VCLT.
[508] Article 27 VCLT.
[509] Emphasis added.
[510] Bosnia v. Serbia case, para. 162.
[511] Emphasis added.
[512] Emphasis added.

from enacting any legislation other than those related to penalties as long as they can give effect to the Genocide Convention. In this line, to give effect to the genocide convention means to make the prevention of genocide possible. This leads to a further question about what kind of legislation can give effect to the Genocide Convention.

2.1.2. Content of necessary legislation to give effect to the Genocide Convention

What legislation can be necessary to give effect to the Genocide Convention? This question might seem easy but at the same time it is complicated. Easy because one might say that article V opened a possibility for territorial states to enact any legislation that is susceptible of preventing genocide. However, it is also complicated because article V did not indicate what kind of legislation is necessary in the prevention of genocide. That is what will be examined here.

The key word here is the adjective "necessary". The Convention does not define this word and nowhere in the *travaux préparatoires* of the Genocide Convention, there is any indication that drafters wanted to give any special meaning to this word. Hence, this word is to be understood in its ordinary meaning. The American Heritage English Dictionary defines necessary in different ways: it may mean *absolutely essential* therefore a synonym of indispensable or as *needed to achieve a certain result or effect*; requisite. [513] Though not really different to the latter explanation, Black's Law Dictionary[514] gives a more detailed definition. It first says that this word is to be considered in the connection in which it is used as it is a word susceptible of various meanings.[515] Indeed, according to this dictionary, this word may import absolute physical necessity or inevitability or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought.[516]

In my understanding it is not indispensable to engage in a debate on knowing whether the necessary legislation to give effect to the provisions of the Genocide Convention falls within the first meaning: absolutely essential, indispensable or the second one: useful, suitable, proper or conducive to the end sought. The reason is simple. Given the object and purpose of the Genocide

[513] See *The American Heritage® Dictionary of the English Language, Fourth Edition*, 2003, available at <http://www.thefreedictionary.com/necessary> (visited June 1 2012).
[514] Garner, A. Bryan (ed.), *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minnesota, 1999, p.1029.
[515] Ibidem.
[516] Ibidem.

Convention which is to avoid the occurrence of genocide, both meanings are valid because they may serve that purpose. An additional reason may be that the indispensability or usefulness of the legislation to give effect to the Genocide Convention may not only depend on the content of that legislation vis-à-vis the Genocide Convention but also and especially on how it is applied. In other words, it might be hard to say that a given legislation is indispensable or useful to give effect to the provisions of the Genocide Convention. For the obligation to prevent genocide which requires taking all appropriate measures, the word "necessary" cannot be understood to have one or the other meaning (exclusively). If some legislation might be indispensable, some others may be useful in the sense that they may contribute to the prevention of genocide and they still mean "necessary".

This leads me to an argument that necessary legislation is any kind of legislation that addresses all the factors and phases in the process to genocide as discussed in chapter three. For instance legislation that does not allow totalitarianism, discrimination, inequality among groups, dehumanisation, impunity, extermination etc. It is also a legislation that creates an environment that does not allow economic hardship to happen. At this stage, the legislation addresses all those factors that, if not avoided at this level, might create a favourable environment for the outbreak of conflict that may in turn lead to genocide. Ban Ki-Moon rightly put that "conflicts often break out in countries where governments are weak or rule in a way that is blatantly unfair to some groups"[517] The best way to prevent this is to promote "good governance" -- to advocate for healthy and balanced economic development; respect for the human rights of all, including those of minority groups; and for political arrangements in which all groups are fairly represented."[518] If that is correct, "necessary legislation" deals with all those areas. [519]

It is worth pointing out other provisions in other international legal instruments that address the same factors in the primary phase. Recently, the Jacob Blaustein Institute made a compilation of them which is very much instructive.[520] For instance, with regard to the factors of genocide

[517] Ban Ki-Moon, Secretary-General of the UN, "Lessons from Rwanda, The United Nations, The United Nations and the Prevention of Genocide", on the occasion of the 13th anniversary of the Rwandan genocide, 2007, available at <http://www.un.org/preventgenocide/rwanda/neveragain.shtml> (visited on 26 January 2012).

[518] Ibidem.

[519] See also Seibert-Fohr, Anja, "State Responsibility for Genocide Under the Genocide Convention", in Gaeta Paola (Ed.), *The UN Genocide Convention, A Commentary*, Oxford University Press, 2009, p. 361-365.

[520] For more details see Compilation of Risk Factors and Legal Norms for the Prevention of Genocide by Jacob Blaustein Institute for the Advancement of Human Rights in Cooperation with the Office of the Special Adviser on

(poverty, absence of rule of law, totalitarianism…), the International Covenant on Economic, Social and Cultural Rights requires states to create conditions whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.[521] Article 2(1) of this convention states that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".[522] These laws shall for instance include those recognizing the fundamental right of everyone to be free from hunger, and will obligate states to take, individually and through international co-operation, including specific programmes which are needed *inter alia* "to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources".[523]

With regard to the phases of deprivation and discrimination in the process to genocide, article 2(2) of the ICESCR stipulates that "the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[524]

As for discrimination *per se*, among other things, article 21 of the International Convention on the elimination of all forms of racial discrimination (ICERD) obligates states parties to it, to "prohibit and bring to an end, by all appropriate means including legislation, as required by circumstances, racial discrimination by any persons, group or organisation".[525]

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the Prevention of Genocide, 2011 available at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/blaustein.pdf> (visited on 8 February 2012).

[521] International Covenant on Economic, Social and Cultural Rights (ICESCR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27, available <http://www2.ohchr.org/english/law/cescr.htm> (visited on 06 February 2012).

[522] Ibidem., article 2(1).

[523] Idem, article 11(2), a.

[524] Idem, article 2 (2).

[525] Art 21(d) of the International Convention on the elimination of all forms of racial discrimination(ICERD), adopted and opened for signature and ratification by General Assembly resolution 2106(XX) of 21 December 1965, entered into force 4 January 1969, in accordance with Article 19, available at

For the phases of dehumanisation and propaganda to incite people to commit genocide it is important to say that article V of the Genocide Convention explicitly referred to article III by saying that states undertake to "…provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III". This article III lists the direct and public incitement to commit genocide among acts punishable under this convention.

Also, article 4 of the ICERD stipulates that: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

> "(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."[526]

There are also some examples of domestic laws that have specific provisions in their legislations. For instance, article 137c, paragraph 1 of the Dutch Criminal Code stipulates:

> "He who publicly, verbally or in writing or image, deliberately expresses himself about a group of people based on their race, their religion or belief, their hetero- or homosexual nature or their physical, mental or intellectual disabilities, shall be liable to a prison sentence of a maximum of one year or pecuniary fine of the third category".[527]

<http://www2.ohchr.org/english/law/cerd.htm> (visited on 06 February 2012).

[526] See article 4 of the ICERD.

[527] See The Dutch Penal Code, translated by Rayar, Louise and Wardsworth, Stafford on behalf of the University of Maastricht, Fred B. Rothman & Co, Littleton, Colorado, 1997, pp. 133-134.

Similarly, Article 137d, paragraph 1of the same Criminal Code states that:

> "He who publicly, orally, in writing or graphically, incites hatred against or discrimination of people or violence against an individual or belongings of people because of their race, their religion or their belief, their gender, their heterosexual or homosexual orientation or their physical, psychological or mental disability, shall be liable to punishment with a maximum of one year or a pecuniary fine of the third category."[528] Finally, article 137 (e) penalizes the making public of a statement that is discriminatory for a group of people or incites to hatred, discrimination or violence.[529]

It is not possible here nor is it very important to mention all the provisions from various international legal instruments that are complementary to the Genocide Convention in the sense that they give indication on the kind of the legislation that, by their nature, may also give effect to the Genocide Convention. Nor is it necessary to mention all states that have such laws. It is more important to answer the question whether these other international instruments and those domestic laws thereof have any legal link to the Genocide Convention. In other words, would not complying with them mean also not complying with the obligation to prevent genocide under the Genocide Convention?

The Genocide Convention has not included such a specific provision but it is impossible to prevent genocide without having recourse to adopting measures that are also required by those other conventions. Indeed, if article I of the Genocide Convention obligates states to prevent genocide and article V obligates states to take necessary legislation that can give effect to the Genocide Convention, the fact that the necessary legislation might be falling within other instruments should not be a problem. Instead, it should be understood as an added value to the prevention of genocide. And since genocide is a crime of crimes which is at the apex of the pyramid[530] of all violations of human rights, it makes sense to construe from that that this level is reached after many other violations have occurred. Genocide is the umbrella of many other

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[528] Ibidem.

[529] Ibidem. See also the Irish Act on the Prohibition of Incitement to Hatred on Account of Race, Religion, Nationality or Sexual Orientation of 29 November 1989, Number 19, in Irish Statute Book produced by the office of the Attorney General, available at <http://www.irishstatutebook.ie/1989/en/act/pub/0019/print.html> (visited on 5 March 2012).

[530] See International Criminal Tribunal for Rwanda, Prosecutor v. Jean Kambanda (Case No ICTR-97-23-S) Judgment, 04 September 1998, para. 16. See also International Criminal Tribunal for Rwanda, Prosecutor v. Omar Serushago (Case No ICTR-98-39-S) Judgment, 05 February 1999, para. 15 available at <http://www.ictr.org> (visited on 09 February 2012).

human rights violations because the process that leads to it involves the violation of many other human rights. This means that it is the final level of violation of human rights and it is reached as a consequence of violation of others. It can therefore be argued that if territorial states adopt laws that conform to those conventions, they are at the same time respecting their undertakings in the respective conventions but also by the nature of the obligation to prevent genocide, they are complying with their obligation to prevent genocide by adopting necessary legislation that is susceptible of giving effect to the Genocide Convention. And if adopting such legislation related to discrimination and other things as shown above fits in the necessary legislation to give effect to the Genocide Convention, it does not require that states be at the same time parties to those other international instruments. They are directly required to adopt such legislation in complying with their obligation under the Genocide Convention. Whether or not the breach of their obligations under those conventions would engage the responsibility of states under the Genocide Convention is another question that cannot be answered here.

However, since article V did not indicate what kind of legislation is necessary in the prevention of genocide, states have been given a wide margin of appreciation in how to apply this at this level. Given the uncertainties surrounding this level (primary) and unfamiliarity states have in it, the prevention at this level is very likely to be disregarded by states. This is a problem on prevention of genocide at this level because there is a lack of a legal framework on what are the necessary laws to be adopted to prevent genocide at the primary level. Also, the fact that there is no monitoring body to provide guidelines and to assess whether states apply what is required at this level makes it even more unlikely that every territorial state will adopt necessary laws. While the legislation is necessary to prevent genocide at the primary level, the next question becomes whether it is the only measure needed at that level.

2.2. Is only legislation envisaged at the primary level in order to prevent genocide?

The question here is whether legislation is the only measure that can be taken at this primary level. In other words, do the measures required by international law only consist of enacting legislation in *stricto sensu*? Looking back to the example of the prevention of torture, the answer to this question might be in the negative. The Inter-American Court of Human Rights has explained in a case of torture that the duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and

ensure that any violations are considered and treated as illegal acts.[531] Similarly, prevention of genocide needs also different measures that are not only legislation, in order to ensure that genocide does not happen. Article I of the Genocide Convention does not give any limitation. It was concluded above that this article did not limit the legislation as long as it is necessary to give effect to the Genocide Convention. There are no reasons the arguments used to reach that conclusion would not apply to other measures as well. The analysis of this article I has proven that despite the focus of the convention on legislation, it did also provide for measures other than the legislation. The European court of human rights has given a ruling that can support this argument in a case where the applicant (Oyal), a new-born baby had been infected with HIV Aids virus during blood transfusions in a state hospital in Turkey.[532] The applicant claimed that state authorities had failed in their positive obligation to protect the right to life.[533] In explaining the positive obligation of states with regard to the right to life (article 2 paragraph 1 of the European convention of human rights) the court said that it "requires states to make regulations compelling hospitals, whether public or private, to adopt measures for the protection of their patients,"[534]and it found that Turkey had failed to do so.[535]

What should other measures to prevent genocide at this level include? Measures to prevent genocide at this level may for instance include educational measures through schools and media coverage. These may maintain or have changes in behaviour and therefore have effect on the prevention of genocide. As suggested by Linda M.Woolf and Michael R. Hulsizer, "education is a primary element involved in creating a culture of peace".[536] Measures could also concern the promotion and maintenance of good diplomatic relations with other states to prevent conflicts with other states that can turn in long run into genocide against its people. As the Inter-American Court of human rights observed again that "it is not possible to make a detailed list of all measures",[537] to prevent torture, it is equally impossible to make a detailed list of measures to

[531] Velasquez-Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C) para. 175.
[532] European Court of Human Rights, Case of Oyal v. Turkey (application no 4864/05), Judgment, Strasbourg, 23 March 2010, available at <http://www.echr.coe.int> (visited on 09 February 2012).
[533] Idem, para. 51.
[534] Idem, para. 54.
[535] Idem, para. 105.
[536] Woolf, M. Linda, and Hulsizer R. Michael, "Psychosocial Roots of Genocide: Risk, Prevention and Intervention", in *Journal of Genocide Research,* Vol. 7, No. 1, 2005, pp. 101- 128, p. 122.
[537] Velasquez-Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C)

prevent genocide because "they vary with the law and the conditions of each State Party".[538] However, though these different measures can have a place in article I of the Genocide Convention, the fact that they have not been explicitly mentioned in the Genocide Convention can make it easy for states not willing to take them to ignore them. In other conventions on prevention, it is sometimes preferred to have a specific provision that mentions other measures to be taken. For instance, art 2 of the Convention Against Torture stipulates that States parties "shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".[539] Likewise article 7 of the ICERD puts that: "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention."[540]

Such specific provisions are missing in the Genocide Convention and it is a problem on this primary level because not only there is no monitoring body to follow-up the implementation of the Genocide Convention at this level but also a specific provision would have made it much more clear what measures can be taken at this level. In this regard, article 9(1) of the ICERD can serve as a good example that can be envisaged to solve the two problems. It says: "States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and

(b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties…"[541]

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para. 175.

[538] Ibidem.

[539] Article 2 of the CAT.

[540] Art 7 of the ICERD.

[541] See article 9 (1) of the ICERD. See also its articles 10 and 11 which concern the procedure and functioning of the committee.

2.3. Preliminary conclusions

It can be argued that though not much is said on this in the Genocide Convention, preventing genocide at the primary level is part of the Genocide Convention. It can therefore be concluded that the obligation to prevent genocide is owed from the primary level. States are obligated to put in place measures that are relevant for the prevention of genocide. Those measures include enacting legislation as well as other measures that are necessary for that purpose. What is necessary for that purpose is a legislation and other measures that prevent those factors shown in chapter three from developing into the following phases. Prevention means to take measures that aim at avoiding the occurrence of genocide and as states have the obligation to prevent genocide by adopting measures that makes it not happen, it follows that this obligation is owed from the moment the necessity to take measures arises. This coheres with the meaning of prevention and the spirit of the Genocide Convention which is to avoid the occurrence of genocide. The problem is however that the flaws in the Genocide Convention can be in the interest of states unwilling to take measures to prevent genocide.

If for whatever reasons no measures have been taken at this level,[542] or if, despite the measures in place, there are signs that a genocidal conflict between groups (racial, ethnic, national or religious) is developing; further preventive measures are needed at the next level (secondary).

[542] Even if, as it was concluded earlier, the obligation to prevent genocide is a principle underlying the prohibition of genocide and therefore binding on states even without treaty obligation, some states may for instance be reluctant to adopt measures to prevent genocide before they become parties to the Genocide Convention. And by the time they become parties, it might already be at late stage of the process to genocide. For instance, Sudan deposited its instrument of accession to the Genocide Convention to the Secretariat of the United Nations on 13 October 2003 and the convention entered into force on 11 January 2004 in accordance with its article XIII. This was already after the conflict had broken out in Sudan in general and in Darfur in particular. Rwanda also acceded to the Genocide Convention in 1975 and it was already during a period the process to genocide had started. This may still be done at this level by adopting laws and other measures that can still give effect to the Genocide Convention by bringing to an end those problems and preventing new ones from taking place. For the sources on the accession to the Genocide Convention and the related situations (in Sudan and Rwanda) see Depositary Notification by the Secretary-General of the United Nations, Ref: C.N.1204.2003.TREATIES-1, 13 October 2003, available at <http://www.un.org> (visited on 14 January 2012). See also Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, paras. 40-72. See also Ruvebana, Etienne, "Victims of the Genocide Against the Tutsi in Rwanda", in Letschert, Rianne et al.(eds.), *Victimological Approaches to International Crimes: Africa*, Intersentia, Antwerpen, 2011, pp. 89-116.

3. Secondary prevention of genocide by territorial states

The question here concerns measures that territorial states should take to prevent genocide once the primary level has not successfully prevented the occurrence of a situation that may lead to genocide. This section first discusses the preventive measures at the national level, and then preventive measures which may have an international character.

3.1. Preventive measures exercised at a national level

What judicial measures exercised at the national level should territorial states take to prevent genocide at this level? What other measures may be available to territorial states that are capable of contributing to the prevention of genocide at this level?

3.1.1. Judicial measures to prevent genocide

The most effective ways to prevent criminal acts, in general, is not only "to provide penalties for persons committing such acts",[543] but also "to impose those penalties effectively on those who commit the acts one is trying to prevent."[544] Judicial measures at the secondary level would thus involve imposing penalties on those who violate the laws that contribute to the prevention of genocide. These laws concern all the factors that have been discussed earlier. They may include laws prohibiting discrimination, dehumanisation, incitement to commit genocide, and murder or all other crimes that target a specific group targeting a group protected by the Genocide Convention. Since it is impossible to discuss all the crimes that can be punished at this level in order to prevent genocide, I will consider and discuss some that I consider most relevant for the prevention of genocide. These are the incitement to hatred against a specific group of people or to discrimination of a specific group, persecution as act of crimes against humanity and the incitement to commit genocide. These will be discussed here as examples of judicial measures that can have a preventive effect on the crime of genocide.

[543] International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v. Serbia- Montenegro), Judgment(Preliminary Objections) 11 July 1996, para. 31, at <http://www.icj-cij.org> (visited on 15 February 2012).
[544] Ibidem.

3.1.1.1. Prevention through the punishment of incitement to hatred or to discrimination

The aim here is not to study all the aspects of this crime but rather to show how punishing it can have effect on the prevention of genocide. It is nonetheless important to give its definition. Far from being the only state that punishes hate crimes,[545] scholars have argued that Germany is one of the states that can serve as a good example in criminalizing this crime.[546] For this reason and as an example of how this crime is understood, I give here its definition from what is known as *Volksverhetzung*[547] as a concept which bans incitement of hatred against a minority of the population in the German criminal code. Its article 130(2)[548] reads as follows: "Whoever:

> 1. with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:
> a) disseminates them;
> b) publicly displays, posts, presents, or otherwise makes them accessible;
> c) offers, gives or makes accessible to a person under eighteen years; or
> (d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a through c or facilitate such use by another; or
> 2. disseminates a presentation of the content indicated in number 1 by radio, shall be punished with imprisonment for not more than three years or a fine.

It is under this law that Ernst Zündel was sentenced to an imprisonment of five years for having

[545] The ICTR has provided a list of examples of other states that punish hate crimes: Vietnam, Russia, Finland, Rwanda, Ireland, Ukraine, Iceland, Monaco, Slovenia, China…See para 1075 of the Nahimana et al. case. This list is not exhaustive.

[546] See for example Erkki, Hirsnik, "The Legal Interest Protected by the Crime of Incitement of Hatred", *Juridica Abstract,* 2009, No.1, pp.47-58, available at <http://www.juridica.ee> (visited on 8 March).

[547] Literally translated to English as Incitement of people or masses.

[548] Article 130 (2) (3) of the German Criminal Code(*Strafgesetzbuch, StGB*) as promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322). Translation provided by the Federal Ministry of Justice available at <http://www.iuscomp.org/gla/statutes/StGB.htm#130> (visited on 29 February 2012). Its para. 3 also says: "Whoever publicly, or at a meeting, denies, diminishes, or approves of an act committed under the regime of National Socialism, of the kind described in article 220A, paragraph 2, in a way likely to disturb public peace, shall be punished by imprisonment up to 5 years, or a monetary fine.

denied the fate of Jews which was interpreted by the court as an incitement to hatred.[549]

Likewise, pursuant to the French press law of 1881 which criminalizes the incitement to racial discrimination, hatred on the basis of ethnic, national, religious origins[550] etc, some condemnations have occurred. For instance in 2008, the actress Brigitte Bardot was convicted on charges of inciting racial hatred for her criticism concerning the ritual slaughter of sheep during a Muslim feast. Bardot was ordered to pay €15,000, the fifth time she was fined for inciting racial hatred against Muslims since 1997.[551] The French politician Jean Marie Le Pen has also been condemned for the incitement to hatred against Muslims.[552]

The Netherlands attempted to punish Geert Wilders for incitement to hatred against the Muslims, non-western immigrants and Moroccans and discrimination of Muslims. However, the Amsterdam District Court acquitted him for lack of proof of the inflammatory nature of his statements.[553]

The punishment of this crime is not an easy task especially because of the big challenge it faces. This is the invocation of the "right to freedom of expression" by those who incite for hatred basing on article 19 of the International Covenant on Civil and Political Rights which provides for that right which include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in printing, in the form of art, or through any other media of his choice". However, the same article adds that this right may be limited in certain circumstances. For instance, article 20(2) of the International Covenant stipulates that states must prohibit "any advocacy of national, racial, or religious hatred that constitutes

[549] Zündel Sentenced to Five Years for Holocaust denial," CBC News, 15 February 2007, available at <http://www.cbc.ca/news/world/story/2007/02/15/zundel-germany.html> (visited on 29 February 2012) .

[550] Article 24 de la *Loi du 29 juillet 1881 sur la liberté de la presse telle que modifiée en ce jour*, Bulletin Lois No 637, p 125, available at <http://www.legifrance.gouv.fr> (visited on 29 February 2012).

[551] See the Legal Project, European Hate Speech Laws, available at <http://www.legal-project.org/issues/european-hate-speech-laws> (visited on 5 March 2012).

[552] In 2004 Jean Marie Le Pen was condemned by the Correctional Court of Paris for incitement to hatred against Muslims. He was found guilty of that offence and was condemned to the fine of 10.000 Euros and ordered to pay 5.000 Euros in damages for the League for Human Rights. This was following an interview he made in *Le Monde* on 19 April 2003 in which he said *inter alia* that Muslims constituted a danger in the sense that when their number will increase in France (from 5,000 to 25,000), they will dominate and humiliate French people. He opposed French to Muslims which was susceptible of creating a feeling of rejection by French. This condemnation was later confirmed by the appeal court and upheld by the cassation court. See TF1 News, *Amende de* 10.00 *Euros confirmée pour* Le Pen, 04 *Fevrier* 2009, available at <http://lci.tf1.fr/france/justice/2009-02/amende-de-10-000-euros-confirmee-pour-le-pen-4866960.html(visited> (visited on 28 February 2012).

[553] See Prosecutor v. Geert Wilders, LJN: BQ9001, Amsterdam District Court, 13/425046-09, available at <www.rechtspraak.nl/ljn.asp?ljn=BQ9001> (visited on 5 March 2012).

incitement to discrimination, hostility, or violence." This article was referred to by the ICTR in explaining the relationship between the freedom of speech and freedom from discrimination. It said that "The Chamber notes that freedom of expression and freedom from discrimination are not incompatible principles of law. Hate speech is not protected speech under international law. In fact, governments have an obligation under the International Covenant on Civil and Political Rights to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".[554] It also referred to article 4 the Convention on the Elimination of all Forms of Racial Discrimination which requires "the prohibition of propaganda activities that promote and incite racial discrimination."[555]

It can therefore be argued that the punishment of persons guilty of the incitement to hatred or to discrimination against a group does not violate the right to freedom of expression and is consistent with the prevention of genocide under the Genocide Convention. This covenant is very much connected with the Genocide Convention with regard to the prevention. Moreover, there is nothing wrong when human rights treaties can complement each other in the pursuit of the protection of those rights. In this line, Diane F. Orentlicher rightly mentioned that "it is perfectly appropriate and even desirable to interpret one human rights treaty in light of others"[556] because "this approach promotes coherence in human rights treaty law and helps ensure that states are not subject to conflicting obligations under different human rights treaties."[557]

The question that needs a consideration here is however what the punishment in all the cases mentioned above, and other related cases not mentioned may mean to the prevention of genocide especially when the crime is committed in time of peace. In fact, all these punishments and attempt to punish were not done in the name of prevention of genocide as such nor did the convicted persons necessarily intend to commit genocide. However, since as already explained earlier, these acts may contribute to the building-up of the ideology of genocide that might cause genocide soon or late, punishing those acts may be one of the means to give effect to the Genocide Convention. In fact, by the nature of these very crimes as precursor to genocide, punishing them contributes to preventing genocide because it may stop them from continuing

[554] See Nahimana et al. case, para. 1074.
[555] Ibidem.
[556] Orentlicher, F. Diane, "Criminalizing Hate Speech: A Comment on the ICTR's Judgment in *The Prosecutor v. Nahimana, et al*.", *Hum Rights Brief*, Vol. 13, No. 1, 2006, pp. 1-5.
[557] Ibidem.

and dissuade others from inciting for hatred. After all, if it is true that there cannot be genocide if there is no hatred of the perpetrator against the victim group, punishing a person who sows that seed of hatred is a way to preventing that genocide from happening even when this falls short of incitement to genocide *per se*. This reasoning is supported by the ruling of the supreme court of Canada in Mugesera case[558] where it explained the rationale of the Canadian provision that punishes incitement to hatred.[559] It noted that "the intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused. The risk of hatred caused by hate propaganda is very real. This is the harm that justifies prosecuting individuals under this section of the *Criminal Code"*.[560] From this discussion it is argued that punishing incitement to hatred or discrimination is required at the national level. Whether a state can be held internationally responsible for the breach of the obligation to prevent genocide when it has failed to punish perpetrators of this crime is another question not covered by the present work. But what then if the incitement is made during tensions or war? This leads to the next example of persecution as act of crimes against humanity.

3.1.1.2 Prevention through punishing incitement to hatred that takes form of persecution as a crime against humanity

In some circumstances such as the time of high tension or war, the incitement to hatred may take the form of persecution. The question here is whether and how its punishment can have a preventive effect. Persecution is known in international law as one of enumerated acts of the crimes against humanity.[561] For the first time, in the Streicher case before the Military International Tribunal at Nuremberg in 1946, it has been recognized that persecution is a crime against humanity.[562] Streicher was found guilty of persecution as a crime against humanity

[558] Supreme Court of Canada, Mugesera *v*. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40.
[559] Section 319(1) of the Criminal Code of Canada, available at <http://laws-lois.justice.gc.ca/eng/acts/C-46/> (visited on 5 March 2012).
[560] Mugesera *v*. Canada, para. 102.
[561] See for example art 6 (c) of the Charter of the International Military Tribunal for the trial and punishment of the major war criminals of the European Axis, signed in London pursuant to the agreement on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics. See also article 5 of the ICTY Statute, 3 of the ICTR Statute and 7 of the Rome Statute of the ICC.
[562] See Nahimana et al. case, para. 1073.

because of his anti-Semitic writings that significantly predated the extermination of Jews in the 1940s.[563] Pursuant to customary international law as codified to date, like for any of the enumerated acts constituting the crime against humanity, persecution becomes crimes against humanity if it is committed *as part of a widespread or systematic attack directed against any civilian population or any identifiable group*.[564]

Moreover, there are also some required elements for persecution itself. The jurisprudence of the ICTY and ICTR has clarified the elements of persecution by determining that it requires a "blatant denial of a fundamental right reaching the same level of gravity as the other acts enumerated as crimes against humanity under the Statute.[565] As an example, in the Nahimana case, the ICTR noted that "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under article 3 of its Statute". The Supreme Court of Canada also noted that "a speech such as Mr. Mugesera's, which actively encouraged ethnic hatred, murder and extermination and which created in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents, bears the hallmarks of a gross or blatant act of discrimination".[566] It concluded therefore that the criminal act required for persecution was met.[567]

History and jurisprudence shows that there is even a close link between persecution and genocide. In fact, when the perpetrators of the extermination of Jews were punished, "genocide" as a word was still under construction; but what happened to Jews meets the definition of

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[563] Ibidem.

[564] See for example article 7 (1) of the Rome Statute of the International Criminal Court cited earlier. See also Akayesu case para. 579. These two concepts have been defined in Akayesu case para. 580 as follows: The concept of "widespread" may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of "systematic" may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy. For a civilian population, the supreme court of Canada gave an example in para 162 of the Mugesera case that "A prototypical example of a civilian population would be a particular national, ethnic or religious group. Thus, for instance, the target populations in the former Yugoslavia were identifiable on ethnic and religious grounds".

[565] International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Zoran Kupreskic (Judgment) Case No.: IT-95-16-T14, January 2000, para. 620.* See also International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Georges Ruggiu (Judgment and Sentence)*, ICTR-97-32-I, 1 June 2000, paras. 18-24, available at <http://www.ictr.org> (visited on 8 March 2012). See also Nahimana et al. case, para. 1072. See also Mugesera *v*. Canada, para. 146.

[566]Mugesera *v*. Canada, para. 148.

[567] Ibidem.

genocide and it is indeed to be qualified as genocide. This was preceded by (and committed together with) persecution. It is the same for the Former Yugoslavia and Rwanda as mentioned earlier. The jurisprudence above shows that persecution targeting a group protected by the Genocide Convention is one of the clearest signs that genocide may follow. It may therefore be argued that since where genocide has occurred it has been preceded by persecution, punishing this latter crime at the domestic level may prevent genocide from happening. It may not only stop the perpetrators from continuing but may also discourage others from doing the same. The difficulty with this argument is however that this jurisprudence is a post genocide one and there is no way to show instances where punishing prosecution before genocide happened has prevented genocide from happening. On the other hand though, it is possible to argue that the fact that persecution has not been punished made genocide possible. If a state punishes perpetrators who are under its control, this may prevent them from continuing the persecution. However, this assumes that state has control over the perpetrators. If this is not the case, it becomes a serious challenge. Another serious challenge is where a state is itself the persecutor or where persecution is coupled with other clear calls to commit genocide. These challenges will be addressed in the next chapter of this work.

3.1.1.3. Prevention through punishing incitement to commit genocide

Another crime is the incitement to commit genocide. There is no jurisprudence on the national level with regard to the punishment of this crime before genocide is completed. This may be due to two possible reasons. First, the Genocide Convention did not provide the definition of this crime nor did the doctrine provide enough guidance for its definition that could serve in the process to incorporate it in national laws. Even states which have incorporated the Genocide Convention in their domestic laws have not defined the incitement to commit genocide.[568] Others omitted even to include it in their implementary legislation.[569] Had they defined it, it could have probably served as light for the rest. This lack of clarity on its scope contributed for instance to

[568] See Israeli Law No 57/10/50 of 29 March 1950, available at <http://preventgenocide.org/il/law1950.htm> (visited on 23 February 2012).

[569] Danish Law Nr. 132 of 29 of April 1955 Law concerning punishment of Genocide available at <www.retsinfo.dk> (visited on 5 March 2012). This law made punishable acts enumerated in article II of the Genocide Convention. For those acts enumerated in article III of the Genocide Convention it only made punishable attempt and complicity in the acts enumerated in art II of the genocide but omitted the direct and public incitement to commit genocide and conspiracy.

the opacity on the question whether or not the incitement to commit genocide could be punished even when it does not produce the intended effect. The second possible reason may be that while many states might have considered themselves as not pressured by any danger of genocide and have been reluctant to adopt laws domesticating the Genocide Convention, others have been reluctant to do so because their leaders were themselves involved in acts that could lead to genocide.

The problem of lack of definition remained even after the creation of the International Criminal Tribunal for the Former Yugoslavia[570] and the International Criminal Tribunal for Rwanda.[571] Both article 4, 3(c) of the ICTY Statute[572] and 2, 3(c) of the ICTR Statute[573] made the crime of public and direct incitement to commit genocide punishable without defining it and without indicating whether it could be punished even before genocide is committed or completed. Since the definition and scope of this crime is essential for its punishment and therefore for the prevention of genocide, and since it is the argument of the author of this work that this crime plays a key role in the whole process to genocide, it is paramount to briefly discuss its definition and scope here before discussing whether it can be punished even where it has not reached the intended result.

The ICTR has had to confront the difficulty of lack of definition of this crime and was compelled to give an indication on its definition, scope and on the question whether it can be punished when genocide is not completed. For the definition, after having viewed how both the common law and civil law systems[574] define incitement, the ICTR provided in the Akayesu case a definition

[570] The International Criminal Tribunal for the Former Yugoslavia was created by the Security Council Resolution 827 of 25 May 1993 for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. The Resolution is available at <www.un.org>(visited on 6 March 2012).

[571] The International Criminal Tribunal for Rwanda was created by the Security Council Resolution 955 of 8 November 1994 for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. The Resolution is available at <www.un.org> (visited on 6 March 2012).

[572] See article 4, 3(e) of the Statute of the ICTY as annexed to the Security Council Resolution 827 of 23 May 1993 available at <www.un.org> (visited on 6 March 2012).

[573] See article 2, 3(e) of the Statute of the ICTR as annexed to the Security Council Resolution 955 of 8 November 1994, available at <www.un.org> (visited on 6 March 2012).

[574] According to the court, incitement is defined in Common law systems as encouraging or persuading another to commit an offence and in civil law system it as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audio-visual communication. See

of that crime. It said: " it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audio-visual communication."[575]

From the formulation of this crime and its definition, to be punishable, the incitement must be *public*[576] and *direct*.[577] To explain the first element(public), the ICTR cited the International Law Commission that has characterized "public" incitement as "a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television".[578] For instance, the court found that the speeches of Akayesu, made on 19 April when he "joined a crowd of over 100 people which had gathered around the body of a young member of the Interahamwe in Gishyeshye"[579] and "seized the opportunity to address the people"[580] were made in public and in a public place.[581] Likewise, in the Nahimana case, the ICTR Chamber found it as incitement made in public, "the broadcast of 4 June 1994, by Kantano Habimana, as illustrative of the incitement engaged in by RTLM".[582] This broadcast was calling for the extermination of the *inkotanyi* (then meaning Tutsi by euphemism*)*. [583] Also in Mugesera case, the Supreme Court of Canada found that his message was delivered in a public place at a public meeting[584] where he spoke to about 1,000 people at a meeting of the MRND, at Kabaya in Gisenyi prefecture.[585] The Canadian Law defines "public

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International Criminal Tribunal for Rwanda, Prosecutor v. Akayesu Jean Paul, Case No. ICTR-96-4-T, Judgment, 02 September 1998, para. 555.

[575] International Criminal Tribunal for Rwanda, Prosecutor v. Akayesu Jean Paul, Case No. ICTR-96-4-T, Judgment, 02 September 1998, para. 559.

[576] Emphasis added.

[577] Emphasis added.

[578] Akayesu case, para. 556. See also *Nahimana et al.*, para. 1011.

[579] Idem, paras 210 and 673.

[580] Ibidem.

[581] Idem, para 674.

[582] *Nahimana et al.*, para. 1032.

[583] Ibidem.

[584] Mugesera *v*. Canada, para. 94.

[585] Idem, para 24.

place" as one to which the public has access by right or invitation, express or implied."[586]

The court also explained the second element (direct) of the incitement by saying that direct incitement "implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement".[587] An example of this is about the infamous speech of Leon Mugesera in November 1992 in which he wondered this: "Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? Are we really waiting till they come to exterminate us?"[588] Likewise, a local court in Rwanda found that the broadcast of Valerie Bemeriki on RTLM that "do not kill those cockroaches with a bullet - cut them to pieces with a machete" as a direct incitement.[589] But in some cases the inciters might be careful and use indirect language. The ICTR was mindful of this. It said that depending on a specific culture, "incitement may be direct, and nonetheless implicit……"[590] For instance in the call addressed to the population to unite in order to eliminate what he termed the sole enemy: the accomplices of the *Inkotanyi*,[591] it has been established that Akayesu then clearly urged them to kill the Tutsi.[592] The ICTR also found as a direct incitement in the Nahimana case, the fact of "calling on listeners to exterminate the *Inkotanyi*, who would be known by height and physical appearance. Habimana told his followers, "Just look at his small nose and then break it".[593] Another example is about the same infamous speech of Leon Mugesera in which he said: "…So don"t you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly".[594] Given the context of that speech and the fact that this river (Nyabarongo) is not navigable, the Canadian Supreme Court deduced that he meant to throw dead bodies in it.

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[586] Section 319 (1) of the Criminal Code of Canada.
[587] Akayesu case, para. 557.
[588] Mugesera *v*. Canada, para. 90.
[589] BBC, Rwanda jails journalist Valerie Bemeriki for genocide, 15/12/2009. <http://news.bbc.co.uk/2/hi/africa/8412014.stm> (visited on 01 March 2012).
[590] Akayesu case, para. 557.
[591] *Inkotanyi* literary means brave fighter. The rebel movement that had been fighting against the Rwanda regime since 1990 was called Rwandese Patriotic Front- *Inkotanyi*.
[592] Akayesu case, para. 673.
[593] *Nahimana et al. case,* para. 1032.
[594] Mugesera *v*. Canada, para. 90.

Apart from the two elements of incitement to commit genocide present in the formulation itself the court added another one. This is the intent to commit genocide. The ICTR noted that "the person who incites must also have the specific intent to commit genocide."[595] In support of this ICTR argument, the Supreme Court of Canada explained what can help to assess this guilty mind by saying that "a speech that is given in the context of a genocidal environment will have a heightened impact, and for this reason the environment in which a statement is made can be an indicator of the speaker's intent".[596]

With this status of the crime of incitement to commit genocide, it can be said that its punishment is possible, required at the national level as well, the question being however whether this is possible when it has not produced effect *i.e* before genocide is committed or is completed.

This question has been somehow addressed by the ICTR. Indeed, in the Akayesu case the ICTR said that "the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator".[597]

The same court confirmed it in the Nahimana case by saying that the causal relationship between the incitement and genocide itself is "not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement."[598] It concluded that "with regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have."[599]

In all this however, the court has used the words "fail to produce the result expected" or "regardless of whether it has the effect it intends to have". It clearly answers the question of whether it can be punished when a specific incitement has not produced the specific result it intended but it raises the question whether this means or implies also "before it produces the intended result", *i.e* before genocide is committed. The ICTR has said that the incitement to commit genocide is among "inchoate offences which are punishable by virtue of the criminal act

[595] Akayesu case, para. 560.
[596] Mugesera *v*. Canada, paras. 88-89. See also *Nahimana et al.* case, para. 1022.
[597] Akayesu case, para. 562.
[598] Nahimana et al. case, para. 1015.
[599] Idem, para. 1029

alone, irrespective of the result thereof, which may or may not have been achieved".[600] In both Akayesu and Nahimana cases it confirmed that this nature as inchoate crime does not require a result.[601] It even went far to say that the fact that the drafters of the Genocide Convention did not mention explicitly that the incitement to commit genocide can be punished even where it was not successful does not mean that the intent was not to punish unsuccessful acts of incitement.[602] If this is true, there is no legal reason why it would not be possible to punish it even before it produces the effect it intends as well, *i.e* before genocide happens. If it is a separate crime and not a mode of participation as it is already shown, it means that as far as it is consummated it should be legally punishable even before genocide occurs or never occurs. I fully join the argument of the Supreme Court of Canada that "because of its inchoate nature, incitement is punishable by virtue of the criminal act alone irrespective of the result",[603] and this is possible even when no genocide is committed yet or ever.

This argument serves to answer another question on whether punishing this crime before genocide is committed can have a preventive effect. The answer is affirmative because, as inchoate crime is described as a ""step toward the commission of another crime",[604] if you punish the perpetrator of that crime before he commits the other crime he intends to achieve, you will prevent him from reaching that final step.[605]

This argument coheres perfectly with the object and purpose of the Genocide Convention as far as the prevention of genocide is concerned. Indeed, as already mentioned earlier, article I of the Genocide Convention is one of the sources that created the obligation to prevent genocide. Its article III made the public and direct incitement to commit genocide a crime. Articles V and VI obligated states to provide penalties and to apply them. So, if it is a crime that occurs before the genocide and it can lead to it and states have the obligation to prevent genocide from happening, punishing the incitement before it causes genocide is to prevent genocide from happening. There is no reason not to interpret it in this way and the fact that the ICTR did not explicitly give that

[600] Akayesu, para. 562.
[601] Akayesu, para 561 and Nahimana para. 1015.
[602] Akayesu, para. 561.
[603] Mugesera v. Canada, para. 85.
[604] Garner, A. Bryan (ed.), *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minnesota, 1999, p.1108.
[605] For more about the rationale of punishing inchoate crimes see Cassese, Antonio et al. (revisers), *Cassese's International Criminal Law*, 3rd edition, Oxford University Press, 2013, p. 199.

detail is probably because it was simply dealing with post genocide cases. There is no theoretical or practical reason or use to not consider an unsuccessful incitement as an incitement before genocide occurs. After all, nothing in the *travaux préparatoires* of the Genocide Convention indicates that the incitement to commit genocide can only be punished when and after genocide has occurred. This would be contrary to its object and purpose. Also, the fact that the ICTR did not make causation a requisite for that crime to exist does not mean that it implied that it is regarded as a crime with no causation relationship with genocide. The court has explicitly shown it in Akayesu case for instance that "the direct and public incitement to commit genocide as engaged in by Akayesu was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba". Moreover, the fact that it later added in the Nahimana *et al.* case that "it is the potential of the communication to cause genocide that makes it incitement"[606] shows that the ICTR was also of the view that it is punished because it can cause genocide.[607] Article 318 of the Criminal Code of Canada is a good example to show that reasoning to punish the crime before the intended final crime is committed is preventing the commission of that crime. This article formulates the crime as "advocating genocide" and defines it as: "supporting or arguing for the killing of members of an "identifiable group" — persons distinguished by their colour, race, religion, ethnic origin or sexual orientation. The intention or motivation would be the destruction of members of the targeted group. Any person who promotes genocide is guilty of an indictable offence, and liable to imprisonment for a term not exceeding five years."[608] The language used in this provision shows even more that the idea is to punish it at the moment the perpetrator commits it to prevent the intended destruction from happening.

From this prevention perspective, it is concluded that territorial states (through their courts) are legally required to punish perpetrators of the incitement to commit genocide under their control and this from the very moment it is consummated in order to prevent the intended result from being achieved. However, like for the other crimes discussed above, the problem is when the state is not willing to do that because its apparatus is the perpetrator itself or when it has no

[606] Nahimana *et al*. case (judgment and sentence), para. 1015.

[607] See Akayesu case, para. 551. In this case, the court referred to the drafting history of the Genocide Convention to show the potential of direct and public incitement to commit genocide to cause genocide. It said that the delegates agreed to expressly spell it out as a specific crime because of its critical role in the planning of genocide. In particular, the court referred to the USSR delegate who stated that "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so…".

[608] Article 319 of the Criminal Code of Canada.

control over the perpetrators. This will be discussed later. Before that, since the judicial measures may need to be supplemented by other measures, it is important to first see what those other measures may be at the secondary level.

3.1.2. Other measures

It was said earlier that at the primary level states are required to adopt and apply measures that give effect to the Genocide Convention. Those measures may be of political, administrative, educational, cultural, socio- economic, security or other nature. If a state has not adopted them before, it can still adopt and apply them at the secondary level. It will be argued here that territorial states are required to enforce measures adopted at the primary level. In principle one could argue that all acceptable means should be used to ensure that these measures are enforced, the question being how they can be enforced.

It is impossible to discuss each and every measure of these kinds and how they should be enforced. Only some examples regarding the political, educational, socio-economic, and security will be discussed here. Moreover, even for these chosen ones, they will be discussed as illustrative and certainly without being comprehensive.

Political measures taken at the primary level or at the secondary level which may concern fostering democracy need to be enforced through the institutions of the state. It is generally agreed that measures that are based on fair mutual accommodation between different communities, good understanding of others and working out compromises foster democracy (implying that where there is true democracy no genocide is possible).[609] The political system should be made in a way that each political organ is capable to exercise its power independently. For instance, in accordance with the constitution of the state, the parliament should be able to hold the President and any other member of the executive accountable in case of failure to enforce or abide with measures that are susceptible of preventing genocide. This does not require only a constitutional framework that guarantees a checks and balance mechanism but also a political culture of accountability.

Another example is about the educational measures. It has been noted in literature that the habits

[609] See for example United Nations Institute for Training and Research (UNITAR), Seminar Report, UNITAR Peace and Security Series: Preventing genocide, 2-3 April 2007, New York, available at <http://www.responsibilitytoprotect.org/files/Summary_Report_with_contacts.pdf> (visited on 14 March 2012).

of understanding others and working out compromises may be learned at school.[610] Indeed from basic school to the education of political leaders, if *curricula* are designed to facilitate constructive social engagement and peaceful coexistence[611] among different groups, this can arguably give effect to the prevention of genocide. So, at the secondary level, state organs check if this educational measure is being implemented through the ministry of education. If it is not, there must be administrative and or political sanctions against the concerned authorities, imposed by competent state organs. For instance, the parliament should be capable of holding a minister of education accountable for failing to adopt an education system that promotes the culture of tolerance among different groups.

For socio-economic measures, they may include the welfare of the population and the equitable enjoyment and sharing of resources among groups. They need to be implemented by the ministries concerned and in case they do not, the parliament should be able to hold the minister accountable for that. For instance, if a specific group is marginalised, is denied social rights and is deprived of resources for instance, the institutions concerned should be held accountable for that. Furthermore, investment measures as a key to socio-economic development[612] need to be enforced in order to ensure that the problem of economy scarcity is addressed. In his report, the UN Secretary-General recognized that "eradication of poverty and addressing, in particular, inequality, justice and human security issues in developing countries would greatly contribute to conflict prevention in the long term."[613] In case of failure, the accountability could be engaged as well.

Another category of measures is about security. If for some reasons the genocidal conflict has grown to reach a civil war for example, the state should still put in place measures that prevent the escalation to genocide. These should include but not be limited to the negotiation and to refrain from training militias that could be used later to commit genocide. Also, article VIII of the Genocide Convention gives a possibility to a state to call upon the competent organs of the United Nations to take appropriate measures in accordance with the UN Charter in order to prevent genocide. This article did not specify which measures are appropriate but it is worth

[610] Ibidem.
[611] Ibidem.
[612] Ibidem.
[613] Prevention of Armed Conflict, Report of the Secretary-General of the United Nations, 7 June 2001, available at <www.un.org> (visited on 14 March 2012).

saying in line with what has been discussed above that these measures may be necessary for example in case of a civil war in which either a rebel movement has a genocidal agenda or the conflict itself can create a favourable environment for a potential genocide. In both situations, a state may call upon the UN to take measures such as imposing arms embargo on the leaders of the movement or any other measure against them. The measures to prevent genocide by the UN will not be discussed in depth here but later in a separate chapter on the UN.

It is argued that at the secondary level, territorial states are required to enforce those various measures exercised on its territory that may have preventive effect on genocide. The question on what measures territorial states should take at the secondary level to prevent genocide that may involve actors not under their jurisdiction and/or control need to be addressed.

3.2. Preventive measures with international character

The question to be addressed here concerns what a territorial state should do for instance to address a problem related to incitement to commit genocide from outside either done by heads of other states, individuals outside its jurisdiction or inside but not under its control or when another state supports a rebel group that attacks it with a potential risk of genocide.

3.2.1. Prevention by punishing the incitement to commit genocide committed outside its territory

What measures should a territorial state take that aim at punishing officials of other states as well as individuals not under its control who commit the crime of incitement to commit genocide against its people? Scholars and other commentators have suggested that territorial states should take action against individuals through its courts and the ICC or before the ICJ against the state from which this crime is being committed for the violation of the Genocide Convention.[614] These possibilities are discussed here from a prevention perspective. There could be other measures such as diplomatic, political, economic, cultural, but they are not discussed here.

[614] Gregory, S. Gordon, "From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement's Law's Emerging Analytical Framework", *Journal of Criminal Law & Criminology*, Vol. 98, No 3, 2008, pp. 915, 920. See also John Hagee and Joseph Potasnik, "Prosecute Mahmoud Ahmadinejad for Incitement to Genocide", *American Thinker*, October 1, 2010 available at <http://www.americanthinker.com/2010/10/prosecute_mahmoud_ahmadinejad.html> (visited on 22 February 2012).

3.2.1.1. Preventive measures through municipal courts

Mahmoud Ahmadinejad's call for the destruction of the state of Israel when he was president of Iran has been cited in literature as an example of situation in which a territorial state should take judicial measures through its courts.[615] Among his statements on several occasions, Ahmadinejad said in October 2005 that Israel should be "wiped-off the map".[616] He stated later again that the "Zionist regime . . . cannot survive," and "cannot continue its existence."[617] During the Israel-Hezbollah military conflict, he stated that the "real cure for the [Lebanon] conflict is elimination of the Zionist regime."[618] He later told the French newspaper *Le Monde* that "these false people, these fabricated people (the Israeli people) cannot continue to exist".[619]

Some scholars have subsequently qualified these calls as flagrant crime of public and direct incitement to commit genocide and also as a violation of the Genocide Convention.[620] Others have however argued that Ahmadinejad's words have been mistranslated and or misquoted and did not mean to incite people to commit genocide against the people of Israel but rather the regime change in Jerusalem.[621] However, whether Ahmadinejad has said and meant to wipe off Israel or whether what he said has been mistranslated is not the point of discussion here. Instead of examining the merit of Ahmadinejad's statements, the point is rather to see what the legal possibilities available for a territorial state to prevent statements from officials or individuals in other states that indeed call for the destruction of its people. The legal means to put an end to such calls once they are there are central to this discussion. Among them, there may be a possibility to indict them in order to have them on trial.

After the adoption of the Genocide Convention, some states parties to it have adopted laws that

[615] Gregory, S. Gordon, *op.cit*, 892.
[616] Nazila, Fathi, *Wipe Israel "off the map"*, The New York Times, October 27, 2005, available at <http://www.nytimes.com/2005/10/26/world/africa/26iht-iran.html> (visited on 20 February 2012).
[617] Gregory S. Gordon, *op.cit*, p. 865.
[618] Ibidem.
[619] Ibidem.
[620] See International Association of Genocide Scholars, Resolutions Condemning Iranian President Ahmadinejad's Statements Calling for the Destruction of Israel and Denying the Historical Reality of the Holocaust: and Calling for Prevention of Iranian Development of Nuclear Weapons, available at <http://genocidescholars.wsg.net/about-us/iags-resolutions-statements/> (visited on 21 February 2012). See also, Pax American Institute, Iran's Violation of International Law: Defiance of Conventions, Treaties, Statutes, Resolutions and Safeguards Agreement 1948-2011, A special Report, Vol. NSS IL No. 3, 2011, p. 14, available at <http://www.paxamerica.org/wp-content/uploads/2010/02/SPECIAL-REPORT-Irans-Violations-of-International-Law-03-2011.pdf> (visited on 21 February 2012).
[621] Shiraz, Dossa, "The Explanation We Never Heard", *Literary Review of Canada*", Vol. 15, No. 5, 2007, pp. 4-5.

make genocide punishable as well as other crimes related to it including the incitement to commit genocide. For instance, Israel adopted in 1950 a law No 57/10/50 on the prevention and punishment of the crime of genocide,[622] which treats a person guilty of incitement to commit genocide in its article 3 like a person guilty of genocide itself and punishes him the same way.[623] Article 5, gives to Israeli courts the universal jurisdiction in case of genocide and related crimes. It stipulates that "A person who has committed outside Israel an act which is an offence under this Law may be prosecuted and punished in Israel as if he had committed the act in Israel."[624] Like article IV of the Genocide Convention itself which obligates states to punish persons committing genocide or any of the other acts enumerated in article III whether they are constitutionally responsible rulers, public officials or private individuals,[625] this Israeli law gives Israel courts the competence to punish any person regardless of his position. Under article 4 of the said Israeli law, any person guilty of an offence under this Law (which includes incitement to commit genocide) may be punished whether he is a legally responsible ruler, a member of a legislative body, a public official or a private individual. Reading this article with article 3 of the same law which allows Israel to try people who have committed offences under the law on the prevention and punishment of genocide as if he has committed it in Israel without mentioning any exception, it appears that this could include any person, including a head of state of another state.

In this line, though Gregory S. Gordon does not explicitly refer to these laws, he argued that in the example of Ahmadinejad, Israel also could base on a "passive personality" principle and the "protective principle" because Israelis are victims of his statement and because his statement was coupled with the development of nuclear weapons to be used against the same people.[626] However, though this argument may cohere well with Israeli law mentioned above and may constitute a good means to prevent genocide, from international law perspective it is unconvincing. In fact, the ICJ ruling in the Arrest Warrant case is an example of how the above

[622] Israeli Law No 57/10/50 of 29 March 1950, available at <http://preventgenocide.org/il/law1950.htm> (visited on 23 February 2012).

[623] Article 3 reads: A person guilty of any of the following acts shall be treated like a person guilty of genocide: (1) conspiracy to commit genocide; (2) incitement to commit genocide; (3) attempt to commit genocide; (4) complicity in genocide.

[624] Article 5 of the Israeli Law No 57/10/50 of 29 March 1950, available at <http://preventgenocide.org/il/law1950.htm> (visited on 23 February 2012).

[625] Article IV of the Genocide Convention.

[626] See Gregory, S. Gordon, *op.cit*, pp. 892-893

argument has some serious challenges. This ruling reaffirmed that heads of states, heads of governments and ministers for foreign affairs as officials enjoy full personal immunity from jurisdiction in other states.[627] The Court thus found that the issuance of the arrest warrant of Mr. Yerodia "infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law"[628] as an incumbent minister for foreign affairs of the Congo.

It follows from this ruling that Israel or any other state in the same situation would not legally exercise this right to issue an international arrest warrant against an incumbent head of state that has incited people to commit genocide against its people.[629]

Nevertheless, as the court has indicated in this case, not all state officials are concerned with this full personal immunity from jurisdiction in other states.[630] It may be therefore deduced from the said court's ruling that a territorial state may have jurisdiction to try other foreign state officials with the exception of those who enjoy the full personal immunity for international crimes. In exercising this, it can therefore issue an international arrest warrant against a state official of another state for incitement to commit genocide. If that is correct, there is no point to ask whether that territorial state against which the crime of incitement to commit genocide is committed would have jurisdiction to prosecute individuals who commit it from foreign states and who live there,[631] or from inside the state but not under its control. This is because, if it can do so for state officials of foreign states there is no legal reason to suggest otherwise for individual foreign citizens as well as its nationals who commit the same crime.

However, with regard to what this procedure means to prevention, two difficulties might be most challenging. The first is that there is a category of state officials who enjoy full immunity from jurisdiction in other states and therefore cannot be indicted by them. In that case, they might

[627] International Court of Justice, Case concerning the arrest warrant of 11 April 200 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, para. 51, available at <http://www.icj.cij.org> (visited on 24 February 2012).

[628] Idem, para. 70.

[629] It is argued this way because, if the Court found that the mere issuance of an arrest warrant against an incumbent Minister for Foreign Affairs violated the immunity which he enjoyed and therefore "constituted a violation of an obligation of Belgium towards the Congo", there is no other international legal basis under which Israel or any other state would not have been *a fortiori* violating the same obligation if it has issued an arrest warrant against President Ahmadinejad or any other head of state who incites to commit genocide.

[630] For an extensive analysis see for instance Brus, M.M.T.A, "No Functional Immunity of State Official for International Crimes: A Principled Choice With Pragmatic Restriction", T.M.C. ASSER PRESS, November 2011, pp. 37- 81.

[631] This is based on the assumption of universal jurisdiction which will be explained further later.

continue the incitement. The second is that even for those who do not enjoy the full immunity, the enforceability of arrest warrants against them may be problematic and as long as the indicted persons are not arrested, they may continue the incitement. For instance, if the inciters against Israel are in Iran and Israel issues arrest warrant against them, they might never be arrested unless they happen to be in another state that is willing to arrest them. Yet they might be careful before they travel unless they are sure they will not be arrested. Like the other challenge shown above on the fact that a state cannot indict persons that enjoy the personal full immunity, this challenge weakens this possibility and though it cannot be said that it means nothing to the prevention of genocide, it is not that promising for the prevention of genocide.

However, with regard to these challenges related to the situation where the incitement is committed by one of those enjoying the personal full immunity, the court did not say that international law closes all the possibilities to prosecute a head of state or other concerned with the case in other states. Among the possibilities that the court listed, and in line with the prevention of genocide, it is important to mention the one that says that those enjoying the full immunity from criminal jurisdiction in other states can be subject to criminal proceedings before international criminal courts,[632] and this may presumably concern individuals outside a territorial-state's control as well.

3.2.1.2. The possibility for a territorial state to seek preventive measures through the ICC

As it is noted in the preamble of the Rome Statute, to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes was among the justifications of the creation of the ICC.[633] This expression of the preventive intent of the founders of the ICC seems to be accepted in literature.[634]

Under article 5 of the ICC Statute, the ICC has jurisdiction with respect to the crime of genocide (among other crimes). Article 6 defines genocide in the same way as the Genocide Convention did. Article 25, 3(e) states *inter alia* that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:…in respect of the

[632] Arrest Warrant case, para. 61.

[633] See the preamble of the Rome Statute of the ICC.

[634] See for example Blattmann, René, "Prevention of Genocide: The Role of the International Criminal Court", *Politorbis* Nr. 47 - 2 , 2009, pp. 85-90, p. 88, H. Chung Christine, "The Punishment and Prevention Of Genocide: The International Criminal Court as A Benchmark of Progress and Need", *Case Western Reserve University's Journal of International Law*, Vol. 40, 2007-2008, pp. 232-234.

crime of genocide, directly and publicly incites others to commit genocide."[635] Article 25, 3(e) has been linked to article 5 by expressly saying that: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(e): In respect of the crime of genocide, directly and publicly incites others to commit genocide".[636]

In this way, article 6 and 25, 3(e) of the ICC Statute (read together with article 5) may be a legal basis under which the ICC may treat the public and direct incitement as separate crime and not just a mode of participation of genocide.[637] The case-law on this crime and literature support this.[638]

The procedure to refer the cases to the ICC is provided for in article 13, 14 and 15 of the ICC Statute. The referral is done either by a state party to the ICC Statute, the Security Council or is initiated *proprio motu* by the ICC prosecutor.[639] If a state is not party to the ICC, it could, under article VIII of the Genocide Convention call upon the Security Council to take appropriate measures which, in this case could be to refer the situation to the ICC in accordance with article 13 of the ICC statute.[640] These provisions provide a clear legal basis for a territorial state to seek preventive measures through the ICC against officials of other states who enjoy the immunity from jurisdiction as well as other individuals outside its control. However, the fact that there is

[635] See articles 6 and 25, 3(e) of the Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002, available at <www.icc.cpi.org> (visited on 5 March 2012).

[636] Article 25 3(e).

[637] For an argument contrary to this see Thomas, E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide", *Harvard Human Rights Journal,* Vol. 22, 2009, pp. 262-266. He finds this suggestion impossible by arguing that the Rome statute did only make article 25 a list of the modes of participation of crimes and not as a separate crime because it did not list it among the crimes over which it has jurisdiction (art 5).

[638] International Military Tribunal for the German Major War Criminals, Streicher Judgment, October 1, 1946, reprinted by the University of West England, available at <http://www.ess.uwe.ac.uk/genocide/Streicher2.htm> (visited on 22 February 2012). See also Akayesu case, paras. 549-562, Prosecutor v. George Ruggiu Case No. ICTR 97-32-1, judgment and sentence, paras, 13-16, 44, 81, Nahimana case et al., para. 436, Mugesera *v*. Canada case. For more analysis see also Gregory, S. Gordon, *op.cit*, p. 882.

[639] Articles 13, 14, 15 of the ICC Statute.

[640] For instance, this possibility made it possible for the Security Council to adopt resolution 1493 referring the situation in Darfur to the ICC. On 14 July 2008 the ICC indicted President Bashir for ten charges: five of crimes against humanity, three counts of genocide, and two of murder. The first arrest warrant was issued on 14 March 2009 and a second on 12 July 2010 available at <http://www.icc-cpi.int> (visited on 22 February 2012). The crimes here are others but the same could also apply in case of the crime of incitement to commit genocide.

no effective mechanism to arrest the indicted persons may undermine the chances of preventability of this measure.[641] But since there is no single measure that is capable of preventing genocide alone, it can be argued that it can play its role no matter how little it may be.

3.2.1.3. The possibility for a territorial state to seek preventive measures through the ICJ

Articles VIII and IX of the Genocide Convention provide a legal basis for a state victim of an on-going incitement to commit genocide (or other international crimes that may lead to genocide) to bring a case before the ICJ against another state from which this crime is being committed for the violation of that Convention.[642] To contribute to the prevention of genocide, the Court may order the state concerned to stop its people from committing that crime and may order it to take any other measures to prevent the commission of genocide.[643] The court may also hold the state concerned responsible for the violation of the obligation to prevent genocide. Theoretically, it is possible to say that the ICJ may take measures that may contribute to the prevention of genocide. However, in practice it may be unlikely that this possibility offers a big contribution to the prevention of genocide due to various reasons. For instance, in some cases, the ICJ may lack jurisdiction.[644] Furthermore, even where the ICJ may have jurisdiction over a given case and would order the responsible state to prevent or stop the incitement to commit genocide, there is no clear mechanism to enforce that.[645] The Serbia case is a good example. In fact, despite the ICJ

[641] For instance, even if Israel were party to the ICC and the statement by Ahmadinejad committed could qualify as public and direct incitement to commit genocide, Israel could refer the situation to the ICC prosecution and the ICC could presumably indict him but as long as no one would arrest him, he could continue the incitement in Iran and why not in other supporting states. The same applies to other individuals who commit such a crime outside the control of a territorial state. The challenges in the process to arrest them might be lesser than of a head of state though. As it has been observed, the preventive effectiveness of ICC existence depends on the states immediately concerned and the international community making joint efforts. For more, see for example Blattmann, René, "Prevention of Genocide: The Role of the International Criminal Court", *Politorbis* Nr. 47 - 2 , 2009, pp. 85-90, p. 87.

[642] Article VIII reads: And Article IX:

[643] In 1993, Bosnia submitted a request to the ICJ for provisional measures to stop Serbia from committing grave crimes against its people. The court ordered that Serbia and Montenegro "should immediately take all measures within its power to prevent the commission of the crime of genocide". This case did not concern the crime of incitement to commit genocide but what is common to it and a case where the crime of incitement to commit genocide might be committed is about what a state may do when it believes that another state is in the process to commit genocide against its people by inciting to commit genocide. See ICJ report of 1993, p. 3 and p. 325.

[644] For the state to bring the case before the ICJ and for the Court to have jurisdiction on that case, a number of conditions provided for in International law must be met. See for example article 36 of the ICJ Statute.

[645] Article 94 of the Charter of the UN obligates each member of the UN to comply with the ICJ decisions. When it does not, the other party may have recourse to the Security Council which, if it deems necessary may take action to

provisional measures that ordered Serbia to prevent the commission of genocide and the subsequent confirmation that Serbia should take them immediately, the measures were not taken and the genocide followed.

3.2.2. What if the inciting state is developing weapons of mass destruction which could be used to commit genocide against the people of a territorial state?

If a state is developing weapons of mass destruction and there are reasons to think that they might be used to exterminate people in a territorial state,[646] the latter may take some actions in accordance with the Charter of the UN and the Genocide Convention.

The Charter provides for an indication on what a state in that situation can legally do. It sets a principle in its article 2(3) that: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".[647] At this level a state could use the diplomatic means to settle the issue. Article 33 of the Charter suggests how to do it. It says that a state may "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[648] These peaceful means may not be successful. In that case the same Charter in its article 37 of the Charter requires states, once they have exhausted the peaceful means, to refer the dispute to the Security Council.[649] That possibility is also offered in article VIII of the Genocide Convention. Under this article, the territorial state may refer such a situation to any competent organ of the UN for it to take appropriate actions to prevent genocide

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give effect to the ICJ judgment. From a prevention perspective, this mechanism is weak because it does not provide a quick response. The Security Council may even not take action due to various reasons as it will be shown later.

[646] See Justus Reid Weiner, Esq *et al.,* "Referral of Iranian President Ahmadinejad on the Charge of Incitement to Commit Genocide", *Jerusalem Center for Public Affairs*, Jerusalem, 2006, available at <http://www.jcpa.org/text/ahmadinejad-incitement.pdf> (visited on 16 March 2012). The most cited example of the Iranian plan to develop nuclear weapons which, according to many analysts, is motivated by the intent to use them in future to wipe Israel off the map. These analysts have noted that this could be reached through not only "arming Hezbollah and Hamas, but also and especially through advancing its "rogue nuclear weapons program, and expanding its arsenal of long-range nuclear-capable missiles that can reach anywhere in Israel and Europe. To link this to the potential of genocide, commentators have explained it using a parallelism with what happened in Rwanda prior to the 1994 genocide. They have noted that while "the Hutus in Rwanda were equipped with the most basic of weapons, such as machetes, should the international community do nothing to prevent it, Iran will soon acquire nuclear weapons. This would increase the risk of instant genocide, allowing no time or possibility for defensive efforts."

[647] See Charter of the UN.

[648] See article 33(1) of the UN Charter.

[649] See article 37 of the UN Charter.

and any other acts punishable under the Genocide Convention.[650] There is no practice on where this possibility has been used to prevent an inciting state to stop from developing weapons of mass destruction. However, considering the practice of the Security Council on these weapons in general,[651] it is possible to say that it is well positioned to take actions that may include a situation where a state might be developing those weapons to use them to commit genocide or to prevent their spread to non-state actors,[652] (to prevent that they use them to commit genocide, among other things).

3.3. Preliminary conclusions

At this level, it is safe to conclude that territorial states are under the obligation to prevent genocide at the secondary level. In doing so, the means discussed above are appropriate since by the nature of the discussed crimes and other signs as precursors to genocide as well as the nature of the crime of genocide, using the suggested means can prevent genocide from happening. The means are not without challenges though. The latter include the lack of international and national monitoring system to follow-up the implementation of this obligation at this level. When these challenges make the prevention unsuccessful then other measures are needed at the tertiary level.

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[650] It states: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." It should be noted that the Charter of the UN and the Genocide Convention are not the only legal basis for actions against a state which developing weapons of mass destruction. See also article III. A. 5 of the Statute of the International Atomic Energy Agency adopted on 23 October 1956 at the Headquarters of the United Nations and entered into force on 29 July 1957, available at <http://www.iaea.org> (visited on 12 May 2010). This Statute assigns to the agency the function to establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a State, to any of that State's activities in the field of atomic energy. Under Art III. B. 4, the IAEA may refer the situation to the SC of the UN.

[651] Security Council measures have included requesting states to take preventive measures, condemning states concerned for the acts of non-compliance with their obligations under international law related to the non-proliferation of nuclear weapons or taking sanctions against that state. See for instance UNSC Resolutions 687, section C of 3 April 1991, 707 of 15 August 1991, 715 on 15 October 1991, 1060 of 12 June 1996, 1284 of 17 December 1999, 1540 of 28 April 2004, 1696 of 31 July 2006, 1737 of 27 December 2006, 1747 of 24 March 2007, 1803 March 2008 and 1718 of 14 October 2006, 1874 of 12 June 2009 available at <http://www.un.org> (visited on 19 March 2012). See also UNSC Resolution 1540 of April 28 2004, available at <http://www.un.org> (visited on 19 March 2012).

[652] See for instance Security Council Resolution 1540 of April 28 2004, available at <http://www.un.org> (visited on 19 March 2012).

4. Tertiary prevention of genocide by territorial states

This level is the final one: after the onset of genocide, *i.e* when genocide has started. The question is to know what a state is required to do in order to stop it from continuing. This may depend on who is committing it. In fact, genocide might be being committed by a territorial state's own organs, a rebel group or a part of the population against another or by another state supporting a movement against the people of that state or by that other state against the whole nation of the territorial state. This section discusses these situations in order to see what the legal preventive means available to may be. Though the tertiary level may also deal with the aftermath of genocide in order to prevent genocide from reoccurring, this component will not be treated here. In fact, given its predictable complexity in that it would deal with various questions on the responsibility of the bearers of the obligation to the continuous process of the prevention of genocide, it will not be part of this work.[653]

4.1. Who within the state is committing genocide?

It has been argued in the previous chapter that the obligation to prevent genocide implies the obligation not to perform acts that may lead to genocide and the obligation not to commit genocide. The previous section addressed the obligation not to perform acts that may lead to genocide. The aim at this level is to investigate what a territorial state can do when the measures taken at the secondary level have been unsuccessful (or have not been taken at all) and acts of genocide by state officials, by a rebel group or a part of its population have started.

4.1.1. When genocide is being committed by the territorial state's organs

History has proved that genocide has been possible where states have organised and perpetrated it.[654] In that case, one might think that it would be useless to discuss what territorial states are required to do to stop it when it is the perpetrator itself. However, it has not been concluded that genocide is only possible where the whole state apparatus is involved in it. In case state organs acts with genocidal intent without the order or authorisation of state leaders, the territorial state

[653] Given the importance the responsibility for the breach of the obligation to prevent genocide may have to the prevention of genocide it is recommended that this component be treated in the future. Such a work would supplement and make this process of the prevention of genocide complete.

[654] For example, the Holocaust was organized and perpetrated by the Nazi regime. Also, the genocide against the Tutsi in Rwanda was organized, instigated and committed by the Regime in Rwanda in 1994.

should prosecute individuals involved. Article VI of the Genocide Convention obligates states to punish persons charged with genocide or any of the other acts enumerated in article III of the same convention.[655] There is no requirement that genocide be completed for its perpetrators to be punished. As long as it can be established that acts of genocide have been commenced, the territorial state should legally punish its perpetrators and those who attempted to commit it. It is not impossible to imagine a situation where such acts may occur. For instance a state military commander in a given region where there is war (or not) may order his troops to exterminate a given group (without the order or authorization from his hierarchical superiors). To imagine this is not arbitrary. For instance, on 9 December 1947 (during the 1945-1949 Indonesia's fight for independence), the Dutch soldiers who were looking for weapons and resistance leader Lukas Kustario known for ambushing Dutch bases,[656] massacred men and boys in the West Java village of Rawagede.[657] When these villagers said they didn"t know where he was, nearly all the men were rounded up and taken to the fields where they were massacred.[658] Official papers estimate the number of men killed at Rawagede at 150, but other reports say around 431 men and boys.[659] There is no evidence that Major Alfons Wijnen who was the commander in charge during that massacre received an order from the Dutch government to do it. The fact that he was not prosecuted for that and that he was instead later promoted to colonel and got the royal honour does not suffice to say that he had acted upon the order of his government. The point here is not to say that the massacre in Rawagede was a genocide (which it was not), but to show how it is possible that commanders can act ruthlessly without necessarily being authorized or ordered by the leaders of their state. It should not be impossible to think that it might be possible also for

[655] See article VI of the Genocide Convention.

[656] Karmini, Niniek, "Dutch state apologizes for 1947 Indonesia massacre", 9 December 2011, available at <http://www.thejakartapost.com/news/2011/12/09/dutch-state-apologizes-1947-indonesia-massacre.html> (visited on 27 March 2012).

[657] DutchNews.nl, "The Netherlands apologies for Rawagede massacre, pays compensation", 05 December 2011, available at <http://www.dutchnews.nl/news/archives/2011/12/the_netherlands_apologies_for.php> (visited on 27 March 2012).

[658] Karmini, Niniek, "Dutch state apologizes for 1947 Indonesia massacre", 9 December 2011, available at <http://www.thejakartapost.com/news/2011/12/09/dutch-state-apologizes-1947-indonesia-massacre.html> (visited on 27 March 2012).

[659] DutchNews.nl, "The Netherlands apologies for Rawagede massacre, pays compensation", 05 December 2011, available at <http://www.dutchnews.nl/news/archives/2011/12/the_netherlands_apologies_for.php> (visited on 27 March 2012). See also Johan van der Tol, Dutch crimes in colonial Indonesia – time for a review?, published on 19 June 2012 by Radio Netherlands Worldwide, available at <http://www.rnw.nl/international-justice/article/dutch-crimes-colonial-indonesia-%E2%80%93-time-a-review> (visited on 26 June 2012).

any troop with the intent to commit genocide.[660]

Punishing commanders and other soldiers involved may have a direct preventive effect since it might stop them from continuing to perform their acts.

4.1.2. When genocide is being committed by a rebel group (not under the control of the territorial state)

Another genocidal situation may emanate from a rebel group that may have the intention to commit genocide. History shows that some rebel groups, such as the Lord Resistance Army in Uganda, have inflicted huge sufferings to the population and there is no reason to think that a rebel group would not commit genocide as well. The Genocide Convention did not go in all the details on the means to be employed by states in order to stop (suppress) genocide in such a situation. But the interpretation of article I of the Genocide Convention which obligates states to prevent genocide permits to say that states are required to protect their populations from genocide by employing all legitimate means to put an end to genocide being committed by rebel groups. The measures may include negotiations with the rebel group(s) in order to end hostilities. In case the negotiations are impossible, the state concerned may use force to stop the genocide. It may also refer the situation to the ICC which may indict the perpetrators.[661] If, for whatever reasons a state is incapable of putting an end to such acts, the territorial state may seek military assistance from other states.[662] It may also call upon competent organs of the UN to take actions against the rebels. When a territorial state does not do this, it is not complying with its obligation

[660] For instance, the reason behind the mutiny in Mali was that the government was incapable to provide means in order for the army to effectively fight the ethnic Tuareg rebels. It is not impossible that a mutiny like the one in Mali, even without overthrowing the government, would decide to eliminate the Tuareg people as a whole or in part. On this mutiny in Mali, see Voice of America, "UN Security Council Condemns Mali Coup", 22 March 2012, available at <http://www.voanews.com/english/news/UN-Security-Council-Condemns-Mali-Coup-143911426.html> (visited on 27 March 2012).

[661] See articles 13 and 14 of the ICC Statute. It is under this legal basis that Uganda referred to the ICC the situation concerning the Lord Resistance Army for the alleged international crimes committed in Uganda. Under the same basis, a territorial state may do the same when the crime of genocide is being committed on its territory. See the Uganda referral available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx> (visited on 25 March 2012).

[662] For instance, since 2008, the United States has supported regional operations led by the Ugandan military to capture or kill LRA commanders. The US has authorized the deployment of approximately 100 U.S military personnel to serve as advisors to regional forces that are working toward the removal of Joseph Kony from the battlefield. See Congressional Research Service, "The Lord's Resistance Army: The U.S. Response", April 11, 2012.

to prevent genocide.

4.1.3. When genocide is being committed by a part of the population of the territorial state

In a situation where a part of a population is committing genocide against another group, the state is required to stop it. The situation where a given part of the population may resolve to kill another is not impossible to imagine. For instance, the UN commission of inquiry on Burundi has concluded that "acts of genocide against the Tutsi minority were committed in Burundi in October 1993."[663] This was following the assassination of the Hutu President of Burundi in 1993. According to that commission of inquiry, this assassination "was planned beforehand as an integral part of the coup that overthrew him, and that the planning and execution of the coup was carried out by officers highly placed in the line of command of the Burundian Army".[664] The Burundian Army was then mainly composed of the Tutsi.

It is a state's obligation to prevent a population in this situation from committing genocide against another part of the population. The measures to be taken may include arresting and punishing the instigators and perpetrators and using force where appropriate. This genocide may be being committed by a very big part of the population that a state may be incapable to stop it from continuing. In such a case, that territorial state should either seek assistance from other states or call upon the competent organs of the UN to take action.[665] Also, like for measures against the rebels, the territorial state should refer such a situation to the ICC.

4.2. When genocide is being committed by another state or rebel groups from another state

The Genocide Convention did not give details on what a state should do to stop genocide being committed to its population by another state or by an organization from and supported by another state. Yet, this is not a situation that is unlikely. For instance, there have been claims that

[663] Report of the International Commission of Inquiry for Burundi, para. 496, available at <http://www.usip.org> (visited on 26 March 2012). This commission was created by the Security Council Resolution 1012 of 28 August 1995 to investigate, inter alia on the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which followed, available at <www.un.org> (visited on 26 March 2012).

[664] Report of the International Commission of Inquiry for Burundi, para. 213, available at <www.usip.org> (visited on 26 March 2012)

[665] See article VIII of the Genocide Convention.

Burundi, Rwanda and Uganda were all involved in mass killings in the jungles of eastern Congo some of which could, as noted in the mapping report,[666] "be classified as crimes of genocide" if "they were proven before a competent court." [667]

To know what measures a state concerned may take, it is important to make a distinction of circumstances in which this genocide may happen. First, it is possible that a state may invade another with the intention to commit genocide against the people of that state as such or against an identified group in that state (racial, ethnic, religious). Secondly, genocide may be committed by armed bands or groups operating from another state. The point here is not to discuss all the notions on these circumstances, but to see what the legal means available to the state victim are, for it to stop that genocide.

4.2.1. When a territorial state is victim of aggression by another state with the intention to commit genocide

A state may attack a territorial state using its regular armed forces or sending other armed bands or groups.[668] In either situation, the legal basis for action is basically the Charter of the UN and the Genocide Convention. Since this is a violation of one of the fundamental principles of the UN which prohibits the use of force against another state,[669] the first means to say here is article 51 of the UN Charter which recognizes to every state the inherent right of individual or collective self-defence if an armed attack occurs against it until the Security Council takes

[666] Office of the United Nations High Commissioner on Human Rights, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, pp. 278-284, para 510-522.

[667] Idem, pp. 282, 284, para. 515, 522

[668] See also Resolution 3314 (XXIX) of the General Assembly of the United Nations adopted on 14 December 1974 available at <http://www.un.org> (visited on 28 March 2012). This resolution provides a list of acts of aggression. Among them there are: "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."[668] See also Resolution RC/Res.6 on Amendments to the Rome Statute of the International Criminal Court on the crime of aggression and article 8 *bis* of the Rome statute of the ICC, available at <http://treaties.un.org> (visited on 28 March 2012). International Court of Justice, Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, 27 June 1986, para. 195, available at <http://www.icj-cij.org> (visited on 29 March 2012).

[669] See for instance article 2(4) of the UN Charter which reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

action.[670] So, the territorial state attacked is required to defend itself in order to protect its population from genocide. And as said in article 51, this right may be exercised individually or collectively.[671] However, depending on the military power of the aggressor, it might be difficult for the state victim to defend itself effectively (even through collective self-defence). In such a case, the Security Council action may be sought for.[672]

Other measures may include seeking measures through the ICC which may indict individuals involved for the crime of genocide.[673] If the territorial state is not party to the ICC or if the aggressing state is not party to it, the territorial state can refer the case to the Security Council which, under article 13(b)[674] of the Rome Statute of the ICC, can refer it to the ICC.[675] One of the big challenges here is that the aggressing state may not make its plan to commit genocide clear when it has started the war against the territorial state. For such a hidden agenda, one may think that punishing aggression from the very beginning could be an alternative to prevent that state from committing genocide. Indeed, since the prosecution would concern persons in a position effectively to exercise control over or to direct the political or military action of the aggressing State,[676] if it is done at the beginning, it could presumably have preventive effect on genocide. However, the fact that this possibility is yet to be available,[677] is one of many

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

[671] Article 51 of the Charter of the UN. The ICJ has set two conditions: 1. The victim state should declare its status as victim and request assistance, 2. The wrongful act must constitute an armed attack. See Nicaragua case, para. 102-5 and 110, 127. For more on this, see Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford University Press, Oxford, 2008, p. 735-737, Simma, Bruno et al. (eds.) *The Charter of the United Nations: A Commentary*, 2nd edition, Volume I, Oxford University Press, Oxford, 2002, pp. 789-806 and Shaw N. Malcolm, *International law*, sixth edition, Cambridge University Press, Cambridge, 2008, pp. 1131-1143.

[672] See articles 1, 2(4), 24, 39-42, 51, 52, 53 of the UN Charter. Article I and VIII of the Genocide Convention are additional legal basis for this.

[673] Article 5(a) of the ICC gives the jurisdiction to the ICC over genocide. Article 13(a) and 14(1) enable a state party to refer a case to the ICC and art 25 gives the ICC the jurisdiction over individuals responsible of international crimes under its jurisdiction.

[674] This article gives to the Security Council the power to refer to the ICC such a case.

[675] Ibidem.

[676] See Resolution RC/Res.6 on Amendments to the Rome Statute of the International Criminal Court on the crime of aggression. See also article 25, 3*bis* of the Rome Statute of the ICC available at <http://treaties.un.org> (visited on 28 March 2012).

[677] The Rome Statute of the ICC has made aggression an international crime that falls within its jurisdiction.

challenges on the prevention of genocide through the ICC.[678]

4.2.2. When genocide is being committed by armed bands or groups operating from another state

The problem may arise when the acts by these bands can hardly be attributable to the state from which they operate because the involvement of that state can be done either in a calculated way or the state is just passive.

For the first situation, the involvement may not constitute of sending the armed bands against another but by supplying logistical means, providing financial support to an organization that has already the intention to commit genocide in the territorial state. Obviously, the territorial state has the right to self-defence on its territory. The problem arises when it comes to using such a right to follow these bands outside its territory in order to dismantle them. The ICJ has said in Nicaragua case that some acts, though constitute a clear breach of international law (the principle of the non-use of force and an intervention in the internal affairs of a State) do not give rise to an entitlement to self-defence that involves the use of force.[679] It clearly said that "while the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack."[680]

However, this jurisdiction has been kept on hold for this crime of aggression awaiting its definition. It got defined in June 2010 but the conditions under which the court will exercise jurisdiction over it make it impossible for the court to exercise jurisdiction before 1 January 2017. When the court will start to exercise this jurisdiction, it will be possible for a state victim of aggression to refer the case before the ICC. See article 5 of the Rome Statute of the ICC. See also Resolution RC/Res.6 on Amendments to the Rome Statute of the International Criminal Court on the crime of aggression. See also article 15 *bis* and 15 *ter* of the Rome Statute of the ICC available at <http://treaties.un.org> (visited on 28 March 2012).

[678]Those challenges include the length of the process of investigation. In fact, by the time the ICC determines that there are acts of genocide going on; it might be too late to stop the acts. Also, as it has been heavily criticized in literature and by other different sources, the prosecution depends on the availability of persons to be prosecuted. The ICC has been challenged for its incapacity to pursue nationals of powerful states, in particular its refusal to investigate war crimes allegedly committed by British soldiers in Iraq. These challenges (which are even not exhaustive) make this possibility weak as far as the prevention of genocide is concerned most especially when genocide is being committed by individuals from powerful states. For more about this see for example Schabas, A. William, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court", *Journal of International Criminal Justice,* Vol. 6, No. 4, 2008, pp. 731-761,p.731. See also *Margaret M. deGuzman,* "Choosing to Prosecute: Expressive Selection at the International Criminal Court", *Michigan Journal of International Law*, Vol. 33, 2012, pp. 265-320, p. 272.

[679] Nicaragua case, para. 247.

[680] Ibidem.

The court added that such conduct (supply of arms) "is of lesser gravity than an armed attack".[681] However, it is doubtful whether this interpretation could apply in case these arms are supplied by a state to the armed bands or groups operating from its territory in order to be used to commit genocide in a given territorial state. In fact, if the armed band is neither sent by that state nor is it acting on its behalf but operates from that state and gets arms from it and uses them to commit genocide in the territorial state, it can be argued that this could either be interpreted as an implicit sending or as a substantial involvement of that state. This could presumably justify the use of force as self-defence. The Security Council resolution 1368 (2001) of 12 September 2001[682] which recognized the right of self-defence in the context of the September 11 terrorist attack on the United States may serve as a support to this argument. Though the acts committed are different from genocide, the rest is similar and the response that international law may give in this regard may not be different.

Things may get more complicated however when the state that supplies funds and arms is different from the one that serves as support base of the organization. For instance it has been alleged that Hezbollah (and Hamas) get arms and financial support from Iran and Syria.[683] Even where it may be assumed that Hezbollah attacks to Israel aim at committing genocide against the Jews and that it gets arms and other support from the two states, it is difficult to use the same argument to say that Israel could exercise its right of self-defence against Syria and Iran if Hezbollah is not operating from their territory. However, Israel could alternatively take countermeasures[684] against those states. But it might be difficult for it to find one that will stop those states from continuing if the intention is absolutely to commit genocide. Another

[681] Ibidem.

[682] Security Council Resolution 1368 of 12 September 2001 on the terrorist attack on the United States, available at <www.un.org> (visited on 16 March 2012).

[683] Justus Reid Weiner, Esq et al., "Referral of Iranian President Ahmadinejad on the Charge of Incitement to Commit Genocide", *Jerusalem Centre for Public Affairs*, Jerusalem, 2006, available at <http://www.jcpa.org/text/ahmadinejad-incitement.pdf> (visited on 16 March 2012).

[684] See articles 22, 47-50 of the ARSIWA, Nicaragua case, para. 249. See also International Court of Justice, Gabčikovo-Nagymaros Project case (Hungary v. Slovakia), Judgment, ICJ reports 1997, paras. 83-86. The ICJ mentioned 4 required conditions for countermeasures to be justifiable in international law: (1)The act constituting countermeasure must be taken in response to a previous intentional wrongful act of another state and must be directed against that state, (2) The injured state must have already called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation, but the request was refused, (3) The countermeasure must be commensurate with the injury suffered, taking into account the rights in question, (4) The purpose behind evoking the countermeasure is to induce the wrongdoing state to comply with its obligations under international law. Therefore, the measure must be reversible.

alternative may be the referral of the situation to the Security Council (which itself is not very promising). The referral of the case to the ICJ could be an option. However, not only this might take long before a decision is made (thus difficult to have a prompt preventive effect), but also the court's decision might still need the enforcement of the Security Council at the end (if the state concerned does not comply with that decision).[685] Given the nature of the peril, this gives very little chance of prompt preventability of genocide.

The second situation is when there is a passive involvement of a state. This is when for whatever reasons; a band is operating from the territory of a given state but without any supply of arms or any kind of logistical or financial support from that state. This may happen in two ways. First, a state may, without necessarily taking active part in what the band is doing, be unwilling to prevent it from doing it from its territory. Secondly, the state may be aware of what the armed band is doing from its territory and may not be acquiescing to that, but is unable to prevent it from using its territory as a support base to commit genocide in another state. The question being what the territorial state can do to stop the commission of genocide by this armed band in both situations. In other words, what solution does international law provide to the problem where the people of a territorial state may be facing such a peril from a band operating from another state?

Prima facie, it could be said from what the ICJ has said in the Nicaragua case that both situations could not justify measures involving the use of force against the band in another state. That is why numerous scholars and states have argued for example that Israel violated international law in pursuing Hezbollah in Lebanon.[686] Likewise Rwanda was criticised the same way when it used force in DRC to fight the former Rwandan soldiers and *interahamwe* militia most of whom were involved in the 1994 genocide and who were carrying out armed attacks from DRC allegedly aiming at committing genocide against the Tutsi ethnic group in Rwanda.

Though the claim by both Israel and Rwanda in attacking those bands in Lebanon (2006) and DRC (1996) respectively were not explicitly to stop genocide, they were both considering themselves as legally dismantling the organisations because of the peril they represented. For instance one of the reasons invoked later by Mr Kagame (then Vice-President) was to destroy the ex-Rwandan forces (FAR) and militias in Zaire"[687] (now DRC) and this because they had been

[685] See article 94 of the Charter of the United Nations.

[686] See examples in Gray, Christine, *International Law and the Use of Force*, 3rd edition, Oxford University Press, Oxford, 2008, pp. 237-244.

[687] Gourevitch, Philip, op.*cit*, pp. 292, 296.

using Zaire as a support base to attack and selectively kill people belonging to the Tutsi ethnic group in Rwanda. This use of force was heavily criticized not necessarily for the illegality of use of force but mainly for the alleged international crimes during the operations.[688] Not much has been debated on whether the justification to suppress acts of genocide could be used as a legal ground for the operations. This is probably because no clear claim was made to justify the operations within the ambit of the Genocide Convention and other international sources on the prevention of genocide. This makes it difficult to make an argument that the attacks on a genocidal band/rebel group in another state can be justified within the combination of article 51 of the Charter and article I of the Genocide Convention. The case DRC v. Rwanda which included the violation of the rule on the prohibition of use of force did not reach the merit stage. Had it reached it, it could have probably compelled the ICJ to give an interpretation on that and this could have presumably advanced this area. The ICJ did give its position in the case DRC v. Uganda that Uganda (which was ally with Rwanda in that war) had violated international law with regards to the rules on the prohibition of use of force despite its argument that it was preventing rebels from attacking Uganda using Congolese territory.[689] However, since Uganda did not have such a heavy claim (genocide), this cannot serve to draw a conclusion that the use of force in such a case is absolutely outside the Charter of the UN, read together with the Genocide Convention.

If it was true that the bands were committing genocide against the Tutsi in Rwanda, the latter could have probably argued that it was preventing its people from it by stopping the bands from continuing those acts. Whether this could have been convincing enough is not sure. The "approximate application" principle may presumably be useful in this situation. In the Gabcikovo Nagymaros Dams case, Slovakia invoked a principle that it described as the "approximate application",[690] in justifying countermeasures against Hungary after the latter had

[688] See for example, Office of the United Nations High Commissioner on Human Rights, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, pp. 278-284, para. 510-522, available at <http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf> (visited on 30 March 2012).

[689] International Court of Justice, Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005, paras. 148-165, available at <http://www.icj-cij.org/docket/files/116/10455.pdf> (visited on 2 April 2012).

[690] See also International Court of Justice, Gabčikovo-Nagymaros Project case(Hungary v. Slovakia), Judgment, ICJ

violated the treaty between them. It was referring to what had been expressed by Judge Sir Hersch Lauterpacht in the 1950s as follows:

> "it is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument - not to change it.[691]

Though one would say that this principle would be an option to be relied on while acting to dismantle genocidal bands in applying the Charter of the UN and the Genocide Convention; its legality is not guaranteed. The Court also avoided giving an opinion on it in the said case. It did neither acknowledge that this principle existed nor did it say that it did not.[692] Yet, it could be a good path to be explored and exploited in the future.[693] Since not much has been done so far to clarify this area, these uncertainties of international law may constitute at the same time an obstacle to the prevention of genocide and a danger in general because it may make some territorial states, in order to defend themselves against a threat of future genocide from other states (or rebels supported by them), take the law into their own hands by taking action against other states as a preventive measure which, though this may prevent an imminent genocide against its population, it may cause other deaths in the concerned state(s) and may not remove the danger of genocide in future.

It is possible to say that to date international law is still unclear on how genocide can be prevented in the situations discussed above. The mainstream among international lawyers is that using force is only accepted where it is clear that a band is sent or is acting on behalf of a state to attack another. Whether this applies to a situation where the attack aims at committing genocide is not yet clearly explored. Yet, given the seriousness of the peril, self-defence should be justified even in case of passive involvement or inability to prevent the band from using its territory to

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reports 1997, para. 75.

[691] International Court of Justice, Admissibility of hearings of petitioners by the committee on South West Africa, I.C.J.Reports 1956, separate opinion of Sir Hersch Lauterpacht, p. 46, available at <http:// www.icj-cij.org> (visited on 30 March 2012).

[692] See also International Court of Justice, Gabčikovo-Nagymaros Project case (Hungary v. Slovakia), Judgment, ICJ reports 1997, para. 76.

[693] Other paths that could be exploited in the future may include distress and necessity as circumstances precluding wrongfulness of use of force by a territorial state against armed bands which commit genocide from another state.

commit genocide in a territorial state. In such a case however, there should be a need of putting in place some railings in order to avoid that there be abuse.

4.3. Preliminary conclusions

Whatever the challenges, it is possible to argue that international law does not only obligate territorial states to prevent genocide before it starts but also to continue after the onset of it in order to suppress the on-going acts of genocide regardless of where they emanate from. This is done through the legal means discussed in this section even though not all are promising because of the uncertainties or ineffectiveness of some rules of international law. Here again, the challenge of the lack of monitoring mechanism is serious at this level because there may be uncertainties on whether or not what is going on constitutes acts of genocide. International and national monitoring mechanisms would be useful to authoritatively determine this and put a pressure on the territorial state concerned to comply with its obligation to prevent genocide.

5. Some challenges common to the prevention at the three levels and how they should be overcome

All these categories of measures face some common big challenges. First, for the measures to be enforced, territorial state's institutions need to be independent from each other in order for example to impose sanctions against another where applicable. The legislation may have provided for that independence but if a territorial state turns out to be characterised by authoritarianism, this independence might be altered at this level. In that case, the measures might be of little significance. The way this can be overcome may depend on how the second challenge may be dealt with.

The second challenge is that there is no coordination of preventive measures in these categories. For instance there is no monitoring body that could establish a link between these measures and the prevention of genocide. It has been noticed earlier in this work that the Genocide Convention did not expressly obligate states to create national mechanisms for the prevention of genocide. It was argued however that nothing would preclude states from creating one in complying with the obligation to prevent genocide because it may be essential for the prevention. In other words, creating that national mechanism (a national independent body) is consistent with the Genocide Convention in general and its article I in particular. That national mechanism would alternatively

help in the follow-up of how the prevention of genocide is being implemented. However, since this is not expressly provided for in the Genocide Convention, its likelihood has low chances because not every state (if any) would necessarily interpret article I of the Genocide Convention in this way. The fact that it is not provided may be in fact a good excuse for many unwilling states.

The third challenge is that, even if a state would create this national mechanism, it is not clear where it would report on the international level. The Genocide Convention did not create any international body to which a national mechanism would report a situation of failure to enforce preventive measures by states. Yet, some other conventions on prevention that are already explained in chapter two of this work can serve as a good example for the Genocide Convention as well. Indeed, one of the good examples may be about the development of the laws on the prevention of torture. In fact, the Convention Against Torture not only obligated states to prevent it[694] but its additional (optional) protocol came to supplement it by obligating states to set up independent national preventive mechanism to undertake regular visits to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.[695] Likewise, a monitoring mechanism has been provided for on the European[696] and American[697] levels. Though it does not create a national preventive mechanism as such but it has a system of regular visits that is a good preventive way to deter the occurrence of torture.

It may be argued that following the example of torture at the international level with regard to national and international mechanisms, these mechanisms would help to resolve the uncertainties and other obstacles surrounding the prevention of genocide at this level. These mechanisms

[694]See article 2(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (visited on 16 February 2012).

[695] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 by the UN General Assembly Resolution A/RES/57/199, available at <http://www2.ohchr.org> (visited on 16 February 2012).

[696] See articles 1, 8, 10, 12 of the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession on 26 November 1987, available at <http://conventions.coe.int> (visited on 17 February 2012).

[697] Articles 1, 6, 7 of the Inter-American Convention to Prevent and punish Torture, adopted de Indias, Colombia, on 12 September 1985 available at <http://www.oas.org> (visited on 16 February 2012). See also Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the commission in March 2008, available at <http://www.cidh.oas.org> (visited on 16 February 2012).

would even develop guidelines on preventive measures in all fields. The guidelines are essential to assess if a state is breaching its obligation under the Genocide Convention at each level and this is useful because states would then improve how they comply with their obligation to prevent genocide.

Conclusion

This chapter which aimed at investigating what the obligation to prevent genocide entails to territorial states argued that this obligation of states under existing international law first and foremost meant to obligate states to prevent genocide from being committed to their own population, *i.e* the people on their territory.

With regard to the question on what this obligation entails to territorial states *in concreto*, it was argued that the effective way to prevent genocide by territorial states is to do it through three levels: primary, secondary and tertiary and that this coheres well with the Genocide Convention and international law in general. This is because prevention of genocide means to tackle all the factors and phases that are susceptible of leading to it. Measures at the primary level include enacting legislation as well as other measures that are necessary for the prevention of genocide such as administrative, political, educational, cultural, economic measures as well as any other measures that can be relevant for the prevention of genocide. This may include the establishment of relevant legal institutions and mechanisms with a mandate to monitor the implementation of the Genocide Convention through those different measures.

At the secondary level, it was argued that measures include imposing penalties to people who commit some crimes like the incitement to hatred against a specific group of people or to discrimination of a specific group, persecution as act of crimes against humanity and the incitement to commit genocide. Punishing perpetrators of these crimes before genocide happens is complying with the obligation to prevent genocide and may indeed have a preventive effect. When territorial states have no control over the perpetrators of the said crimes it was shown how international law provides for means to punish them when the crime committed is an international one. And though the existing means have proven to be not very much promising because of the challenging system under which they are used, it was shown that their existence is already good sign from which they can be improved upon for the future. It was also shown that prevention at this level requires other measures other than judicial ones.

At the tertiary level, it was argued that the obligation to prevent genocide obligates territorial states to halt acts of genocide after its onset. This is because this obligation is continuous. It does not cease when the acts have commenced. States are obligated to put an end to those acts regardless of where they emanate from.

It was demonstrated however that the fact that so far no institutions have been put in place to monitor the implementation of the obligation to prevent genocide by territorial states at all levels is a challenge to the effective prevention of genocide. Moreover, though it would be consistent with article I of the Genocide Convention for a state to create a national preventive mechanism to monitor this, it is not very much likely to happen. Unless the Genocide Convention is amended or an additional protocol is adopted to include a provision that creates both international and national monitoring mechanisms to follow-up the implementation of this obligation and to develop guidelines related to the measures to be taken, the prevention of genocide at all levels might continue to be difficult in the future.

Furthermore, except where the threat of genocide comes from other parties than the territorial state itself, all these preventive measures discussed in this chapter would only make sense when the territorial state is in good faith, *i.e* when it does not plan or commit genocide itself. In fact, a state cannot be a killer and preventer at the same time. This raises the question to know how genocide can be prevented in a territorial state when this state is doing nothing to prevent the factors and risks of genocide in different phases from developing themselves, where there are signs that a given situation may lead to genocide, or that the state itself has a genocidal plan against its own population. As already mentioned above, the experience shows that most genocide are possible where territorial states are either perpetrators themselves, unwilling or unable to prevent it.[698] Since it has been concluded that the prevention of genocide concern all states, it will be examined *in concreto* how other states can prevent genocide outside their territories. The extent to which international law requires and permit non-territorial states to prevent genocide will be examined. In fact, since the spirit in that convention seems to have been doing it through international cooperation,[699] it is opportune to question or examine if it was meant by the Genocide Convention that States have the obligation not only to prevent genocide within their own territories but also beyond the limits of their territories (in other states) in order

[698] For example, the Holocaust was organized and perpetrated by the Nazi regime. Also, the genocide against the Tutsi in Rwanda was organized instigated and committed by the Regime in Rwanda in 1994.

[699] See articles I, IV, V, VI, VII, VIII of the Genocide Convention as well as its preamble.

to prevent genocide. This is discussed in the next chapter.

Chap VI. Prevention of genocide by non-territorial states[700] under international law

Introduction

This chapter will address the question what the obligation to prevent genocide means to non-territorial states. Are they obligated to prevent genocide in territorial states? If so, from what moment are they entitled and/or required to do so? What is the impact of the geographic distance on prevention and what measures can the non-territorial states legally take?

This chapter first discusses the territorial scope of the obligation to prevent genocide (section one) and the capacity of non-territorial states to prevent genocide outside their territories (section two). Regardless of the conclusions in these sections, the three other sections will examine what international law permits and/or requires to non-territorial states to prevent genocide at the primary level (section 3), the secondary level (section 4) and at the tertiary level (section 5). The influence as one of the available means of non-territorial states to prevent genocide at all levels is also discussed (section 6). The final section (7) discusses the issue of coordination of the prevention of genocide at all levels. Except for section one and seven, for other sections the discussion will include an examination of the capacity of those non-territorial states to prevent genocide outside their territories.

1. The territorial scope of the obligation to prevent genocide

This section first confronts the obligation to prevent genocide with the principle of state sovereignty. It also discusses the ICJ ruling on the territorial scope of the obligation to prevent genocide. In both subsections, the aim is to answer the question whether state sovereignty may (not) constitute a barrier to the prevention of genocide by non-territorial states.

1.1. Confronting the obligation to prevent genocide with state sovereignty

Sovereignty is considered as one of the central pillars of international law.[701] Numerous scholars

[700] For the purpose of this work, by the prevention of genocide by non-territorial states I refer to measures that states may take which are susceptible of preventing genocide outside their territories.

[701] Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford University Press, Oxford, 2008, p.289-

have written about its origin and scope. Apparently, there is no disagreement on the fact that the present foundations of international law with regard to sovereignty were shaped by agreements concluded by European states as part of the Treaty of Westphalia in 1648.[702] After almost 30 years of war, the supremacy of the sovereign authority of the state was established within a system of independent and equal units, as a way of establishing peace and order in Europe.[703]

After the Second World War, the principle was introduced in the UN Charter. According to article 2 (1) of that Charter, the world organization is based on the principle of the sovereign equality of all member states. In a subsequent ruling of the ICJ in Nicaragua case, this principle of State sovereignty was reaffirmed as being a principle under, not only the Charter of the UN but also customary international law which creates the duty of every State to respect the territorial sovereignty of other States.[704]

State sovereignty denotes the competence, independence, and legal equality of states.[705] It is normally used to encompass all matters in which each state is permitted by international law to decide and act without intrusions from other sovereign states which include the choice of political, economic, social, and cultural systems and the formulation of foreign policy.[706] A sovereign state is empowered in international law to exercise exclusive and total jurisdiction within its territorial borders. Other states have the corresponding duty not to intervene in the internal affairs of a sovereign state.[707] Sovereignty is a legal attribute of a territorially bounded political community enjoying full membership in the international system.[708] This principle holds that states are not subject to the authority of any higher institution or principle and that the state

298. See also Crawford, James, *Brownlies's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012, 447-449.

[702] See for example Abiew, Francis, *The Evolution of Doctrine and Practice of Humanitarian Intervention*, Kluwer, The Hague, 1999, and Reisman Michael, "Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law,* Vol. 84, 1990, p. 867.

[703] See Nguyen, Quoc Dinh et al., *Droit International Public*, 7e ed. L.G.D.J, Paris, 2002, pp. 52. See also Shaw, N. Malcolm, *International Law*, 5th edition, Cambridge University Press, Cambridge, 2003, pp. 411-413.

[704] Nicaragua case, paras. 212-213.

[705] See Shaw, N. Malcolm, *International Law*, 6th ed., Cambridge University Press, Cambridge, 2008, pp. 214-215.

[706] Ibidem.

[707] See ICISS report, para. 2.8.

[708] Brad, R. Roth, "State Sovereignty, International Legality, and Moral Disagreement", Updated Version of Paper Presented at the Panel on "Questioning the Aspiration to Global Justice" Annual Meeting of the American Political Science Association, September 2, 2005, p. 10, available at <http://www.law.uga.edu/intl/roth.pdf> (visited on 24 May 2012).

itself is the ultimate source of political authority within its territory.[709]

On the other hand however, the same Charter which recognises this principle of state sovereignty also has among the goals of the UN, the promotion and encouragement of the respect of human rights and fundamental freedoms. In that line, some subsequent conventions on human rights have created obligations whose nature may dictate either the reinterpretation of the concept of sovereignty for their application in some circumstances or may simply limit their application in case of the absolute sovereignty. One of those conventions is the Genocide Convention which creates the obligation to prevent genocide which, as it will be shown *infra*, is not limited by territory in its application. Then the question becomes how the prevention of genocide by non-territorial states is possible if the principle of sovereignty excludes the interference of states in others' internal affairs. It is now important to see how this obligation to prevent genocide has been confronted with this concept of sovereignty and in so doing it will be examined how this has been perceived from the early stage of the drafting process of the Genocide Convention and after its adoption.

During the Lemkin's struggle to draft a law and convince great powers to accept it so as to prevent and punish the crime of genocide, there have been some suggestions by scholars on the state sovereignty, some of them arguing that sovereignty should not be defined in the way to permit slaughter.[710] Lemkin argued that the destruction of a people cannot be considered as a matter of internal affairs. He wrote:

> "It seems inconsistent with our concept of civilization that selling drugs to an individual is a matter of worldly concern, while gassing millions of human beings might be a problem of internal affairs".[711]

He said again that "the treaty on genocide would enshrine a new reality: states would no longer have the legal right to be left alone. Interference in a genocidal state's internal affairs …was not only authorized but required by the convention".[712] Apparently, Lemkin predicted that

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[709] Cronin, Bruce, "The Tension Between Sovereignty and Intervention in the Prevention of Genocide", *Human Rights Review*, Vol. 8, No 4, 2007, pp. 293-305, p. 293.

[710] Power, Samantha, *op.cit*, p. 47.

[711] Lemkin's letter to the editor, New York Times, November 8 1946, quoted in Power, Samantha, ""*A problem from hell*": *America and the Age of Genocide*, Harper Parennial edition, New York, London, Toronto, Sydney 2007, p. 48.

[712] Idem, p. 58. See also Lemkin, Raphael, "Genocide as a Crime in International Law*", American Journal of International Law*, Vol. 41, No.1, 1947, p.145-151.

prevention of genocide could not easily be done without the involvement of states in other states" affairs. On the critique by the Soviet Union that no interference to sovereignty should be allowed, René Cassin responded: "The right of interference is here, it is here" he noted, "Why? Because we do not want a repetition of what happened in 1933, when Germany began to massacre its own nationals and everybody….bowed, saying "Thou art sovereign and master in thine own house".[713] Genocide can never be the exclusive internal concern of any country", "wherever it occurs, it must concern the entire civilized world".[714] Clearly, these two eminent personalities known as fathers of the Genocide Convention and the UDHR respectively had the view that no state can invoke the principle of state sovereignty on issues related to genocide.

Others have later argued on this issue. In the mid-1950s, Professor Hersh Lauterpacht said: "…Acts of commission or omission in respect of genocide are no longer, in any interpretation of the charter, considered to be a matter exclusively within the domestic jurisdiction of the state concerned".[715]

In the 1990s and especially during and after the two major genocidal conflicts since the Holocaust, the principle of state sovereignty has been even much more discussed. Proponents of the argument that states" obligation to prevent genocide extends outside their territories have contended that the principle of state sovereignty cannot be used by a state which plans to commit genocide or is committing it. For instance, during the conflict in the Balkans, Boutros Boutros-Ghali then UN Secretary-General wrote in the Agenda for Peace that "respect for its fundamental sovereignty and integrity are crucial to any common international progress".[716] He continued that "the time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality."[717]

In 1996, Francis Deng *et al.* argued in their book on sovereignty that "a government that allows its citizens to suffering a vacuum of responsibility for moral leadership cannot claim sovereignty

[713] Idem, p.76. René Cassin was a French Jewish lawyer who took the lead on the Human Rights Commission in drafting the Universal Declaration of Human Rights and who in 1968 was awarded the Nobel Prize for his efforts.
[714] Idem, p.59.
[715] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, Cambridge University Press, Cambridge, 2000, p. 498.
[716] Boutros Boutros-Ghali, "An Agenda for Peace: Preventive Diplomacy, Peace-making and Peace-keeping", 17 June 1992, para. 17 available at <http://www.un.org/docs/SG/agpeace.html> (visited on 15 May 2012).
[717] Ibidem.

in an effort to keep the outside world from stepping in to offer protection and assistance."[718] The authors added that sovereignty is not "merely the right to be undisturbed from without, but the responsibility to perform the tasks expected of an effective government," and that the "right to inviolability should be regarded as lost…in response to its own inactivity or incapacity and to the unassuaged needs of its own people."[719]

Arguing in the same direction as these authors, W. Michael Reisman (referred to by the said authors) has made an interesting requalification of the principle of state sovereignty.[720] He sees sovereignty as "popular sovereignty" and not "state sovereignty".[721] In explaining what it means, he argued that in modern international law, the sovereignty of people is what counts and not the metaphysical abstraction called the state. In the context of the international intervention in Haiti in 1991, he explained further the popular sovereignty in question where he wondered that "if the purpose of coercion is to reinstate a *de jure* government elected in a free and fair election after it was ousted by a renegade military, whose sovereignty is being violated?, the military's?[722] Hauke Brunkhorst has distinguished popular and state sovereignty and argued that popular sovereignty logically precedes state sovereignty.[723] Georg Cavallar thinks that this idea of popular sovereignty was also in Kant's mind where he was of the view that a state cannot be seen as a possession because "it is a society of people, which no one other than itself can command it or dispose of."[724] However, if it is true that Kant seemed to also accept the popular sovereignty, his explanation does not favour the interference in state's matters. Cavallar refers to Kant's three exceptional cases in which interference is justified: (1) in case of an actively inflicted injury (namely the first aggression), (2) in case of military preparations (giving rise to a right of anticipatory attack), and finally (3) by the *potentia tremenda*, or the alarming increase of a

[718] Deng, Francis et al., *Sovereignty as Responsibility: Conflict Management in Africa*, the Bookings, Washington, DC, 1996, p. 33.
[719] Idem, p xvii-iii.
[720]Reisman, W. Michael, *Sovereignty and Human Rights in Contemporary International Law*, (1990), Faculty Scholarship Series, Paper 872, p. 874.
[721] Idem, pp. 867, 868, 872, 876. See also Deng Francis et al., *op.cit*, p. 9.
[722]Ibidem.
[723] Hauke, Brunkhorst, "Paradigmenwechsel im Volkerrecht? Lehren aus Bosnien", in Lutz-Bachmann, Matthias and Bohman, James (eds.), *Friedden Durch Recht: Kants Friedensidee und das Problem einer neuen Weltordnung*(Frankfurt am Main, Suhrkamp, 1996), p.262-3 cited in Cavallar, Georg, *Kant and the Theory and Practice of International Right*, University of Wales Press, Cardiff, 1999, p. 89.
[724] Cavallar, Georg, *op.cit*, p. 89.

neighbour's power.[725] Here it can be noticed that he appears to stick to the absolute state sovereignty as well by opposing any interference by other states in a state's own business.[726] He justifies this by specifying that states must not injure the moral personality of others.[727] Cavallar explains that Kant's notion of "moral" is understood as the opposite of physical and not of the immoral.[728] Being a moral person, a state enjoys the autonomy attached to that status. Hegel's view on this is similar to Kant's, because he also considered a state as a moral being, capable of being autonomous (among other things).[729] According to Cavallar, Kant's argument is that since the international right should be based on the principle of equality, the latter is violated if one state claims the rights of interference that are denied to others.[730] However, in the exceptions he gives, Kant bases his argument on the injury as being the only element that triggers any interference by injured states.[731] His position was that internal affairs of one state do not violate the rights of neighbouring states,[732] therefore give no right of interference in other states" internal affairs.

Let me now confront two things in Kant's justification to the prevention of genocide. First, he uses the argument that states cannot interfere in another state's internal affairs because a state is a moral person that he equates with a natural or physical person since both enjoy a legal personality. Yet, he does not say how to deal with the situation where that moral person may want to eliminate natural persons of a given group. In fact, he does not show why he accepts only three exceptions. Also, this analogy (moral person and natural person) might weaken his argument more than it might strengthen it because when a natural person prepares himself to commit or is committing a crime, he might be prevented from completing it if the process of the commission of that crime gets to be known and is punished if he has completed it. Thus, his/her legal status does not protect him/her from being prevented from continuing or from being punished. So why then a moral person (state) with the legal personality as well, would not be prevented or punished when it does the same? This then weakens any reliance on the mere fact

[725] For more discussion on these exceptions, see Cavallar, Georg, *op.cit*, pp. 81- 93.
[726] Idem, p. 84.
[727] Ibidem.
[728] Idem, p 85.
[729] Tesón, R. Fernando, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., Transnational Publisher, Inc. Irvington-on Hudson, New York, 1997, p. 60.
[730] See Cavallar, Georg, *op.cit*, pp. 81-93.
[731] Idem, p. 84.
[732] Idem, p. 85.

that sovereignty of state is solely based on the status as a moral person regardless of its conduct. Secondly, the notion of injury as explained in Kant's theory does not exclude any possibility to interfere in another state to prevent genocide at least more obviously by neighbouring states because genocide may cause serious injury to other states. For instance, as noted by Bruce Cronin, "genocide not only grossly abuses the victims; but it also tends to produce massive refugee flows, spawn cross-border guerrilla movements, and create tensions with neighbouring states."[733] The example of the consequences of the genocide in Rwanda to its neighbouring countries, especially to the Democratic Republic of Congo is telling. So, contrary to Kant's position referred to by Cavallar, my view is that other states are injured not only in the three cases he gave.

It can therefore be said that not only Kant's arguments are not convincing if they are to be used to exclude interference in case of genocide, but also his reasoning did not support the idea behind the sovereignty as a "popular" one and not as a "state" one even if he seemed to prefer it. In the current status of international law, this reasoning might not find its place when it comes to genocide because as it was demonstrated earlier, genocide is a concern of all states and therefore all states are injured even when a state is committing genocide against its own people within its boundaries. Indeed it has been argued in literature that the prohibition of genocide is so fundamental that "the international community of States as a whole" is said to have recognized it as "peremptory" norms (*jus cogens*), subject neither to persistent objection nor to "derogation" (i.e., justification or excuse for non-performance).[734]

However, while this argument might be valid (at least clearly) where a territorial state is already committing genocide it is doubtful whether it would necessarily be valid during the earlier phases of the process to genocide. Georg Cavallar seems not to solve this problem when he argues that there is a primacy of the popular sovereignty because it is the united will of the people that matters and suggests that the interference is permissible even when it violates state sovereignty.[735] This argument puts the will of the people above the sovereignty of the abstract state ("state" sovereignty). But the problem with it is not only that it does not solve the problem on whether the popular sovereignty would permit interference even at early phases of the process to genocide, but also it does not suggest any way to measure that an interference of other states

[733] Cronin, Bruce, *op.cit*, p. 294.
[734] See for example Brad, R. Roth, *op.cit*, p. 7-8.
[735] See Cavallar, Georg, *op.cit*, p. 89.

would be necessarily the will of the people concerned. Indeed, if for instance a state convinces the majority of its population to eliminate a minority group of its population, it is hard to argue that interference would be the will of the people of that country, unless the will would be that of people of other states (which would not necessarily be within the meaning of his argument).
The solution to that may however be that genocide is a concern of all as noted above. Moreover, the argument that sovereignty should be taken as responsibility seems to be an intermediary and good argument in this regard and it supports the "popular sovereignty" while not requiring the condition of the will of the people of the state concerned. Amitai Etzioni noted that "sovereignty as responsibility means that the individual states are entitled to full sovereignty so long as they abide by the norms established by the international community."[736]
Apparently, it can be noticed that there is an overwhelming claim that State sovereignty is not a barrier to the prevention of genocide by non-territorial states. The analogous argument that "just as there is no absolute freedom for individual, there cannot be absolute sovereignty for the state,"[737] is relevant. However, before reaching a final conclusion on the questions above it is first essential to see what has been the interpretation of the ICJ on this matter.

1.2. The ICJ and the territorial scope of the obligation to prevent genocide

As said earlier in this work, the wording of article I of the Genocide Convention shows that the Contracting Parties (states) have a direct obligation to prevent genocide. Furthermore, it has been concluded earlier that the prohibition of genocide is a peremptory norm from which no derogation is permitted, and entails also an *erga omnes* (towards all) obligation of states.[738] By their very nature, some obligations including those deriving from the outlawing of genocide are owed to the international community as a whole and therefore are concern of all states[739] (including non-parties to the Genocide Convention). The question whether this character makes it obligatory to all states to prevent genocide outside their territories is already posed above. It is worth examining the ICJ interpretation of the obligation to prevent genocide to see whether it is

[736] Amitai, Etznioni, "Sovereignty as Responsibility", published by Elsevier Limited on behalf of Foreign Research Institute, Winter 2006, pp. 71-85, p. 83.
[737] Tesón, R. Fernando, *op.cit*, p. 60.
[738] International Court of Justice, Case concerning the Barcelona Traction, Light and Power Company, Limited (New application: 1962) Belgium v. Spain Judgment, 5 February 1970, para. 33 and 34, available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (visited on 18 May 2011).
[739] Ibidem.

in line with the claim above that the obligation to prevent genocide dictates states to act beyond the limits of their territories and that therefore the principle of state sovereignty is not a barrier to that.

The ICJ affirmed in its advisory opinion on the reservation to the Genocide Convention that the bases of this convention are "the moral and humanitarian principles".[740] The court reached this conclusion after having considered the origin of the Genocide Convention itself and the spirit with which it was adopted. It said:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge"…[741]

Furthermore, the court said that its object on the one hand is to safeguard the very existence of certain human groups and on the other, to confirm and endorse the most elementary principles of morality.[742] It said:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d"être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[743]

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[740] Reservation to the Convention on Genocide, Advisory Opinion: I.C.J. Reports1951, p. 15-30, p. 24.
[741] Idem, p. 23.
[742] Ibidem.
[743] Ibidem.

More explicitly, on the question whether a state has the obligation to prevent genocide beyond its territory, the ICJ did mention in the Bosnia Genocide case that the obligation to prevent genocide is not limited by territory.[744] It said:

> "The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question."[745]

Does this really mean that states are obligated to prevent genocide everywhere? For instance does Norway have the obligation to prevent genocide in Madagascar and vice versa? Does Papua New Guinea have the obligation to prevent genocide in Guatemala, Chili in Sri Lanka, New Zealand in Tunisia, Lesotho in Syria and vice versa? Marko Milanovic argued in favour of the majority approach that can be understood to mean that "every state in the world has the duty to prevent any act of genocide, no matter where it might occur."[746] He argued that this approach came to support states' tendency to read article I of the Genocide Convention broadly, *i.e* as not limiting the obligation to prevent genocide to territory.[747] In support of his argument he referred to the example of what has been qualified as "matter of historical record" that "the US government was reluctant at the time to name the then on-going atrocities in Rwanda as genocide because that would have implied its obligation to prevent it.[748]

In his separate opinion in the Serbia v Bosnia case Judge Tomka agrees also that "under Article I of the Genocide Convention the State does have an obligation to prevent genocide outside its territory" but only "to the extent that it exercises jurisdiction outside its territory, or exercises control over certain persons in their activities abroad".[749] He opposed the reasoning of the majority of judges that found the respondent state responsible for the breach of the obligation to

[744]Bosnia v. Serbia case, para. 183.
[745] Ibidem.
[746] Milanovic, Marko, "State Responsibility for Genocide: A follow-Up", *European Journal of International Law,* Vol. 18, No. 4, 2007, p. 687.
[747] Milanovic, Marko, "Territorial Application of the Genocide Convention and State Succession", in Gaeta Paola (Ed.), *The UN Genocide Convention, A Commentary*, Oxford University Press, 2009, pp. 480, 481.
[748] Idem, p. 481. The weakness in his argument is however that he only referred to this US attitude which does not represent the attitude of the majority of other states. Yet he could have referred to other instances as well such as where the Belgium Prime Minister presented his *mea culpa* acknowledging the failure of Belgium to prevent the genocide in Rwanda. The Belgian Prime Minister apologized first in 2000 and in 2004 for the second time. He acknowledged that Belgian conduct caused the loss of many human lives. See this at <http://www.aidh.org/rwand/hirond03.htm> (visited on 14 May 2012).
[749] Bosnia v. Serbia, Separate Opinion of Judge Tomka, para. 67.

prevent genocide in Srebrenica because the respondent did neither *exercise jurisdiction*[750] of Srebrenica nor was it established that it *exercised control*[751] over the perpetrators who conducted these killings in that area.[752] In other words, for Tomka, the elements of exercise of jurisdiction and exercise of control are essential for a state to be bound by the obligation to prevent genocide outside its territory. Marko Milanovic criticized Tomka's approach for having neither "support in the text of the treaty nor is it based on some more general legal principle, nor, for that matter, can the states parties" intent to that effect be inferred from the preparatory work to the convention."[753]

Although the ICJ did not support Tomka's criteria, it did suggest others. In fact, the court made it clear that the obligation under article one of the Genocide Convention "is not limited by territory" and that it applies to a "state wherever it may be acting or may be able to act". This wording suggests that non-territorial states have the obligation to prevent genocide, wherever it might happen,[754] within the confines of its ability and influence.[755] In preventing genocide, states are not limited by their borders and this is not a violation of the principle of sovereignty because nowhere has this principle been understood as justifying acts of genocide. This teleological interpretation of article I of the Genocide Convention by the court is convincing and consistent with the logic and spirit behind the prohibition of genocide. The court authoritatively supported arguments against the interpretation by many states leaders that sovereignty protects them from any interference from outside.[756] Reisman rightly observed that "those who yearn for "the good old days" and continue to trumpet terms like "sovereignty" without relating them to the human rights conditions within the states under discussion do more than commit an anachronism".[757] There is thus a possibility for a state to fulfil this obligation anywhere as long as it has the means

[750] Emphasize added.
[751] Emphasize added.
[752] Bosnia v. Serbia, Separate Opinion of Judge Tomka, para. 68.
[753] Milanovic, Marko, "Territorial Application of the Genocide Convention and State Succession", in Gaeta Paola (Ed.), *The UN Genocide Convention, A Commentary*, Oxford University Press, 2009, p. 481.
[754] Milanovic, Marko, "State responsibility for Genocide, A Follow-Up", *European Journal of International Law*, Vol. 18, No. 4, 2007, 669-694, p. 687.
[755] Ibidem.
[756] Totten, Samuel, "The Intervention and Prevention of Genocide: Where There Is the Political Will, There Is a Way", in Totten Samuel et al.(eds), *Century of Genocide, Critical Essays and Eyewitness Accounts*, 2nd ed., Routledge, New York and London, 2004, p. 477.
[757] Reisman, Michael, "Sovereignty and Human Rights in Contemporary International Law", *American Journal of International Law* 84(1990), p. 876.

to do so and as long as the actions are within what is permitted by international law.[758] The capacity of non-territorial states to prevent genocide in other states will be discussed next.

2. Capacity of non-territorial states to prevent genocide outside their territories

The ICJ noted some parameters that may be taken into consideration in the assessment of the capacity of states to prevent genocide outside their territories."[759] It wrote:

> "this capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events".[760]

It added that:

> "The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide".[761]

There are four criteria from this ruling of the court to assess if a state has the capacity or means to prevent genocide outside its territory. The first criterion is the geographical distance of the state concerned from the scene of the events.[762] The second is the strength of the political links between the state concerned and the persons likely to commit genocide.[763] The third criterion concerns the links of all other kinds between the authorities of that State and the main actors in the events.[764] The Court added as fourth criterion that the State's capacity must also be assessed by legal criteria.[765]

With regard to the first criterion, the court did not indicate how distance should be used to assess the capacity. One of the problems of this criterion is that it might be understood that those states

[758] Bosnia v. Serbia case, para. 430.
[759] Ibidem.
[760] Ibidem.
[761] Ibidem.
[762] Ibidem.
[763] Ibidem.
[764] Ibidem.
[765] Ibidem.

that are near the scene of the events have greater capacity to effectively prevent genocide. For instance, it may lead to the understanding that Serbia had the obligation to prevent genocide in Bosnia because it was geographically closer to it. This understanding may therefore exclude the possibility that other states geographically far from Bosnia would be bound by this obligation. Likewise, it may be understood that states like Burundi, Uganda, Tanzania and DRC were obligated to prevent genocide in Rwanda whereas other states like the US, UK, France etc, that are geographically far from the scene of the events are exonerated from that obligation. Yet, the capacity to prevent may be absent even for a state close to the scene of events and may exist between a state concerned and the actors of genocide in a place very far from the scene of the events. For instance, France might have been in the position to effectively influence the government of Rwanda before and during the genocide of 1994. Yet it is thousands of miles away from Rwanda. This may have not been the same with some states neighbouring Rwanda. So, the geographic distance may indeed be important but not necessarily the most determinant. Thus, that criterion may be relevant, but it needs to be supplemented by other criteria.

The second criterion on the strength of the political links needs also some considerations. The Court simply mentioned this criterion without any indication on the degree of that strength. The subsequent literature has not (yet) been able to indicate how strong the political links need to be for a state to exercise the obligation to prevent genocide. It is generally agreed for instance that France had the capacity to prevent genocide in Rwanda before the genocide and during it because of the then strength of the political links between it and Rwanda.[766] However, there is no clear indication whether this would suffice to meet the court's threshold of "strength of the political links". Also, for other states whose influence was less than of France, it is not clear whether the court's threshold would exclude or include them. Furthermore, the court itself made it difficult and confusing where it states in the same paragraph that the state concerned needs not have the power to prevent genocide, but to use its efforts to prevent genocide no matter what may be the result. Since according to the court, efforts of only one state may be insufficient to produce the result of averting the commission of genocide,[767] it found that there was a need of

[766] See for instance Grúnfeld, Fred and Huijboom Anke, *op.cit*, pp. 233-234. See also *La Mission d'Information de la Commission de la Défense Nationale et des Forces Armées et de la Commission des Affaires Etrangères sur les Opérations Militaires Menées par la France et d'Autres Pays et l'ONU au Rwanda entre 1990 et 1994*, p. 360, available at <http://www.assemblee-nationale.fr/dossiers/rwanda/r1271.asp> (visited on 24 June 2012).

[767] Bosnia v. Serbia case, para. 430.

combined efforts of several states, each complying with its obligation to prevent, in order to achieve the result (avert the genocide).[768] It may thus be arguably questionable whether it was necessary to use the qualification "strong" if combined efforts by several states were envisaged, because even the links that are not strong may still play a role when combined with others. In that way, where political links exist, not only is it difficult to quantify it, but also the obligation should not be limited to only strong political links.

The third criterion is much more encompassing since it concerns the "links of all other kinds between the authorities of that State and the main actors in the events". The court did not elaborate, and the literature avoided to say much either, limiting itself to criticizing the vagueness of all these criteria in general.[769] Yet, it is basically accepted that the links could be more than political; they may include others such as those of military, diplomatic, cultural, economic nature.

The fourth criterion that the capacity must also be assessed by legal criteria"[770] is also to a large extent unclear; in particular as the court added that "since it is clear that every state may only act within the limits permitted by international law".[771] It has been assumed that the court's intent was to stress the "limits" imposed by international law on the actions of states.[772] The Court deliberately avoided to go further because it would have perhaps compelled it to rule on means that could for instance have, as Gattini has noted, included the question on "the admissibility of a humanitarian intervention without UN mandate to prevent an incumbent genocide",[773] as a means to prevent genocide.[774] Obviously as Gattini has noted, the Court was not willing to elaborate upon this matter in the context of the present judgment".[775]

The test to measure the capacity of non-territorial states to prevent genocide outside their territories is complicated. In fact, not only there is a question of what kind of capacity or ability is needed for a non-territorial state to prevent genocide outside its borders and how far it can go (geographical distance) in order to prevent genocide outside its borders, but also the question of

[768] Ibidem.
[769] Gattini, André, "Breach of the obligation to prevent and reparation thereof in the ICJ's Genocide Judgment", *European Journal of International Law*, Vol. 18 No. 4, 2007, p. 701.
[770] See Bosnia v Serbia case, para. 430.
[771] Ibidem.
[772] Gattini, André, *op.cit*, p. 701 .
[773] Ibidem.
[774] Ibidem.
[775] Ibidem.

what actions are permitted by international law for a state to prevent genocide outside its borders. It will be suggested below that depending on the phase of the process to genocide, the criteria to determine what non-territorial states should or may do to prevent genocide elsewhere may be different. The next sections will attempt to translate these criteria into concrete measures for the prevention of genocide at each level.

3. Primary prevention of genocide by non-territorial states: What actions are permitted and required in international law, with what means and to which distance?

It was argued in the previous section that the obligation to prevent genocide by non-territorial states is not limited by territory as long as they have the capacity to do so. The criteria to measure that capacity include the geographic distance and political links. This section will examine the preventive measures at the primary level. Indeed, since neither article I of the Genocide Convention nor the ruling of the ICJ showed specific measures to be taken by non-territorial states at the primary level in order to comply with their obligation to prevent genocide outside their territories, it is worth discussing this in order to indicate what those preventive measures are or could be. Legal scholars who have written after the adoption of the Genocide Convention or after the ruling of the court have hardly addressed this issue.

There is a need to analyse some provisions of the Genocide Convention which indicate some preventive measures which, to some extent, can be interpreted to imply the prevention of genocide outside a state's territory. For instance, article V states that "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III." Not much has been commented on this article to specify what kind of legislation is necessary to give effect to the prevention of genocide, nor does this article make a distinction between measures that can be taken by territorial states and those to be taken by non-territorial states. This section discusses what legislation should be adopted by non-territorial states that can have effect on the prevention of genocide in other states (3.1). Since other measures than legislation can be possible or necessary for the prevention of genocide, they will also be discussed (3.2).

3.1. Necessary legislation that may have effect on the prevention of genocide in other states

Necessary legislation was understood in chapter V as that which addresses all factors that, if not avoided at this level might create a favourable environment for the outbreak of conflict that may on its turn, lead to genocide. The legislation may concern various factors but it is impossible to discuss each of them here. I will limit myself to some examples which include legislation that penalises behaviours that may lead to genocide and genocide itself and provides effective penalties for persons guilty of them (3.1.1). It also includes legislation that creates a regime that enables the prosecution and punishment of those crimes committed anywhere (3.1.2).

3.1.1. Legislation that penalises behaviours that may lead to genocide and genocide itself

It was argued before that legislation that penalises behaviour such as the incitement to hatred or to discrimination, persecution as a crime against humanity, incitement to commit genocide etc, is necessary to give effect to the provisions of the Genocide Convention.[776] This legislation may aim at punishing such behaviour in order to cover three situations. The first is where they may be committed from a non-territorial state by either its nationals or other nationals but against a given territorial state. Secondly, they may also be committed from territorial state by its nationals or other nationals aiming at that territorial state and they are living in that territorial state. Thirdly, they may be committed from the territorial state against it and by its nationals or by other nationals who later go to live in a non-territorial state. Given the fact that penalising them may have effect on the prevention of genocide as already argued earlier, it could be said that non-territorial states would be obligated to adopt such legislation especially also because they are not limited by territory in taking preventive measures. The problem is that criminalising them may be irrelevant if there is no legislation that creates a mechanism to apprehend them and punish them. This will be discussed below.

3.1.2. Legislation that creates a mechanism to prosecute and punish genocide related crimes committed outside the prosecuting state

While there may not be much difficulty to provide for a mechanism that enables non-territorial states to punish individuals who commit those crimes in their territories but against other states,

[776] See article V of the Genocide Convention, read together with article I.

there is a problem with legislation that may give states the jurisdiction to prosecute and punish those who have committed those crimes in other states. According to article VI of the Genocide Convention "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[777] This article appears to limit the jurisdiction to try genocide perpetrators to states in which genocide has been committed as well as to an international tribunal. If that were the case it would be a problem because then the state in which the genocide has been committed would be the only one to have jurisdiction on those responsible of it even when the state is the perpetrator itself.

To be able to assess whether this is correct, the development on this in international law needs to be examined. One year after the adoption of the Genocide Convention, the four Geneva conventions were adopted. Articles 49, 50, 129 and 146 of these conventions (respectively) provided *inter alia* the obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches, the obligation to search for persons alleged to have committed such grave breaches and to bring them before their own courts regardless of their nationality.[778] However, "grave breaches to which the preceding articles relate shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[779] Genocide is not listed as one of these grave breaches under which states would base their competence to adopt legislation that grant them the universal jurisdiction to prosecute and punish the suspects of these grave breaches regardless of their nationality. However, subsequent developments in international law suggest an expansion of the jurisdictional bases for prosecuting genocide to include the universality principle as evidenced in literature and case-law.[780] The principle of universal jurisdiction is in

[777] See article VI of the Genocide Convention.

[778] Articles 49, 50, 129 and 146 respectively of the 4 Geneva Conventions of 12 August 1949, available at <http://treaties.un.org> (visited on 16 May 2011).

[779] Articles 50, 51, 130 and 147 respectively of the 4 Geneva Conventions of 12 August 1949.

[780] Cassesse, Antonio, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 284; Werle Gerhard,

fact classically defined as "a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim."[781] The rationale behind it is broader: "it is based on the notion that certain crimes are so harmful to international interests that states are entitled and even obligated to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim."[782] Those crimes are so grave that they harm the entire international community. [783] The principle allows states to punish international crimes committed by anybody, anywhere in the world.[784] Lemkin already referred to it even before the adoption of the Genocide Convention (but after the first UN General Assembly resolution on genocide).[785] He noted that "the offenders are punishable in a given country even if the crime is committed abroad," affirming that "this principle is the symbol and practical application of the higher doctrine of moral and legal solidarity in protecting the basic values of our civilization."[786]

It has been argued in literature that "the re-conceptualization of the basis for national jurisdiction over criminal violations of the customary laws of war had a knock-on effect for genocide and crimes against humanity." [787] Hence, "despite the merely territorial jurisdiction mandated by Article VI of the Genocide Convention only a year before the grave breaches regime was established, genocide and crimes against humanity also came widely to be characterized as punishable on the basis of universal jurisdiction, by mere virtue of the fact that they were

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Principles of International Criminal Law, T.M.C Asser Press, The Hague, 2005, pp. 169-170; Heinze, A. Eric, *Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention*, Ithaca, NY, USA: State University of New York Press, 2009.

[781] Xavier, Philippe, "The principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh"? *International Review of the Red Cross*, Vol. 88, No. 862 , 2006, pp. 375- 398.

[782] Macedo, Stephen, (ed.), "The Principles on Universal Jurisdiction", *Program in Law and Public Affairs Princeton University ~ Princeton*, New Jersey, p. 16, available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (visited on 8 June 2012).

[783] Ibidem.

[784] Ibidem.

[785] Lemkin, Raphael, "Genocide as a Crime under International Law", *American Journal of International Law,* Vol. 41, No. 1, 1947, pp. 145-151.

[786] Ibidem. Other views similar to Lemkin's as well as views in the opposite have been summarised in Reydams, Luc, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, Oxford, 2003, p. 49-50.

[787] O"Keefe, Roger, ""The Grave Breaches Regime and Universal Jurisdiction"", *Journal of International Criminal Justice,* Vol. 7, No. 4, 2009, 811-831, p. 824.

recognized as crimes under customary international law."[788] The case-law on this has also provided considerable evidence. For instance, in the case Adolf *Eichman,* the District court of Jerusalem noted that:

> In the light of the repeated affirmation by the United Nations in the 1946 Assembly resolution and in the 1948 Convention, and in the light of the Advisory Opinion of the International Court of Justice, there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, ex tunc; that is to say: The crimes of genocide committed against the Jewish People and other peoples were crimes under international law. It follows, therefore, in the light of the acknowledged principles of international law, that the jurisdiction to try such crimes is universal.[789]

That Court added that despite the fact that the Genocide Convention had not expressly provided for the principle of universal jurisdiction, nothing in this convention could lead it to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question.[790] As that court noted, the universality of jurisdiction is not based on Israel law on genocide or on the interpretation of Article 6 of the Genocide Convention, but "derives from the basic nature of the crime of genocide as a crime of utmost gravity under international law."[791] The Court based its argument on the object and purpose of the Genocide Convention. It noted that "had Article 6 meant to provide that those accused of genocide shall be tried only by "a competent court of the country in whose territory the crime was committed" (or by an "international court" which has not been constituted), then that article would have foiled the very object of the Convention "to prevent genocide and inflict punishment therefor".[792]

Recent developments have added force to the Eichmann precedent regarding the prosecution of genocide under the universality principle.[793] Though the two ad hoc international criminal tribunals (ICTY, ICTR) did not have universal jurisdiction themselves, judges from both tribunals have indicated evidence of the existence of universal jurisdiction for genocide. The

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[788] Ibidem.

[789] Attorney-General of Israel v. Adolf Eichmann (Eichmann), District Court of Jerusalem, (Criminal Case No. 40/61), 12 December 1961, para. 19.

[790] Idem, para. 25.

[791] Ibidem.

[792] Idem, paras. 25 – 27.

[793] For an extensive analysis see Heinze, A. Eric,. *Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention*, Ithaca, NY, USA: State University of New York Press, 2009.

notable examples are the Tadić and Ntuyahaga cases. While in the former, the ICTY asserted that "universal jurisdiction [is] nowadays acknowledged in the case of international crimes,"[794] in the latter, the ICTR held that universal jurisdiction exists for the prosecution of genocide.[795] More recent practice of States has also shown that, due to the gravity of the core crimes of international law (genocide being considered by many as the gravest), international law allows states to prosecute suspects of international crimes. Based on their laws that give them such a competence, some states have prosecuted and punished Rwandans who have committed genocide and related international crimes in Rwanda and fled to their territories.[796] The place to discuss the implementation of the obligation to prosecute on the basis of the principle of universal jurisdiction is not here. It should be said however that, even for some other states where it has been impossible to prosecute Rwandan fugitives on their territories for genocide, it was mainly because of the lack of legislation that punishes genocide not because of lack of jurisdiction to prosecute foreign persons who have committed crimes abroad. For instance, Fulgence Niyonteze arrested in 1996 in Switzerland could only stand for trial for murder, incitement to murder and serious violations of the laws of war and not for genocide because this crime was introduced in the Swiss Penal code later in December 2000.[797] Likewise, in the UK,

[794] Prosecutor v. Dusko Tadić (Tadić), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 , IT94 – 1 -AR 72 , para. 62, available at <www.icty.org> (visited on 4th June 2012). See also another example in Application of the Convention on Prevention and Punishment the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Order of the Court on Provisional Measures, 13 September 1993 , ICJ Rep. 325 , para. 110. Here, Judge Lauterpacht argued that Article 1 of the Genocide Convention was intended to "permit parties, within the domestic legislation they adopt, to assume universal jurisdiction over the crime of genocide. For more elaboration, see Heinze, A. Eric, *Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention*, Ithaca, NY, USA: State University of New York Press, 2009.

[795] Prosecutor v. Bernard Ntuyahaga, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999 , ICTR90 – 40 –T, available at <www.unictr.org> (visited on 4th June 2012).

[796] See for Instance Belgium: Sisters Consolata Mukangango and Julienne Mukabutera (the Butare Four),Vincent Ntezimana, Alphonse Higaniro in a 2001; Etienne Nzabonimana and Samuel Ndashyikirwa (2005), Bernard Ntuyahaga (2007) and Ephrem Nkezabera (2009), Canada: Désiré Munyaneza -Jacques Mungwarere, Finland: Francois Bazaramba (2010). On the basis of the Universal Jurisdiction principle, Yvonne Basebya was prosecuted in the Netherlands for Incitement to commit genocide. She was found guilty of that crime on 01 March 2013. The English Summary of the case Basebya is available at <www.Rechtspraak.nl> (visited on 6th June 2013).

[797] Ndahinda M. Felix, "Survivors of the Rwandan Genocide under Domestic and International Legal Procedures", in R.M. Letschert, et al., (Eds.), *Victimological Approaches to International Crimes: Africa,* Cambridge, Antwerp, Portland: Intersentia, pp. 463-492, p. 487.

genocide and related crimes were not punishable under the municipal law at the time the genocide in Rwanda was committed.[798]

In sum, this development may lead to a claim that there is a customary international law that allows non-territorial states to have jurisdiction in respect of certain crimes irrespective of the location of their commission. And I find no contradiction of this international customary rule with article VI of the Genocide Convention because the latter did not mean to be exhaustive. Therefore, if states are permitted to provide for universal jurisdiction as a necessary legislation for the prevention of genocide it can be argued that it should be understood that non-territorial states are obligated to provide for that in complying with their obligation to prevent genocide.

The question that this conclusion may raise is whether enacting legislation that penalises acts that may not constitute international crimes is also permitted and required in international law if they may have effect on the prevention of genocide in other states. The answer to this question can be deduced from the whole line of arguments above. Indeed, states should penalise anything they deem necessary for the prevention of genocide beyond their boundaries. However, for behaviours that may not constitute international crimes, it is safe to say that it is not (yet) clear whether non-territorial states are required to provide for the universal jurisdiction on them.[799]

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[798] Ibidem.

[799] A number of European states have enacted laws criminalising holocaust denial. These include Austria, Belgium, the Czech Republic, France, Germany, Liechtenstein, Lithuania, Poland, Romania, Slovakia, Spain and Switzerland… Israel also criminalises this crime. Furthermore, the Council of the European Union has adopted a decision requiring member states to criminalise the holocaust denial as well as the genocide denial. These laws might have preventive effects as it was argued previously. However, since they are not international crimes, states may not provide for universal jurisdiction and it would hardly be argued that they are not fulfilling their obligation to prevent genocide under the instruments discussed above. For detailed discussion about this see for instance Bazyler J. Michael, "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism", available at <http://www1.yadvashem.org/yv/en/holocaust/insights/pdf/bazyler.pdf> (visited on 5 June 2012). See also Israel Law on Denial of Holocaust -Prohibition- Law- 5746-1986- 8 Jul 1986, available at <http://www.mfa.gov.il/MFA/Anti-Semitism+and+the+Holocaust/Documents+and+communiques/Denial+of+Holocaust+-Prohibition-+Law-+5746-1986-.htm> (visited on 4 June 2012). See Council Framework decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law *Acts adopted under title VI of the EU Treaty in* Official Journal of the European Union L 328/55 of 6.12.2008 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:EN:PDF>. Its article 1.1(c) reads: "Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: … publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group."

The capacity (means and the distance) are not an issue because there is no special means a state needs for it to enact legislation related to genocide. It is done the same way as for legislation on other things. And if it does enact a law that criminalises genocide and related crimes and that law gives the competence to courts to punish all suspects regardless of where they have committed genocide and related crimes (and regardless their nationality), there is no point to examine the distance to which these laws may apply. The obligation is to provide for the said legislation that can have effect on any state regardless of the geographical distance.

Finally, it should be warned that though the enactment of the legislation that may give effect to the prevention of genocide is necessary, the exact portion of preventive effect cannot be measured. And, given the complexity of the process to genocide, none can say that the legislation itself is the only measure to be taken by non-territorial states in order to prevent genocide beyond their territorial boundaries. Other possible preventive measures may be necessary.

3.2. Other measures

The question that needs consideration here is whether, in addition to the legislative measures, non-territorial states are permitted and required (obligated) to take other measures in relation to the prevention of genocide outside their territories.

In answering this question, it is essential to first indicate what kind of other measures it is referred to here. Other measures may be for instance political, social-economic, cultural, educational as well as those related to security. While political measures may be any kind of measure that aims at fostering democracy in other states, socio-economic measures may be any kind of measures that aim at promoting the welfare of the population and the equitable enjoyment and sharing of resources among groups in other states. Educational measures may concern those related to eradicating illiteracy and to promoting the tolerance of differences and the peaceful coexistence among different groups. They may consist of teaching children from their early age about lines that they may not cross in the way they treat each other.

It is not possible nor is it even necessary to enumerate each and every measure falling in these categories. What is more important for the purpose of this work is rather the legal regime under

which states are permitted and required to take those measures. Two situations need to be distinguished. The first situation is where measures can be taken by non-territorial state intended to have effect on other states without necessarily having to engage in action within the territory of these other states. The second is where these measures need actions in other states.

The measures in the first situation may be for instance the formulation of a foreign policy that aims at countering forces that may cause tension among groups in other states that may lead to genocidal conflicts. This means that the policy may demand the leaders of the non-territorial state to refrain from being involved in activities that would fuel any tension between groups in other states. Each state is free (permitted) to adopt its own policy in that regard. Does this also mean that each state is required (obligated) to formulate policies in order to comply with the rules on the prevention of genocide? There is no explicit rule requiring doing so. However, if we accept the ICJ ruling which interpreted the obligation to prevent genocide as requiring states to put in place all means available to them in order to prevent genocide, it can be argued that adopting a foreign policy that counters the emergence of tension between groups (ethnic, religious…) in other states is required. The weakness of this argument may be however the vagueness of foreign policy measures that would be required. It is not clear how such policy may look like because it may depend on the circumstances and the relations between the non-territorial state and the territorial state concerned.[800] As for the capacity and distance, they do not pose problem because there is no special means needed to comply with this obligation. Once such a foreign policy is put in place the distance does not matter because it may have effect to any state (at a close or far distance).

The second situation is where the nature of the preventive measures in other states may require performing actions there. As already mentioned, at the primary level these measures may support reform at the political (e.g: fostering democracy in other states), educational (eradicating illiteracy and formulate a *curricula* that are favourable to the mutual respect between groups and that promote the acceptance of diversity from the young age), socio-economic (welfare of the population and the increase of the economic capacity of the state and the equitable sharing of

[800] A small indication on such a policy is that it should explicitly forbid actions that may fuel tensions in other states. The example of Belgian conduct in Rwanda in the 1930s may be useful in this regard. The act of making a permanent distinction between the ethnic groups in Rwanda, the issuance of identities thereof and the advantages accorded to the Tutsi on the detriment of the Hutu has certainly fuelled the tension and hatred between the two groups. This happened during the era of colonisation but it is not unlikely to happen nowadays as well. For detailed information about the role of Belgium see for example the summary in Akayesu case, para. 83.

resources among the population), security (cooperation in the capacity building in the security sector: the military and the police) level. The question here is not whether states are permitted to cooperate with others in the mentioned areas (and others not mentioned), but rather whether in complying with the obligation to prevent genocide they are required to do so if this can have effect on the prevention of genocide in other states.

It has been already said that the obligation to prevent genocide entails to take any measures that can have effect to the avoidance of genocide. This was perfectly so for the prevention of genocide by territorial states on their own territories. Indeed, since the rights said "derive from the inherent dignity of the human person",[801] states inherently owe to their populations measures (political, socio- economic, educational…) in order to protect and ensure their welfare.[802] In doing so, it may need and may seek help from other states.[803] However, it is not clear how the obligation to prevent genocide would entail the obligation to provide assistance to the state in need in whatever field. This conflict may make that obligation inapplicable.

It is nonetheless relevant to say that non-territorial states are permitted to cooperate with territorial states with the intention to prevent genocide by employing those means (assist others) but this is not the same as being required to do so. Being permitted however is not useless for the prevention of genocide because territorial states which are committed (willing) to preventing genocide should seek assistance to other states to prevent genocide. Even supposing that this obligation would be there, it would hardly be assessable (and achievable) because of the indeterminacy of the capacity of states to help and to which distance.

3.3. Preliminary Conclusions

To conclude this section, it is argued that prevention of genocide at this level by non-territorial states is very essential since it may contribute to the creation or maintenance of a stable/peaceful environment that gives no chance of development of factors and phases that may lead to genocide. States are both permitted and required (obligated) to take preventive measures at that level. Measures constitute the legislation which may include penalising behaviours that may lead to genocide and genocide itself. Also, the legislation should create a mechanism that enables them to apprehend the perpetrators.

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[801] See Preamble of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[802] See article 1(3) of the UN Charter and the preamble and article 2(1) of the ICESCR.

[803] See articles 55 and 56 of the UN Charter and article 2(1) of the ICESCR.

With regard to other measures that may be required by the obligation to prevent genocide, this section argues that non-territorial states are obligated to adopt policies that counter their leaders from engaging in activities that might fuel hatred among groups in other states. Also, states are permitted to take actions in assisting other states to build a stable environment that does not favour the development of the process to genocide. However, the conflict between the obligation to prevent genocide and the lack of obligation to provide aid to other states makes it hard to argue that at this primary level, states are obligated to provide assistance to others in discharging with the obligation to prevent genocide.

When prevention at this level is successful, it makes further actions at a next level unnecessary. When it is not, there is need of other measures at further level.

4. Secondary prevention of genocide by non-territorial states: What actions are permitted in international law with what means and to which distance?

This section examines what is permitted to and required of states in preventing genocide in other states at the secondary level *i.e* "when situational factors predictive of genocide or other forms of mass violence are present."[804] It is a period in which for example there is a totalitarian regime in a certain state that violates human rights of its population and especially discriminates a given group (religious, ethnic, racial…). At this level certain crimes mostly targeting an identifiable group may have been committed and remained unpunished because the regime is the perpetrator itself or is condoning them or is unable to punish the perpetrators due to whatever reasons. It will thus be examined what non-territorial states are permitted and required to do in order to comply with their obligation to prevent that the situation escalates to genocide in the territorial state concerned. In doing so, the judicial measures (4.1), as well as various other measures (4.2) will be discussed.

[804] Woolf, M. Linda, and Hulsizer R. Michael, "Psychosocial Roots of Genocide: Risk, Prevention and Intervention", *Journal of Genocide Research*, Vol. 7, No. 1, 2005, pp. 101- 128, p. 123.

4.1. Judicial measures for the prevention of genocide by non-territorial states

The measures that will be discussed here are those related to the application of the principle of universal jurisdiction by non-territorial states on crimes that may lead to genocide and those related to the referral of situations to the ICC by non-territorial states.

4.1.1. Application of the principle of universal jurisdiction in the prevention of genocide

Some examples of behaviour that may lead to genocide have been given and discussed in the previous chapter. In the previous section it was argued that states are permitted and required to penalise such behaviour and to provide for the exercise of jurisdiction regardless of the nationality of the suspects. This is expressed in the universal jurisdiction principle. This concerned the primary level. Problems arise when it comes to the enforcement of those laws at the secondary level by non-territorial states.

In application of the universal jurisdiction principle at the secondary level, states shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts or extradite such persons.[805] It is an encompassing measure that may allow states to prevent genocide outside their territories by punishing perpetrators of international crimes that are susceptible of leading to genocide. Such crimes that need to be punished at this level may include the incitement to commit genocide, hate speech which may qualify as one of the acts of crimes against humanity (persecution) or conspiracy to commit genocide.[806] Whether punishing these crimes is necessary for the prevention of genocide is no longer a question because it is already answered in the affirmative in the previous chapter.[807] The question is

[805] Articles 49, 50, 129 and 146 of the 4 Geneva Conventions of 12 August 1949 (respectively), available at <http://treaties.un.org> (visited on 16 May 2011).

[806] Their inseparability with genocide can be seen from the whole substantive part of the Genocide Convention (from its article III to IX) which treats these acts together in assigning the obligation to the bearer of the obligation to prevent genocide. The ICJ ruling in Bosnia v. Serbia case supports this argument. Indeed the court noted that: "…those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX…" See Bosnia v. Serbia, para. 167.

[807] For conspiracy to commit genocide which was not discussed as such in chapter V, see Musema, paras, 184, 189, 193, 197. The Court explains how punishing these acts may play a big role in the prevention of genocide. It noted that conspiracy to commit genocide "is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide, has not actually been perpetrated." The Chamber referred to the *travaux prépararoires* of the Genocide Convention. Indeed, during the debate preceding the adoption of the Genocide Convention, the Secretariat advised that, in order to comply with General Assembly resolution 96 (I), the Convention would have to take into account the imperatives of the prevention of the crime of genocide: "This

however whether how it works in reality may contribute to the prevention of genocide at the secondary level.

As seen earlier, the principle of universal jurisdiction is limited to international crimes. This means that other crimes that may lead to genocide such as the incitement to hatred or to discrimination are not covered by the universal jurisdiction and therefore hardly punishable by non-territorial states at the secondary level.[808]

Furthermore, as shown earlier, not all states have put the principle of universal jurisdiction in their legislation (yet, not all states have a legal system that makes international law automatically applicable at the domestic law). This makes it impossible for some states to punish international crimes at the secondary level.

The reality shows that there is no uniform way to apply this principle. There is a wide discretion in how states exercise this principle. In fact, even for those states which have put this principle in their legislation, some of them have limited its scope and this has negative impact on the effect of the principle on the prevention of genocide at the secondary level. For instance, France limits its exercise of jurisdiction to crimes committed abroad to the situation where those crimes have been committed by or against French nationals,[809] on some international crimes,[810] and on the

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prevention may involve making certain acts punishable which do not themselves constitute genocide, for example, certain material acts preparatory to genocide, an agreement or a conspiracy with a view to committing genocide, or systematic propaganda inciting to hatred and thus likely to lead to genocide". It follows that the idea was not limited to making such an act punishable but also to punish it when it is committed even (and especially) before genocide occurs in order for it to serve its prevention purpose. For more about the crime of conspiracy to commit genocide and the incitement to commit genocide see also Ohlin, Jens David, "Attempt, Conspiracy, and Incitement to Commit Genocide", *Cornell Law Faculty Publications.* Paper 24. 2009, pp. 174-339.

[808] This is not to say that non-territorial states are not permitted to provide for jurisdiction that would enable them to try individuals who have committed some crimes (non-international ones) outside their territorial boundaries. Under certain conditions they may exercise jurisdiction on the basis of active personality (nationality) principle. This may be useful because it may give a non-territorial state the jurisdiction to prosecute its nationals who have committed crimes that may lead to genocide in other states. For more about this principle, see Shaw N. Malcolm, *International law*, sixth edition, Cambridge University Press, Cambridge, 2008, p. 659-664. See also Brus, M.M.T.A, "No Functional Immunity of State Official for International Crimes: A Principled Choice With Pragmatic Restriction", T.M.C. ASSER PRESS, November 2011, p. 45.

[809] See article 113-6 and 113-7 of the French Penal Code of 1994, available at <http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070719&idArticle=LEGIARTI000021486425&dateTexte=20120530> (visited on 17 June 2012).

[810] See article 689 of Code of Penal Procedure of 1957 as modified by the Law n°99-515 du 23 June 1999 - art. 30 JORF 24 June 1999, available at <http://www.legifrance.gouv.fr/affichCode.do;jsessionid=B7D690494C9CAA8D0A755A5C501FC0FC.tpdjo09v_3?cidTexte=LEGITEXT000006071154&dateTexte=20120617> (visited on 17 June 2012).

situation when crimes committed fall within the jurisdiction of the ICTY and the ICTR.[811] Likewise, under the Dutch International Criminal act of 2003, universal jurisdiction over some international crimes applies to anyone who commits those crimes only if he is present in the Netherlands or the crimes are committed against or by a Dutch national.[812] These crimes include public and direct incitement to commit genocide and conspiracy to commit genocide.[813] This seems to link the prosecution to certain interests of the non-territorial state concerned.[814] One of the consequences of this is that states may only exercise jurisdiction during a post-genocide period and not before genocide is committed.[815] And though this can still have some preventive effects, it is for preventing the reoccurrence of genocide. Since the prohibition of genocide

[811] Law No. 96-432 of 22 May 1996 adapting French legislation to the provisions of United Nations Security Council resolution 955 establishing an International Criminal Tribunal to prosecute persons responsible for acts of genocide or other serious violations of international humanitarian law committed in 1994 in Rwanda and, for Rwandan citizens, in neighbouring States, available at <http://www.legifrance.gouv.fr/Droit-francais> (visited on 17 June 2012).

[812] See Section 2.1 of the Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), available at <http://www.universaljurisdiction.org/national-laws/netherlands> (visited on 17 June 2012). But even for those who may be found in the Netherlands there has been limitation that International Crimes Act of 2003 did not solve. This Act gave Dutch courts the universal jurisdiction over the crime of genocide committed outside the NL but only over acts constituting genocide committed after that legislation was passed in 2003. The case of Joseph Mpambara who was suspected for having committed genocide in Rwanda (among other crimes) is a good illustration for this. The District court in the Hague found that it had no jurisdiction in that matter because as it noted, it appeared "from the foregoing that in the period of the facts described in the summons, there were no legal provisions applicable - nor in the Penal Code, nor in the Act Implementing the Genocide Convention, nor in the Act on criminal law in time of war, nor in any other Act or regulation - which provided for jurisdiction with respect to genocide committed by a non-Dutch national abroad, if this fact was not committed against or with regard to a Dutch national or a Dutch legal person or if any Dutch interest was not impaired or could be impaired"(see para. 26 of its judgment of July 2007). The Appeal Court in the Hague (December 2007) as well as the Supreme Court (October 2008) respectively confirmed this. See the judgments of the three courts available at <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Supreme-court/Summaries-of-some-important-rulings-of-the-Supreme-Court/Pages/Summary-judgment-on-jurisdiction-in-genocide-case-Rwanda.aspx> (visited on 17 June 2012). It must be precised that he was later charged of war crimes and torture but only convicted of torture and sentenced to 20 years of imprisonment by the District court in the Hague (2009). The Court of Appeal did not confirm that ruling and sentenced him to life in prison in July 2011. See <http://www.rechtspraak.nl> (visited on 17 June 2012).

[813] See section 3.1& 2 of the Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), available at <http://www.universaljurisdiction.org/national-laws/netherlands> (visited on 117 June 2012).

[814] Carnero, Rojo Enrique, "National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain", *Journal of International Criminal Justice*, Vol. 9, No. 3, 2011, pp. 699-728.

[815] For instance Yvonne Basebya was prosecuted in the Netherlands for Incitement to commit genocide 18 years after genocide happened. She was found guilty of that crime on 01 March 2013. See the English Summary of the case available at <www.Rechtspraak.nl> (visited on 6th June 2013).

(which include those related international crimes) is a concern of all states,[816] regardless of the nationality of the perpetrator and victim, to limit the scope of the principle to the state interests is not convincing and may make the prevention of genocide ineffective.

Even those states that have not limited the scope of this principle, the chances of success are limited because there is no enforcement mechanism to arrest the suspects. The states that have more or less unlimited universal jurisdiction include Germany. Under its Code of Crimes against International Law (CCAIL), Germany punishes international crimes[817] even when they have been committed abroad and bear no relation to Germany.[818] Likewise, Rwanda[819] and Israel[820] punish the incitement to commit genocide committed abroad regardless of the nationality of the perpetrator and of the victim. But there is no practice on how they have applied this principle on these crimes before genocide happens. Spain[821] and Belgium[822] have had unlimited universal

[816] Bassiouni, M. Cherif, "International Crimes: "Jus Cogens" and "Obligation Erga Omnes", *Law and Contemporary Problems,* Vol. 59, No. 4, 1996, pp. 63-74, p. 63.

[817] See article 6 and 7(1), 10 of the "*Gesetz zur Einführung des Völkerstrafgesetzbuches*", *Bundesgesetzblatt 2002*, Teil I., No. 42, 29 June 2002, pp. 2254-2260. In English it is the Code of Crimes against International Law (CCAIL) of 26 June 2002.

[818] Idem, article 1.

[819] See art 90 of the Organic Law N° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts, O.G of the Republic of Rwanda, n° Special,10 September 2008.

[820] See Israeli Law No 57/10/50 of 29 March 1950, available at <http://preventgenocide.org/il/law1950.htm> (visited on 23 February 2012).

[821] Organic law 6/1985 of July 1985 on the judicial power as amended by the organic law 11/1999. Article 23.4(a) of this law gave Spanish courts the jurisdiction to try perpetrators of genocide regardless of the place of the commission, the nationality of perpetrator or of the victim. In 2009 this article was amended and the new law of 5 November 2009 included this: "Notwithstanding the dispositions of international treaties and covenants signed by Spain, in order for Spanish tribunals to have jurisdiction over the aforementioned crimes [including genocide, crimes against humanity and war crimes] it must be proven that those responsible for the crimes are in Spain or that there are victims of Spanish nationality, or that a link of relevant connection with Spain is ascertained, and, in all cases, it must be proven that no proceedings involving an effective investigation and prosecution, as the case may be, of such punishable facts have been started in another competent country or by an international tribunal. The criminal proceeding started before Spanish courts will be provisionally suspended where there is evidence of the start of another proceeding concerning the reported facts in the country or by the tribunal mentioned in the preceding paragraph." For details on this see <http://jicj.oxfordjournals.org/content/early/2011/06/10/jicj.mqr019.full.pdf> (visited on 18 June 2012).

[822] *Loi du 16 juin 1993 relative à la Répression des infractions graves aux Conventions Internationales de Genève du 12 Août 1949 et aux Protocoles I et II du 8 juin 1977*. My translation in English: Law of 16 June 1993 related to the punishment of grave breaches to the Geneva Conventions of 12 August 1949 and its Protocols I and II of 8 June 1977. This law was modified by another law of 10 February 1999 which extended the exercise of universal jurisdiction to genocide and crimes against humanity. But this universal jurisdiction was restricted by another law that modified the latter on 23 April 2003 on the punishment of grave breaches of international humanitarian law. This law gave to the Prosecutor the discretion to refuse to proceed a case it bears no relation to Belgium. The law

jurisdiction (the so-called "absolute universal jurisdiction") in their laws and have used it in a number of cases but not always successfully when the perpetrators were not on their territories.[823] Indeed, it might be easy to put this principle in the legislation and not difficult to know about the crimes being committed in other states that may lead to genocide and to issue an international arrest warrant, but to materialise it without the cooperation of the state concerned is almost impossible without violating other rules of international law. The example of the abduction of Adolf Eichmann from Argentina in April 1960 by Israeli secret agents (Mossad) is telling. Though Eichmann was accused of very serious crimes of international law, the action by Israel was condemned by the Security Council of the UN (among others) as affecting the sovereignty of the Argentine Republic.[824] Indeed, if there is no other mechanism to enforce such an arrest warrant, the only way to apprehend the suspects would be the one used by Israel which, as the Security Council affirmed, is likely to "endanger international peace and security".[825] The rest would be to wait until the indicted person would travel to another state that is willing to arrest him/her[826] or to wait until the person will voluntarily surrender to the court (which is very unlikely and not promising for the prevention of genocide).

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was repealed by another of 5 August 2003 with all its modifications and a title I*bis* was introduced in the criminal Code. Now the exercise of jurisdiction of crimes committed abroad is limited to 3 situations: when the perpetrator is a Belgian national or resident (the active personality principle), when the victim is Belgiun or at the moment of the crime, the person has resided in Belgium at least for 3 years (passive personality principle) and when there is an international or customary rule obligating Belgium to punish the perpetrator of a give crime (universal jurisdiction principle).. The drafting history on universal jurisdiction and the laws thereof can be found at <http://competenceuniverselle.wordpress.com/legislation-belge/> (visited on 18 June 2012). The scope of the universal jurisdiction has been limited by the fact that except when the suspect is Belgian national or resident, the prosecutor has the discretion to refuse to proceed with a given case. The reasons he may refuse include when an international court has jurisdiction over the case or another national court (if there are guarantees of independence and impartiality of courts).

[823] For instance Augusto Pinochet was indicted by Spain but never was tried by it. And the arrest of Adolfo Scilingo (the Argentina military officer) in 1997 was successful because he had voluntarily come to Spain as a witness in the proceedings relating to the Spanish victims of the repression in Argentina. Among other crimes committed in the "dirty war" of 1970s, he was prosecuted for attempted genocide (but was not convicted for it). See the case Public Prosecutor's Office, de Lois (Graciela) (intervening) and ors (intervening) v Manzorro Scilingo (Adolfo), Final Appeal Judgment, Case No 16/2005, ILDC 136 (ES 2005), Aranzadi JUR 2005/132318, 19th April 2005, HC (Criminal Chamber) (Spain). See also the analysis of this case in *Oxford Reports on International Law in Domestic Courts,* available at <http://www.oxfordlawreports.com/subscriber_article?script=yes&id=/oril/Cases/law-ildc-136es05&recno=10&searchType=Advanced&jurisdiction=Spain> (visited on 18 June 2012).

[824] Security Council Resolution 138 (1960) of 23 June 1960 related to the case of Adolf Eichmann (S/4349), available at <http://www.un.org/documents/sc/res/1960/scres60.htm> (visited on 19 June 2012).

[825] Ibidem.

[826] For instance, Germany enforced the French arrest warrant against Rose Kabuye (then Rwandan high ranking

The application of the principle of universal jurisdiction by non-territorial states on the prevention of genocide is limited by the customary rule which grants absolute immunity to heads of states or governments and ministers for foreign affairs who are charged with those crimes that may lead to genocide.[827] The decision of the Assembly of the African Union which called upon all concerned African States to "respect the immunity of state officials when applying the principle of Universal jurisdiction""[828] is a clear example on the limitation. Yet, if these are among the top leaders, when they are not arrested, they may continue to commit those crimes and most likely be obstacle to the arrest of other officials and individuals who are under their control.

Unless these challenges surrounding the application of this principle are addressed, the role of that principle in the prevention of genocide at the secondary level will remain not very significant. One of the suggestions to overcome most of those challenges might be an adoption of a global convention to harmonize the application of universal jurisdiction. Such a convention can play a big role in putting in place guidelines that would ease its application without "creating an atmosphere of insecurity and distrust incompatible with the preservation of peace",[829] and without allowing the process to genocide to grow further. It would for instance adopt the

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state official) and extradited her to France. See Brus, M.M.T.A, "No Functional Immunity of State Official for International Crimes: A Principled Choice With Pragmatic Restriction", T.M.C. ASSER PRESS, November 2011, p. 60. On the other hand, on September 10, 2005, based on evidence presented by a UK law firm acting on behalf of a Palestinian human rights NGO, Senior District Judge Timothy Workman issued the first ever warrant under the UK's Geneva Conventions Act 1957 against retired Israeli General Doron Almog. The warrant sought Almog's arrest for his alleged participation in grave breaches of the Geneva Conventions in Israeli-occupied Gaza, where he had been a commander. Almog arrived at Heathrow Airport the following day, but did not disembark from his flight after he was informed of the existence of the warrant. He returned to Israel before the Metropolitan Police could execute the warrant. See Human Rights Watch, Universal Jurisdiction in Europe, the State of the Art, Report, Volume 18, No 5(D), June 2006, p. 4, available at <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf> (visited on 14 June 2012).

[827] For a detailed analysis on the tension between immunity rules, international human rights and international criminal law see Van Alebeek, Rosanne, *The Immunity of States and their Officials in the Light of International Criminal Law and Human Rights Law*, Oxford University Press, Oxford, 2008. For more on immunities as a challenge to the application of international criminal law see also Zahar, Alexander and Göran, Sluiter, *International Criminal Law*, A Critical Introduction, Oxford University Press, Oxford, 2008, pp.503-508.

[828] Assembly of the African Union, Decision of the Abuse of the Principle of Universal jurisdiction, Sixteenth Ordinary Session 30 - 31 January 2011, Addis Ababa , Ethiopia, para. 4, Assembly/AU/ /Dec.335(XVI), Doc. EX.CL/640(XVIII), available at <http://au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf> (visited on 20 June 2012)

[829] Security Council resolution 138(1960) of 23 June 1960 related to the case of Adolf Eichmann (S/4349), available at <http://www.un.org/documents/sc/res/1960/scres60.htm> (visited on 19 June 2012).

universal jurisdiction *in absentia* approach which allows states to prosecute irrespective of any factors,[830] but with safeguards on how it must be applied. The suggestion of the African Union of the "need for an international regulatory body with the competence to review and or handle complaints or appeals arising out of the abuse of the principle of universal jurisdiction"[831] may be relevant in that regard. More doctrinal considerations are needed in the development of this principle for a better future use in the prevention of genocide.

In the meantime, other alternatives for non-territorial states may be explored and exploited by non-territorial states.

4.1.2. Preventing genocide through the referral of a situation to the ICC and through the execution of its arrest warrants

When the challenges mentioned above render impossible or complicated the possibility for non-territorial states to prosecute perpetrators of crimes that may lead to genocide in other states, the remaining possibility would be to refer the situation to the ICC (directly if they are parties to it or through the SC if they are not).[832] The discussion here will examine whether that possibility is available and how the arrest warrants of the ICC may be enforced by non-territorial states.

4.1.2.1. Preventing through the referral of situations to the ICC

The legal basis for states in general to refer to the ICC a situation in which international crimes that may lead to genocide have been committed has been discussed in the previous chapter.[833] However, when it comes to the referral of a situation in a territorial state by non-territorial states,

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[830] Inazumi defines universal jurisdiction *in absentia* as a jurisdiction exercised by a state irrespective of any factors, even irrespective of the fact that the suspect is not found in that State. However, due to the lack of support in practice, Inazumi opines that it would be easier to create more solid rules in both conventional and customary international law for the ordinary universal principle than to do it for universal jurisdiction in absentia. See Inazumi, Mitsue, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, Antwerpen-Oxford, 2005, p.101&105.

[831] Assembly of the African Union, Decision of the Abuse of the Principle of Universal jurisdiction, Sixteenth Ordinary Session 30 - 31 January 2011, Addis Ababa , Ethiopia, para. 3, Assembly/AU/ /Dec.335(XVI), Doc. EX.CL/640(XVIII), available at <http://au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf> (visited on 20 June 2012)

[832] In addition to this, a state not party to the ICC Statute may also have accepted the jurisdiction of the court on given crimes under the procedure set out in article 12(3) of the ICC Statute. See the example of the declaration of Ivory Coast of 18 April 2003 available at <www.icc.cpi.int> (visited on 20 June 2012).

[833] See Chapter V, Section 3.2.1 on the possibility for a territorial state to seek preventive measures through the ICC

things become rather complicated. Article 12(2) of the ICC Statute provides for the jurisdiction of the court in the situations where the crimes have been committed on the territory of the state party or by a national of a state party.[834] Article 13 lists three situations in which the court may exercise jurisdiction: when a situation has been referred to it by a state party in which the crimes in question have been committed, by the Security Council and the situation where the Prosecutor has initiated investigation *proprio motu*. Read literally together, these articles may be understood as excluding the possibility of a referral to the ICC by a non-territorial state unless those crimes have been committed by its nationals. The practice on this has been literal. Uganda, Central African Republic, the Democratic Republic of Congo and Mali referred the situations to the ICC because of the territorial and nationality links.[835] In other examples of Sudan, Kenya, Ivory Coast and Libya, the referral was either done by the Security Council,[836] or the investigations were started *proprio motu.*[837] In all these situations, no other states had attempted to refer them to the ICC. However, since in both stances, territorial states or the Security Council were willing to refer the situations to the ICC; it is not fully clear that the reason why non-territorial states did not refer a situation to the ICC was because they were banned by the ICC Statute (article 12(2) and 13) to do so. This leaves the question unresolved with regard to situations in which the territorial state is unwilling, or unable to prosecute and is unwilling to refer the situation to the ICC and for whatever reason the Security Council cannot refer it to the ICC. Yet, there are practical obstacles for non-territorial states to apprehend the suspects. Of course the possibility of non-territorial states (either party to the ICC or not) to refer the situation to the SC under articles I and VIII of the Genocide Convention is available to them but it does not solve the problem where the Security Council is itself unwilling to refer it to the ICC. The Rome Statute of the ICC has not foreseen this and there is a need to provide for alternative in the near future.

[834] See article 12(2) of the ICC Statute.
[835] See referrals at <www.icc.cpi.int> (visited on 20 June 2012).
[836] See Security Council Resolutions 1593 of 31 March 2005 referring the situation in Darfur to the ICC and 1970 of 26 February 2011 referring the situation in Libya to the ICC. See more on the jurisdiction of the ICC pursuant to the SC referral in Werle, Gerhard, *Principles of International Criminal Law*, 2nd ed., T.M.C Asser Press, The Hague, 2009, paras. 235-238.
[837] This was done in the Situation in Kenya and in Ivory Coast. See Pre-Trial chamber II and III on the authorisations to open investigation in Kenya (31-03-2010) and in Ivory Coast (03-10-2011), available at <www.icc.cpi.int> (visited on 20 June 2013).

4.1.2.2. Preventing through the execution of the ICC arrest warrants

Where situations have been referred to the ICC and the latter has issued arrest warrants against the suspects, the question becomes what the possibilities are available to non-territorial states for the execution of those warrants in order to comply with their obligation to prevent genocide. In principle, under article 86 and 87 of the Rome Statute of the ICC which require state parties to cooperate with it, article 1 of the Genocide Convention on the obligation to prevent genocide and the customary rule thereof, all states should play a role in the execution of those warrants. However, there are challenges that may limit that. I will focus here on one that I consider most serious. This concerns the situation when the indicted person enjoys full immunity. In fact, on the one hand article IV of the Genocide Convention and 27 of the Rome Statute of the ICC make the official capacity of the suspect irrelevant, but on the other hand customary international law says that Heads of States, Heads of Governments, Ministers for foreign affairs enjoy absolute immunity from jurisdiction in other states,[838] and article 98 (1) of the Rome Statute of the ICC requires states not to proceed with requests and surrender in case this would require it to breach its international obligation in respect to the immunity of a person of a third state…[839] It is beyond the scope of this subparagraph to give an in-depth analysis on this contradiction. Only a few words with regard to the impact this contradiction may have to the prevention of genocide may suffice. If a non-territorial state executes arrest warrants against those persons in accordance with the mentioned provisions above, it might be at the same time violating the customary rule which grants full immunity and sometimes article 98(1) of the ICC.[840] Scholars do not agree on the issue of immunity in the execution of the arrest warrants against sitting Heads of States. For instance, Paola Gaeta argues that the immunity of sitting Heads of states for instance may

[838] See Arrest Warrant Case, para. 58-59. See also Brus, M.M.T.A, "No Functional Immunity of State Official for International Crimes: A Principled Choice with Pragmatic Restriction", T.M.C. ASSER PRESS, November 2011, p. 49-50.

[839] See article 98 (1) of the Rome Statute of the ICC. For more about the obligation to cooperate see also Ciampi, Annalisa, "The Obligation to Cooperate", in Cassese, Antonio et al.(eds.), *The Rome Statute of the International Criminal Court: A commentary*, Vol. II, Oxford University Press, 2002, p. 1611-1617.

[840] This contradiction may presumably be less acute when the referral to the ICC has been made by the Security Council acting under chapter VII of the Charter because article 25 of the Charter of the UN makes it compulsory for states (in this case parties to the ICC or not) to comply with its decisions and article 103 makes the obligations under the Charter prevail over any incompatible obligation. For more about this analysis see Swart, Bert, "Arrest and Surrender", in Cassese, Antonio et al.(eds.), *The Rome Statute of the International Criminal Court: A commentary*, Vol. II, Oxford University Press, 2002, p. 1677.

continue to apply in some circumstances.[841] Akande argues that it may not.[842] Cherif M Bassiouni argues that legal obligations which arise from the international crimes that rise to the level of *jus cogens* (which constitute obligation *erga omnes*) are inderogable.[843] He maintains that such an obligation includes "… the non-applicability of any immunities up to and including Heads of States."[844] The arguments in favour of the possibility to execute the warrants unlimitedly sound consistent with the purpose of the rules on the prohibition of those international crimes which includes punishing those who commit them and is in line with the obligation to prevent genocide as well. That is why it may be argued that the rule on the absolute immunity should not apply in the execution of arrest warrants against persons indicted by the ICC because it would be contrary to the *jus cogens* concept that does not allow any derogation such as immunities or statute of limitations. Furthermore, if there is an obligation to prevent genocide that binds all states, and persons indicted of international crimes are concerned with article IV of the Genocide Convention and 27 of the Rome Statute of the ICC that waive the immunity in case of those crimes, it should follow that non-territorial states should be under the obligation to arrest the indicted persons regardless of their status. The scope of these articles should not be limited to the exclusion of immunities but also should comprise the prohibition of immunities in the execution of the arrest warrants for the crimes concerned.[845] If the contrary argument is the one to prevail, it makes those arrest warrants of the ICC meaningless because the ICC does not have its own police to execute them and there exists no other way these people could ever be arrested. The result is that in such cases, the suspects may continue their acts.

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[841] See Gaeta, Paola, "Official Capacity and Immunities" in Cassese, Antonio et al.(eds.), *The Rome Statute of the International Criminal Court: A commentary*, Vol. I, Oxford University Press, 2002, pp. 975-1001. The recent development in the African Union also shows how African States rejects the possibility to put on trial a sitting Head of state. See AU Decision on Africa's Relationship with the International Criminal Court of 12 October 2013, Ext/Assembly/AU/Dec.1(Oct.2013), available at <http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf> (visited on 28 October 2013).

[842] Akande, Dapo, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", 2009, *Journal of International Criminal Justice*, pp. 333-352. See also Akande, Dapo, "The Genocide Convention and the Arrest Warrants Issued by the ICC", *EJIL:Talk*, 2011.

[843] Bassiouni, M. Cherif, "International Crimes: "*Jus Cogens*" and "Obligation *Erga Omnes*", *Law and Contemporary Problems,* Vol. 59, No. 4, 1996, pp. 63-74, p. 63.

[844] Ibidem.

[845] See also Wirth, Steffen, "Immunities, Related Problems, And Article 98(1) of the Rome Statute", *Criminal Law Forum*, Vol. 12, 2001, pp. 429-458. Pp 452-458.

4.2. Other preventive measures

It was said on the prevention of genocide at the primary level that other measures may include political, economic, diplomatic, security and any other measures that can be deemed necessary for the prevention of genocide. The question here is whether states are permitted and required to take these categories of measures in order to prevent genocide at the secondary level. Not each and every measure that can be taken and that can prevent genocide will be discussed here. With some few examples of these measures, the idea is to show what international law permits and requires non-territorial states for the prevention of genocide outside their borders.

Let me start with the negative obligation to prevent genocide which requires states not to engage in activities that may fuel tension that may lead to genocide. For instance, if a state is clearly led by a dictator who uses discrimination against a group protected by the Genocide Convention as one of the weapons to hang on to power, other states should refrain from engaging themselves, either politically, economically, militarily (they should especially refrain themselves from supplying arms to that state), etc. The reason is that the more the regime loses external support, the more it is isolated and the more it runs out of means that could even make the genocide happen. The history shows how the external support can further the capacity of a state to commit genocide. This has been overwhelmingly confirmed in literature. For instance, the French parliamentary report has been explicit in stating that in 1992, France increased sensibly the supply of weapons in Rwanda. Yet, as the report noted, it was a year in which massive massacres against the Tutsi in Bugesera had taken place, the Coalition for the Defence of the Republic (CDR) had been created, the training of militia was taking place and a network zero "*réseau zéro*" specialized for the hunting of Tutsis and moderate Hutus was in place.[846] This report

[846] *La Mission d'Information de la Commission de la Défense Nationale et des Forces Armées et de la Commission des Affaires Etrangères sur les Opérations Militaires Menées par la France et d'Autres Pays et l'ONU au Rwanda entre 1990 et 1994,* p. 357, available at <http://www.assemblee-nationale.fr/dossiers/rwanda/r1271.asp> (visited on 24 June 2012). See also Alison Des Forges who wrote that "In March 1992, Radio Rwanda was first used in directly promoting the killing of Tutsi in a place called Bugesera, south of the national capital. On 3 March, the radio repeatedly broadcasted a communiqué supposedly sent by a human rights group based in Nairobi warning that Hutu in Bugesera would be attacked by Tutsi. Local officials built on the radio announcement to convince Hutu that they needed to protect themselves by attacking first. Led by soldiers from a nearby military base, Hutu civilians, members of the *Interahamwe*, a militia attached to the MRND party, and local Hutu civilians attacked and killed hundreds of Tutsi. See Alison Des Forges, "Call to Genocide: Radio in Rwanda, 1994 in Thompson, Alan(ed), The Media and the Rwanda Genocide, International Development Research Centre, Ottawa, 2007, p. 42, available at <http://site.ebrary.com/lib/ugroningen/Doc?id=10176403&ppg=59> (visited on 26 June 2012).

criticized the French officers and diplomats for having ended up "holding conversations, discussions, with a criminal government."[847] It has also been observed elsewhere that even in 1993, after it was clear that the Rwandan regime had systematically committed several massacres against the Tutsi ethnic group in Kibilira, Bigogwe, Bugesera..., "French soldiers were deployed, manning checkpoints and scrutinizing identity cards far from where any French citizens were known to be living".[848] Yet, the special rapporteur on extrajudicial, summary arbitrary executions Mr. Bacre Waly Ndiaye had reported that the attacks against the Tutsi ethnic group that had taken place by then constituted acts of genocide under article II(a) and (b) and article III of the Genocide Convention.[849] These are only a few illustrative examples of activities that states should refrain from performing at the secondary level.

However, when a non-territorial state has already a link with a territorial state which, at a given point, presents risks of genocide, that non-territorial state has the obligation to perform positive actions necessary to prevent genocide in the state concerned. Arguably, even non-territorial states which do not have the possibility to exercise influence on a territorial state concerned can take other measures against it which may include economic sanctions against the leaders of that state, the severance of diplomatic relations, to name and shame the leaders of that state and therefore to isolate them from any international forum, arms embargo etc. But again, this is also difficult to assess and implement.

Other measures may include what is provided for in article VIII of the Genocide Convention under which any Contracting Party may call upon the competent organs of the United Nations to take such actions under the UN Charter as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in art III"".[850] Non-territorial states may for instance request the UN to take measures that address means of communication used by the territorial states to spread out the hate ideology or the incitement to commit

[847] See Organization of African Unity/African Union: Rwanda: The Preventable Genocide, Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, July 7, 2000, Addis Ababa, Ethiopia: OAU, 2000, para. 12. 24, available at <http://www.africa-union.org/official_documents/reports/report_rowanda_genocide.pdf> (visited on 24 June 2012).

[848] Idem, para. 12. 26.

[849] Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on the mission he conducted in Rwanda from 8 to 17 April 1993, in UN DOC E/CN.4/1994/7/Add.1 of 11 August 1993 paras. 78-80.

[850] See article VIII of the Genocide Convention

genocide.[851] Those means may be radio, television, and social media such as Facebook, Twitter, Weblogs and YouTube (accessible through internet). What the UN can do to prevent genocide will be discussed in a separate chapter. At this level, it suffices to say that since calling upon the organs of the UN would be one of the available means to comply with their obligation to prevent genocide, it can be argued that states would be legally obligated to call upon those organs of the UN to take appropriate measures for the prevention and suppression of genocide whenever the role of the UN is necessary. It can be said that a non-territorial state would therefore be breaching the obligation to prevent genocide if it gets the information on the risk or commission of genocide by/in a territorial state and refrains from calling upon competent organs of the UN to take action where necessary.

4.3. Preliminary conclusions

To sum up, it may be said that preventing genocide by non-territorial states at the secondary level is permitted and required within the limits imposed by international law as shown in this section. The application of the principle of universal jurisdiction by non-territorial states to suspects of international crimes that may lead to genocide in the way suggested in this section can have a significant contribution to the prevention of genocide. Likewise, the execution of the ICC arrest warrants by non-territorial states without distinction based on the official status of the suspects may have a contribution to the prevention of genocide. Other measures that non-territorial states may take at this level which include requesting the UN to take actions that may address means of communication used to incite hatred and to commit genocide may have a contribution to the prevention of genocide. The instances discussed are not exhaustive. And

[851] On examples of some of the incriminatory broadcasts of the RTLM before the beginning of the genocide in Rwanda, see Media Case, paras. 362-389. See also List of RTLM Transcripts available at <http://surplusknowledge.com/index.php?option=com_content&view=article&id=55&Itemid=64> (visited on 27 June 2012). On the potential that measures that may include jamming radios may have to the prevention of genocide see for example Akhavan, Payam, "Preventing Genocide: Measuring Success by What Does Not Happen", *Criminal Law Forum,* Vol. 22, 2011 pp. 1–33, p. 7. He argues that "…a measure as easy, cheap and quick as jamming RTLM could have had a decisive preventive effect on the Rwanda genocide" because "terminating its broadcast would have significantly impaired the capacity of the *génocidaires* to implement their diabolical plan, which required the mobilisation of the masses to carry out most of the killings". For more about the measures related to hate radios see for instance Jamie, Frederic Metzl, "Rwandan Genocide and the International Law of Radio Jamming", *The American Journal of International Law*, Vol. 91, No. 4, 1997, pp. 628-651, p. 635. Alison Des Forges, "Call to Genocide: Radio in Rwanda, 1994", in Allan Thompson (ed.), *The Media and the Rwanda Genocide*, 2007, pp. 41-54.

though there is much indeterminacy of the laws on the prevention of genocide which may have effect on the preventability of genocide at this level, if prevention of genocide is understood in the way it has been explained above and is implemented as it has been suggested, genocide can be significantly prevented at this level.

5. Tertiary prevention of genocide by non-territorial states: What actions are permitted in international law with what means and to which distance?

Prevention of genocide at the tertiary level requires robust actions to stop an on-going genocide. This section will focus on actions which involve the use of force in order to halt genocide. Does the obligation to prevent genocide give this right and obligation to non-territorial states? This section first gives a brief discussion on the scope of the rules on the prohibition of use of force in the context of the prevention of genocide (5.1). Secondly, it discusses whether that use of force could take the form of humanitarian intervention as it stands today (5.2). In the third place, it discusses whether the commission of genocide could be a stand-alone legal ground for the use of force to stop it (5.3). This is followed by a discussion on whether necessity could be a circumstance to preclude the wrongfulness of the use of force in case of genocide (5.4). Lastly, a summary of conditions that should guide the use of force to put an end to genocide will be given (5.5).

5.1. The prohibition of use of force in the context of genocide

> *"When we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."*[852]
>
> *"The state is widely understood to be the servant of its people, and not vice versa…Nothing in the Charter of the United Nations precludes a recognition that there are rights beyond borders."*[853] *Kofi Annan*

The prohibition of use of force is a principle recognised in international law which obligates states to refrain from using force in other states except in case of self-defence and authorisation

[852] Annan, Kofi, "Two concepts of sovereignty", Thoughts presented in the session of the UN G.A, 18 September 1999, available at <http://www.un.org/News/ossg/sg/stories/kaecon.html> (visited 30 June 2010).

[853] Annan Kofi, "Balance State Sovereignty with Individual Sovereignty", Speech on 20 September 1999 before the U.N. General Assembly, Press Release SG/SM/7136 GA/9596, available at <www.un.org> (visited on 25 May 2012).

of the Security Council. If this prohibition is absolute, it would mean that there is no way non-territorial states would use force to put an end to genocide when not acting in self-defence and when the Security Council is unable to authorise them to do so. This subsection examines whether this prohibition is absolute. If the prohibition is not absolute, it will be examined whether the use of force to end genocide may be among the exceptions.

5.1.1. Mainstream views on the prohibition of use of force

Article 2(4) of the UN Charter states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[854] Subsequent resolutions of the UN confirmed this prohibition and any other form of intervention in other states' internal affairs.[855] This was confirmed by the ICJ in Nicaragua case.[856] Numerous scholars have interpreted the rules on the principle of the prohibition of use of force and the practice thereof as absolute and not susceptible of any derogation.[857] Their view is that the use of force not in case of self-defence and not authorised by the Security Council of the UN is outlawed in absolute terms by the Charter of the UN and that it has become a customary international law.[858] For instance, Ian Brownlie and Karl Zemanek have maintained that article

[854] Charter of the United Nations.

[855] See General Assembly Resolution 375(IV) on the Draft Declaration on Right and Duties of States , 6 December 1949, General Assembly Resolution 2131(XX) on the Inadmissibility of Intervention in the Domestic Affairs of States, and the Protection of their Independence and Sovereignty, 21 December 1965, General Assembly Resolution 2625, 24 October 1970 on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the UN, General Assembly Resolution 3314 (XXIX) adopted on 14 December 1974 available at <http://www.un.org> (visited on 28 March 2012).

[856] Nicaragua case, paras. 187-200, International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment, 2006, paras. 148-165, available at <http://www.icj-cij.org> (visited 25 May 2010).

[857] See for instance, Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd edition, Volume I, Oxford University Press, Oxford, 2002, p. 123, Brownlie, Ian, *Principles of Public International Law*, 7th edition, Oxford University Press, New York, 2008, pp.742-745, Brownlie, Ian, *International Law and the Use of Force by States*, Clarendon Press, Oxford: 1963), pp. 267–8, Corten, Olivier, T*he Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, Hart Publishing, Oxford and Portland, Oregon, 2010, pp15-27, Lubell, Noam, *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, New York, 2010, pp. 25-29, Zemanek, Karl, *New Trends in the Enforcement of Erga Omnes Obligations*, , in Max Planck Yearbook of United Nations, Kluwer Law International, The Hague, 200, pp1-52, p. 37-42, Chesterman**,** Simon, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, 2002, p. 50 and the literature he referred to.

[858] See for instance Brownlie, Ian, *Principles of Public International Law*, 7th edition, Oxford University Press, New

2(4) did not allow other exceptions than an enforcement action authorized by the Security Council and self-defence.[859] Likewise Hersch Lauterpacht has equated territorial integrity with territorial inviolability,[860] which would mean to be an absolute ban of use of force. Bruno Simma has argued the same.[861] He wrote that the terms "territorial integrity" and "political independence" are not intended to restrict the scope of the prohibition of the use of force and maintained that "integrity" has to be read as "inviolability."[862] This view that the prohibition of use of force outside the two exceptions is absolute is what is generally accepted in international law.[863] However, some have understood it otherwise and for the purpose of this work, it is worth having a consideration on that.

5.1.2. Views in favour of an extensive interpretation of article 2(4)

Other scholars argue in favour of the broad interpretation of article 2(4) on the prohibition of use of force.[864] This broad interpretation is that article 2(4) prohibits only intervention directed against territorial integrity or political independence as well as the intervention which is inconsistent with the purposes of the United Nations.[865]

York, 2008, pp.744.

[859] Brownlie, Ian, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, pp.267–268. See also Zemanek, Karl, *New Trends in the Enforcement of Erga Omnes Obligations*, in Max Planck Yearbook of United Nations, Kluwer Law International, The Hague, 2000, pp. 1-52, p. 37-42.

[860] Quoted in Chesterman, Simon, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford University Press, Oxford, 2002, p. 50.

[861] Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd edition, Volume I, Oxford University Press, Oxford, 2012, p. 215-216.

[862] Ibidem.

[863] See more also in Arend, Anthony Clark and Beck, J. Robert, *International Law & the Use of Force, Beyond the UN Charter Paradigm*, Routledge, London and New York, 1993,pp. 29-45, See also Corten, Olivier, *op.cit*, pp.15-27.

[864] Gray, Christine, op.cit, p.45, D'Amato Anthony, *International Law: Process and Prospect*, 2nd ed., Transnational Publisher, Inc., Irvington, New York, 1995, pp. 56-72, Lillich, B. Richard, "Forcible Self-Help by States to Protect Human Rights", *Iowa Law Review*, Vol. 53, 1967, pp. 325-351, pp.332- 334, Lillich, B. Richard and Newman, C. Frank, *International Human Rights: Problems Of Law, Policy And Practice*, Little Brown and Company, Bosnon and Toronto1979, pp. 516-520. Reisman Michael, "Humanitarian Intervention to Protect the Ibos", in Lillich, B. Richard (ed.), *Humanitarian Intervention and the United Nations*, University Press of Virginia, Charlotteville, 1973, p. 171.

[865] D'Amato, Anthony, *International Law: Process and Prospect,* 2nd edition, Transnational Publisher, Inc., Irvington, New York, 1995, pp. 56-72, Stone Julius, *Aggression and World Order, A critique of United Nations Theories of Aggression*, Stevens &Sons Limited, London, 1958, p. 95.

5.1.2.1. The use of force not directed at the territorial integrity of a state

On the first element which concerns the territorial integrity of a state,[866] it has been argued in literature that "article 2(4) does not forbid "the use of force" *simpliciter,* it forbids it only when directed "against the territorial integrity….,"[867] *i.e* when it results in territorial conquest.[868] The rationale was mainly to prevent "territorial aggrandizement and secessionist movements",[869] which would cause alteration of states" boundaries and would therefore make the national unity or territorial integrity of a state impossible.[870] In explaining this concept through its historical background, Anthony D'Amato argues for example that when it was included in the Treaty of Paris of 30 March 1856, the parties to it had in mind the preservation of the Ottoman Empire and the treaty aimed at preventing the permanent loss of portion of one's territory.[871] In addition to this, the fear that the arbitrary establishment of borders would be at the origin of wars of annexation of territories given to other states might have contributed to the evolution of this concept. This fear contributed to determining this concept because as D'Amato has written, it prevents some powerful states from waging wars against weak states for search for economic gains and the search for strategic gains, among others.[872] D'Amato's argument rejects the word "inviolability" used by the proponents of the absolute ban of use of force because he believes that the drafters of the Charter would have used that word had they wanted to mean it.[873] He agrees however that territorial inviolability would have indeed meant the absolute prohibition of use of force but he maintains that in the absence of such a word, some actions would not be forbidden by article 2(4).[874]

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[866] See also Nicaragua case, para 227.
[867] Stone, Julius, *Aggression and World Order, A Critique of United Nations Theories of Aggression*, Stevens &Sons Limited, London, 1958, p. 95.
[868] Ibidem.
[869] For an extensive analysis see for example W. Zacher, Mark, "The Territorial Integrity Norm: International Boundaries and the Use of Force", *International Organization* 55, 2, Spring 2001, pp. 215–250, p. 221- 243. See also Amerasinghe, C. Felix, *Principles of the Institutional Law of International Organizations*, 2nd ed., Cambridge University Press; Cambridge, 2005, pp. 507-508.
[870] Idem, p. 221.
[871] D'Amato , Anthony, *International Law: Process and Prospect*, 2nd edition, Transnational Publisher, Inc., Irvington, New York, 1995, p. 58.
[872] Idem, p. 244.
[873] Idem, p. 59.
[874] Ibidem.

5.1.2.2. *The use of force not directed against the political independence of other states*

Political independence refers to the autonomy in the affairs of the state with respect to its institutions, freedom of political decisions, policy making, and in matters pertaining to its domestic and foreign affairs.[875] Independence is defined in the Black's Law Dictionary as a state or condition of being free from dependence, subjection or control,[876] and the political independence as "the attribute of a nation or state which is entirely autonomous and not subject to the government, control, or dictation of any external power.[877]

Those in favour of a broad interpretation of article 2(4) posit that this article does not prohibit the use of force when it does not undermine the political independence of a state.[878] The ICJ explanation in Nicaragua case is relied on to support their argument:

> "A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices which must remain free ones.[879]

5.1.2.3. *The use of force not in any other manner inconsistent with the purposes of the United Nations*

Needless to recall, the use of force directed against the two elements discussed above are inconsistent with the purposes of the UN. For the use of force which is not inconsistent with the purpose of the UN, a reference has been made to the Charter to explain that article 2(4) does not prohibit the use of force in the absoluteness. The purposes of the UN include achieving the international co-operation in solving problems of humanitarian character and in promoting

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[875] Blay, KN Samuel, *Territorial Integrity and Political Independence*, Max Planck Encyclopedia of Public International Law, 2010, para.1.

[876] Garner, A. Bryan (ed.), *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minnesota, 1999, p. 770.

[877] Ibidem. Likewise, according to Merriam Webster dictionary, being independent is to be "not subject to control by others: self-governing. Not affiliated with a larger controlling unit…" See Merriam Webster online dictionary, Independent, available at <http://www.merriam-webster.com/dictionary/independent> (visited on 3 July 2012). Other dictionaries define the word "independent" as the state or quality of being independent; autonomy; freedom from the influence, guidance, or control of a person or a group. *The American Heritage Dictionary of the English Language, Fourth Edition*. S.v. "independent.", available at <http://www.thefreedictionary.com/independent> (visited on 2 July 2012).

[878] See for instance Stone, Julius, *Aggression and World Order, A Critique of United Nations Theories of Aggression*, Stevens &Sons Limited, London, 1958, p. 95. See also Amerasinghe, C. Felix, *op.cit*, p. 507-509.

[879] Nicaragua, para. 205.

human rights.[880] The preamble of the UN Charter states that the people of the United Nations are determined "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow of mankind, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person…."[881] When those human rights enshrined in the Charter are "instead violated; delinquent government forfeit the protection afforded by article 2(4)".[882] In brief, the argument is that using force to save the lives of people has not been prohibited by article 2(4) of the Charter (because it is consistent with the purposes of the UN: promoting respect for human rights).[883] Among other possible exceptions,[884] the arguments of those who oppose the absoluteness of the prohibition revive the principle of humanitarian intervention.[885] The question is however whether such a rule has even legally existed and in the affirmative whether it could apply to the situation of genocide.

5.2. Humanitarian intervention and the use of force to put an end to genocide

Is the principle of humanitarian intervention recognized in international law to the extent that using force to put an end to genocide may be justified under it? A definition and background will be first given. Secondly, the arguments in favour of this doctrine will be summarised. Thirdly, the arguments of the opponents of this doctrine will be given. Then some observations on the two sides will be given in the context of the prevention of genocide.

5.2.1. Background and definition of humanitarian intervention

Humanitarian intervention is an old concept. The Dutch jurist Hugo Grotius has written in the seventeenth century that, "where a tyrant "should inflict upon his subjects such a treatment as no one is warranted in inflicting" other states may exercise a right of humanitarian intervention."[886]

[880] See article 1 para. 3 of the UN Charter.
[881] Charter of the United Nations, *op.cit*., p.75.
[882] Tesón, R. Fernando, *op.cit*, p. 174.
[883] See Holzgrefe, J.L, "Humanitarian Intervention Debate", in Holzgrefe, J.L and Keohane O. Robert, (ed.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas,* Cambridge University Press, Cambridge, 2003, p. 45.
[884] D'Amato suggests that some other actions like the Israeli raid on the Iraqi nuclear reactor would not be forbidden by article 2(4). See D'Amato, Anthony, *International Law: Process and Prospect*, 2nd edition, Transnational Publisher, Inc., Irvington, New York, 1995, p. 59.
[885] Amerasinghe, C. Felix, *op.cit*, p. 508-509.
[886] Hugo Grotius, *De Jure Belli ac Pacis*, Oxford University Press, 1925. See also, Holzgrefe J.L and Keohane O.

Ian Brownlie has written that, historically, there have been two models of humanitarian intervention.[887] The first one is the one that has been admitted by the majority of publicists of the end of the nineteenth century that the right of humanitarian intervention (*l"intervention d"humanité*) existed.[888] It concerned a state which had abused its sovereignty by brutal and excessively cruel treatment of those within its power, whether nationals or not.[889] According to Ian Brownlie, this model did not survive the post-1919 era. [890] The second model is connected with the NATO bombing of Yugoslavia in 1999 whose humanitarian motives were undermined by various political agendas by the intervening states.[891] I will not engage in the details of these models. Instead, without ignoring that there have been various definitions of the concept of humanitarian intervention in literature,[892] for the purpose of this work I will refer to the one given by Wil D.Verwey, generally accepted by legal scholars.[893] He defined humanitarian intervention as being a "coercive action taken by states, at their initiative, and involving the use of armed force, for the purpose of preventing or putting a halt to serious and wide-scale violations of fundamental human rights, in particular the right to life, inside the territory of another state".[894] This doctrine has always created a tension among scholars and commentators, some finding it legally justified and others finding it illegal.

5.2.2. Arguments of the proponents of humanitarian intervention in general

Proponents of the doctrine of humanitarian intervention argue that it is legally justifiable on the ground of the protection of the greatest fundamental right which is the right to life and more significantly, the right to life for a people. They argue that the customary law on humanitarian

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Robert,(ed.), *Humanitarian Intervention*, Cambridge University Press, Cambridge, 2003, p. 26, Tesón R.Fernando, *Humanitarian Intervention: An inquiry into Law and Morality*, 2nd ed., Transnational Publisher, Inc. Irvington-on Hudson, New York, 1997, p. 56, Stahn, Carsten, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm"?, *American Journal of International Law*, Vol. 101, No 1, 2007, pp. 99-120, p. 111.

[887] Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford University Press, New York, 2008, pp.742-745.

[888] Idem, p.742.

[889] Ibidem.

[890] Ibidem.

[891] Ibidem.

[892] Şaban, Kardaş, "Humanitarian Intervention: The Evolution of the Idea and Practice", *Journal of International Affairs*, Volume VI, No 2, 2001, p. 1.

[893] See for example Holzgrefe, J.L and Keohane, O. Robert, (ed.), *op.cit*, p. 18.

[894] Verwey, D. Wil, "Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective", in Jan Nederveen Pieterse (ed.), *World Orders in the Making*, Macmillan Press Ltd, London, 1998, p. 180.

intervention existed before the UN Charter. Examples of pre-Charter interventions often used by the proponents of this doctrine are the ones by France, England, and Russia in Greece in 1827-30, France in Syria in 1860-61, Russia in Bosnia-Herzegovina and Bulgaria in 1877-78, United States in Cuba in 1898 and Greece, Bulgaria and Serbia in Macedonia in 1903-13.[895] They argue that this doctrine survived the UN Charter because the latter did not outlaw it.[896] Some even go further to add that not only the Charter permits it but that it could also be understood to require it.[897] Hence, they argue that the UN Charter did neither terminate nor did even weaken the doctrine of humanitarian intervention.[898] To affirm this, they rely on some examples of post-Charter humanitarian interventions.[899] Without being exhaustive, here are some of those instances given in literature. One of them is the Indian use of force in Bangladesh (1971) to help people to secure their independence from Pakistan and end repression. Other examples are the Tanzanian use of force against the Ugandan brutal President Idi Amin and end the repression, the Vietnam invasion in Cambodia (1978) which led to the overthrow of Pol Pot.[900] Also, after the 1991 Iraq/Kuwait conflict, the USA, France and the UK launched a military intervention in Iraq to protect the Kurds and Shi'ites who, at the end of the Iraq/Kuwait conflict, were turned on by the government of Iraq.[901] Another example is the NATO airstrikes in the Federal Republic of Yugoslavia (FRY) in 1999, undertaken also without the Security Council authorisation. This

[895] See Holzgrefe J.L, *op.cit*, p. 45.

[896] See for instance Lillich, B. Richard, "Forcible Self-Help by States to Protect Human Rights", *Iowa Law Review*, Vol. 53, 1967, pp.325-351, pp.332- 334, Lillich, B. Richard, "Intervention to Protect Human Rights", *McGILL LAW JOURNAL*, Vol. 15, No. 2, 1969, pp. 205-217, Kofi Abiew, Francis, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Kluwer Law International, The Hague, 1999, pp. 131-135, Teson, R. Fernando, "The Liberal case for Humanitarian Intervention", in Holzgrefe, J.L and Keohane O. Robert, (ed), *op.cit,* pp. 108-111.

[897] See Mertus, Julie, "Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo", *William and Mary Law Review*, Vol. 41, 2000, pp. 1743-1787, Reisman Michael, "Humanitarian Intervention to Protect the Ibos", in Lillich, B. Richard(ed.), *Humanitarian Intervention and the United Nations*, University Press of Virginia, Charlotteville, 1973, p. 177. He argues that not only humanitarian intervention is not inconsistent with the Purposes of the United Nations but that it is rather in conformity with the most fundamental preemptory norms of the Charter. See Weller, Marc, *Iraq and the Use of Force in International Law*, Oxford University Press, Oxford, New York, 2010, p. 101-102. See also L.C Green, "Enforcement of International Humanitarian Law and threats to national sovereignty", *Journal of Conflict and Security Law,* Vol. 1, 2003, pp. 101-131.

[898] Reisman, Michael, "Humanitarian Intervention to Protect the Ibos", in Lillich, B. Richard(ed.), *Humanitarian Intervention and the United Nations*, University Press of Virginia, Charlotteville, 1973, p. 171.

[899] Téson, R. Fernanndo, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd ed., Transnational Publishers, Ardsley, 2005, 219-278.

[900] Gray, Christine, op.cit, pp. 31, 32. See also Scheffer, J. David, "Toward a Modern Doctrine", *University of Toledo Law Review*, Vol. 23, 1991-1992, pp. 253-294.

[901] Gray, Christine, op.cit, p. 33.

intervention occurred after an attempt to authorise it failed due to Russian veto.[902] NATO leaders spoke of genocide by the central government of FRY[903] and that this forcible intervention aimed at preventing Yugoslavia from committing genocide against the ethnic Albanian civilians in Kosovo.[904] When the FRY instituted proceedings against the ten NATO states for the violation of article 2(4), only Belgium invoked clearly the right of humanitarian intervention in the joint hearings on the requests for provisional measures. It said:

> "The Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with article 2(4) of the Charter, which covers only intervention against the territorial integrity or political independence of a state."[905]

Belgium cited the examples of India's intervention in Pakistan, Tanzania in Uganda, Vietnam in Cambodia, the West African states first in Liberia and later in Sierra Leone.[906] It is unfortunate that this case did not reach the merits stage. As Gattini also observed, it would have been a convenient context for the court to examine this argument of Belgium",[907] which could have probably contributed to the clarification of questions pertaining to this doctrine.

Another forcible intervention mostly neglected in literature when it comes to examples of humanitarian intervention is the Rwandan use of force in former Zaire (now the Democratic Republic of Congo) in 1996. Yet, as Rwanda claimed later, among other reasons, its intervention aimed at saving the Congolese Tutsi minority people (Banyamulenge) of South Kivu against whom the declaration of war had been made by the Zairean authorities.[908] The Zairean officials were at that time speaking openly of the Banyamulenge as "snakes", and local radio stations and

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[902] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, p. 530. NATO intervened because it was clear that the SC had failed to address the issue. Yet it had determined in Resolutions 1160 of 31 March 1998 and 1190 of 03 September 1998 that the situation in Kosovo warranted an international engagement and constituted a threat to International Peace and Security. See both resolutions at <http://www.un.org/Docs/scres/1998/scres98.htm> (visited on 8 July 2012).

[903] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd edition, Cambridge University Press, Cambridge, p. 530.

[904] See Youngs, Tim et al., "Kosovo: NATO and Military Action", Research Paper 99/34 of 24 March 1999, International Affairs and Defence, House of Commons Library, pp. 11, 18, 21, available at <http://www.parliament.uk> (visited on 8 July 2012).

[905] International Court of Justice, Legality of Use of Force Case (Provisional Measures), 1999), pleadings of Belgium, 10 May 1999, CR 99/15, available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (visited on 11 July 2012).

[906] Ibidem.

[907] Gattini, Andrea, *op.cit*, p. 701.

[908] Gourevitch, Philip, op.*cit*, p. 296.

newspapers" propaganda against them sounded more and more like the 1994 Hutu Power media of Rwanda. This was following the massacre of the Tutsi communities of Mokoto in North Kivu in May 1996.[909] Mr Kagame (then Rwanda Vice-President) later revealed that the intervention aimed at handling three things: "first to save the Banyamulenge and not let them die, empower them to fight, and even fight for them; then secondly to dismantle the camps, return the refugees to Rwanda, and destroy the ex- Rwandan forces (FAR) and militias; and third, to change the situation in Zaire."[910] The claim by Mr Kagame has indeed an element of humanitarian intervention *i.e* to save Banyamulenge from being exterminated, among other things. The DRC later instituted proceedings against Rwanda for the violation of article 2(4) (among other things) but again, the case never reached the merits stage. It would have been interesting to see what would have been the ruling of the ICJ on a possible argument by Rwanda that its intervention to save the Banyamulenge was not in violation of article 2(4) of the Charter. In most of these examples, it has been argued that in addition to the fact that the examples of use of force were not authorized by the Security Council, they were not condemned by it (during and after), which the proponents find as indication of legality of the actions. However, other arguments are radically opposed to the claim that humanitarian intervention is accepted in international law as it will be shown below.

5.2.3. Arguments of the opponents of humanitarian intervention in general

Roberto O. Keohane gives an interesting illustration to explain how humanitarian intervention has been opposed by scholars. He noted that:

> "saying "humanitarian intervention" in a room full of philosophers, legal scholars, and political scientists is a bit like crying "fire" in a crowded theatre: it can create a clear and present danger to everyone within earshot.[911]

Indeed, this doctrine has been subject of rejection mainly because of the danger it may allow or cause. A summary of numerous scholars' propositions on which a legal case against the humanitarian intervention rest is worthy of note here.

The first is that one cannot draw from the pre-Charter practice in assessing the legality of humanitarian intervention since there is no clear evidence that such customary rule has existed

[909] Idem, pp. 291, 294, 295.
[910] Idem, pp. 292, 296.
[911] Keohane, O. Robert, "Introduction", in Holzgrefe J.L and Keohane, O. Robert ,(ed), *op.cit*, p.1.

before the UN Charter.[912] As they contend, had such a right existed, it would have been invoked and exercised during the massacres of Armenians in the 1914-19, the forced starvation of 4 million Ukrainians by Soviets in 1930s, the massacre of hundreds of thousands of Chinese by the Japanese in 1931-45 and the extermination of 6 million Jews by the Nazis in 1939-45.[913] They argue that not only the examples of pre-Charter humanitarian interventions were insufficient to establish a customary right of humanitarian intervention,[914] but even if that had been the case, the Charter has ushered in a new era.[915] They therefore argue that humanitarian intervention is contrary to article 2(4) of the UN Charter.[916]

The second is that since 1945 even where intervening states have used force to protect human rights, they have been very much reluctant to invoke humanitarian intervention.[917] It has been referred to the well-known examples of Tanzania in Uganda, Vietnam in Cambodia, India in Bangladesh, US, UK and France in Iraq, NATO in Kosovo, in which intervening states have invoked legal grounds other than humanitarian intervention to justify their actions.[918] They therefore opine that partisans of humanitarian intervention cannot rely on customary international law because the practice and the *opinio juris* are lacking.[919]

The third is that states have consistently rejected humanitarian intervention. Brownlie cited the example of the bombing of Yugoslavia in 1999 by NATO.[920] The hostile response to the NATO intervention in Yugoslavia has been referred to in affirming that the doctrine has been rejected.[921]

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[912] Malanczuk, Peter, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Het Spinhuis Publishers, Amsterdam, 1993, p. 27, Arend, Anthony Clark and Beck, J. Robert, *International Law & the Use of Force, Beyond the UN Charter Paradigm*, Routledge, London and New York, 1993, pp. 112-137.

[913] See an explanation of arguments of the opponents of humanitarian intervention by Holzgrefe J.L, *op.cit*, p. 45

[914] Brownlie, Ian, *International Law and the Use of Force by States*, Oxford University Press, Oxford, 1963, pp. 339-441.

[915] Tams, J. Christian, "Prospects for Humanitarian Uses of Force", in Cassese, Antonio, *Realising Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. 368.

[916] See for instance Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., Volume I, Oxford University Press, Oxford, 2002, p. 131.

[917] Tams, J. Christian, *op.cit*, p.368.

[918] States invoked other grounds such as self-defence or acting under authorisation of the SC in its resolutions. In the Kosovo situation, only Belgium invoked this right when the case against NATO states was brought before the ICJ.

[919] Brownlie, Ian, *Principles of Public International Law*, 7th edition, Oxford University Press, New York, 2008, pp.742.

[920] Tams, J. Christian, *op.cit*, p. 368.

[921] Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford University Press, New York, 2008, pp.742.

It has been observed that among the reasons of rejection of humanitarian intervention there is the fact that it is an inherently vague doctrine in that it has been given by its protagonists in various forms.[922] Indeed, some of its protagonists have restricted the doctrine to free a nation oppressed by another; others to put an end to crimes and slaughter; others to end tyranny, others to end extreme cruelty, others to end religious persecution and others to the case of feeble government or misrule leading to anarchy.[923] The opponents of the doctrine of humanitarian intervention find this too vague with the risk to open the floodgate of interventions for other motives.

Some other scholars have noticed however that weaker states oppose the recourse to humanitarian intervention even for extreme cases like genocide because they want to protect themselves from the conquest by powerful states.[924] In other words, they avoid abuse by those powerful states. And for strong states, they oppose any intervention mainly because it would put them in a position to intervene to stop genocide even where they believe it is not in their interests.[925] But this interest is vital for either strong or weak states because as Payam Akhavan has put it "states will be unwilling to expend blood and treasure where their vital national interests are not directly implicated."[926] This explains why some of the authors even prefer that there be no development of a customary rule of humanitarian intervention in the future because of the danger it constitutes.[927] They recognize however that it is intolerable to see grave violations of human rights within a state and to see other states being banned by public international law from intervening.[928] This is found as being a split between law and morality.[929]

I will not engage in the determination of who is right among these opposite views. Each side's views have their merits and the debate is not closed. However, I must note that the views of the opponents of this doctrine are considered by many as gaining the ground. That is why this

[922] Ibidem.
[923] Ibidem.
[924] Corten, Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, Hart Publishing, Oxford and Portland, Oregon, 2010, pp. 497-549, Cronin, Bruce, "The Tension Between Sovereignty and Intervention in the Prevention of Genocide", *Human Rights Review*, Vol. 8, No 4, 2007, pp. 293-305.
[925] Ibidem.
[926] Akhavan, Payam, "Preventing Genocide: Measuring Success by What Does Not Happen", *Criminal Law Forum* Vol. 22, 2011, 1–33, p. 7.
[927] Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., Volume I, Oxford University Press, Oxford, 2002, p. 132.
[928] Ibidem.
[929] Ibidem.

doctrine cannot give an answer to the question whether it may provide a legal basis for the prevention of genocide when genocide is being committed. The problem of the intolerable suffering which is genocide in this work remains unsolved if the arguments of the opponents of humanitarian intervention are the one to prevail as it is the case in practice.[930] Despite the dominance of the arguments of the opponents of this doctrine, the debate on humanitarian intervention might never end if things remain unchanged either way. This means that unless this doctrine is expressly prohibited in the Charter or is expressly authorized by it, the debate on this doctrine will remain. If it happens to be expressly prohibited, it should precise the scope of that prohibition. And if it happens to be allowed, it should of course make it clear what kind of circumstances would trigger it. In any case, the debate would perhaps end. Since this is not yet the case, the debate may take another orientation in the search for the solution to the unresolved issue. Instead of relying on humanitarian intervention in its broader sense, it will be examined below whether the commission of genocide as such, which is a violation of a peremptory norm, would legally trigger the use of force to end it. In fact, as said above, one of the reasons this doctrine has been so much opposed is that it has been vague in its scope to the extent that it could be easily abused in many ways including using force to any kind of human rights violation.

5.3. Can the commission of genocide be an independent ground to trigger the use of force to comply with the obligation to prevent genocide by non-territorial states?

No definitive answer followed from the discussion about the humanitarian intervention. Recourse to other sources may be necessary. In the present case, recourse to the rules on the prohibition of genocide will be made in order to examine whether the nature of those rules could dictate the use of force to put an end to genocide without having to borrow other concepts.

It has been concluded earlier that the prohibition of genocide and the obligation to prevent genocide is both conventional (Genocide Convention) and customary.[931] The rules on the prohibition of genocide are today regarded as *jus cogens* norms.[932] The question whether this

[930] Though there is no statistical information on that, it is generally believed that international lawyers who espouse the right of humanitarian intervention are a few in numbers. See explanation by Brownlie, Ian, *Principles of Public International Law*, 7th edition, Oxford University Press, New York, 2008, pp.742.

[931] This means that where I refer to the Genocide Convention on the obligation to prevent genocide it also implies the reference to customary international law.

[932] See also Cassese, Antonio "Genocide", in Cassese, Antonio et al. (eds.), *The Rome Statute of the International Criminal Court: A commentary*, Vol. I, Oxford University Press, 2002, p.337-338. He argues that rules on the prohibition of genocide as community obligation which are now part of *jus cogens* or peremptory norms confer upon

nature would mean to obligate non-territorial states to use force to put an end to genocide needs consideration from the drafting process of the Genocide Convention until today. The use of force to put an end to genocide has been invoked during the drafting process of the Genocide Convention. For instance, Raphael Lemkin wrote in 1947 that "by declaring genocide a crime under international law and by making it a problem of international concern, the right of intervention on behalf of minorities slated for destruction has been established."[933] The Genocide Convention adopted later provides in article I that genocide is an international crime that states undertake to prevent.[934] Under the obligation to prevent genocide, states have a direct obligation to prevent genocide which requires states to employ all means reasonably available to them to prevent genocide,[935] wherever they may be acting or able to act.[936] However, there exists no clear indication that the use of force to put an end to genocide is allowed and required. Instead, it includes an express provision on the possibility for states to call upon the competent organs of the UN to take appropriate actions to prevent genocide,[937] which could be understood as the only forum through which the use of force could be sought. After the entry into force of the Genocide Convention, the ICJ gave an interesting opinion with regard to the object and purpose of that convention which is relevant for the present discussion. It noted:

> "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."[938]

The ICJ has confirmed in the DRC v. Rwanda case that the prohibition of genocide constitutes a norm of *jus cogens*.[939] Schabas has suggested that arguably as a result of the treaty-based obligation to prevent genocide in article I of the Genocide Convention and the customary norm

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states the right to require that acts of genocide be discontinued.

[933] Lemkin, Raphael, "Genocide as a Crime under International Law", *American Journal of International Law,* Vol. 41, No. 1, 1947, 145-151.

[934] See article I of the Genocide Convention.

[935] See Bosnia v. Serbia case, para. 161.

[936] Idem, para. 183.

[937] See article VIII of the Genocide Convention.

[938] See Bosnia v. Serbia, para. 161&430.

[939] See Bosnia v. Serbia, para. para. 64.

that it reflects, the use of force is permitted even without Security Council authorization.[940] Building upon the assertion that the prohibition of genocide is a norm of *jus cogens,* Schabas added that the duty to prevent genocide as enshrined in international law is a peremptory norm, thus, it trumps any incompatible obligation, even one dictated by the Charter of the United Nations.[941] The argument of M. Cherif Bassiouni that "the implications of *jus cogens* are those of duty and not of optional rights,"[942] supports this argument. The prohibition of genocide is not only a peremptory norm from which no derogation is permitted but also an *erga omnes* (towards all) obligation of states.[943] Also, article 40[944] and 41[945] of the ILC draft articles on state responsibility for international wrongful acts strongly support this argument because, even though they do not suggest how serious breaches by a state of an obligation arising under a peremptory norm should be ended by other states, they confirm that these serious breaches must indeed be ended by other states. Genocide being the gravest breache of international law, in case it is being committed, if force is the only way to end it, a claim is that it should be ended under

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[940] Schabas, A. William, *Genocide in International Law,* Cambridge University Press, Cambridge, 2000, p. 500.

[941] Ibidem. But Judge Lauterpacht was hesitant to conclude that the use of force to end genocide was permitted in international law. Application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Further request for the Indications of Provisional Measures, p. 436. See also Schabas, A. William, "Genocide, Crimes Against Humanity And Darfur: The Commission of Inquiry's Findings of Genocide", *Cardozo Law Review*, Vol. 27, No. 4, 2006, 1703-1721, p. 1718. For more about this, see also Schabas, A. William, *Genocide in International Law, The Crime of Crimes,* 2nd ed., Cambridge University Press, Cambridge, pp. 527-528. For more about the *erga omnes* nature of some obligations, see also Prosecutor v. Tihomir Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Judgment of the Appeal Chamber, 29 October 1997, para. 26, <http://www.icty.org>, (visited on 12 June 2013). The court said with regard to article 29 of the ICTY Statute on the duty to cooperate that this article imposes an obligation on Member States towards all other Member States.

[942] Bassiouni, M. Cherif, "International Crimes: "Jus Cogens" and "Obligation Erga Omnes"," *Law and Contemporary Problems,* Vol. 59, No. 4, 1996, pp. 63-74, p. 65.

[943] Barcelona Traction case, para. 33 and 34.

[944] See the ARSIWA. Article 40 reads: *Application of this chapter:*

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

[945] *Article 41: Particular consequences of a serious breach of an obligation under this chapter:*

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

that basis. This is what might have inspired the African Union (AU) to adopt article 4 (h) of the Constitutive Act. In this article, the African Union explicitly recognised the Union's right to intervene in a Member State "in respect of grave circumstances namely: war crimes, genocide and crimes against humanity."[946] The AU did not elaborate on that, but the fact that it recognises in the same article that it functions in accordance with the principle of prohibition of use of force,[947] may be construed as indicating that the AU Member States consider that they do not violate that principle in case they use force to end those grave crimes. This provision has not been condemned by the UN. Had it been contrary to the UN Charter, the UN would have been entitled to ask for its amendment.

A further interesting analysis on the heinous nature of the crime of genocide and the obligation to end it has been made by Heinze. He argued that the rules on the prohibition of genocide show the special status that the crime of genocide has in international law in comparison to certain other modes of human suffering that international law proscribes but still tolerates (e.g., violations of certain political rights). [948] He continued that genocide is a form of human suffering considered intolerable, a form that maintains a fundamentally different legal status with regard to its rectification than do other violations.[949] He made an interesting analogy with the standards of the principle of universal jurisdiction in showing the normative legal framework of the use of force to end genocide. Recalling the primary rationale for universal jurisdiction which is that some crimes are so heinous and so universally abhorred that a state is entitled to undertake legal proceedings against the perpetrators, regardless of where the crime took place or of the nationality of the victims or perpetrators, he opines that law of universal jurisdiction is an appropriate normative legal framework in which the use of force to end genocide can be grounded. He referred to other scholars who have argued on this that if punishment can be justified for certain serious human rights crimes, even if such punishment severely encroaches upon the traditional boundaries of sovereign prerogative, "then so can intervention be justified to stop such a crime that is about to occur or is already in progress." [950] As he observed, it is not

[946] See article 4(h) of the Constitutive Act of the African Union Adopted By The Thirty-Sixth Ordinary Session Of The Assembly Of Heads Of State And Government *11 July, 2000 - Lome, Togo* , available at <http://www.africa-union.org> (visited on 19 June 2013)
[947] Ibidem.
[948] Heinze, A. Eric, *op.cit*, p. 96-97.
[949] Ibidem.
[950] Singer, Peter, *One World: The Ethics of Globalization*, Yale University Press, New Haven & London, 2002, p.

this principle of universal jurisdiction that renders using force to end genocide legal but it shows the definite normative similarity between these two concepts in that both are only rightly employed under the worst cases of human suffering.[951]

Considering all that is said above, some arguments may be given. *Jus cogens* norms cannot be derogated from because they are hierarchically higher than "ordinary" norms.[952] Therefore, the procedural requirement (authorisation by the SC) should not be understood to take away the obligation to put an end to genocide which is the most serious breach of international law. Moreover, it is possible that both rules be read in a harmonious way to serve the purpose for which they have been established. Since the prohibition of genocide is a *jus cogens* norm, it follows for instance that states members of the SC (who are themselves under the obligation to put an end to genocide) should not veto a decision on the authorisation of use of force when genocide is taking place in a given place. In fact, this veto could be interpreted as contrary to peremptory norm on the prohibition of genocide. The same is the failure to take action for any other reason whatsoever. For instance, during the conflict in the Balkan, it has been argued that the Security Council's failure to take enforcement action and to lift the arms embargo against the government of Bosnia was a violation of the Genocide Convention by the members of the Security Council which were also parties to the Genocide Convention.[953] It would have been a good opportunity for the court to contribute to this, had Bosnia filed the case against the United Kingdom for violating the Genocide Convention through its activities in the Security Council as it had argued.[954] Schabas believes that the court's ruling in the Bosnia v. Serbia case suggests that Bosnian argument against the UK had chance of success because of some similarities with

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120. For extensive analysis see Heinze, A. Eric, *op.cit*, p. 176.

[951] Heinze, A. Eric, *op.cit*, p.80&100. His argument is that article I of the Genocide Convention contains language that could possibly be construed as authorizing the use of force to achieve its purposes in that, it creates an obligation that requires state parties to prevent and punish the crime of genocide.

[952] See Orakhelashvili, Alexander, *Peremptory Norms in International Law*, Oxford University Press,Oxford, pp. 7-11.He argues that *jus cogens* norms prevail over treaties. See also European Court of Human Rights, *Al-Adsani v. the United Kingdom*, Judgment, 21 November 2001, Joined Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para. 3. They argue with regard to the prohibition of torture that a state violating a *Jus Cogens* norm cannot invoke hierarchically lower rules to avoid the consequences of the illegality of its actions.

[953] See Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, p. 527.

[954] Ibidem.

the former.[955] This could have concerned other members of the SC as well. When the Security Council of the UN fails to take decision on ending genocide, it violates the peremptory norm of international law. It would be absurd to comply with a conduct contrary to the law in refraining from ending that genocide.

The proponents of the absoluteness of article 2(4) of the UN Charter may find this argument not valid but then they may be challenged to find a way of ending this serious breach of international law in the state of necessity when no other ways are available.

5.4. Necessity: a circumstance precluding the wrongfulness of the use of force in case of genocide?

Hard as it may be for many to instinctively accept, if there is one thing as bad as using military force when we should not, it is not using force when we should".[956]

When genocide is being committed and for whatever reasons, no competent organ of the UN can take action to end it, then genocide becomes unstoppable if no state may use force to stop it. This is because it is very difficult to imagine that it will stop by itself or just from the initiative of the one who commits it. The *genocidaires* need to be coerced to stop their acts. The question is whether the use of force out of necessity to save people from genocide would be wrongful. In other words, can necessity provide a valid argument that is recognised in international law?

The ILC confirmed in its articles on the responsibility of states for international wrongful acts the existence of the doctrine of necessity in international law which precludes the wrongfulness of an act. Even though it admitted that some writers have opposed this doctrine,[957] it noted that the balance of that doctrine has nonetheless continued to favour the existence of the plea of necessity.[958] As the ILC explained, this doctrine of necessity denotes "those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser

[955] Ibidem.

[956] Evans, Gareth, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Bookings Institution Press, Washington D.C, 2008, p. 128.

[957] See for example Heathcote, Sarah, "*Est-ce que L"état de Nécessité Est un Principe de Droit International Coutumier*"? *Revue Belge de Droit International*, Vol. 1, *ANU College of Law Research Paper* No. 09-22, 2007, pp. 53-89.

[958] See article 25 (and para. 13 of its commentary) of the ARSIWA.

weight or urgency".[959] That means that it arises where there is an irreconciliable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other.[960] Necessity has been invoked in some cases, and this may indicate that it exists in international law. For instance Belgium invoked it against FRY and defined it as the cause which justifies the violation of a binding rule in order to safeguard, in face of grave and imminent peril, values which are higher than those protected by the rule which has been breached.[961] The ILC relied on a number of other examples and case-law which support its conclusion that such doctrine exists in international law. [962] The *Gabčíkovo-Nagymaros Project* case is among those examples. In this case, the ICJ noted that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.[963] There are conditions that need to be fulfilled as reiterated in article 25 of the ILC draft articles on states responsibility. The first condition set out in paragraph 1(a) is that necessity can be invoked to safeguard an essential interest from a grave and imminent peril, the second one set out in paragraph 1(b) is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole.[964] The question is whether these conditions would be met in case of genocide. The ILC explicitly noted that article 25 does not cover the use of force not sanctioned by chapters VII and VIII.[965] It did not give reasons for that. The only explanation it gave is that article 25 does not cover conduct regulated by the primary obligation.[966] Yet, the primary obligation has not clearly regulated it. There are reasons to think that these conditions can be met in case of genocide. It is essential to confront these conditions with the case of genocide.

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[959] See article 25 (and para. 1 of its commentary) of the ARSIWA.
[960] See para. 2 of the commentaries on article 25 of the ARSIWA.
[961] International Court of Justice, Legality of Use of Force Case (Provisional Measures), 1999, pleadings of Belgium, 10 May 1999, CR 99/15, available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (visited on 11 July 2012).
[962] See paras 4 (the Anglo-Portugese dispute of 1832), 5 (the '*Coroline'* incident of 1837), 6 (the *Russia Fur* Seals of 1893), 7 (the *Russia Indemnity case*), 8 (*Societé Comerciale de Belgique*), 9 (the bombing of the Liberian oil tanker Torrey Canyon by the British),11 (*Gabčíkovo-Nagymaros Project Case*), 12 (*Fisheries Jurisdictions case*) of the commentary on article 25 of the ARSIWA.
[963] See Gabčíkovo-Nagymaros Project Case, pp. 40–41, paras. 51–52. The court recognised this doctrine of necessity in customary international law but it rejected its invocation in that case because the conditions were not met. See also the international Law Commission, ARSIWA, with commentaries, 2001, p. 80, para. 11.
[964] See article 25, 1(a,b) ARSIWA, with commentaries, 2001, p. 80, para. 11.
[965] See para. 21 of the commentaries on article 25 of the ARSIWA.
[966] Ibidem.

The first condition is that necessity can be invoked to safeguard an essential interest from a grave and imminent peril. Genocide is the gravest crime of international law committed against mankind; an odious scourge as the preamble of the Genocide Convention described it.[967] In the case between Belgium and the FRY, Belgium noted that even assuming that (for the sake of argument) the rule on the prohibition of use of force had been breached (which it found not), it invoked the higher values which it attempted to safeguard which included rights of *jus cogens* and the collective security of an entire region.[968]As for the grave and imminent peril it contended that it attempted to safeguard these higher interest from the humanitarian catastrophe recorded in the resolutions of the Security Council.[969] There cannot be a greater interest than the right not to be genocided. And there cannot be a bigger peril than genocide. The gravity of peril in a situation of genocide has been overwhelmingly shown in literature as demonstrated elsewhere in this work and there is no reason to expatiate on that here.

Instead, I will now turn to the second condition which is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole. The interest protected by the Charter's ban to use force was not meant to condone the commission of genocide. That would be contrary to the principles and purposes of the very Charter. The "link theory" identified in literature supports this assertion.[970] According to this theory, the "Charter's absolute ban on force should be observed by member states only if, or to the extent that the UN peace-keeping and restoring machinery actually works; *i.e* to the extent that the UN effectively maintains or restores international peace and security."[971] It has been observed that member states were prepared at the San Francisco Conference to accept an absolute ban of unilateral use of force on condition and presupposing that the UN would effectively safeguard international peace and security which include the prevention and

[967] See also preamble of the Genocide Convention. See also Harhoff, Frederik, "Unauthorised Humanitarian Intervention- Armed Violence in the Name of Humanity"? *Nordic Journal of International Law,* Vol. 70, 2001, p. 114. He lists the commission of genocide among examples of grave perils that threaten essential interests.

[968] International Court of Justice, Legality of Use of Force Case (Provisional Measures*)*, 1999, pleadings of Belgium, 10 May 1999, CR 99/15, available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (visited on 11 July 2012).

[969] Ibidem.

[970] Verwey, D. Wil, *op.cit*, p. 193-194, See for example Spiermann, Ole, "Humanitarian Intervention as a Necessity", in *Nordic Journal of International Law,* Vol. 71*,* 2002, pp. 523-543, Harhoff, Frederik, "Unauthorised Humanitarian Intervention- Armed Violence in the Name of Humanity"? *Nordic Journal of International Law,* Vol. 70, 2001, p. 118.

[971] Ibidem.

elimination of a situation in which human rights violations have become intolerable.[972] If that high and common interest is not safeguarded by the UN, it would be unconvincing to sacrifice lives of thousands and millions of human beings and invoke the interest to abide with a rule on the authorisation from a dead or stuck organ. What is that interest when for instance the Security Council's failure to authorise the use of force to stop genocide is due to the veto of China or Russia (which are themselves frequently accused of being violators of human rights) for no valid reason? What is the interest when such failure is due to the fact that any of the permanent members of the SC has been against initiation of a resolution to authorise the use of force to end genocide from the very beginning like the US in regard to Rwanda and there is no other way to stop that genocide?

In other words, it is the interest of all states (the one in which genocide is being committed and others). It can therefore be plausibly argued that the conditions for necessity in case of the commission of genocide can be met and the ILC" omission to include it is regrettable but does not preclude its application. In fact, given the nature of the state of necessity, the ILC did not (and is even unable) to determine beforehand a list of all situations in which necessity may be invoked. My argument is that since non-territorial states" use of force to end genocide as the only available way to save the people under the peril of genocide does neither impair the interest of the state in which genocide is being committed nor does it impair the interest of the international community as a whole, necessity could be validly invoked to preclude the wrongfulness of the use of force in that situation.

5.5. Threshold needed for the use of force to end genocide under any of the discussed forms

It is important to suggest some threshold conditions that should be taken into consideration for the use of force to end genocide to be in harmony with other rules of international law. Some threshold conditions have already been suggested in literature, [973] and I will supplement (while

[972] Idem, p. 194.

[973] Gray, Christine, *op.cit*, p. 34, 35, Stacy Helen, "Humanitarian Intervention and Relational Sovereignty", in S.P Lee (ed.), *Intervention, Terrorism, and Torture, Contemporary Challenges to Just War Theory*, Springer, Dordrecht, 2007, 89- 104, p. 95. Tesón, R. Fernando, *Humanitarian Intervention: An inquiry into Law and Morality*, 2nd edition, Transnational Publisher, Inc. Irvington-on Hudson, New York, 1997, p. 16.
For instance, After the USA, UK and France's intervention to protect Kurds and Shi"ites in Iraq, it has been suggested that extreme humanitarian need would justify humanitarian intervention. Some conditions were suggested to govern the determination of this need. Those conditions are the urgent situation of extreme humanitarian distress

being inspired by) them with the following six more threshold conditions: (1) genocide must be taking place; (2) the state to use force must do it with the sole aim to end genocide; (3) the state must have first pushed the UN to take action, (4) the state must have the capacity to end it, (5) the state must be able to respect the laws of war; (6) the state should not be accused of the same acts on its territory.

The first threshold condition is that genocide must be taking place in a given place. The problem is that, given the fact that the state or group committing acts of genocide may probably rarely make a declaration admitting to be committing genocide, it might be difficult for the state to use force to determine beyond doubt that what is going on is genocide. Moreover, states might always hide behind the uncertainty on whether genocide is occurring as a pretext not to act. This is what happened in Rwanda when the US for instance persistently and radically avoided to use the "g" word.[974] As long as there is no such a body to authoritatively determine that genocide is taking place, this problem will remain.

The second threshold condition is that the state to use force must have the only aim to save the population victim of the on-going genocide and must withdraw the troops after the mission is accomplished. In other words, it must be for purely putting an end to genocide. In my view however, being pure does not mean that state to use force may completely have no other incentives. Even where other incentives may exist, the use of force may still be pure as far as putting an end to genocide is concerned if the major or primary reason is to save the lives of the people against whom genocide is being committed. Of course those other incentives must not be contrary to article 2(4) of the Charter. That means that the intervener's incentives must not be to conquer the territory of the state concerned, to affect its political independence or any other

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which demands immediate relief, the other state should not be willing or able to meet the distress and deal with it, there should be no practical alternative to intervening in order to relieve the stress, and also the action should be limited in scope and time. Helen Stacy has also suggested some conditions (three). The first is that the humanitarian crisis must be widespread and extreme for intervention to be justified. The second is that the use of force must be welcomed by a firm consensus of injured citizens within the ailing state. This has been also suggested by Tesón. But it has been argued before in this work (on the concept of popular sovereignty) that since a state may convince the majority of its population to eliminate a minority group of its population, the intervention might not need a prior will of the people of that state because the majority may be indeed against it. After all if the idea is to save the lives of people, what would be needed is rather the welcome by the group in danger and in this case there is no use to require that it be expressed by them because none may like to be genocided. The third and final one requires that international intervention does some good, and at very least, does no harm.

[974] See Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, p. 593-594.

incentive inconsistent with the purposes of the UN. The purity of the use of force to end genocide should not be measured by only taking into account other hidden incentives but mainly by examining whether the purpose expected from that use of force is achieved, *i.e*: saving the lives of people under the threat of genocide. To suggest this is being realistic because it would be too utopian to believe that states would be willing to use force in other states for the sole purpose to save the people in those states with whom they have no link whatsoever. This is not to say that it is impossible but it may be extremely rare because as Rodley, Verwey and Frank have observed, states have showed very little interest in intervening where the humanitarian concern was the only incentive, yet they have intervened where other incentives were present.[975] It is not impossible to imagine the use of force with other incentives but that do not undermine article 2(4) of the Charter. For instance if a state intervenes in its neighbouring state which is committing genocide, it might do that with another strong incentive to prevent that the genocidal crisis causes refugee flows to its territory as well as the insecurity to it that may arise from that crisis from the state concerned. Another example may be that of states anywhere or particularly in Africa, where, due to the arbitrary establishment of borders, some neighbouring states may have the same ethnic groups because they originated from one of them. In such cases, if a territorial state that has those ethnic groups which originated from a non-territorial state decides to eliminate them, and the state of origin uses force to save them, the latter might be highly motivated by the link with the ethnic group concerned. The determination of this pure purpose may also be assessed from actions on the ground. In the Nicaragua case, though it may not be said that the court recognised the right to use force for strict humanitarian objective, it provided some indication on examples of where states may use this argument as a pretext. It said that: "the protection of human rights, a strict humanitarian objective, cannot be compatible with the mining of spots, the destruction of oil installations, or the training, arming and equipping of the *contras*".[976]

The third threshold condition would be that the state to use force to end genocide should first try to push for the UN action (through the competent organs of the UN). Since that state may be ready to intervene, it may push the SC to authorise it or to authorise any other action within a

[975] Verwey, D. Wil, *op.cit*, pp. 197-198.
[976] See Nicaragua case, para. 268.

short time. Article VIII[977] of the Genocide Convention can also be a good basis for this. The difficulty attached to this is that it may take too long for the competent organs to take action or to the state that wishes to use force to know that the action will never be taken. And while waiting for this, people to be saved might be perishing, which may make the result that the state to use force aims at achieving be insignificant. It is difficult to set a period within which the state should wait for. It is probably better to say that the state to intervene assesses the situation by considering the chance of success of the UN decision to authorise an action. But the period must be short for the use of force to serve its purpose. It would be absurd to wait long if for example there are all signs that show that there are no chances that a decision by the UN would be ever reached.

The fourth threshold condition is that the state to use force in order to end genocide should have the capacity or the potential to successfully stop the genocide. The problem becomes how to measure this capacity. Is the capacity measured by taking into account the geographic distance between the state to use force and the state concerned? Or is it by taking into account the military power of the state to use force? My argument is that each of the two factors is important for the chance of success. If a neighbouring state has the military capacity to stop genocide it might be much easier than other states geographically far from the scene of genocide. The examples of Tanzania in Uganda, Vietnam in Cambodia, India in Bangladesh and West African states in Liberia and Sierra Leone are telling. But where there is military capacity, the geographic distance is not a barrier. The example of the intervention of the US, UK and France in Iraq to save the Kurds and Shiites is one of many others that demonstrate this. Though it may be difficult to assess each and every state's military capacity, it is axiomatic that some states are more powerful than others. For instance, the five permanent members of the Security Council are even better placed because of their military superiority in the world. And the use of force undertaken by one of them may achieve the result (provided that it is not directed against one of the permanent members of the SC which may have more or less the same capacity).

The fifth condition is that the state to use force should be able to respect the laws of war. One of them is that it should not be likely to use weapons of mass destruction. The reason is simple; the

[977] To recall its content, article VIII reads: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

state which uses force to end genocide should not cause as much deaths as the *genocidaires* want to. And since these weapons are susceptible of causing as much deaths to the potential victims of genocide as to other innocent people and future generations, the idea of saving people is lost because that state destroys than it saves.

The sixth threshold condition, I suggest, is that the state to use force to end genocide should not be accused of the same acts on its own territory against its own population. And the reason is simple; if that state can commit genocide itself, it would hardly be expected to be motivated by a genuine objective to stop others from doing the same as it is doing.

5.6. Preliminary conclusions

To comply with the obligation to prevent genocide at the tertiary level, non-territorial states are obligated to take all necessary measures. When the situation requires the use of force as the only necessary means to end genocide, this section has shown that there may be barriers due to how article 2(4) has been interpreted as providing for the absolute prohibition of the use of force. This interpretation has had (and still has) effects on the situations of genocide because it is the one that has prevailed in practice over another which finds that article 2(4) is not a bar to the use of force for humanitarian purposes since it is not directed against the territorial integrity and political independence of another state or is not any other manner inconsistent with the purposes of the UN.

However, this section argues that the prohibition of use of force should not be understood as banning the use of force in a state where genocide is being committed because the prohibition of genocide is a *jus cogens* norm. A norm of such a character should make void any other norm and conduct contrary to it. The Charter's requirement on the authorisation of a competent organ of the UN was not meant to (and cannot) condone the commission of genocide. It should not be a bar to the fulfilment of such an imperative obligation to end genocide. The argument is that the use of force to save people from genocide should be legally justifiable when genocide as a serious breach of international law is being committed. Using force to end genocide should be understood as abiding with the obligation to end serious breach of international law which is, as shown before, a part of the obligation to prevent genocide. International lawyers who argue otherwise without providing for alternative on how to end genocide should accept to be released from the confinement and enslavement of the positivist reasoning and look beyond the traditional

and arid rigidity of interpretation of laws.

Where such an interpretation would not be convincing enough, non-territorial states should use force to end genocide and invoke necessity which is a circumstance precluding the wrongfulness of the use of force because the interest to save populations from genocide is superior to the mere requirement of the UN authorization. In fact, if states were banned to use force in order to stop an on-going genocide where the UN has failed to do it, the rules on the prevention of genocide and the aim of the UN would be rendered meaningless, at least clearly at the tertiary level.

In arguing this way, I do not purport to end or resolve the whole debate on the use of force. For the purpose of this work, modesty demands to say that my arguments are based on interpreting the norms involved in good faith in light with the object and purpose of the norms on the prohibition of genocide and the Charter itself.

The measures suggested at the tertiary level (as at other levels in previous sections) are assumed to be susceptible of preventing genocide but they may need to be accompanied by the use of influence as a preventive means available to non-territorial states at all levels. This is an interesting notion which deserves some consideration in a separate section below.

6. The use of influence as means to prevent genocide at all levels

The aim for this section is to clarify the notion of influence as a means available to non-territorial states for the prevention of genocide. It is proceeded in three subsections. The first defines this notion. The second explains how to use it and the third discusses how to assess the capacity to influence.

6.1. Definition of influence

The ICJ used the notion of influence as one of the means available to non-territorial states for the prevention of genocide in other states but did not define that notion. This notion has also been used by the Security Council in more or less similar way but also without defining it.[978] Since no special meaning was given to it, it will be used here in its ordinary meaning. The Black's law

[978] See for instance Security Council Resolution 2076, Demanding the Immediate Withdrawal of "M23" Rebels from Key Congolese City, and the End To "Any And All" Outside Support, para. 10, available at <http://www.un.org> (visited on 05 June 2013). In this resolution, the Security Council called on "all relevant actors *to use their influence on the M23* to bring about an end to attacks".

dictionary defines influence as a power exerted over others.[979] That dictionary explains that to influence is to affect, modify or act upon by physical, mental or moral power, especially in some gentle, subtle and gradual way.[980] The Oxford dictionary also defines influence in more or less the same way. According to that dictionary, influence is an action exerted, imperceptibly or by indirect means, by one person or thing on another so as to cause changes in conduct, development, conditions, etc.[981] It is the capacity to have an effect on the character, development, or behaviour of someone or something, or the effect itself.[982] This power to influence may derive from ability, wealth, position etc.

Applying this meaning to the influence in the prevention of genocide, it is possible to say that the influence in the prevention of genocide is the power exerted by non-territorial states to a territorial state concerned or any other person likely to commit, or already committing genocide, to discharge its obligation to prevent genocide and refrain from acting in a way that may lead to genocide. This influence may derive from the ability or position of non-territorial states to take physical actions that may compel the states to change their plan/conduct. This may fall within what has been discussed in the previous sections. But the influential power may also derive from the wealth of non-territorial states as well as other political links between them and the states concerned. This needs attention below.

6.2. The use of influence to prevent genocide

There is no doubt; the use of influence with regard to the prevention of genocide is a novelty of the ICJ. It has not much support in literature. It is nonetheless essential to discuss its (potential) use in more or less concrete way.

Some states may depend on outside support to be able to function. That means that they may be under the full infusion of some non-territorial states that support them financially, militarily, logistically, or any other way. This is the same for non-state actors which may depend on outside support. Most of the time, those non-territorial states which support them in many areas have the

[979] Garner, A. Bryan (ed.), *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minnesota, 1999, p.779.
[980] Ibidem.
[981] Lesley, Brown, (ed.), *The New Shorter Oxford English Dictionary*, Vol. 1, Clarendon Press, Oxford, Oxford, New York, 1993, p. 1363
[982] "Influence". Oxford Dictionaries. April 2010. Oxford Dictionaries. April 2010. Oxford University Press, available at <http://oxforddictionaries.com/definition/english/influence> (visited on 12 April 2013).

capacity to influence them. They can do it in a good or bad way. Risks of genocide may be there even before the support. But states which support may help to take away the risks if they use the influence in a good way. On the other hand, if the supporters are passive or are active in influencing negatively, the influence can even make things worse by speeding up the genocide and by giving to states the ability to make it possible.

Hence, if the use of influence is a means to prevent genocide, non-territorial states need to use it in a good way, *i.e*, in a way that helps them to comply with their obligation to prevent genocide. This would logically imply to refrain from influencing them in a bad way (negative obligation). Moreover, there would be both the positive obligation to influence in a way that contributes to the prevention of genocide and a negative obligation not to influence states or other actors in a way that may help to violate the obligation to prevent genocide. For instance, the support (assistance) in other states should be accompanied with the obligation to ensure that the influence pertaining to that support is used in a way that does not make genocide possible. This can fit perfectly well at the primary level of prevention. Indeed, it may be assumed that if the influence is used in a good way, it may contribute to preventing the risks of genocide from developing.

Moreover, this influence can also work at further levels: secondary and tertiary. Concerning the influence that may be used at the secondary level, it has been extensively written how France had tremendous influence over the Rwandan government before the genocide started.[983] The influence derived from the support in various areas such as financial, military etc. It has been overwhelmingly affirmed that had France wished, it could have used its influence over Rwanda during the conflict, to prevent what later happened.[984] Among those writings, the French

[983] Gouteux, Jean Paul, *Un genocide Secret d"Etat, la France et le Rwanda*, 1990-1997, editions Sociales, 1998, Gouteux, Jean Paul, *Un Genocide sans Importance: La Francafrique au Rwanda*, 2e ed, Edition Tahir Party, 2001, Grúnfeld, Fred anfd Huijboom, Anke, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders*, Martinus Nijhoff Publishers, Leiden, 2007, Verschave, Francois-Xavier, *La Complicite de Genocide? La Politique de la France au Rwanda,* La Decouverte, Paris, 1994, Wallis, Andrew, *Silent Accomplice: The Untold Story of France's Role in Rwandan Genocide*, I. B Tauris, 2006, Des Forges, Alison, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, 1999, Dallaire, Romeo, *Shake Hands with the Devil, the Failure of Humanity in Rwanda,* Arrow Books, London, 2004, Organization of African Unity/African Union: Rwanda: the preventable genocide. Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, July 7, 2000 -- Addis Ababa, Ethiopia: OAU, 2000, available at <http://www.africa-union.org/official_documents/reports/report_rowanda_genocide.pdf> (visited on 24 June 2012), *La Mission d'Information de la Commission de la Défense Nationale et des Forces Armées et de la Commission des Affaires Etrangères sur les Opérations Militaires Menées par la France et d'Autres Pays et l'ONU au Rwanda entre 1990 et 1994, available at* <http://www.assemblee-nationale.fr/dossiers/rwanda/r1271.asp> (visited on 24 June 2012).

[984] Ibidem.

parliamentary commission on the French mission in Rwanda has noted that given the flagrant lack of progress toward democratisation, the French government should have asked itself on the coherence of its politics vis-à-vis Rwanda and that it should have convinced President Habyarimana to democratise the regime that was committing repeated human rights violations, while ensuring to him the indefectible military and diplomatic support.[985] On its turn, the International Panel of Eminent Personalities noted that "since the Habyarimana government remained a favourite recipient of foreign aid, and since no one demanded an end to the escalating incitement against the Tutsi,"[986] nothing would preclude Hutu radicals from believing that "they could get away with just about anything."[987] This Panel irresistibly concluded that "…until the genocide began, the French government was the closest foreign ally of a Rwandan government that was guilty of massive human rights abuses. Likewise, it has been observed that Serbian government "was in a position to exert enormous amount of influence over the Bosnian Serb forces."[988] And as the court affirmed it, Serbia should have used its influence over them to prevent genocide in Bosnia.[989]

At the tertiary level, influence can still be needed. The International Panel of Eminent Personalities noted with regard to France's capacity to influence the government of Rwanda to stop committing genocide that, as a matter of deliberate policy, it failed to use its *undoubted influence* to end such behaviour".[990]

The two examples (France-Rwanda and Serbia-Bosnia) show the undeniable capacity to influence the action of the person likely to commit genocide or already committing it. The

[985] *La Mission d"Information de la Commission de la Defense Nationale et des Forces Armées et de la Commission des Affaires Etrangeres, sur les Opérations Militaires Menées par la France, d"Autres pays et l"ONU au Rwanda entre 1990 et 1994, p. 360, available at* <http://www.assemblee-nationale.fr/dossiers/rwanda/r1271.asp> (visited on 24 June 2012).

[986] Organization of African Unity/African Union: Rwanda: the preventable genocide. Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, July 7, 2000, Addis Ababa, Ethiopia: OAU, 2000, para.10.2 available at <http://www.africa-union.org/official_documents/reports/report_rowanda_genocide.pdf> (visited on 24 June 2012),

[987] Ibidem.

[988] Gibney, Mark, "Genocide and State Responsibility", *Human Rights Law Review*, Vol. 7, No. 4, 2007, p.760-773, p.768.

[989] See Bosnia v. Serbia, para. 438.

[990] Organization of African Unity/African Union: Rwanda: the preventable genocide. Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, July 7, 2000, Addis Ababa, Ethiopia: OAU, 2000, para.10.30 available at <http://www.africa-union.org/official_documents/reports/report_rowanda_genocide.pdf> (visited on 24 June 2012).

question is whether the capacity to influence can only exist when it is axiomatic as it was in these two examples. This leads me to the examination of how the existence of influence can be assessed.

6.3. Assessing the capacity to influence

If it can be inferred from the ICJ interpretation that non-territorial states have the obligation to use influence as a means to prevent genocide at each level, how can it be assessed? As already seen before, the ICJ noted that in assessing this capacity, one needs to consider some parameters which may include the geographical distance, the political links. The uncertainties surrounding these parameters have been shown before, and they apply also here. For instance, though the geographical distance may indeed be useful to establish links between the non-territorial state and the state or other actors concerned, the reality on the ground shows that states far from the scene of events may be even much more influential than those which are nearer. This means that the position of a state may be more determinant. Furthermore, with regard to the political link, it is clear from the ICJ interpretation that where this link between a non-territorial state and the territorial state or other actor concerned exists, the obligation to prevent genocide requires it to use the influence in preventing genocide.

The understanding of this ruling may face some problems. Firstly, there is no indication on how the influence can be measured. Indeed, given the intangibility of influence, it is very difficult to set standards on assessing the influence. Secondly, this ruling might be understood to be limited to only where there is an established link between the non-territorial state and the territorial state or any other person concerned. And one might ask why this would also not be possible to other states that, though no existing link with the territorial state or any other person concerned, have the means to influence it by either establishing a relation with it solely for the prevention of genocide or using any other means to influence that state. In fact, when the ICJ ruled that Serbia had enormous influence over the Bosnian Serbs forces because of the link it had with them; it must be argued that it did not mean that no other states could have had influence on them. This has been also shown in literature that, though indeed Serbia had influence over the Bosnia Serbs forces, there were many other states that could have had influence but did not use it over the Bosnian Serb forces.[991] It may be highly difficult to assess how a state can be able to influence

[991] See for example Gibney, Mark, "Genocide and State Responsibility", *Human Rights Law Review*, Vol. 7, No. 4,

another when there are no existing ties between them but it may not just simply be said that no influence is possible in such a situation because the position of the state to influence may suffice for the state or the other persons to be influenced to count on the benefit from that state in the future.

Thirdly, the ruling of the court may be understood to mean only the use of influence over the state and any person likely to commit genocide or already committing it. This would exclude the possibility of the use of influence not over the person likely to commit or already committing genocide but to the one likely to contribute to preventing it from happening and preventing its continuation after it has started. For instance, a non-territorial state like the UK may not have been in a position to influence Bosnian Serb forces but over Serbia instead. Why wouldn"t it use it to convince Serbia to prevent genocide in Bosnia (by influencing the Bosnian Serb forces in that way). Likewise, supposing that a non-territorial state like the US did not have influence over the government of Rwanda before and during the genocide in Rwanda, it should have used the influence it had over the UN to prevent what happened. In fact, if the rule is to employ all necessary means to ensure that genocide does not happen, and the *influence* can be necessary to make genocide not happen, then it can be argued that using it wherever it is necessary to prevent genocide would play a bigger preventive role than how the ICJ has limitatively explained it.

6.4. Preliminary conclusions

Despite these challenges, it must be said that this novel idea of the ICJ is laudable and it may have a contribution to the prevention of genocide. This influence does not take away other measures shown in previous sections that non-territorial states may take to prevent genocide. It may be used together with them where necessary but also without them as the circumstances dictate. Using influence to prevent genocide at all levels may be a good means to prevent genocide. However, the indeterminacies surrounding that notion as explained above as well as the lack of practice in that area show the need to do more in its further development for it to be a more promising means of prevention of genocide. That further development is the best route for a better prevention of genocide through the use of influence. The ICJ and the ILC could be better placed to do that. The next question is about how this means to prevent as well as other means available to non-territorial states as discussed before are coordinated.

2007, p.760-773, p.768.

7. Coordination at all three levels of prevention in discharging the obligation of non-territorial states to prevent genocide[992]

As discussed in the previous sections, the obligation to prevent genocide is a collective one.[993] The ICJ indicated in the Bosnia v. Serbia judgment that the result of preventing genocide could have been achieved if several states had combined efforts, each complying with its obligation to prevent.[994] These efforts can be made individually, but could also take the form of cooperation by several states. Yet nowhere it was shown how the preventive measures to be taken by different actors (taken individually or collectively) can be coordinated. The question becomes then about how this obligation of all states, owed to all states, can be discharged in a coordinated way, in order to know who does what, when, how and where precisely.

Mark Toufayan has observed that the idea of a duty, and not merely a right, of not directly affected states to enforce compliance by a state with its obligations relating to genocide, overestimates the capacity of states in general to identify signs of imminent genocide and to employ measures to prevent human rights abuses.[995] He continued that such a duty may lead to anarchy if no institutional mechanisms are established or no existing structures are used to control the execution by all states of their duty to prevent.[996] Indeed, whether a preventive measure can be taken individually by a state or through cooperation, international law does not provide clear mechanism on how this should be coordinated. Coordination would resolve many problems involved in the prevention of genocide. For instance, it would help to know who has the capacity to take preventive measures in some specific situations. It would also help to avoid some duplication in taking some measures. In fact, if a state has already taken some measures, it

[992] I have chosen to use coordination in discharging this obligation because I found it more accurate and fitting with what has been treated before than to use allocation or distribution of obligation in case of shared obligations as some prefer to use. I found that it would not be accurate because the obligation of states is already there as already shown in previous sections and chapters. This means that it is not allocated or distributed at the moment the need to discharge it arises. It is there from the moment this obligation has been legally created. Therefore, the coordination in discharging that obligation looks at how this obligation is discharged not how it is distributed.

[993] Vashakmadze, Mindia, "Shared Responsibility for the Prevention of Genocide", SHARES Research Paper 14, 2012, p. 17, available at <www.sharesproject.nl> (visited on 26 February 2013).

[994] Bosnia v. Serbia, para. 430.

[995] Toufayan, Mark, "A Return to Communitarianism? Reacting to Serious Breaches of Obligations Arising under Peremptory Norms of General International Law Under the Law of State Responsibility and United Nations Law", *Canadian Yearbook of International Law*, Vol. 42, 2004, pp.197-251, p. 226.

[996] Ibidem.

might be better in some circumstances that other states take different measures. Another example is that this coordination would help to identify where international cooperation is needed and the form it can take. In fact, international cooperation in the prevention of genocide which takes its roots from the preamble of the Genocide Convention,[997] has not been clarified by that very convention as to how it is to be done concretely. In the preamble of that convention, it is explicitly noted that "in order to liberate mankind from such an odious scourge, international co-operation is required."[998] The ILC confirmed this requirement to cooperate to bring serious breaches of international law to an end,[999] but did not indicate the form of cooperation either. Article 41 of ILC draft articles on state responsibility also considers this co-operation essential. It states that "States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40".[1000] The latter article concerns serious breach by a State of an obligation arising under a peremptory norm of general international law.[1001] It (the ILC) justified this lack of indication by invoking the diversity of the circumstances which could be involved.[1002] There is nonetheless some indication where the ILC noted that both institutional and non-institutional kinds of cooperation can be envisaged provided that the means used are lawful.[1003]

Later, the ICJ also recognised that the combined efforts of several States, each complying with its obligation to prevent, might achieve the result averting the commission of genocide which the efforts of only one State were insufficient to produce.[1004] It thus reaffirmed the necessity of cooperation in discharging the obligation to prevent genocide. However, it did not show how this can be coordinated.

The point here is not to determine the details on the different kinds of cooperation. Instead, it is to show this gap in international law. This compels me to suggest a creation of an institution on the prevention of genocide that would coordinate these responsibilities. Such an institution would supervise and control the implementation of the obligation to prevent genocide by states

[997] It reads "Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required".
[998] See the Preamble of the Genocide Convention.
[999] See articles 40 and 41 of the ARSIWA.
[1000] See article 41(1) of the ARSIWA.
[1001] See article 40 of the ARSIWA.
[1002] See para 2 of the commentaries on article 41 of ARSIWA.
[1003] Ibidem.
[1004] See Bosnia v.. Serbia, para. 430.

(including the territorial states). It would also contribute to the clarification of some other means of prevention such as the use of influence as shown above. Moreover, the fact that the obligation to prevent genocide is owed to everybody, without any hierarchical coordination between the bearers, it may easily be breached by everybody. And this is a big challenge which weakens the prevention of genocide because if each state takes action (or should take it) in its way without any coordination, it is even difficult to know who breached what, when, how and where. Hence, though the rules on coordination are not the only needed for the prevention of genocide, they are indispensable for the prevention of genocide by states for the prevention to be possible (and of course effective). It can be therefore argued that there is a need of amendment of the Genocide Convention or an adoption of an additional protocol to it which would include a creation of an organisation for the implementation of the Genocide Convention and the customary law it reflects. That organisation could monitor the implementation of the obligation to prevent genocide and could coordinate the works of all actors involved in the prevention. This institution could be called the Organisation for the Prevention of Genocide (OPG). It should have the independence from states, the capacity and authority to investigate from early stages and to recommend appropriate measures to be taken at different levels. But a creation of such an institution may not be enough alone. It would also involve the creation of a fund for the prevention of genocide (FPG) that should be managed by the OPG and should take care of all issues related to the prevention of genocide. Without saying that this can guarantee the non-commission of genocide, it can certainly create a more favourable legal framework in the prevention of genocide.

If that is not done, the promise to prevent genocide by non-territorial states will remain shaky or "blank cheques" as it has appeared in different cases. It should be recalled that during the process to adopt the Genocide Convention, the Netherlands deemed it "important to carefully consider which stipulation could be accepted by a large number of states".[1005] This was because, as it continued, it "would regret if, in order to obtain a speedy result, a document were created which could not really enter into force".[1006] Apparently this suggestion has prevailed in the drafting of the Genocide Convention in that some relevant provisions like one related to the coordination

[1005] See Prevention and punishment of genocide, comments of governments on the draft prepared by the Secretariat, in document E/447 of 15 April 1948. Reproduced in Abtahi, Hirad, and Webb, Pilippa *The Genocide Convention: The Travaux Preparatoires*, Nijhoff, Leiden, 2008, p. 635.
[1006] Ibidem.

were not included. If that might have been a strategy needed by then to have somewhere to start from, it can validly be said that now after 65 years of the existence of that Convention, it would equally be regrettable if that Convention created using empty words (in order to be accepted by a large number of states) which practically resulted in empty outcome would remain unchanged.
In the meanwhile, the ILC and the ICJ (when the opportunity arises) may contribute to developing this area further in order to alleviate the acute gap on coordination in the prevention of genocide. Other researches are also needed to contribute to the clarification of that issue.

Conclusion

This chapter investigated whether international law permits and requires non-territorial states to prevent genocide outside their territories and where the answer was affirmative it investigated how it should be done *in concreto*. Doing this required first to confront this obligation to prevent genocide with the principle of the state sovereignty recognised in international law, in order to see whether the latter is not a barrier to the prevention of genocide by non-territorial states. It has been argued that since the popular sovereignty is at the centre and even the purpose of the state sovereignty, it counts more than the borders. States have the primary responsibility to protect their populations from genocide. Therefore, the opinion that sovereignty is not "merely the right to be undisturbed from without, but the responsibility to perform the tasks expected of an effective government,"[1007] is persuasive. This reasoning rejected the argument that "the preservation and stability of governments are the main values in international relations."[1008] The right to inviolability should be regarded as lost by a state…" in response to its own inactivity or incapacity and to the unassuaged needs of its own people."[1009] The argument that the surest means by which a state may avoid outside intervention is to recognize and itself ensure respect for fundamental rights and liberties in the territories under its jurisdiction,[1010] is valid. The absolute sovereignty is to be rejected with regard to genocide because it would mean to limit states from preventing genocide outside their boundaries and therefore permit states to commit

[1007] Deng, Francis et al., *op.cit*, pp xvii-iii.
[1008] Tesón, R. Fernando, *Humanitarian Intervention: An inquiry into Law and Morality*, 2nd edition, Transnational Publisher, Inc. Irvington-on Hudson, New York, 1997, p.153.
[1009] Deng, Francis et al., *op.cit,* pp xvii-iii.
[1010] Arbour, Louise, *The Responsibility to Protect as a Duty of Care in International Law and Practice*, High commissioner for human rights address to the Dublin's Trinity College on November 23, 2007, available at <http://www.ochcr.org> (visited on 18 May, 2011).

unchecked/unstoppable genocide. This would be inconsistent with the object and purpose of the rules on the prohibition of genocide which is to avoid the occurrence of genocide. However, since the actions by non-territorial states may not be unlimited, this chapter had also to examine what is legally required to states at each level (primary, secondary and tertiary).

At the primary level, it was argued that two categories of measures are necessary for the prevention of genocide by non-territorial states. These are the necessary legislation as well as other measures. For the necessary legislation, in addition to the legislation that prevent genocide on their own territories, non-territorial states also have the obligation to put in place legislation that can have effect on the prevention of genocide outside their territories as well. For instance, in addition to penalising the incitement to commit genocide, states should have laws that would enable them to prosecute and punish those who have committed it in their own states. Universal jurisdiction is necessary to give effect to such crimes wherever they may be committed. It was shown how the obligation to provide for the universal jurisdiction for genocide takes its source in customary international law. This applies to genocide and related crimes committed outside a state's boundaries and can have effect on the prevention of genocide because it dissuades potential offenders. No contradiction of this international customary rule with article VI of the Genocide Convention exists because the latter is not considered to be exhaustive as the subsequent practice has proven it. The second category of measures which concern measures other than legislative include political, social-economic, cultural, educational, security, etc. It was understood that they may take the form of negative or positive obligation. For the form of negative obligation, states are required to refrain from taking part in activities that can create tension between groups in other states (that may lead, soon or late, to genocide). As for the form of positive obligation, it was argued that states are permitted to take actions in assisting other states to build a stable environment that does not favour the development of the process to genocide.

At the secondary level of prevention it was also focused on two categories of measures. The first category was about implementing the laws on the punishment of some crimes that may lead to genocide which means more specifically to apply the principle of universal jurisdiction. Despite the challenges in the process, it was argued that states are not only permitted but also have the obligation to search and bring to justice people who commit crimes such as the incitement to commit genocide, the conspiracy to commit genocide and hate speech that falls in the acts of

crimes against humanity. It was argued that punishing these crimes on time (before genocide happens) can have preventive effect and that was the idea to put them in the Genocide Convention. The other category is about other measures. It was argued that non-territorial states have the obligation not to be involved in the activities that may fuel tension among groups in other states and that they have the obligation to take various positive actions in the prevention of genocide.

At the tertiary level, robust actions which may involve the use of force are needed to end genocide. It was examined whether this could be done under the doctrine of humanitarian intervention but it was found that the state of debate on this doctrine does not provide a definite answer on that. However, it has been noticed that the arguments of the opponents of this doctrine are seemingly the ones that prevail today. One of the reasons advanced by them is that humanitarian intervention as defined today may give room to abuses because states could then invoke any human rights to forcibly intervene in other states. A recourse to the commission of genocide as a possible ground to justify and require the use of force has been made. It was argued that a progressive interpretation of the rules on the prohibition of genocide could have a room for the use of force to end genocide because of the peremptory nature of its prohibition. Where this argument would be not convincing enough, it was argued that the principle of necessity may preclude the wrongfulness of use of force in case non-territorial states do it in order to save people under the peril of genocide when this is the only available way these people can be saved.

Furthermore, the novel notion of influence as means to prevent genocide at all levels was discussed. It was argued that it is indeed a new (or at least newly expressed) means of prevention which can be used at different levels of prevention. The challenges it may face have also been identified. Among them there is a lack of means to assess it. Also there is no one to assess it. That is why in the last section on the coordination in discharging the obligation to prevent genocide it has been suggested that there is a need to create an international institution for the prevention of genocide. This institution would not only assess the influence but would coordinate how this obligation ought to be discharged in general. This is not to ignore the role that the UN could presumably have in the prevention of genocide. This role will be discussed in the next chapter.

Chapter VII. The United Nations and the obligation to prevent genocide under international law

"There can be no more important issue and no more binding obligation than the prevention of genocide",

Indeed, this may be considered one of the original purposes of the United Nations. The "Untold Sorrow" which the scourge of war had brought to mankind, at the time when the organization was established, included genocide on a horrific scale. The words "Never again" were on everyone's lips," Kofi Annan.[1011]

Introduction

The three previous chapters mainly discussed the obligation to prevent genocide in international law with a specific focus on what states are obligated to do in preventing genocide. Because of the nature of this obligation and the actions needed at different levels of prevention as well as the challenges involved, the need to see the role of the United Nations in the prevention of genocide became pressing at several occasions. This is also because the UN has been mentioned in the Genocide Convention. Indeed, while article I of the Genocide Convention provides for the obligation vis-à-vis contracting parties to prevent and punish genocide, article VIII provides for recourse to the UN for preventive actions. This article states that "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III".[1012]

An analysis of the language used in these two articles read in the context of the Genocide Convention as a whole as well as other related sources of international law is very essential in order to know whether the United Nations has an obligation to prevent genocide and in the affirmative to know the actions it should take in complying with that obligation. Other questions linked to this need to be answered as well. The first is whether the obligation to prevent genocide by the UN (if any) is subjected to prior information by contracting states about the risk,

[1011] Annan, Kofi, "Genocide is a Threat to the Peace Requiring Strong, United Action", key note speech to the Stockholm International Forum on Preventing genocide, Press Release, SG/SM/9126, 26/01/2004.
[1012] See article I and VIII of the Genocide Convention.

imminence or occurrence of genocide. The second is related to the territorial scope of that obligation (if any). The third is related to the organs of the UN which are competent to take action to prevent genocide at each level and the actions they may and should take.
To find answers to these questions, this chapter is divided in 3 sections. The first section will treat the question whether the UN has the obligation to prevent genocide. While the second section will discuss the territorial scope of the obligation to prevent genocide by the UN, the third will investigate what organs of the UN are competent to take preventive measures and what kinds of measures they can and should take to prevent genocide at each level of prevention.

1. The obligation of the United Nations to prevent genocide

This section will first look at the drafting history of art VIII of the Genocide Convention in order to understand what that history could mean to the obligation to prevent genocide. This will be done while also examining how this article has been interpreted later in literature (1.1). Other possible legal sources will be examined in order to investigate what could be the basis of the UN obligation to prevent genocide (1.2). The conclusion will be drawn that the UN has the obligation to prevent genocide under general international law, enhanced by the purposes and general competence of the UN under the Charter. It will also be examined whether the obligation to prevent genocide by the UN comes into existence only when it is called upon by states (1.3).

1.1. Drafting history of article VIII and how it was interpreted later

To show what article VIII of the Genocide Convention means to the prevention of genocide by the UN, it is worth going back to its drafting history. That history shows different views of delegates of states. Some of those delegates have urged the deletion of this article whereas others have supported it. For instance, the United States, the United Kingdom and Belgium did not support this proposal and suggested that article VIII be dropped because its concerns were already dealt with in the Chapter VII of the UN Charter.[1013] For them, what is permitted under the Charter should not be permitted in different terms in a convention.[1014] In contrast, the Soviet Union's delegate argued that any act of genocide is a threat to the international peace and

[1013] UN Doc. A/C.6/236.
[1014] Ibidem.

security and as such should be dealt with under chapters VI and VII of the Charter;[1015] the obligation to bring a case of genocide to the attention of the Security Council would ensure that States did not evade their obligations.[1016]

After a long debate, in which the article was deleted and reintroduced,[1017] article VIII was finally voted for.[1018] For some, although this article was unnecessary because the powers it conferred to the Security Council were already conferred to it by the Charter, it was essential to have this provision in the Genocide Convention so that the convention could not be understood to imply recourse only to the ICJ.[1019]

After this article was adopted, comments, critics and support have continued. For instance, Nehemiah Robinson criticized the article for being insignificant and observed that its "low value" was shown by the fact that it was originally deleted.[1020] Likewise, Benjamin Whitaker wrote that article VIII adds nothing new to the convention.[1021] Their views were that this article added nothing to what was already provided for by the Charter.

Others have been in favour of this article. Among them, Hans-Henrich Jeckeck argued that article VIII which allows for recourse to the organs of the UN, presents an obstacle to any state that might invoke article 2(7) of the Charter to claim that genocide is within its domestic jurisdiction.[1022] Similarly, Nicodeme Ruhashyankiko, Special Rapporteur on human rights adds that:

> "Article VIII of the convention, while adding nothing to the Charter, is of some importance in that it states explicitly the right of States to call upon the United Nations with a view to preventing and suppressing genocide and the responsibility of the

[1015] UN Doc. A/C.6/SR.101.

[1016] Ibidem.

[1017] For a detailed drafting history and the comments thereof, see Ruhashyankiko, Nicodeme, "Study of the Question of the Prevention and Punishment of the Crime of Genocide", Sub-Commission on the Promotion of Human Rights, 1978 , UN Doc. E/CN.4/Sub.2/416, paras. 284-298.

[1018] For more details on the drafting history, see Schabas, A.William, *Genocide in International Law, the Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, pp. 533-539.

[1019] Schabas, A.William, *Genocide in International Law, the Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, p. 538.

[1020] Robinson, Nehemiah, *The Genocide Convention: A commentary*, New York: Institute of Jewish Affairs, 1960, p. 90.

[1021] Whitaker, Benjamin., "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide", UN Doc. E/CN.4/sub.2/1985/6, para. 66.

[1022] Hans-Heinrich, Jescheck, "Genocide", in Rudolph Bernhardt (ed.), Encyclopedia of Public International Law, Vol. II, Amsterdam: North-Holland Elsevier, 1995, pp.541-4, p. 542.

> competent organs of the United Nations in the matter. Furthermore….it is the only article in the convention …which deals with the prevention of genocide, referring to the possibility of preventive action by the United Nations called upon by Parties to the Convention…such action by the UN organs is action of a particularly humanitarian nature, the need and justification for which should not be underestimated. It would be desirable for the organs of the UN, in pursuance of article VIII of the Convention, to exercise their powers in this field actively".[1023]

This longstanding difference of opinions on the value of article VIII results in doubt on whether the Genocide Convention provides for a stand-alone legal basis for action by the UN to prevent genocide.

1.2. The legal basis for the UN obligation to prevent genocide

This subsection discusses the legal basis for the UN obligation to prevent genocide by examining whether the Genocide Convention could be a stand-alone legal basis for that obligation or whether the legal basis for that obligation has to be found in general international law (1.2.1). The purposes and general competence of the UN will also be discussed in order to see what role they play in the determination of the legal basis for the UN obligation to prevent genocide (1.2.2).

1.2.1. Does the UN obligation to prevent genocide derive from the Genocide Convention as a stand-alone legal basis or from general international law?

The UN is not party to the Genocide Convention. Because of that, it could be understood not to be bound by the obligation created by it.[1024] However, it has been argued that the duty imposed to all states under article I of the Genocide Convention and customary law extends to the UN as the organisation of the existing inter-state society.[1025] The ICJ has confirmed that the rights and

[1023] Ruhashyankiko, Nicodeme, "Study of the Question of the Prevention and Punishment of the Crime of Genocide", Sub-Commission on the Promotion of Human Rights, 1978, UN Doc. E/CN.4/Sub.2/416, para. 304.
[1024] See article 34 of the VCLT. The content of this article was repeated (with adjustment) in article 34 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, adopted on 21 March 1986. This Convention is not yet in force. However, some of the rules it contains reflect customary international law.
[1025] Toufayan, Mark, "A Return to Communitarianism? Reacting to Serious Breaches of Obligations Arising under Peremptory Norms of General International Law Under the Law of State Responsibility and United Nations Law", *Canadian Yearbook of International Law*, Vol. 42, 2004, pp.197-251, p. 235.

obligations enshrined in the Genocide Convention are rights and obligations *erga omnes*[1026] and it can be argued that the UN has become the regime for the enforcement of obligations *erga omnes*.[1027] The UN is considered by some as a mechanism of enforcement without which the prohibition of genocide would be a dead letter and would continuously be breached.[1028] Like other conventions of humanitarian character, the Genocide Convention must be deemed capable of creating not only rights but also obligations both for third states and international organisations.[1029] As already noted earlier in this work, it has been confirmed by the ICJ in its advisory opinion on reservation to the Genocide Convention that the principles underlying the convention are recognised by civilised nations as binding on States even without any conventional obligation because contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest.[1030]

Furthermore, on the basis of the peremptory character of the rules enshrined in the Genocide Convention, they apply *mutatis mutandis* to intergovernmental organisations.[1031] That is why arguments have been made that actions of the UN in relation to genocide should be seen as ensuring compliance with the obligations to prevent genocide that are imposed to the UN.[1032]

However, like with regard to third states to the Genocide Convention, it cannot be said that it is the Genocide Convention that technically binds the UN to prevent genocide but the customary rules it contains. Giorgio Gaja has argued that when the UN does nothing to prevent genocide, it infringes its obligation to prevent genocide under general international law.[1033] He referred to the ICJ ruling that a state in a position to influence "effectively the action of persons likely to commit, or already committing genocide"[1034] would have to "take all measures to prevent genocide which were within its powers".[1035] He concluded that this would reasonably apply to an

[1026] Bosnia v. Serbia case, para. 31.
[1027] Toufayan, Mark, *op.cit*, p. 237.
[1028] Idem, p. 241. See also Toope, J. Stephen, "Does International Law Impose a Duty Upon the United Nations to Prevent Genocide"?, *McGill Law Journal*, Vol. 46, 2000, p. 187-194.
[1029] Ibidem.
[1030] Reservation to the Convention on Genocide, Advisory Opinion: I.C.J. Reports1951, p. 15-30.
[1031] Toufayan, Mark, *op.cit*, pp. 238-239.
[1032] Gaja, Giorgio, "The Role of the United Nations in Preventing and Suppressing Genocide", in Gaeta Paula (Ed.), *The UN Genocide Convention, A Commentary*, Oxford University Press, 2009, p. 405. See also Toufayan, Mark, p. 251.
[1033] Gaja, Giorgio, *op.cit*, pp. 405-406.
[1034] Bosnia v. Serbia case, para. 430.
[1035] Ibidem.

international organisation in relation to general international law.[1036] Similarly, Olivier De Schutter has argued that human rights are qualified as "general principles of law recognized by civilized nations"[1037] and concluded that "international organisations, as subject of international law, must comply with general public international law in the exercise of their activities..."[1038] Also, though not writing specifically about genocide, André de Hoogh has argued that "…the United Nations is also bound by the rules of universal customary law."[1039] The International Court of Justice has confirmed that general international law is a source of an international obligation that binds international organisations. It said in its opinion on the interpretation of the Agreement of 25 March 1951 between the WHO and Egypt that:

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[1040]

However, having the obligation is one thing and having the competence to act is another as it will be explained next.

1.2.2. The UN obligation to prevent genocide reinforced, enhanced, confirmed and enabled by the purposes and general competence of the United Nations enshrined in the Charter

The Charter of the UN was referred to in article VIII of the Genocide Convention as an instrument which could serve as a basis for taking appropriate actions to comply with the obligation to prevent genocide which exists under general international law. That is why it is said that that article did therefore not give extra powers to the UN. The reference to the Charter by article VIII of the Genocide Convention may be seen as evidence that a general rule to prevent genocide exists and that the Charter is an instrument that can materialise it.[1041] If that were not

[1036] Gaja, Giorgio, *op.cit*, p. 405.

[1037] De Schutter, Olivier, "Human Rights and the Rise of International Organisations: The logic of Sliding Scales in the Law of International Organisations", in Wouter Jan, et al., (eds.), *Accountability for Human Rights Violations in International Organisations*, Intersentia, Antweerp-Oxford-Portland, 2010, p. 72.

[1038] Ibidem.

[1039] De Hoogh, André, *Obligations Erga Omnes and International Crimes, A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, Kluwer Law International, The Hague/ London/ Boston, 1996, p. 104.

[1040] Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (International Court of Justice, 20 December 1980) (I.C.J report 1980 p. 73), para. 37.

[1041] This is not to say however that it is article VIII that creates the obligation to prevent genocide. Robinson has argued that the adjective "appropriate" used in article VIII of the Genocide Convention does not mean that the

the case, it may arguably be said that there would have been no reason to refer to the Charter. Article VIII and the obligation of the UN to prevent genocide fit well within the purposes of the UN.[1042] Indeed, the Charter contains human rights provisions which support the argument that the prevention of genocide by the UN though not explicitly mentioned in the Charter can be implied from them to reinforce the binding obligation to prevent genocide. Among them, article 1(3) states that the Organization is mandated "to achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms ..."[1043] Similarly, as required by article 55 of the Charter, "the United Nations shall promote: ... (c) universal respect for, and observance of human rights and fundamental freedoms for all...".[1044] Furthermore, among other things, in the preamble of the Charter, the people of the United Nations engaged themselves to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person… and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained…"[1045] Not only sometimes genocide happens in a context of wars but even where it may happen in peace time, it may cause as much sorrow to mankind as war may do. This may make it be among those odious scourges the United Nations are determined to save the succeeding generations from suffering.

The provisions of the Charter mentioned above are obligations that emanate from the purposes of

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organs of the UN may do more than they are authorized to do under the Charter because the Convention does not confer upon it additional powers, as regards the kind of action. "Appropriate" action is action within the framework of the general competence of the organs and reference to "action under the Charter" means that it relates to the powers these organs possess under the Charter. See Robinson, Nehemiah, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 98.

[1042] This view is supported by the commentary on article VIII in the draft prepared by the Secretary-General: preventive action can be taken by the United Nations on the basis of the general competence of the United Nations under the Charter applied in a particular case of genocide. See Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes, pp. 411-412 cited by Ruhashyankiko, Nicodeme, "Study of the Question of the Prevention and Punishment of the Crime of Genocide", Sub-Commission on the Promotion of Human Rights, 1978, UN Doc. E/CN.4/Sub.2/416, para. 295.

[1043] See article 1 para. 3 of the Charter of the United Nations, available at <http://treaties.un.org> (visited on 10 September 2012).

[1044] See article 55 of the Charter of the United Nations, available at <http://treaties.un.org> (visited on 10 September 2012).

[1045] See preamble of the Charter of the United Nations. See also Stone Julius, *Aggression and World Order, A critique of United Nations Theories of Aggression*, Stevens &Sons Limited, London, 1958, p. 43. He noted that the purposes of the UN include the respect of treaties and general international law.

the UN which include saving people from suffering from grave human rights violations. On this same question whether human rights obligations are contained in the Charter, referring to mainly its preamble as well as articles 55 and 56, Ian Brownlie has argued that they do and that they create legal obligation under the UN Charter.[1046] The ICJ also seems to have given an affirmative answer to that question as well. In the advisory opinion in the Namibia case, the ICJ observed that: "…to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[1047] The ICJ noted the same in the case concerning the US Diplomatic and Consular Staff in Teheran that "…to wrongfully deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations."[1048] Some scholars have drawn from these instances to argue that the court has accepted that the human rights provisions of the Charter contain binding obligations and that they may be interpreted in light of subsequent human rights instruments adopted by the United Nations.[1049]

Arguably, in practice the UN has not considered itself as having no obligation to prevent genocide. For instance, Boutros Boutros-Ghali who was the UN Secretary-General during the Rwandan genocide challenged the Security Council, saying it was afraid to use the word "genocide" in presidential statements and resolutions because this would have required it to prevent the crime being committed.[1050] His successor Kofi Annan went to Rwanda in 1998 to acknowledge that the international community and the UN failed Rwanda at the time of evil.[1051] In his action plan of 2004, Kofi Annan again noted that "neither the United Nations Secretariat,

[1046] See Brownlie, Ian, *Principles of Public International Law*, 7th ed., Oxford University Press, New York, 2008, pp. 555-556.

[1047] Legal Consequences for States of the Continued Presence of South African Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para. 131, available at <www.icj-cij.org> (visited on 10 September 2012).

[1048] United States Diplomatic and Consular Staff in Tehran, Judgment, 1. C. J. Reports 1980, para. 91, available at <www.icj-cij.org> (visited on 10 September 2012).

[1049] See for example Kamminga, T. Menno, *Inter-State Accountability for Violations of Human Rights*, University of Pennsylvania Press, Philadelphia, 1992, p. 75-76.

[1050] Schabas, A. William, *Genocide in International Law: the Crimes of Crimes,* Cambridge University Press, Cambridge, 2000, p. 477.

[1051] Barnett, Michael, *Eyewitness to a Genocide, the United Nations and Rwanda*, Cornell University Press, Ithaca and London, 2002, p.154.

nor the Security Council…. paid enough attention to the gathering signs of disaster. Still less did we take timely action."[1052] Likewise, the UN independent inquiry on the actions of the UN in the 1994 Rwanda genocide concluded that the UN failed in its obligation to prevent that genocide.[1053] Also, in his 2009 report on the situation in the North Kivu, the Special Adviser on the prevention of genocide wrote that his office "acts on the premise that the responsibility of preventing genocide and related atrocities lies with the United Nations system as a whole, including the Security Council and the Secretariat."[1054] Several other reports and writings have reached the same conclusion.[1055] Also, in the November 2012 report of the Secretary-General's Internal Review Panel on the United Nations in Sri Lanka, it was concluded that the "UN system failed to meet its responsibilities to protect civilians."[1056] More particularly, the report pointed the finger to the failure of the Secretariat, the members of the Security Council and the Human Rights Council. Though this report is not about the prevention of genocide as such and had no mandate to establish if genocide was committed in Sri Lanka, the statement of the Secretary-General does confirm that the UN has an obligation towards humanity to protect it "from harm" in which the protection of people from genocide finds its place. He said: "Our obligation to all humanity is to overcome our setbacks, learn from our mistakes, strengthen our responses, and act meaningfully and effectively for the future. These principles and objectives drove me to

[1052] United Nations Secretary-General Kofi Annan's Action Plan to Prevent Genocide, Press Release SG/SM/9197 AFR/893 HR/CN/1077, Geneva, 07 April 2004, available at <http://www.un.org> (visited on 31 January 2012).

[1053] Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, section III.5, available at <http://www.un.org> (visited on 16 September 2012).

[1054] Report of the Special Adviser of the Secretary-General on the Prevention of Genocide on his mission to the Great Lakes region from 22 November to 5 December 2008 with respect to the situation in North Kivu, 5 March 2009, para. 3 of the Summary, available at <http://www.un.org> (visited on 16 September 2012).

[1055] See for example *La mission d"information de la commission de la defense nationale et des forces armées et de la commission des affaires étrangeres, sur les opérations militaires menées par la France, d"autres pays et l"ONU au Rwanda entre 1990 et 1994,* The Parliamentary commission of inquiry regarding the events in Rwanda, Belgian Senate Session of 1997-1998, December 6 1997 available at <http://www.senate.be/english/index.html> (visited on 16 September 2012) and the Organization of African Unity/African Union: Rwanda: the preventable genocide. Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, July 7, 2000 --Addis Ababa, Ethiopia: OAU, 2000. See also Dallaire, Romeo, *Shake Hands with the Devil, the Failure of Humanity in Rwanda,* Arrow Books, London, 2004, Des Forges, Alison, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, 1999.

[1056] Report of the Secretary-General's Internal Review Panel on the United Nations in Sri Lanka released by the Secretary-General of the UN on the 14th November 2012, paras 75- 80, available at <http://www.un.org> (visited on 15 November 2012).

establish the Panel and they will guide us as we take forward its outcomes."[1057] These principles that he referred to were also mentioned in the report in which it was concluded that "events in Sri Lanka mark a grave failure of the UN to adequately respond to early warnings and to the evolving situation during the final stages of the conflict and its aftermath, to the detriment of hundreds of thousands of civilians and in contradiction with the principles and responsibilities of the United Nations."[1058] In the same circumstances, the report would notice the same failure of the UN if genocide was committed in Sri Lanka.

Moreover, it may be said that without the obligation of the UN to prevent genocide, that obligation would have little meaning: although states are primarily obligated to prevent genocide, in many cases they may not easily prevent it without either the authorization or the involvement of the UN. At this level, it may be said that the obligation to prevent genocide is imposed to the UN by general international law because the principles underlying the prohibition of genocide in international law are customary rules and that it is enhanced and confirmed by the purposes and general competence of the UN as enshrined in the Charter of the UN. In fact, given the horrors that preceded the creation of the UN, it would have been a fundamental mistake to create an organization which would have the responsibility to prevent wars without having the same responsibility to prevent genocide. And even where it could not be established that that was the intention of the framers of the Charter, I would join Tesón who has argued that "international treaties, especially the UN Charter, should be interpreted in accordance with present purposes and expectations in the international community."[1059] I argue that preventing genocide falls squarely within the goals of the UN. If a contrary interpretation were the one to prevail, then there would be an extremely urgent necessity to reconsider the Charter to make it clear that the prevention of genocide independently falls within the purposes of the UN and that the UN is consequently bound by it. Further precisions will be given in a section on the competent organs of the UN and the actions they can take to prevent genocide and the temporal scope thereof. Before that, there is a need to first answer the question whether the UN is relieved of its

[1057] Statement of the Secretary-General on Internal Review Panel Report on Sri Lanka, 14 November 2012, available at <http://www.un.org> (visited on 15 November 2012).

[1058] Report on Sri Lanka, para. 80.

[1059] Téson, R. Fernando, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, Transnational Publisher, Inc. Irvington-on Hudson, New York, 1997, p. 154. See also Zimmermann, Andreas, "The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?" in Fastenrath, Ulrich et al., *From Bilaralism to Community Interest: Essays in Honor of Simma, Bruno* Oxford University Press, Oxford, 2011, pp. 634-643.

obligation to prevent genocide if states do not call it upon to take actions thereof.

1.3. Is the obligation of the UN to prevent genocide triggered only if called upon by states?

During the discussion on the drafting of article VIII of the Genocide Convention, the language of that article as far as calling upon the UN is concerned was not clarified. However, there have been some discussions on who should have the obligation to report the genocide being committed to the competent organs of the UN. Indeed, Raphael Lemkin and V. Pella Vespasian who were consulted by the Secretariat as experts suggested that it should be a duty of the Secretary-General of the United Nations, because the governments might hesitate to do it themselves.[1060] Yet, others said that this suggestion would be a violation of the Charter of the United Nations because it did not attribute that power to the Secretary-General.[1061]

The initial draft of article VIII by the Secretariat contained a paragraph which provided that parties "shall do everything in their power to give full effect to the intervention of the United Nations". At the urge of the Netherlands this was eliminated because as the Netherlands observed, this had a little real meaning.[1062] Robinson later criticised this deletion because he found the deleted paragraph clearer than the new one and he observed that there is a lack of clearness on the obligation of states to call upon the competent organs of the UN to take action in case of genocide.[1063] In my view, however, I find the Dutch position tenable because this paragraph would still add nothing to the language used that states may call upon the competent organs of the UN to take action. This paragraph was rather a further step to be taken after the UN has decided to intervene and not at the level of calling it upon. So, if the first paragraph asked states to call upon competent organs of the UN, there is no reason to say in another paragraph that states will do everything to give effect to the intervention of the UN because this follows from article 25 of the Charter for example. Not considering that initial draft makes sense.

However, the language used in the final article is not less vague. It does not indicate whether the

[1060] UN DOC. E/447, p.46.

[1061] Ibidem.

[1062] See Prevention and punishment of genocide, comments of governments on the draft prepared by the the Secretariat, in document E/447 of 15 April 1948. See also Abtahi, Hirad, and Webb, Pilippa *The Genocide Convention: The Travaux Preparatoires*, Nijhoff, Leiden, 2008, p. 638.

[1063] Robinson, Nehemiah, *The Genocide Convention*, *A Commentary*, published by the Institute of Jewish Affairs, 1960, p. 96.

action of the UN is conditioned to a prior call by states parties. As was also noticed by Robinson, what is clear here is that this article grants to the contracting parties to the convention, the right to call upon the organs of the competent organs of the United Nations to take action,[1064] but does not say anything on whether or not the action of the UN is conditioned to a prior call of contracting parties. This right has indeed been used with express reference to article VIII of the Genocide Convention by the US Secretary of State Colin Powell while initiating in the Security Council, the creation of a commission on Darfur.[1065] He said that he was acting pursuant to that article and the commission was launched following this initiative.[1066] But in no way he indicated that the UN could only do that upon the call by the United States as contracting state to the Genocide Convention.

There is no basis for a claim that a prior request to the UN by states is required before the UN can act. If the UN has the obligation to prevent genocide it rather follows that it should act *proprio motu* rather than making itself dependent on information from whomever.

1.4. Preliminary conclusions

In this section, it is concluded that since the rules on the prohibition of genocide are of universal customary law, they create the obligation to prevent genocide not only for states but also for the UN as an international organisation. This obligation of the UN is reinforced, enhanced, confirmed and enabled by the purposes and general competence of the United Nations enshrined in the Charter. It is not article VIII of the Genocide Convention (which refers to the UN) that confers to the UN the power to prevent genocide.[1067] Yet, that fact does not make that article irrelevant as some writers have argued. Article VIII does not create new powers of (organs of) the UN as such, but it refers to the instrument that gives the powers to the UN which may include the prevention of genocide. There was no need to reproduce all the provisions that are relevant to the prevention of genocide in the Genocide Convention and the reference to the Charter was considered sufficient in this regard. In complying with that obligation, the UN does not have to

[1064] Robinson, Nehemiah, *The Genocide Convention*, *A commentary*, published by the Institute of Jewish Affairs, 1960, p. 96.

[1065] Schabas, A. William, *Preventing Genocide and Mass Killing: The Challenge of the United Nations*, Report published by the Minority Rights Group(MRG), 2006, p. 16, available at <http://www.minorityrights.org> (visited 25 September 2012).

[1066] Ibidem.

[1067] See Robinson, Nehemiah, *The Genocide Convention: A commentary*, New York: Institute of Jewish Affairs, 1960, p. 98.

first be called upon by states. This would be contrary to the UN being established as organisation to implement common objectives. Furthermore, the Charter provides the procedures/competence for its functioning and operation and it does not require prior information by states before it can act. The actions of the UN will be discussed further in other sections of this chapter related to the competence of the organs of the UN to take action in the prevention of genocide. Before that, the territorial scope of the UN obligation to prevent genocide will be first examined in next section.

2. The territorial scope of the obligation to prevent genocide by the UN

It will be examined here whether or not the actions of the competent organs of the UN may be limited to the signatories of the Genocide Convention and parties to the Charter of the UN or whether under the obligation to prevent genocide, the competent organs of the United Nations are allowed to take action in the territory of a State which is party to the Convention or to the Charter or to both.

In the first draft of the Genocide Convention that was prepared by the Secretary-General, paragraph one of the text related to article VIII of the Convention read as follows:

> "Irrespective of any provisions in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes…"

This formulation suggested that the competent organs of the UN take actions to prevent genocide in any part of the world, but this paragraph was amended later and there is no clear indication on the reasons that pushed the drafters to remove the "in any part of the world" formulation. This problem on whether the UN organs were allowed to take measures in non-parties of the Genocide Convention remained and it was raised in further discussions of the ad hoc Committee.[1068] To solve it, as was later noted, it was said that the solution to the problem must be looked for in the provisions of the Charter which gave the General Assembly and the Security Council competence in respect of matters affecting international peace and security and human

[1068] See Robinson, Nehemiah, *The Genocide Convention: A commentary*, New York: Institute of Jewish Affairs, 1960, p. 96.

rights to which there could be no territorial limits.[1069]As was noted by Robinson, these provisions include article 2(6) which provides that "the organization shall ensure that states which are not members of the UN act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security.[1070] Article 10 also did not place any limitation to the General Assembly on the discussions and recommendations. This article gives the General Assembly the possibility to discuss matters related to violations of human rights which may include situations of genocide. Similarly, chapters VI, VII, VIII and XII of the Charter do not place any limitation to the Security Council in dealing with matters related to the maintenance of international peace and security.[1071] Also, according to article 99 of the Charter of the UN, the Secretary-General of the UN, without any territorial limitation, may bring to the attention of the Security Council, any matter which may threaten the international peace and security.[1072]

From this, Ruhashyankiko deduced that it follows that an organ of the United Nations would have the right to take action to prevent genocide even in the case of states members or non-members of the UN which were not parties to the Genocide Convention. However, as this commentator noted, such action would not mean that the convention was binding on States which were not parties to it, but would simply be an application of the general powers of United Nations organs in the specific case of genocide,[1073] and there is apparently no conflict between the two instruments on this. This view by the mentioned commentators seems to be plausible and there is no controversy among writers on this.

It can therefore be safe to say that the Charter of the UN which was referred to by article VIII of the Genocide Convention provides for a mechanism through which genocide can be prevented

[1069] Ibidem. See also Ruhashyankiko, Nicodeme, "Study of the Question of the Prevention and Punishment of the Crime of Genocide", Sub-Commission on the Promotion of Human Rights, 1978, UN Doc. E/CN.4/Sub.2/416, para. 296.

[1070] See article 2(6) of the charter of the UN. See also commentary by Robinson, Nehemiah, *The Genocide Convention: A commentary*, New York: Institute of Jewish Affairs, 1960, p. 96. For more about article 2(6) see Simma, Bruno et al. (eds.), *The Charter of the United Nations, A Commentary*, 3rd ed., Volume I, Oxford University Press, Oxford, 2012, pp. 254-279.

[1071] See Robinson, Nehemiah, *The Genocide Convention: A commentary*, New York: Institute of Jewish Affairs, 1960, p. 96-97.

[1072] See article 99 of the Charter and the commentary by Robinson, Nehemiah, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960, p. 97.

[1073] Ruhashyankiko, Nicodeme, "Study of the Question of the Prevention and Punishment of the Crime of Genocide", Sub-Commission on the Promotion of Human Rights, 1978, UN Doc. E/CN.4/Sub.2/416, para. 296.

anywhere by competent organs of the United Nations. This alternative may serves as a solution on the difficulties related to the hesitation that states parties to the UN and/or to the Genocide Convention, may have on the prevention of genocide in states non-parties to the Genocide Convention. However, as will be shown in the next section, some conditions might have to be fulfilled before the competent organs can take action.

3. The competence of organs of the United Nations to prevent genocide and when and how they can act

Article VIII of the Genocide Convention does not specify which UN organ is competent. There are six principal organs of the UN: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat.[1074] The question here is which of these organs are competent to take actions to prevent genocide and which actions they may take. It is therefore opportune to examine organ by organ to show the competence of each (if any) in the matter. However, since there is no practical use to discuss an organ which is no longer operational, the Trusteeship Council will not be discussed. Each subsection will correspond to each of the five organs.

3.1. The Security Council

3.1.1. Does the Security Council have the competence to prevent genocide?

Article VIII of the Genocide Convention referred to competent organs of the United Nations which can take actions in accordance with or in reference to the Charter of the United Nations. As already argued earlier, it is not this article which creates the competence of the UN. It presupposes that the UN is competent to prevent genocide. To be competent means to have due legal authority to deal with a particular matter.[1075] The Security Council's competence to prevent genocide can be based on articles 1(3), 55, and 24 among others. Articles 1(3) mandates the Organization "to achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms..."[1076] Article 55 states that "the United Nations shall promote: ... (c) universal respect for, and observance of human rights and fundamental freedoms

[1074] See UN Charter.
[1075] Garner, A. Bryan (ed.), *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minnesota, 1999, p. 284
[1076] See article 1 para 3 of the Charter of the United Nations.

for all ...".[1077] Article 24 of the Charter confers the Security Council the primary responsibility for the maintenance of international peace and security.[1078] More precisely, the powers of the Security Council to take actions that may be useful in preventing genocide fall under chapters VI and VII of the Charter. Under chapter VI which is related to pacific settlement of disputes, the Security Council shall, when necessary call upon parties to a dispute, to settle it through pacific means (negotiation, mediation, conciliation etc) in order to avoid that the conflict reaches a stage that is likely to endanger the maintenance of international peace and security.[1079]

These powers of the Security Council to act in preventing genocide have been indeed affirmed in literature that human rights concerns have been brought within the jurisdiction of the Security Council under article 24, paragraph 1 of the UN Charter.[1080] However, it must be precised that these powers referred to here belong to the general competences of the Security Council. This means that all the questions that may be raised from them are not solved here. In fact, article 2(7) of the Charter of the UN may limit the competence of the Security Council.[1081] It states that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".[1082] However, knowing whether and to what extent this article may limit the Security Council in the action to prevent genocide is possible through a discussion on when and how the Security Council may act.

3.1.2. When and how can the Security Council act to prevent genocide?

3.1.2.1. Prevention at the primary level

The Charter of the UN subjects the powers of the Security Council to take action to a preliminary

[1077] See article 55 of the Charter of the United Nations.
[1078] See article 24 of the Charter of the United Nations. For detailed discussion on this see Toope, J. Stephen, "Does International Law Impose a Duty Upon the United Nations to Prevent Genocide"?, *McGill Law Journal*, Vol. 46, 2000, p. 187-194.
[1079] See article 33 and 34 of the Charter of the United Nations.
[1080] Toope, J. Stephen, *op.cit*, p. 187-194.
[1081] See article 2(7) of the Charter of the UN.
[1082] See article 2(7) of the Charter of the UN.

condition: a dispute must endanger or breach international peace and security.[1083] Yet, at this level, there is no sign of risk of genocide *per se* and generally no dispute. At the first glance, it may appear that the Security Council lacks the power to take action at this primary level because the condition of the threat to international peace and security is not met. In other words, for the Security Council to take action in case of human rights violation, it is generally assumed that the latter must have reached such a level of severity that they threaten international peace and security.[1084] That is also what article 2(7) may imply. This assertion might not be necessarily true if one gives a close reading to the Charter. The Charter has been interpreted in literature that it reflects the view that the respect for human rights is a necessary precondition for the preservation of international peace and security.[1085] If that is true, it would make it possible for the Security Council to take action not only in cases where international peace and security is actually threatened or breached, but also in early phases of the process leading to such a situation. This may include for instance the setting up of a group of experts to investigate in a given state to see whether there are factors that might soon or late lead to genocide. The General Assembly declaration on fact-finding missions supports this view. Under this declaration, "fact-finding missions may be undertaken by the Security Council,… in the context of their respective responsibilities for the maintenance of international peace and security in accordance with the Charter."[1086] If gathering information before a genocidal conflict starts may make the Security Council exercise effectively its functions in relation to the maintenance of international peace and security and may be significant to the prevention of genocide, it may be argued that the Security Council may presumably not be acting *ultra vires* in doing so.

[1083] See for instance chapters V, VI, VII of the Charter of the United Nations.

[1084] Kamminga, T. Menno, *Inter-State Accountability for Violations of Human Rights*, University of Pennsylvania Press, Philadelphia, 1992, p. 117, Gowlland-Debbas,Vera, "The Security Council as the Enforcer of Human Rights", in Bardo, Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, Oxford University Press, Oxford, 2011, pp. 42-49. For more about the powers of the Security Council to take action to maintain peace and security see Conforti, Benedetto and Focarelli, Carlo, *The Law and Practice of the United Nations, 4th* ed., Nijhoff, Leiden, 2010, pp. 175-198, De Brichambaut, Marc Perrin, "The Role of the United Nations Security Council in the International Legal System", in Byers, Michael, *The Role of Law in International Politics: Essays in International Relations and International Law,* Oxford University Press, 2010, pp. 270-276.

[1085] Kamminga, T. Menno, *op.cit*, p. 116.

[1086] Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/46/59), adopted by the General Assembly of the United Nations on December 9 1991, para. 7, available at <www.un.org> (visited on 10 October 2012)

Though it was not about the prevention of genocide, Security Council resolution 1373[1087] may serve as a support for the argument above. This resolution was adopted in the aftermath of the 11 September terrorist attacks which did constitute a threat to international peace and security, but the resolution went further to decide that all states shall take various measures to prevent and suppress acts of terrorism. After reaffirming that terrorism is a threat to international peace and security and that it is contrary to the purposes and principles of the United Nations,[1088] the Security Council demanded all states in this resolution, to adopt measures that include enacting legislation that criminalizes terrorist acts as serious criminal offences and punishes conducts that may lead to or facilitate terrorism.[1089] It called upon all states to become parties as soon as possible, to relevant conventions and protocols relating to terrorism, including the international convention for the suppression of the financing of terrorism of 9 December 1999.[1090] It even created a committee to monitor the implementation of that resolution and all states were called on to report on actions they had taken to that end no later than 90 days from the day this resolution was adopted.[1091]

If we apply the theory of the three levels of prevention to terrorism, it becomes clear that this resolution which concerned all states included those states in which there were no signs of terrorism and for them it refers to prevention at the primary level. This could apply to genocide as well, as genocide is contrary to the purposes and principles of the UN and qualifies as a threat or breach of international peace and security. It would follow that for instance a Security Council resolution demanding states to enact legislation that creates an environment that does not allow the emergence of a genocidal conflict even before there is a dispute is in conformity with the Charter. If the Security Council can adopt such a resolution for terrorism under the authority of chapter VII of the UN (which makes it binding) which demands all states (including those where no acts of terrorism have occurred) to adopt measures to put legislation that prevents it, my argument is that in regard of genocide, the same legal ground could be used by the Security

[1087] See Security Council Resolution 1373 of 28 September 2001, available at <www.un.org> (visited on 12 October 2012).

[1088] The Security Council had made that determination in its Resolution 1368 of 12 September 2001, available at <www.un.org> (visited on 12 October 2012).

[1089] See Security Council Resolution 1373 of 28 September 2001, available at <www.un.org> (visited on 12 October 2012).

[1090] Ibidem. For analysis on this, see Szasz, Paul, "The Security Starts Legislating", *American Journal of International Law,* Vol. 96, No 4, 2002, p. 901-905.

[1091] Ibidem.

Council to demand states to put in place legislation that prevents genocide from the primary level without violating article 2(7). And if the Security Council has needed a triggering event like the September 11 attacks to adopt such a resolution (because it needed to determine a threat to international peace), there are a plenty of such triggering occasions for genocide as well.[1092] If the SC can take such measures that demand states to enact legislation that gives effect to the Genocide Convention (like those against totalitarianism, discrimination, inequality among groups, dehumanisation, extermination…), it could do the same to demand them to take any other measures that it deems necessary for the prevention of genocide. This is because the duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts.[1093] The Charter itself has given a clear justification for a long-term approach to prevent conflict in its article 55 which expressly recognizes that solutions to international economic, social, health and related problems; international, cultural and educational cooperation; and universal respect for human rights are all essential for the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.[1094] Genocide being a potential result (or end result) of those conflicts needs to be prevented through that approach as well. It can therefore be concluded that the Security Council could take action that can prevent genocide at the primary level.

However, given the unfamiliarity with this level of prevention today, the absence of will among the members of the Security Council as well as the absence of a mechanism to check its actions at this level, the prevention at this level by the Security Council is likely to be disregarded by it. The fact that it is believed that the action by the Security Council must rest on the international peace and security and not on protecting human beings as such is itself a challenge to the prevention of genocide in general and at the primary level in particular. While the idea of the Security Council to base its decisions on the likelihood of a situation to threaten international peace and security is not bad, it is doubtful whether this idea would serve the purposes of the UN if it were to be interpreted as not putting the human beings at the centre of the objectives it aims at achieving. It is argued that this international peace and security should be interpreted as

[1092] The genocide in Rwanda, Srebrenica, Darfur can be some of the instances of such triggering occasions.

[1093] Velasquez-Rodriguez v. Honduras, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C) para. 175.

[1094] See article 55 of the Charter of the United Nations.

aiming *inter alia* at protecting human beings (as the victim of endangered international peace and security).[1095] If the opposite tendency and threshold are the ones to prevail, there is a risk that they will undermine the prevention of genocide, at least certainly at the primary level. In fact, if the human right to life is not put expressly at the centre of the aim that the maintenance of the peace and security wants to achieve, it would make not only the prevention of genocide by the Security Council at this level ineffective (if not impossible), but also the idea behind the Charter of the United Nations questionable. The prevention of genocide should not be dependent on another value because as it has also been argued, "article 1 of the Charter includes both purposes: maintaining peace and promoting human rights" [1096] (in which the prevention of genocide falls). Unless laws are made clearer on that, there is a risk that this mist will remain with all the consequences.

3.1.2.2. Prevention at the secondary level

The question here is whether the Security Council can take action to prevent a potential genocide and what it can do at this level. As it is impossible to mention and/or discuss all signs of genocide, it is also impossible to mention all possible measures that the Security Council can take. Only some illustrative signs and measures thereof will be discussed with the assumption that if the Security Council can do something in situations discussed below, it can also do it in regard of other situations. The secondary level has been explained in previous chapters. It is nonetheless worth recalling that at this level, there are concrete signs that may lead to a genocidal conflict and that the preventive measures aim at eliminating them in order to avoid that the situation escalates to genocide. Among those signs, there is internal conflict within groups in a given state that is likely to generate in genocide, discrimination against a given group, targeted killings, dehumanisation or even the incitement to commit genocide. The basis for the Security

[1095] On how peace should be understood see Conforti, Benedetto and Focarelli, Carlo, *The Law and Practice of the United Nations, 4th* ed., Nijhoff, Leiden, 2010, pp. 205-206. They distinguish two ways in which peace is understood: 1. That it is understood as the absence of inter-state or internal conflicts (negative and restricted way). 2. That it is understood as a set of political, social and economic circumstances that obstruct the rising of future conflicts (positive and extensive way). The authors find the first meaning preferable but they note that the tendency nowadays favours the second which is also related to human security. Human security has been defined as the security of people, their physical safety, economic and social well-being, respect for their dignity and worth as human beings. See Report of the International Commission on Intervention and States Sovereignty on Responsibility to Protect, 2001, p.15.

[1096] Tesón, R. Fernando, *Humanitarian Intervention: An inquiry into Law and Morality*, 2nd edition, Transnational Publisher, Inc. Irvington-on Hudson, New York, 1997, p. 153.

Council to take actions to address these signs can be mainly found in chapters VI and VII of the Charter of the UN.

3.1.2.2.1. Measures under article VI of the Charter of the UN

In situations of disputes whose continuance may be likely to lead to genocide, some preventive measures may be available for the Security Council to avert that. Among them, the SC can call upon parties to the dispute to settle their disputes by peaceful means.[1097] Those means may include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements but may also be any other peaceful means of the choice of the parties.[1098] While the Security Council can itself investigate the matter,[1099] it may also recommend appropriate procedures or methods of adjustment or recommend terms of settlement.[1100] The Security Council has a big range for action because not only the provisions of the Charter under which it can act are relevant for prevention, but also because they do not limit it to only them. This may contribute to the prevention of possible genocide(s) if the Security Council acts in a timely fashion and adapts its actions to the nature of the conflict.

The fact that the list of possible measures is not exhaustive has made it possible for the Security Council to take actions relating to the creation of peacekeeping operations. The Charter did not *expressis verbis* make reference to peacekeeping operations when it comes to taking measures in situation of armed conflict. However, the Security Council has found implied powers from it to establish them.[1101] These peacekeeping operations may not be specifically created to prevent genocide, but they could have that effect because of the nature of the mission. It is essential to briefly explain what peacekeeping is and what it aims at, in order to examine whether the peacekeeping operations may be a tool to prevent genocide.

[1097] See article 33(2) of the Charter of the UN.

[1098] See article 33(1) of the Charter of the UN.

[1099] See article 34 of the Charter of the UN.

[1100] See articles 34, 36, 37 and 38 of the Charter of the UN. For more about measures under chapter VI of the Charter see Amerasinghe, C. Felix, *Principles of the Institutional law of international Organizations*, 2nd revised ed., Cambridge University Press; Cambridge, 2005, pp. 510-512.

[1101] Though not explicitly provided for in the Charter, peacekeeping operations find their legal basis in a number of provisions of the Charter. They include article 24, chapter VI, VII and VIII which all give to the Security Council, primary responsibility to maintain international peace and security. In addition to the latter provisions, the powers of the Security Council to create peacekeeping operations may also derive from article 7(2) as well as 29 of the Charter on the power of the UN to create subsidiary organs. Indeed, article 7(2) reads: "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter." Article 29 reads: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

Peacekeeping is a tool available to the United Nations to help countries torn by conflict to create conditions for lasting peace.[1102] Depending on the nature of the conflict, a peacekeeping operation may aim at preventing the outbreak of conflict or the spill-over of conflict across borders; stabilizing conflict situations after a ceasefire in order to create an environment for the parties to reach a lasting peace agreement; assisting in implementing comprehensive peace agreements; and leading states or territories through a transition to stable government, based on democratic principles, good governance and economic development.[1103]

Given this nature and aims of the peacekeeping operations, it is possible to say that they have the potential to prevent genocide by preventing the escalation of a conflict likely to lead to genocide. One may even say that, depending on how these operations are planned and executed, they may be well placed to prevent genocide. For instance, the Security Council established the United Nations Protection Force (UNPROFOR) by its resolution 743 as an interim arrangement to create the conditions of peace and security for the negotiation of an overall settlement of the Yugoslav crisis.[1104] Though UNPROFOR was not successful in preventing genocide in Srebrenica, it has been acknowledged by many authors that this mission (whose name was later changed by the Security Council but only with regard to the troops to be deployed in Macedonia to become the United Nations preventive deployment: UNPREDEP),[1105] was successful in preventing what could have escalated in an ethnic violence and possible genocide in Macedonia.[1106] During the conflict in Rwanda, the Security Council adopted resolution 872 that created the United Nations Assistance Mission for Rwanda (UNAMIR) to contribute to the implementation of the Arusha peace agreement signed between the government of the Republic of Rwanda and the Rwandese Patriotic Front (the two parties then in conflict).[1107] Among other

[1102] See http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml(visited on 12 October 2012).

[1103] See http://www.un.org/en/peacekeeping/operations/pkmandates.shtml (visited on 12 October 2012).

[1104] See Security Council Resolution 743 of 21 February 1992, available at <www.un.org> (visited on 19 September 2011).

[1105] Security Council resolution 983 of 31 March 1995.

[1106] Those authors are referred to in Akhavan, Payam, "Preventing Genocide: Measuring Success by What Does Not Happen", in *Criminal Law Forum* (2011) 22:1–33, pp. 24-25.

[1107] See Resolution 872 adopted by the Security Council of 5 October 1993, available at <www.un.org> (visited on 18 October 2012). This was following the Security Council resolution 812 of March 12, 1993 on the possibility to send troops in Rwanda in which it had asked the Secretary-General to examine the establishment of an international force in Rwanda which would be "entrusted *inter alia* with the protection of, and humanitarian assistance to, the civilian population." The power of the UN to create a peacekeeping force had been also recognized in the Expenses case in which the ICJ said that such action is within the powers of the Organization and within the functions of the

things, this resolution gave to UNAMIR, the mandate to "contribute to the security of the city of Kigali."[1108] Needless to say, this implied the protection of the population under the threat of genocide and doing that could have been preventing genocide.[1109] If the presence of the UNAMIR did not prevent the conflict from escalating to genocide it was not due to the legal impossibility to prevent that but mainly to the weakness in how UNAMIR was created and the means it was given.[1110] That is why it has been subsequently suggested that such causes be addressed in the future. Indeed, if the peacekeeping operations are created on time, given a clear and proper mandate with sufficient means, they may clearly be good alternative to some challenges indicated in previous chapters. The challenges include the situation where territorial states are unable to prevent the escalation of a conflict that may lead to genocide and non-territorial states are not permitted to deploy troops to prevent that escalation without the authorisation of the UN.[1111]

3.1.2.2.2. Measures under chapter VII

The Security Council may take coercive measures that may enforce peace, and depending on the nature of the conflict, this may prevent a potential genocide. The legal basis for this is chapter VII of the Charter of the United Nations. Article 39 of the Charter of the United Nations states that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with article 41 and 42, to maintain or restore international peace and security."[1112] The question here is whether at the secondary level, acts that may lead to genocide may constitute threat to the peace. On that question, even if there is little indication on whether or not in 1948 (the time the Genocide Convention was adopted) genocide was considered to be a threat to the international peace and security, subsequent practice of the Security Council has

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General Assembly (as well as the Security Council). See Expenses case, ICJ report 1962, 163.

[1108] Security Council resolution 872 of October 5 1993, available at <www.un.org> (visited on 15 October 2012).

[1109] For more details about the potential the UNAMIR had to prevent genocide in Rwanda see Dorn, A. Walter and Matloff, Jonathan, "Preventing the Bloodbath: Could the UN have Predicted and Prevented the Rwandan Genocide*"? Journal of Conflict Studies*, Vol. 20, No. 1, 2000.

[1110] For details on this, see Dallaire, Romeo, *Shake Hands with the Devil,* the failure of humanity in Rwanda*,* Arrow Books, London, 2004.

[1111] For more about this, see Report of the Panel on United Nations Peacekeeping operations (known as Brahimi Report) submitted by the Secretary-General of the UN to the General Assembly and the Security Council of the UN on 21 August 2000, available at http://www.un.org/peace/reports/peace_operations/ (visited on 15 October 2012.

[1112] See article 39 of the Charter of the United Nations, available at http://www.un.org (visited on 15 October 2012).

shown that now it is. For instance, although it did not mention "genocide" as such in its Resolution 688 of 1991, the Security Council did condemn acts that could lead to it. In this resolution, deeply disturbed by the magnitude of the human suffering involved, the Security Council condemned the repression of the Iraqi civilian population in many parts of Iraq, including in Kurdish-populated areas, the consequences of which threatened international peace and security in the region.[1113] In the justification of the establishment of the International Criminal Tribunal for the former Yugoslavia, the Security Council noted in its resolution 827[1114] that it "would contribute to the restoration and maintenance of peace". In other words, the ICTY was predicated on a hypothesis of deterrence,[1115] *i.e* to prevent that the situation continues to constitute a threat to the peace. In its resolution 1291[1116] the Security Council was for the first time even specific on genocide by calling on "all the parties to the conflict in the Democratic Republic of the Congo… to respect the convention on the prevention and punishment of the crime of genocide".[1117]

As it has been argued in literature, the concept of threat to the peace has acquired a wide meaning in the practice of the Security Council so that its current meaning certainly includes gross violations of human rights.[1118] This wide discretion can be seen in the instance where the Security Council determined that the Beirut attack of 14 May 2005 in which the former Lebanese Prime Minister Rafiq Hariri and 22 others were killed constituted a threat to international peace and security and created a special tribunal to try the suspects.[1119] In situations where the

[1113] Security Council Resolution 688 of April 5, 1991, available at <http://www.un.org> (visited on 15 October 2012).

[1114] Security Council Resolution 827 of 25 May 1993, available at <http://www.un.org≥ (visited on 18 October 2012).

[1115] Schabas, A. William, *Preventing Genocide and Mass Killing: The Challenge of the United Nations*, report published Minority Rights Group (MRG), 2006, p. 12 available at <http://www.minorityrights.org> (visited on 15 October 2012).

[1116] See Security Council Resolution 1291 of 24 February 2000 on the situation concerning the Democratic Republic of the Congo, para. 15 available at <http://www.un.org≥ (visited on 15 October 2012).

[1117] Ibidem.,

[1118] See Gaja, Georgio, *op.cit*, p. 402. See also Ratner R., Steven, "The Security Council and International Law", in Malone M. David(ed.), *The UN Security Council, From the Cold War to the 21st Century*, Lynne Rienner Publishers, London, 2004, pp. 601-602. The views of these authors support a view that grave human rights violations may rise to threat to the peace. However, Simma, Bruno et al. are of the view that the practice of the SC does not reflect a sufficient consensus to extend the notion of threat to the peace to grave violations of human rights in the absence of a risk of armed conflict. See Simma, Bruno et al. *The Charter of the United Nations, A Commentary*, 3rd ed., Vol. II, 2012, pp. 1285-1287. See also the literature they refer to.

[1119] See Security Council Resolution 1757 of 30 May 2007 on the establishment of the Special Tribunal for

violations may include acts that may lead to genocide it becomes even more compelling. I also support the argument that acts that may lead to genocide may constitute a threat to the peace. Therefore, depending on the gravity of the situation, a situation at the secondary level may qualify as a threat to the peace. This is for instance a situation in which the plan to commit genocide can be surmised and the incitement to commit it is broadcasted on radios and televisions. It can also be a situation in which there are targeted killings (religious, national, ethnic or racial group). This requires immediate action by the Security Council. Of course the level of gravity of a situation to qualify as a threat to the peace belongs to the Security Council. On this power of the Security Council, it has been for instance affirmed by the ICTR that "article 39 of the Charter of the United Nations gives a discretionary power to the Security Council in assessing the existence of a threat to the peace".[1120] Likewise, the Special Court for Lebanon observed that the Charter does not "define or spell out the prerequisites of what precisely constitutes peace, security or the threat to the peace", and that it "appears to be a deliberate choice in order to ensure that the Security Council enjoys a great measure of freedom and flexibility when carrying out its responsibility to maintain international peace and security."[1121] This discretion may be useful in that the Security Council may take any action in accordance with the Charter of the UN that it deems necessary to prevent the situation from escalating to genocide.

Those measures of the Security Council may for example address the issue of radios, televisions and social media which incite to hatred or to commit genocide.[1122] For instance, the Security Council could have taken action to authorise the UNAMIR to shut down the RTLM during the period it was clear that its messages were inciting to hatred and to commit genocide. Depending on the means to be used, this could have been authorised under article 41 or 42 of the Charter.

Lebanon, available at <http://www.un.org> (visited on 15 November 2012)

[1120] ICTR, *Prosecutorv. Karemera,* Case No.ICTR-98-44-T, Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, 25 April 2001, available at <http://www.unictr.org> (visited on 15 November 2012).

[1121] STL, *Prosecutor v. Salim Jamil Ayyash , Mustaf a Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra,* Case No. STL-II-01IPT/AC/AR90.1, Decision On The Defence Appeals Against The Trial Chamber's "Decision On The Defence Challenges To The Jurisdiction And Legality Of The Tribunal", 24 October 2012, available at <http://www.stltsl.org> (visited on 15 November 2012)

[1122] Measures under article 41 of the UN Charter, may concern those not involving the use of armed force which may include complete or partial interruption of economic relations and rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations.

General Dallaire, the UNAMIR commander for example has asserted that "many lives would have been saved" if he had been provided with proper jamming equipment."[1123] Likewise, the Security Council could have demanded the Republic of Rwanda as well as other states to punish perpetrators of the crimes of incitement to discrimination or to commit genocide.

Moreover, now that the ICC has been established, other measures of the Security Council at this level may be to refer cases of crimes like the conspiracy to commit genocide and the incitement to commit genocide to the ICC before genocide starts.[1124] For instance, the threat to refer the case of incitement to commit genocide to the ICC is said to have been successful in preventing genocide in Côte d'Ivoire.[1125] Indeed, when the national radio and television broadcasted hate propaganda against foreigners in Côte d'Ivoire in 2004, the Security Council adopted the resolution 1572 in which it demanded "the government of Côte d'Ivoire to stop the radio and television broadcasting inciting hatred, intolerance and violence."[1126] Combined with other pressure, this contributed to making the hate broadcast stop later on.[1127]

The Security Council may take other measures which may for instance be directed against non-state actors/groups. Depending on the nature of the groups in question, the Security Council action may prevent a possible genocide. It has adopted measures on sanctions against rebel groups imposing to them an arms embargo, travel ban, asset freeze, and even the use of force against them[1128] in order to protect civilians. This can be a means to prevent genocide. The

[1123] Jamie Frederic Metzl, "Rwandan Genocide and the International Law of Radio Jamming", *American Journal of International Law*, Vol. 91, No. 4, 1997, pp. 628-651, p. 636. For in-depth analysis on what should be the role of the SC in radio jamming see Tiffany, McKinney, "Radio Jamming: The Disarmament of Radio Propaganda", *Small Wars & Insurgencies*, Vol. 13, No. 3, 2002, p. 111-144.

[1124] See articles 5, 13(b), 16 and 25 (3,e) of the Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002, available at <www.icc.cpi.org> (visited on 15 October 2012).

[1125] Akhavan, Payam, "Preventing Genocide: Measuring Success by What Does Not Happen", *Criminal Law Forum,* Vol. 22, 2011,1–33, pp. 26-27.

[1126] See Security Council Resolution 1572 of 15 November 2004, available at <http://www.un.org> (visited on 18 October 2012).

[1127] Akhavan, Payam ,"Preventing Genocide: Measuring Success by What Does Not Happen", *Criminal Law Forum,* Vol. 22, 2011,1–33, pp. 26.

[1128] See for example Security Council Resolutions concerning armed groups operating in Eastern DRC: 1493 (2003), 1596 (2005), 1596 (2005), 1649 (2005), 1698 (2006), 1804 (2008), 1807 (2008), 1896 (2009), 1952 (2010), 2076 (2012), and 2098 (2013), available on <http://www.un.org> (visited on 15 June 2013). For more about Security Council measures see also Kooijmans H. Pieter (ed.), "The Security Council and Non-State Entities As Parties to Conflicts", in Wellens, Karel, *International Law: Theory and Practice, Essays in Honour of Eric Suy*, Martinus

operation Artemis in Ituri may serve as a good example for the prevention of genocide where acts of rebel groups may lead to genocide. When the UN mission in the Congo faced massacres in the eastern town of Ituri in May 2003, France took the lead in an intervention by organizing a three months "Operation Artemis" whose objectives were *inter alia* to secure the town of Bunia and ensure the protection of displaced persons in the refugee camps in Bunia, waiting for the deployment of a UN peacekeeping force at the place.[1129] This was pursuant to the Security Council Resolution 1484 of May 2003 which authorised an interim multinational emergency force.[1130] As Gareth Evans remarks, the Operation Artemis force (supported logistically by other EU countries) almost certainly prevented genocide in Ituri.[1131] Though in the practice of the Security Council the prevention of genocide has not been mentioned in its resolutions, the measures taken against some rebel groups have significantly played a role in weakening them and presumably prevented possible genocide especially in the Eastern DRC. The hesitation to explicitly invoke the prevention of genocide in its resolutions may probably be due to the heavy weight of the word "genocide". Yet, there is no legal reason that would prevent it from adopting a resolution that expressly mentions the prevention of genocide at the secondary level.

In sum, it can be said that the Charter of the UN provides for a legal basis for the Security Council to play a crucial role in the prevention of genocide at the secondary level. The challenge may however be the absence of a mechanism to monitor, coordinate or check its actions at this level and this may make the prevention at this level by the Security Council be disregarded by it. If the situation is too grave and requires further actions, then preventive actions at the tertiary level may be needed.

3.1.2.3. Prevention at the tertiary level

When genocide is being committed, chapter VII of the Charter gives a possibility to the Security Council to take further actions. Under article 41 of the Charter, such actions may include to refer

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Nijhoff Publishers, The Hague, Boston, London, 1998, pp. 333-344.

[1129] See Kees, Homan, "Operation Artemis in The Democratic Republic of Congo", in: European Commission: Faster and more united? The Debate About Europe's Crisis Response Capacity, May 2007, pages 151-155. See also Evans, Gareth and Ellis, Stephan, "The Rwandan Genocide: Memory is not enough", 8 April 2004 available at <http://www.crisisgroup.org> (visited on 5 June 2011).

[1130] See Security Council Resolution 1484 of 30 May 2003, available at <www.un.org> (visited on 15 November 2012).

[1131] Evans, Gareth and Ellis Stephan, "The Rwandan Genocide: Memory is not enough", 8 April 2004 available at <http://www.crisisgroup.org> (visited on 5 June 2011).

to the ICC a situation in which individual suspects are committing genocide.[1132] For instance, the Security Council has referred to the ICC, the situation in Darfur[1133] and this was followed by the indictment of some individuals including President Omar Al Bashir.

If the Security Council considers that the measures under article 41 would be inadequate or have proved to be inadequate, article 42 of the Charter provides for the competence to take forceful actions.[1134] In other words, under this article, the Security Council may authorise the use of force to end genocide. Another means available to the Security Council is that, under chapter VIII of the Charter of the UN, it can utilize such regional arrangements or agencies for enforcement action under its authority.[1135]

However, for all these ranges of competence of the Security Council, the pace to take them in order to end genocide has been slow mainly due to shortcomings in the implementation mechanism, the lack of will of its members, combined with the absence of mechanism to monitor, coordinate or check the action of the Security Council. For instance, with regard to the competence to refer a situation of genocide to the ICC, the Security Council referral of the situation in Sudan to the ICC made it only binding to Sudan and parties to the conflict which were demanded to cooperate fully with the ICC.[1136] In theory, the fact that the SC did not make it binding to other states to execute the arrest warrant should not be a problem for the states parties to the Rome statute of the ICC as already seen earlier. However, in reality it can be said that the Security Council explicit reference to states parties to the ICC as well would have made it more compelling and therefore arguably increased the chances of implementability. As for states not parties to the ICC, the Security Council did not demand them to cooperate with the ICC. It only urged them to do so therewith recognising that they had no such an obligation. This reduces the chances of implementability of the arrest warrant against those individuals because states non-parties to the Rome Statute of the ICC are not concerned by the resolution even though as it has been argued earlier in this work, there are other grounds under which they could base their right

[1132] See article 13(b) of the Rome Statute of the ICC.

[1133] See for instance the Security Council Resolution 1593 of 31 March 2005 on the referral of the situation in Darfur to the ICC, available at <http://www.un.org> (visited on 18 October 2012).

[1134] See article 42 of the Charter of the United Nations. Such action may include demonstrations, blockade and other operations by air, sea or land forces of members of the United Nations.

[1135] See art 53 of the Charter of the United Nations.

[1136] See para. 2 of the Security Council resolution 1593 of 31 March 2005 on the referral of the situation in Darfur to the ICC available at <http://www.un.org> (visited on 19 October 2012).

and obligation to arrest them. I argue that the same grounds should apply to the Security Council as well when it takes action on the prevention of genocide and nothing would legally prevent it from demanding other states to implement its resolution because its powers derive from the Charter and not solely from the Rome Statute of the ICC. It would be absurd if the Security Council were entitled to refer a situation of a state non-member of the Rome Statute of the ICC and be denied the possibility to demand another non-member to implement its resolution related to the referral concerned. It has been argued before that the UN can act upon genocidal situations involving states members of the United Nations but not parties to the Genocide Convention, states parties to the Genocide Convention but not members of the United Nations or those neither parties to the Genocide Convention nor members of the United Nations if the conditions imposed by the Charter of the United Nations are met. The same reasons should apply here to the Security Council as one of its competent organs. It can indeed act outside the United Nations membership under some conditions.[1137] This argument is supported by the practice of the Security Council with regard to the measures on terrorism. Indeed, after the terrorist attacks on the US embassies in Dar-es-Salaam and Nairobi in 1998 and 1999 respectively, the Security Council adopted a number of resolutions that obligated all states (including the non-members of the UN) to take measures against the Taliban and all individuals involved from any place of the world in order to prevent acts of terrorism from reoccurring.[1138] Since these resolutions bound all states, Switzerland adopted a number of preventive measures to implement the SC resolutions and this from the 2nd of October 2000, two years before it became member of the United Nations.[1139] So, if the Security Council could legally do it with regard to measures on prevention of terrorism, there is no reason it could not be the same with regard to measures on the prevention of genocide as well.

With regard to problems related to the Security Council measures on the use of force to put an end to genocide, the Security Council has been reluctant to take them in clear situations of genocide. Even where it has adopted resolutions related to such measures, they have not been followed by clear actions to end genocide. For instance, when genocide started in Rwanda in

[1137] See article 2(6) of the Charter of the UN as referred to above.

[1138] See Security Council Resolutions: 1267 of 15 October 1999, 1333 of 19 December 2000, 1373 of 28 September 2001, 1390 0f 16 January 2002, available at <http://www.un.org> (visited on 19 October 2012).

[1139] See more details in the Case Nada v. Switzerland (application no.1059/08), judgment, Strasbourg, 12 September 2012, European Court of Human Rights, paras. 15-24 available at <http://www.echr.coe.int/ECHR/homepage_en> (visited on 08 October 2012).

April 1994, the Security Council missed a clear opportunity to take action to halt it. It instead adopted resolution 912 which reduced to 90 % the number of the UNAMIR troops.[1140] When later in May and June it finally adopted resolutions 918[1141] and 925[1142] to expand UNAMIR's mandate[1143] as well as to extend it[1144] and increase the troops up to 5.500,[1145] the states logistical support capability sought by the Security Council for rapid deployment of the expanded UNAMIR was not provided for many weeks. On the urge of France, the Security Council later adopted resolution 929 of 22 June 1994 authorizing France's humanitarian intervention in Rwanda.[1146] The specific word "genocide" was not mentioned in this resolution, but what was mentioned in the preamble of this resolution to some extent was a part of its definition and it was indeed genocide as the Security Council had already acknowledged in the resolution 925 adopted on 8 June 1994 that genocide was taking place.[1147] In this resolution 929 the Security Council said that it was deeply concerned by the continuation of systematic and widespread killings of the civilian population in Rwanda, recognizing also that the situation in Rwanda was a unique case which demanded an urgent response by the international community. Under chapter VII, the Security Council authorized the State cooperating with the Secretary-General to use all necessary means to achieve the humanitarian objectives:[1148] which were "to contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda" and "to provide

[1140] Security Council Resolution 912 of April 21, 1994, available at <http://www.un.org> (visited on 18 October 2012).
[1141] Security Council Resolution 918 of 17 May 1994, available at <http://www.un.org> (visited on 18 October 2012).
[1142] Security Council Resolution 925 (1994) "Rwanda" (8 June 1994), available at <http://www.un.org> (visited on 18 October 2012).
[1143] See para. 3 of the Security Council Resolution 918 of 17 May 1994, available at <http://www.un.org> (visited on 18 October 2012).
[1144] See para. 3 of the Security Council Resolution 925 (1994) "Rwanda" (8 June 1994), available at <http://www.un.org> (visited on 18 October 2012).
[1145] See the Security Council Resolution 918 of 17 May 1994, para. 5 available at <http://www.un.org> (visited on 18 October 2012).
[1146] Security Council Resolution 929 (1994) "Rwanda" (22 June 1994), available at <http://www.un.org> (visited on 18 October 2012).
[1147] Security Council Resolution 925 (1994) "Rwanda" (8 June 1994), available at <http://www.un.org> (visited on 18 October 2012). The Security Council noted: "Expressing once again its grave concern at the continuing reports indicating that systematic, widespread and flagrant violations of international humanitarian law, including acts of genocide, have been committed in Rwanda".
[1148] Security Council Resolution 929 (1994) "Rwanda" (22 June 1994), para 3 available at <http://www.un.org> (visited on 18 October 2012).

security and support for the distribution of relief supplies and humanitarian relief operation".[1149] Though resolution 929 did authorize France to use all necessary means, it did not say that those means were to be used to put an end to genocide. Hence, none of these initiatives was successful in halting genocide until the military victory of the RPF in July 1994.

This was due to many reasons as was once acknowledged by Kofi Annan. He said that UN missions can achieve their objectives only when: the Security Council creates them with concrete objectives, the General Assembly allocates necessary resources, states provide sufficient number of well-trained and equipped troops and do it on time.[1150] He immediately added that all these elements are fundamental, but that most lies in the will of the Security Council without which such missions have the most chances to fail.[1151]

The Security Council has also failed to use the available means provided for by chapter VIII of the Charter in order to prevent genocide. This is linked to another challenge related to the Security Council measures to put an end to genocide which is the veto power vested in the five permanent members of the SC. This power may hinder the prevention of genocide in that if it is exercised unlimitedly and it gives room to states which lack the will to take decisions in such situations, to refuse to do so by threatening to use the veto or by using it to block resolutions that aim at putting an end to genocide. One of the many examples of this is the Security Council attempt to authorise NATO to use force in the former Yugoslavia which failed due to Russian veto.[1152] This made the Security Council fail (and therefore miss the opportunity) to utilize NATO for the Kosovo situation. Unless this veto is amended in order to exclude its exercise in case of genocide, the chances that the Security Council may successfully prevent genocide at this level may be limited.

Another serious challenge is that even where the Security Council may reach a decision to halt

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[1149] This Security Council Resolution para. 3 referred to para. 4 of the Security Council Resolution 925 (1994) "Rwanda" (8 June 1994), available <http://www.un.org> (visited on 18 October 2012).

[1150] *La Mission d'Information de la Commission de la Défense Nationale et des Forces Armées et de la Commission des Affaires Etrangères sur les Opérations Militaires Menées par la France et d'Autres Pays et l'ONU au Rwanda entre 1990 et 1994,* III, A, available at http://www.assemblee-nationale.fr/11/dossiers/rwanda/telechar/r1271.pdf (visited on 18 October 2012).

[1151] Ibidem.

[1152] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd edition, Cambridge University Press, Cambridge, 2009, p. 530. NATO intervened because it was clear that the SC had failed to address the issue. Yet, it had determined that in Resolutions 1160 of 31 March 1998 and 1190 of 03 September 1998 that the situation in Kosovo warranted an international engagement and constituted a threat to International Peace and Security. See both resolutions at <http://www.un.org> (visited on 8 July 2012).

genocide, the fact that it has no military force at its disposal that can be immediately deployed to put an end to an on-going genocide makes it a very big challenge to the prevention of genocide. It is argued that if a stand-by military force would exist to intervene immediately when the Security Council has decided so, the prevention of genocide at the tertiary level would be much more achievable.

Let it be concluded that the Security Council's primary responsibility is the maintenance of international peace and security in which measures aiming at preventing genocide at the tertiary level perfectly fit. It is a competent organ to take appropriate actions to prevent genocide at this level. If it has not been able to prevent genocide in many instances it has not been due to the lack of competence but to the identified challenges. Unless the latter are addressed, the Security Council may not be expected to do more than it has done so far to make the prevention of genocide at the tertiary level possible and effective in the future.

3.2. The General Assembly

3.2.1. Does the General Assembly have the competence to prevent genocide?

Article VIII of the Genocide Convention uses the plural form when referring to the "competent organs" of the UN. During the debate on the drafting of article VIII, the General Assembly was referred to as competent organ to take preventive actions.[1153] Since it has been concluded earlier that the competence of the United Nations to prevent genocide may derive from the Charter of the UN, the competence of the General Assembly is to be looked in that Charter.

The Charter of the United Nations gives to the General Assembly the power to discuss any questions or any matters within the scope of the Charter or relating to the powers of any organs provided for in the Charter and except some limits, it can make recommendations to members of the UN or to the Security Council or to both.[1154] Bruno Simma did not comment article 10 in light of the prevention of genocide, but he recognized the fundamental importance of the General Assembly as a central organ of the UN because of the very position of article 10 and the pride of

[1153] Robinson, Nehemiah, *The Genocide Convention: A Commentary,* New York: Institute of Jewish Affairs, 1960, p. 98.

[1154] See article 10 of the Charter of the United Nations, available at <http://www.un.org> (visited on 19 October 2012). This article reads as follows: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

place it has been given in chapter IV of the Charter of the UN.[1155] He added that article 10 vests the General Assembly with a general power of discussion and recommendation regarding any question which comes within the scope of the Charter.[1156] According to him, this power includes the right to investigate which derives from the Charter because in order to discuss any matter thoroughly, the General Assembly must be in a position to carry out the necessary investigations.[1157] Likewise, Nehemiah Robinson has argued that this article is so broad that no limitations whatsoever can be placed on the discussions and recommendations by the General Assembly.[1158] He added that on the basis of the principle of promoting universal respect for and observance of human rights, the General Assembly can discuss violations of its resolutions on genocide and of the principles enshrined in the Genocide Convention by the virtue of the same authority.[1159] This article makes it indeed possible for the General Assembly to discuss a matter related to the prevention of genocide since, as it has been interpreted and argued earlier in this work, this is within the scope of the Charter.

Furthermore, under article 7(2), the GA can create subsidiary organs that it deems necessary for the performance of its functions.[1160] It reads: "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter." And Article 22 reads: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." In the next subsection, this general competence of the General Assembly will be discussed in concrete way to see when this competence can be exercised and what actions may be taken in order to prevent genocide.

3.2.2. When and how can the General Assembly act to prevent genocide?

3.2.2.1. Prevention at the primary level

At this level of the prevention of genocide, the General Assembly may, based on article 10 of the Charter, for instance discuss a situation where some states do no put in place necessary

[1155] Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd edition, Volume I, Oxford University Press, Oxford, 2002, p. 258.
[1156] Idem, p. 258-259.
[1157] Ibidem.
[1158] Robinson, Nehemiah, *The Genocide Convention: A Commentary,* New York: Institute of Jewish Affairs, 1960, p. 97.
[1159] Ibidem.
[1160] See articles 7(2) and 22 of the Charter of the United Nations.

legislation to give effect to the Genocide Convention. And since the General Assembly is not subjected to any limitation on its power to discuss,[1161] it can discuss that matter at that level and it can make recommendations to urge those states to comply with their obligation. Moreover, in exercising its power to make recommendations in this regard, the General Assembly can only be restricted to do so when the Security Council is exercising its powers on that matter. The General Assembly has exercised its power to discuss and make recommendations on the prevention of genocide in the past. For instance it has repeatedly adopted resolutions urging member states to ratify the Genocide Convention.[1162] At several other occasions, the General Assembly has held discussions that referred to the word genocide as shown by Schabas,[1163] but it did not adopt resolutions that contain specific measures to prevent genocide. For instance, the General Assembly has not adopted resolutions that demanded states parties to the Genocide Convention to adopt legislation that gives effect to the Genocide Convention. Yet, adopting such resolutions would presumably contribute to the prevention of genocide at this level.

Other measures at this level may be taken under articles 7(2) and 22 of the Charter of the UN under which the General Assembly can create subsidiary organs that it deems necessary for the performance of its functions.[1164] Its practice shows that it has created many subsidiary organs on various matters.[1165] One of many examples of subsidiary organs created by the General Assembly is the Human Rights Council (replacing the Commission of Human Rights which had been under the authority of the Economic and Social Council (ECOSOC)) created in 2006.[1166]

[1161] Simma, Bruno et al. (eds.), *The Charter of the United Nations*: *A Commentary*, 2nd ed., Volume I, Oxford University Press, Oxford, 2002, p. 262.

[1162] See for instance the General Assembly Resolution 795(VIII) of 3 November 1953 on appeal to states to accelerate their ratifications, or accessions to the convention on the prevention and punishment of the crime of genocide and measures designed to ensure the widest possible diffusion of the nature, contents and purposes of the convention, available at <http://www.un.org/documents/ga/res/8/ares8.htm> (visited on 19 October 2012), General Assembly Resolution 41/147 of 4 December 1986 on the Status of the Convention on the Prevention and Punishment of the Crime of Genocide <http://www.un.org/depts/dhl/resguide/r41.htm> (visited on 19 October 2012), General Assembly Resolution 47/108 of 16 December 1992 on the Status of the Convention on the Prevention and Punishment of the Crime of Genocide, available at <http://www.un.org/Depts/dhl/resguide/r47.htm> (visited on 19 October 2012). This list is illustrative and not exhaustive.

[1163] See Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, p. 542-545.

[1164] See article 7(2) and 22 of the Charter of the UN.

[1165] See Simma, Bruno et al. (eds.), *The Charter of the United Nations*: A Commentary, 2nd edition, Volume I, Oxford University Press, Oxford, 2002, pp. 218-226.

[1166] See General Assembly Resolution 60/251 of 3 April 2006 on the Human Rights Council, available at

The Council was given the overall mandate to promote universal respect for the protection of all human rights and fundamental freedoms for all.[1167] That means that among its functions, this Council has been tasked *inter alia* to promote the full implementation of human rights obligations undertaken by States and to contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.[1168] No doubt, matters related to genocide fall within this mandate and it might therefore be said that this is an available means through which the General Assembly can prevent genocide because this mandate includes promoting "the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights..."[1169] In 2008, the Human Rights Council adopted resolution 7/25 which addresses the prevention of genocide.[1170] In that resolution, it called upon states that have not yet ratified (or acceded to) the Genocide Convention to consider doing so as a matter of high priority and to enact national legislation in conformity with the provisions of the Genocide Convention.[1171] After this resolution, a number of states have ratified (or acceded to) the Genocide Convention,[1172] and some regional forums on the prevention of genocide have been established.[1173] This could be an outcome from the resolution 7/25 even though there is no conclusive evidence on that.

The mandate of the HRC is so broad and arguably vague when it comes to what it can do to prevent. Given that fact, it is possible to argue that there is no legal reason that would preclude the General Assembly from creating a subsidiary organ (permanent or not) which can be vested with an express power to investigate and report on the implementation of the rules on the prevention of genocide by states. This can be useful in the sense that it can exercise pressure on those states and it can presumably contribute to the prevention of genocide at the primary level. The fact that the Genocide Convention did not establish its own treaty organ does not preclude

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<http://www.un.org≥ (visited on 19 October 2012).

[1167] Idem, para. 2.

[1168] Idem, paras. 5(d) &5(f).

[1169] Idem, para. 5(d).

[1170] Human Rights Council Resolution 7/25 on the Prevention of Genocide, 28 March 2008.

[1171] See para. 3 of the HRC Resolution 7/25.

[1172] Those states include Andorra, Cape Verde, Nigeria and San Marino, see <http://treaties.un.org> (visited on 13 November 2013).

[1173] See HRC Document on the Prevention of Genocide, 18 March, 2013, A/HRC/22/L.30.

the General Assembly from creating a subsidiary organ that can help in the implementation of that convention. That subsidiary organ is not the same as the robust monitoring body of the Genocide Convention suggested earlier in this work, but in the absence of the latter, this can be a viable alternative.

Finally, though it can be concluded that the powers of the General Assembly to discuss various matters and to make recommendations accordingly are sufficiently broad to include matters that are related to the prevention of genocide, the problem is not only that in practice the General Assembly has not played that role effectively, but also that its decisions have no binding force. Even if the General Assembly would adopt resolutions aiming at preventing genocide at the primary level, their effect might be weak and there is no easy solution to that problem unless the Charter of the UN is amended in a way that addresses this weakness. Another problem is that in general there is no mechanism to check the actions of the General Assembly and this may weaken the prevention of genocide at this level.

3.2.2.2. Prevention of genocide at the secondary level

One of the means of the General Assembly to prevent genocide at the secondary level is through the Human Rights Council which is one of its subsidiary organs. Indeed, this Council has been given the mandate *inter alia* to address situations of violations of human rights, including gross and systematic violations, and to make recommendations thereon.[1174] The governments concerned are among those to whom these recommendations are to be addressed, but of course, the General Assembly as well.[1175] In its resolution 7/25 of 2008, the HRC called upon all states to cooperate in order to prevent (including to halt) gross human rights violations that could lead to genocide.[1176] Five years after this resolution, the HRC appreciated the outcome of that resolution. However, most of the outcomes may concern the primary level more than the secondary one. It is therefore still too early to assess if and how the HRC can contribute to the prevention of genocide at this level. It suffices to say however that if there are reports of this Council, the General Assembly is competent to reinforce its recommendations by recommending any appropriate measure to be taken by states concerned or any other person concerned.

Furthermore, under the UN Charter, the General Assembly can address matters related to the

[1174] Idem, para. 3.
[1175] Idem, para. 5.
[1176] See para. 6 of the HRC Resolution 7/25.

maintenance of international peace and security and make appropriate recommendations to the state(s) concerned and to the Security Council or to both.[1177] Since acts leading to genocide may be threatening the international peace and security, the General Assembly has the power to address matters related to genocide and make recommendations that aim at averting the occurrence of genocide. However, in exercising this power to address matters, the practice of the General Assembly does not suggest much on how it dealt with the prevention of genocide since the adoption of the Genocide Convention. For instance, despite claims that China's acts were leading to genocide in Tibet, the General Assembly did not use the word genocide in resolutions related to that situation.[1178] Yet, it had put in its agenda the charges that China was committing genocide in Tibet.[1179] In its resolutions, the General Assembly did discuss the issue on a broader human rights perspective,[1180] but it failed to explicitly deal with that situation as likely to lead to genocide.

Apart from the power to discuss matters (which may include those related to the prevention of genocide), the Charter of the UN gave to the General Assembly the possibility to call the attention of the Security Council to situations which are likely to endanger international peace and security.[1181] This is another possibility for the General Assembly to address a situation that is likely to lead to genocide. The big difficulty arises when the Security Council fails to discharge its responsibilities for the maintenance of international peace and security in a situation likely to lead to genocide, due to either the lack of unanimity of the permanent members or any

[1177] See article 11 of the Charter of the United Nations, available at <http://www.un.org> (visited on 19 October 2012). It reads: "(1)The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both. (2) The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion. (3)The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. (4) The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

[1178] General Assembly Resolutions: 1353(XIV) of 21, October 1959, New York, 1723 (XVI) of 20 December 1961, New York and 2079(XX) of 1965, New York.

[1179] See UN Doc. A/PV.812.

[1180] See General Assembly resolutions: 1353(XIV) of 21, October 1959, New York, 1723 (XVI) of 20 December 1961, New York and 2079(XX) of 1965, New York.

[1181] Article 11 para 3 of the Charter of the UN.

other reason whatsoever. And the question is whether the Security Council's failure to take action relieves the General Assembly of its responsibility to take action under the Charter in regard to the prevention of genocide.

3.2.2.3. Prevention of genocide at the tertiary level

The General Assembly has adopted the Resolution 377 (V) of 3 November 1950 entitled "Uniting for peace" [1182] which can be useful to the prevention of genocide at the tertiary level when the Security Council fails to discharge its responsibility. In this resolution, while recognizing that the maintenance of international peace and security is one of the purposes of the United Nations and that it entails taking "effective collective measures for the prevention and removal of threats to the peace", it resolved that in such situation "the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of breach of the peace or the act of aggression the use of armed force when necessary, to maintain or restore international peace and security".[1183] The adoption of this resolution came through a suggestion by Dean Acheson then US Minister of foreign affairs persuading the General Assembly to claim for itself a subsidiary responsibility with regard to international peace and security as enunciated by Article 14 of the Charter.[1184] He suggested this because of the strategy of the Union of Soviet Socialist Republics (USSR) to block any determination by the Security Council on measures to be taken in order to protect the Republic of Korea against the aggression launched against it by military forces from North Korea and this resolution came as a response to this strategy.[1185]

The General Assembly has exercised this competence in a number of situations. For instance, following the failure of the Security Council to exercise its primary responsibility to maintain international peace and security during the time when the Central People's Government of the People's Republic of China was intervening in Korea, the General Assembly adopted a resolution 498 (V) of 1 February 1951[1186] calling upon all States and authorities to continue to

[1182] UN General Assembly Resolution 377 (V) "Uniting for peace" (3 November 1950), para. A(1), available at <http://www.un.org> (visited on 19 October 2012).
[1183] Ibidem.
[1184] See Tomuschat, Christian, *Union pour le Maintien de la Paix*, in United Nations Audiovisual Library of International Law, available at <http://www.un.org> (visited on 21 October 2012).
[1185] Ibidem.
[1186] UN General Assembly Resolution 498 (V) "Intervention of the Central People's Government of the People's

lend every assistance to the United Nations action in Korea[1187] which of course meant military assistance. This was after the General Assembly had found that the People's Republic of China had engaged in aggression in Korea. In this resolution 498(V), the General Assembly did not explicitly refer to its previous resolution 377 "Uniting for Peace", but in the preamble it expressly mentioned that the Security Council had failed to exercise its primary responsibility for the maintenance of international peace and security because of the lack of unanimity of the permanent members which is the same as what is stated in the resolution 377 (V) "Uniting for Peace".

Similarly, after another failure of the Security Council to adopt a resolution on the conflict between Israel and Egypt on 30 October 1956 due to the British and French vetoes, the matter was then transferred to the General Assembly, in accordance with the procedure provided by Assembly resolution 377 (V).[1188] In its first emergency special session, the General Assembly adopted resolution 997 (ES-I),[1189] calling for an immediate ceasefire, the withdrawal of all forces behind the armistice lines and the reopening of the Canal.[1190] To enable this resolution, on 4 November 1956 the General Assembly adopted another resolution 998((ES-I)[1191] which requested the Secretary-General to submit within 48 hours a plan for the setting up, with the consent of the nations concerned, of an emergency international United Nations Force to secure and supervise the cessation of hostilities in accordance with all the terms of the aforementioned resolution 997 (ES-I).[1192] Pursuant to the requested plan in the report of the Secretary-General, the General Assembly adopted a resolution 1000 (ES-I) adopted on 5 November 1956,[1193] by which the Assembly established a United Nations Command for an emergency international Force to secure and supervise the cessation of hostilities in accordance with all the terms of

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Republic of China in Korea" (1 February 1951), available at <http://www.un.org> (visited on 21 October 2012).

[1187] See para. 4 of the UN General Assembly Resolution 498 (V) "Intervention of the Central People's Government of the People's Republic of China in Korea" (1 February 1951), available at <http://www.un.org> (visited on 21 October 2012).

[1188] See the Establishment of UNEF available at <http://www.un.org> (visited on 21 October 2012).

[1189] See resolution 997(ES-I) of the General Assembly of the United Nations (2 November 1956) available at <http://www.un.org> (visited on 21 October 2012).

[1190] Ibidem.

[1191] See resolution 998 (ES-I) of the General Assembly of the United Nations (4 November 1956) available at <http://www.un.org> (visited on 21 October 2012).

[1192] See the Establishment of UNEF available at <http://www.un.org> (visited on 21 October 2012).

[1193] See resolution 1000 (ES-I) of the General Assembly of the United Nations (5 November 1956) available at <http://www.un.org> (visited on 21 October 2012).

General Assembly resolution 997 (ES-I) of 2 November 1956.[1194] No reference was made to the resolution 377 (V) "the Uniting for Peace", but as said above, the matter had been transferred to the General Assembly by the Security Council in accordance with the procedure provided by Assembly resolution 377 (V) and after it had failed to reach a resolution.

To my knowledge, even though the resolution 377 (V) perfectly fits within the means available to the General Assembly in the prevention of genocide, the latter has not used it so far, to that purpose. Even in the situation it was more explicit in using the word genocide in 1982 where it adopted a resolution in which it condemned Israel for the large-scale massacre of the Palestinian civilians in Sabra and Shatila refugee camps situated in Beirut and resolved that this massacre qualified as act of genocide,[1195] it failed to refer to its resolution 377 (V) and take action accordingly. Yet, it was after the Security Council had failed to adopt a resolution under chapter VII on "appropriate measures" against Israel.[1196] The General Assembly did not do more than just deploring "the negative vote by a permanent member of the Security Council which prevented the Council" from adopting such a resolution.[1197] Here too, the General Assembly did not refer to the prevention of genocide and hence it did not make any recommendation to the Security Council to take action thereof. Yet, given the content of the resolution 377(V) it can be argued that together with other provisions of the Charter evoked above, albeit they do not use the concept of prevention of genocide *per se,* it can serve as the basis under which actions to prevent genocide by the General Assembly can be taken at the tertiary level.

In fact, given the content of the resolution 377 as well as the circumstances under which measures may be taken, it is possible to say that it may contribute to serve as a basis to take other measures aiming at preventing genocide such as sanctions against a state or any other person committing or assisting in committing genocide. Under this very resolution, it can arguably be said that the GA could take measures that would include the use of force to end genocide when the Security Council is unable to do that. This has not be done in practice but given the purposes of the United Nations and the rationale of resolution 377 which was to save the purposes of the UN in time of paralysis of the SC, taking measures that include the use of force to put an end to

[1194] See the Establishment of UNEF available at <http://www.un.org> (visited on 21 October 2012).
[1195] See General Assembly Resolution 37/123 (D) of 16 December 1982, para D (2) available at <http://www.un.org> (visited on 21 October 2012).
[1196] Idem, para. A (8).
[1197] Ibidem.

an on-going genocide would be complying with the aims and purposes for which the UN has been established. It would also be of course to abide with the rule and competence to prevent genocide.

The General Assembly appears to be entitled to do something related to the prevention of genocide. However, though the Charter has given this power to the GA, the same Charter has limited the binding character of its actions. Another problem may be the absence of a mechanism to check the actions of the General Assembly at this level. These problems make it difficult to conclude that the General Assembly can prevent genocide effectively. Though it is recognized that the General Assembly can do a lot in preventing genocide using the existing rules of international law as shown above, unless it is given more concrete powers in this regard, there are convincing reasons to say that the actions of the General Assembly to prevent genocide are still limited by the Charter itself.

3.3. The Secretariat

3.3.1. Does the Secretariat have the competence to prevent genocide?

At first sight, it would appear from the discussion earlier (about the drafting history of article VIII of the Genocide Convention) that the Secretariat of the UN was not among the competent organs of the UN to be called upon by contracting parties to take such action under the Charter of the United Nations. This can especially be seen from the fact that in the debate of the drafters of the Genocide Convention there was an attempt to give to the Secretary-General the duty to inform the competent organs of the UN about a situation of genocide but this suggestion was not followed. In fact, during the drafting process, V. Pella Vespasian and Raphael Lemkin consulted by the Secretariat as experts in the field of genocide, believed the Secretary-General should have the duty to inform the organs of the UN on threats of genocide,[1198] but this was not included in the convention presumably because it would have been a new power and duty not mandated by the Charter of the UN.[1199] Those powers and duties of the Secretary-General are defined in articles 97 to 101 of the Charter of the UN.[1200] It is worth examining those powers in order to see

[1198] See Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd edition, Cambridge University Press, Cambridge, 2009, p. 534.
[1199] Idem, p. 534-535.
[1200] Articles 97-101 of the Charter of the United Nations.

whether or not the Secretariat of the UN can qualify as a competent organ of the UN to take appropriate actions for the prevention of genocide.

According to article 97, the Secretary-General is the chief administrative officer of the Organization.[1201] Among other things, article 98 adds that the Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs.[1202] The same article 98 obligates the Secretary-General to make an annual report to the General Assembly on the work of the Organization. Furthermore, like any other chief administrative officer of an Organisation, the Secretary-General is in charge of the management of daily operations in every aspect of the UN. In this capacity, he is well placed to know about the entire "life" and "health" of the Organisation.

In addition to the administrative tasks, article 99 of the Charter of the UN gives him the power to take initiative in bringing to the attention of the Security Council any matter which in his opinion may threaten the international peace and security. That is why the General Assembly declaration on fact-finding by the United Nations in the field of the maintenance of international peace and security has treated the Secretariat (through the Secretary-General) as a competent organ of the UN in matters relating to the maintenance of international peace and security.[1203] It has been argued before that genocide is a threat to the peace. In that way, the Secretary-General would have the competence to bring to the attention of the SC a matter related to genocide.

It may be therefore argued that as the person to deal with daily operations in every aspect of the UN, the Secretary-General may have the competence to address issues related to the prevention of genocide which is within the scope of his powers as described in the articles mentioned above. This nature of the position of the Secretary-General in the Organisation makes it hardly imaginable to think that other competent organs of the UN can prevent genocide without his/her

[1201] See article 97 of the Charter of the United Nations.

[1202] Article 98 of the Charter of the United Nations.

[1203] See Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/46/59), adopted by the General Assembly of the United Nations on December 9 1991, available at <http://www.un.org> (visited on 21 October 2012). Paragraph 1 states: "In performing their functions in relation to the maintenance of international peace and security, the competent organs of the United Nations should endeavour to have full knowledge of all relevant facts. To this end they should consider undertaking fact-finding activities." And Paragraph 7 states: "Fact-finding missions may be undertaken by the Security Council, the General Assembly and the Secretary-General, in the context of their respective responsibilities for the maintenance of international peace and security in accordance with the Charter."

involvement. This position in the Organisation does not make him only a competent organ in the matters related to the prevention of genocide, but also vital because it enables him to access necessary information that would trigger his action. The argument that the Secretariat is among the competent organs of the UN to prevent genocide is highly supported by what the Secretary-General said in his action plan of 2004 on the prevention of genocide. In this action plan, while acknowledging his failure in the past, the Secretary-General explicitly recognised that the prevention of genocide was his duty and pledged to do it better in the future by implementing his five points of his action plan which included to address the root causes of genocide, the protection of civilians in the conflict and the halting of genocide when it has started.[1204] The possible actions of the Secretary-General in the prevention of genocide will be concretely discussed at the three levels of prevention.

3.3.2. When and how the Secretariat can act to prevent genocide?

3.3.2.1. Prevention at the primary level

Article 98 of the Charter gives an indication on actions that the Secretary-General may take. For instance, s/he may include in his/her annual report problems related to potential genocide in any place of the world due to the fact that the states concerned have not adopted legislation that may give effect to the Genocide Convention. And s/he may make recommendations to the General Assembly and the Security Council. Furthermore, under the same article, s/he may use the right s/he has to participate in the meetings of the Security Council and the General Assembly, to give his/her ideas on how to prevent genocide in some specific places and from the primary level. Bruno Simma has commented that the duty of the Secretary-General to draw up provisional agendas for those meetings has in practice gained considerable political significance.[1205] Though the degree of significance of his/her influence is difficult to verify, it is possible to say that no matter how it can be, it can play a role in the prevention of genocide if the Secretary-General puts such questions on the agendas of the meetings. There is an example where Secretary-General Waldheim has successfully suggested the item "measures to prevent terrorism", and it

[1204] United Nations Secretary-General Kofi Annan's Action Plan to Prevent Genocide, Press Release SG/SM/9197 AFR/893 HR/CN/1077, Geneva, 07 April 2004, available at <http://www.un.org> (visited on 22 October 2012).
[1205] Simma, Bruno et al. (eds.) *The Charter of the United Nations: A Commentary*, 2nd edition, Volume II, Oxford University Press, Oxford, 2002, p. 1196

was included in the agenda of the General Assembly session in 1972.[1206] The result was that after the discussion on this item, the General Assembly adopted the resolution 3034 (XXVII)[1207] in which it invited states to take all appropriate measures for the prevention of terrorism[1208] by *inter alia* finding just and peaceful solutions to the underlying causes which give rise to terrorism.[1209] The resolution also created an ad hoc Committee on that.[1210] If it was possible for the prevention of terrorism, there is no legal reason that would preclude it from being possible for the prevention of genocide as well.

Another basis for action by the Secretary-General may be article 99 of the Charter. Under this article, the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. At first glance, this may appear to be already at the secondary level of prevention, but from a more deep analysis, article 99 may also serve at the primary level of prevention of genocide. Some instruments that followed the adoption of the Charter can support this assertion. For instance, while acknowledging that the ability of the United Nations to maintain international peace and security depends to a large extent on its acquiring detailed knowledge about the factual circumstances of any dispute or situation, the continuance of which might threaten the maintenance of international peace and security,[1211] the General Assembly has adopted a declaration that explains how the Secretary-General should act in acquiring that knowledge. Indeed, under this declaration, "the Secretary-General should pay special attention to using the United Nations fact-finding capabilities at an early stage in order to contribute to the prevention of disputes and situations."[1212] This early stage has been explained by Kofi Annan in his report (as the Secretary-General of the UN) on the prevention of conflict. He wrote that preventing

[1206] Ibidem.

[1207] See General Assembly Resolution 3034 (XXVII) of 18 December 1972 on Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes, available at <http://www.un.org> (visited on 22 October 2012).

[1208] Idem, para. 6.

[1209] Idem, para. 2.

[1210] Idem, para. 9.

[1211] See Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/46/59), adopted by the General Assembly of the United Nations on December 9 1991, available at <http://www.un.org> (visited on 22 October 2012).

[1212] Idem, para. 12.

conflict implies the obligation to strive to "address tensions, grievances, inequalities, injustice, intolerance and hostilities at the earliest stage possible before peace and security are endangered.[1213] With regard to the prevention of genocide as such, he later said that "one of the best ways to reduce the chances of genocide is to address the causes of conflict."[1214] On the recommendations of the Secretary-General of the UN in his report on the prevention of armed conflict, the Security Council has adopted resolution 1366.[1215] In this resolution, while stressing the necessity of addressing the root-causes of conflict in preventing genocide and other core crimes of international law, the Security Council invited the Secretary-General to refer to it, information, *inter alia* "on potential conflict situations arising, *inter alia*, from ethnic, religious and territorial disputes, poverty and lack of development…"[1216] This resolution encouraged him to bring to its attention early warnings or prevention cases and to convey to the Security Council his assessment of potential threats to international peace and security.[1217] The resolution also reiterated the importance of the fact-finding missions and supported the enhancement of the role of the Secretary-General in this regard.[1218]

Pursuant to resolution 1366, the Secretary-General Kofi Annan appointed in 2004 Juan Mendez as special adviser on the prevention of genocide.[1219] Likewise, in 2007, Secretary-General Ban Ki-moon appointed Francis M. Deng on a full-time basis at the level of Under-Secretary-General in charge of the prevention of genocide.[1220] The mission and mandate of this office include acting as a catalyst to raise awareness of the causes and dynamics of genocide, to alert relevant actors where there is a risk of genocide, and to advocate and mobilize for appropriate action.[1221]

[1213] The Prevention of armed Conflict, Report of the Secretary-General of the United Nations to the General Assembly and the Security Council of the United Nations, A/55/985 – S/2001/574, 7 June 2001, available <http://www.un.org> (visited on 22 October 2012).

[1214] United Nations Secretary-General Kofi Annan's Action Plan to Prevent Genocide, Press Release SG/SM/9197 AFR/893 HR/CN/1077, Geneva, 07 April 2004, available at <http://www.un.org> (visited on 22 October 2012).

[1215] See Security Council Resolution 1366 of the 30 August 2001, available at <http://www.un.org> (visited on 22 October 2012).

[1216] Ibidem.

[1217] Ibidem.

[1218] Ibidem.

[1219] See Letter S/2004/567 dated 12 July 2004 from the Secretary-General of the UN addressed to the President of the Security Council, available at <http://www.un.org> (visited on 23 October 2012).

[1220] See Office of the Special Adviser on the prevention of genocide, available at <http://www.un.org> (visited on 23 October 2012).

[1221] See Mission statement and the mandate of the Special Advisor on the Prevention of Genocide, available at <http://www.un.org> (visited on 23 October 2012).

Indeed, this Office acts as a mechanism of early warning to the Secretary-General, by bringing to his attention situations that could potentially result in genocide.[1222] Since this does include tackling the causes and dynamics of genocide, the Office of the Special Adviser on the Prevention of Genocide would be entitled to alert the Secretary-General on situations that may lead to genocide even at the primary level. With this, the Secretary-General should be able to significantly contribute to the prevention of genocide at this primary level if that alert is followed by appropriate and timely actions. Actions could include creating a working network with regional and sub-regional arrangements in the monitoring of the situations on the ground and suggesting guidance to states concerned.

Another means available within the Secretariat is through the Office of the United Nations High Commissioner for Human Rights (OHCHR) created by the General Assembly in 1993 as "the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General."[1223] Its mandate is to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international human rights laws and treaties.[1224] This includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the United Nations system in the field of human rights.[1225] Given that mandate as well as the resources available to it, it arguably has the potential to prevent genocide."[1226] If it may be difficult to find where it has done so at the primary level so far, it is not because of the lack of competence but perhaps because of other various reasons.

All these available means contained in the instruments shown above are in accordance with the Charter. They constitute the legal basis under which the Secretary-General can take action that can have effect on the prevention of genocide from the primary level. Bruno Simma has

[1222] See Mission statement and the mandate of the Special Advisor on the Prevention of Genocide, available at <http://www.un.org> (visited on 23 October 2012).

[1223] General Assembly adopted Resolution 48/141 of 20 December 1993 on the High Commissioner for the Promotion and Protection of All Human Rights, para 4., available at <http://www.un.org> (visited on 23 October 2012).

[1224] See <http://www.ohchr.org> (visited on 23 October 2012).

[1225] See <http://www.ohchr.org> (visited on 23 October 2012).

[1226] For extensive analysis see Schabas, A. William, "Preventing Genocide and Mass Killing: The Challenge of the United Nations", Report published by the *Minority Rights Group (MRG)*, 2006.

commented that under article 99 of the Charter the Secretary-General has been given the right of initiative in any matter and has left to the Secretary-General the discretion to evaluate whether the matter is capable of threatening peace and security. [1227] If that is true, the role of the Secretary-General can be significant in the prevention of genocide at the primary level if he uses this power well. However, despite these means available to the Secretariat and the possibilities to invoke article 99 of the Charter in taking action related to the prevention of genocide, the past experience shows that no Secretary-General has ever invoked this article 99 before the outbreak of conflict.[1228] This can be regarded as a weakness of the Secretary-Generals who have failed to use that article in order to prevent genocidal conflicts before they started. Yet, as the idea is that the situation be addressed before the conflict erupts and with the broad power he has, he can investigate on any matter that in his opinion is capable of endangering peace and security. It does not have to be endangering it at that moment. What is needed is the potential to endanger it. Given his position in the UN, nobody else would be better placed to get information from any place of the world than him/her. And if s/he fails to do what s/he should do to prevent genocide, it would be due to other reasons than the lack of information. This is definitely not to say that he for sure has all necessary resources he may need to do so, but s/he is in a position to know what is lacking and needed for him/her to discharge his/her responsibilities.

3.3.2.2. Prevention at the secondary and tertiary levels

Since the legal basis for action by the Secretary-General at both secondary and tertiary levels has the same source and the actions to be taken are not that different, it is not necessary to discuss these levels separately.

Article 99 of the Charter is the main basis for actions that may give effect to the prevention of genocide at these levels. This article gives to the Secretary-General the possibility to include a situation of genocide whenever signs of potential genocide exist which can qualify as being threatening the international peace and security. The General Assembly has put much more light to article 99 in its declaration on fact-finding in the field of maintenance of peace and

[1227] Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., Volume II, Oxford University Press, Oxford, 2012, p. 2014-2021.

[1228] Simma Bruno gives a list of instances where this article has been used and there is nowhere it has been invoked before the conflict (see Ibidem).

security,[1229] by noting that the Secretary-General, on his own initiative or at the request of the States concerned, may bring relevant information on a situation that is threatening peace and security to the attention of the Security Council. In his comment on article 99, Bruno Simma observed that it can be seen as the authorizing clause for declarations, proposals and draft resolutions which the Secretary-General submits to the Security Council.[1230] Since a potential genocide can indeed threaten peace and security, the Secretary-General's action may include the drafting and submission to the Security Council of resolutions that aim at preventing genocide at the secondary and tertiary levels. Without purporting to be exhaustive, those suggested actions may be a preventive diplomacy or preventive deployment to ensure that the conflict does not escalate to genocide (secondary level) or an authorization of a force under chapter VII of the Charter to use all necessary means to put an end to an on-going genocide (tertiary level).[1231]

The role of the Secretary-General at these two levels has even been more enhanced by Security Council resolution 1366 in which the Secretary-General was invited by the Security Council to refer to it information and analyses from within the UN system on cases of serious violations of international law, including international humanitarian law and human rights law and on potential conflict situations, *inter alia*, from ethnic, religious and territorial disputes.[1232] In this resolution, the Security Council acknowledged the failure by all concerned actors of preventive efforts that preceded the tragedies in Rwanda and Srebrenica,[1233] and it was apparently enhancing the UN system in order for it to play its role more effectively.

The Office of the Special Adviser on the Prevention of Genocide (created by the Secretary-

[1229] See also Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/46/59), adopted by the General Assembly of the United Nations on December 9 1991, para. 13, available at <http://www.un.org> (visited on 23 October 2012).

[1230] Simma, Bruno et al. (eds.) *The Charter of the United Nations: A Commentary*, 2nd edition, Volume II, Oxford University Press, Oxford, 2002, p. 1220.

[1231] For instance, after the Secretary-General's Report of 15 November 2013 (S/2013/677) in which he confirmed the existence of gross and systematic violations of human rights (among others) in Central African Republic, the Security Council adopted Resolution 2127 of 5 December 2013 in which it authorised the deployment of the Mission in Central African Republic (MISCA) and authorised it to use all necessary means to protect civilians and restore state authority (see para. 28). Under the same resolution, the SC also authorised France to use all necessary means to support MISCA in the discharge of its mandate (see para. 50). The SG report and the SC resolution are available at <http://www.un.org> (visited on 06 December 2013).

[1232] See Security Council Resolution 1366 of 30 August 2001, para 10, available at <http://www.un.org> (visited on 23 October 2012).

[1233] See Security Council Resolution 1366 of 30 August 2001, eighteenth preamble paragraph, available at <http://www.un.org> (visited on 23 October 2012).

General pursuant to that resolution) was given the mandate that is indeed applicable to the prevention of genocide at these levels.[1234] This includes to:

> "(a) collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; …
>
> (c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide;…"[1235]

Obviously, and as it has been noted in literature, since the mandate of the Special Adviser is prevention of genocide, it cannot be limited to situations that already constitute genocide under the definition of that term in international law but need to focus on situations that may lead to it.[1236] In fact, it is even expressly stipulated in his mandate that he "would not make a determination on whether genocide within the meaning of the 1948 Genocide Convention had occurred."[1237]

Since its creation, this office has collected information in a number of situations and has reported about the likelihood of genocide. For instance, after his mission in 2008 in the Democratic Republic of the Congo, the Special Adviser on the prevention of genocide issued a report that the Secretary-General brought to the Security Council.[1238] Among other things, the Special Advisor concluded in this report that:

> ""…hatred and stigmatization based on ethnicity are widespread in North Kivu. The likelihood of ethnically motivated killings by armed groups and the escalation of genocidal hysteria among the civilian populations are factors that must be taken seriously and addressed in earnest. The risk of genocide in the region is significant, thus immediate

[1234] See Office of the Special Adviser on the Prevention of Genocide, available at <http://www.un.org> (visited on 23 October 2012).

[1235] See Outline of the mandate for the Special Adviser on the Prevention of Genocide as annexed to the Letter S/2004/567 dated 12 July 2004 from the Secretary-General of the UN addressed to the President of the Security Council, available at <http://www.un.org> (visited on 23 October 2012).

[1236] Akhavan, Payam, "Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide," *Human Rights Quarterly, Volume 28, Number 4, November 2006*, pp. 1043-1070, pp.1056-7, para. 8.1.

[1237] Ibidem.

[1238] Letter dated 18 March 2009 from the Secretary-General addressed to the President of the Security Council, available at <http://www.un.org/ga/search/view_doc.asp?symbol=S/2009/151> (visited on 24 October 2012).

action by States in the region and the international community is imperative."“[1239]

Likewise, in 2010 the Special Advisor on the prevention of genocide undertook a mission to Guinnea to collect information on risks of genocide in that country. In his report, he concluded that inter-ethnic tensions existed, especially in the Guinée Forestière region, and between Forestiers ethnic groups and the Malinké and Peuhl.[1240] He warned that if these tensions and the causes behind them were not addressed in the period during and after the elections, there was a real risk that the tensions could escalate into violent conflict with genocidal implications."[1241] The Secretary- General reacted and issued a statement in which he called on national and local leaders, as well as on the population as a whole, to refrain from any act or statement that may incite violence or human rights abuses.[1242] It might be difficult (and it is beyond the scope of this work) to affirm with certainty that it is because of these actions that genocide did not happen (so far) in those places, but it cannot be denied that these actions have played a big preventive role. As Akhavan has put it, sometimes the success of the prevention can only be "measured in terms of what *does not* happen." [1243]

The initiatives and actions by the Secretary-General himself or through his Special Advisor on the prevention of genocide may however face some serious challenges and result in a lack of preventive effect. With regard to the Secretary-General for instance, after receiving the information from the Special Advisor, the Secretariat may either not inform the Security Council in time or may do so but the Security Council fails to take action in time or ever. For example, though it was before the creation of this Office, the Secretary-General has flagrantly failed to take action even where the risk of genocide was clear in Rwanda and after the clear information

[1239] Report of the Special Adviser of the Secretary-General on the Prevention of Genocide on his mission to the Great Lakes region from 22 November to 5 December 2008 with respect to the situation in North Kivu, 5 March 2009, paras. 54&55, available at <http://www.un.org> (visited on 24 October 2012).

[1240] Report of the Special Adviser to the Secretary-General on the Prevention of Genocide on his Mission to Guinea from 7 to 22 March 2010, para. 49, available at <http://www.un.org> (visited on 24 October 2012).

[1241] Ibidem.

[1242] See Secretary-General Warning against Incitement, Divisive Statements or Actions, SG/SM/13223, 3 Nov 2010, available at <http://www.un.org> (visited on 24 October 2012). Other examples include the Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d"Ivoire, New York - 19 January 2011, <http://www.un.org> (visited on 24 October 2012). Gravely concerned about the possibility of genocide, they urged all parties in Côte d"Ivoire to refrain from inflammatory speech that incited hatred and violence. Other examples can be found at <http://www.un.org> (visited on 24 October 2012).

[1243] For an extensive analysis on that see Akhavan, Payam, "Preventing Genocide: Measuring Success by What Does Not Happen", *Criminal Law Forum,* Vol. 22, 2011, 1–33.

by the head of the UN mission in Rwanda which was about a possible genocide. Indeed, four months before the actual start of genocide in Rwanda, General Dallaire who was the Commander of the UN Assistance Mission in Rwanda (UNAMIR) sent to the Secretariat of the UN the information on a plan to wipe out the Tutsi ethnic group with the arms which were in different stocks in Kigali. He sought the permission to seize those weapons caches. No action followed this,[1244] and as a result, these arms were the ones that were used in genocide four months later. It cannot be said with certainty that this can still happen today, but given the procedure in the UN system, nothing guarantees that this cannot be repeated today.

As for the challenges related to the actions by the Office of the Special Advisor on the Prevention of Genocide it must be said that the fact that the Security Council does not receive regular notes or reports from the Special Adviser himself but through the Secretary-General is a problem.[1245] Akhavan suggested that having a direct channel between the Special Advisor and the Security Council would make the mandate become "a permanent feature of Council deliberations, and thus more easily insulate the Special Adviser's Office from unwarranted impediments or political vicissitudes at some point in the future."[1246]

It can be safe to say from this discussion that even though it was not clear whether the drafters of the Genocide Convention referred to the Secretariat of the UN among the competent organs of the UN entitled to take action under the Charter of the United Nations for the prevention of genocide, the Charter, the subsequent practice as well as the reality on the ground have proven that the Secretary-General may have the competence to suggest and take actions which may even be indispensable for the prevention of genocide. The actions that the Secretary-General can take fall within his competence under the Charter of the UN, especially its articles 98 and 99 as explained above. His actions are highly important because not only they may themselves have preventive effect but also may trigger more concrete actions by the organs with enforcement authority, especially when it comes to putting an end to an on-going genocide. This being said, it is also important to add that, although his role is vital in that, the SG may access information within the UN system, the complementarily with other organs of the UN is determinant in the

[1244] Barnett, M., *op.cit*., p.186.

[1245] Akhavan, Payam, "Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide", *Human Rights Quarterly, Volume 28, Number 4, November 2006*, pp. 1043-1070, pp.1056-7, paras 6.1 &6.2.

[1246] Idem, para. 6.2.

prevention of genocide.

3.4. The Economic and Social Council (ECOSOC)

3.4.1. Does the Economic and Social Council have the competence to prevent genocide?

On this question, it has been observed that *prima facie,* it would seem that ECOSOC has no competence in such cases, unless the General Assembly delegates such powers to it".[1247] Yet, this position may not be entirely correct if one interprets the Charter in line with what has been discussed in this work.

It must first of all be recalled that article 1(3) of the Charter makes achieving international cooperation in *inter alia* encouraging respect for human rights and fundamental rights for all, one of the purposes of the United Nations. In this international cooperation, article 55 obligates the UN to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 7(1) of the Charter makes the ECOSOC one of the principal organs of the UN and article 60 gives the powers to ECOSOC to discharge the functions provided in chapter X related *inter alia* to the international cooperation in the promotion of human rights. These provisions are to be read together with article 62 of the Charter. Among its functions and powers as provided for by article 62 of the Charter of the United Nations, the Economic and Social Council "may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all".[1248] This provision is broad enough that it would house recommendations that are related or may have effect on the prevention of genocide. Under this article, nothing would preclude the ECOSOC from making recommendations for the purpose of respecting the right to life by denouncing acts preparing or executing genocide. And this would perfectly fall under article 62. According to the same article, the Economic and Social Council "may also prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence". [1249] Here also, nothing would exclude any proposal of legal instruments related to the prevention of genocide since the prohibition of genocide is among the international human

[1247] See for instance Robinson, Nehemiah, *The Genocide Convention: A commentary*, New York: Institute of Jewish Affairs, 1960, p. 98.
[1248] See article 62 of the Charter of the United Nations.
[1249] Ibidem.

rights norms.

Furthermore, according to article 68 of the UN Charter, the Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.[1250] It appears from article 62 and 68 read together with articles 1(3), 55, 60 and 7(1) of the Charter, and its ECOSOC's practice that the prevention of genocide falls within its competence. The question about when it may act and what it can do concretely to prevent genocide will be examined next.

3.4.2. When and how the ECOSOC can act to prevent genocide?

3.4.2.1. Prevention of genocide at the primary level

Under article 62 of the Charter, the ECOSOC responsibilities include economic, social and human rights matters. In addressing them, the ECOSOC may initiate studies, discuss them, and give recommendations to the General Assembly, member states concerned and specialized agencies. These activities may deal with root causes of genocide. This has been discussed before and there is no need to dwell on that at length here. This competence conferred to ECOSOC by the Charter appears to be broad enough to make ECOSOC arguably be well placed to address many root causes of genocide at the primary level. In his action plan on the prevention of genocide, Kofi Annan emphasized on the prevention at the primary level, which, as a UN organ, concerns the ECOSOC as well. He noted:

> "We must work together with the international financial institutions, with civil society, and with the private sector, to ensure that young people get the chance to better themselves through education and peaceful employment, so that they are less easily recruited into predatory gangs and militias. We must protect the rights of minorities, since they are genocide's most frequent targets. By all these means, and more, we must attack the roots of violence and genocide: hatred, intolerance, racism, tyranny, and the dehumanizing public discourse that denies whole groups of people their dignity and their rights."[1251]

The Charter has provided for some ways through which the ECOSOC can address this. For

[1250] See article 68 of the Charter of the United Nations.

[1251] United Nations Secretary-General Kofi Annan's Action Plan to Prevent Genocide, Press Release SG/SM/9197 AFR/893 HR/CN/1077, Geneva, 07 April 2004, available at <http://www.un.org> (visited on 25 October 2012).

instance, under article 68 of the Charter, the ECOSOC shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions. Under this article, the ECOSOC has set up the Commission on Human Rights (CHR) at its first meeting of 10 December 1946 as its subsidiary body to examine, monitor and report on human rights situations.[1252] From 1993, this commission was assisted by the UN High Commissioner for Human Rights in its work.[1253] The CHR has been replaced in 2006 with the United Nations Human Rights Council (HRC).[1254] Though the Commission has not been very effective in its work, it is nonetheless important to say that it launched a first study on genocide. In late 1960s, the Economic and Social Council approved in resolution 1420 (XLVI) of 6 June 1969 the decision adopted by its Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a study of the question of the prevention and punishment of the crime of genocide.[1255] Nicodeme Ruhashyankiko was designated as a Special Rapporteur to carry out that study that he released some years later.[1256] This study came up with suggestions and recommendations on the prevention of genocide.[1257] In 1980s, the ECOSOC adopted the resolution 1983/33 requesting the Sub-Commission to appoint one of its members as Special Rapporteur with the mandate to revise, as a whole, and update the previous study on the question of the prevention and punishment of the crime of genocide.[1258] Benjamin Whitaker who was appointed also made suggestions and recommendations on the prevention of genocide. In the 1980s and 2000s, the commission has adopted some other resolutions which mainly called upon states to ratify (or to accede to) the Genocide Convention and continue to give considerations to the prevention of genocide.[1259]

[1252] See <http://www.un.org/en/ecosoc/about/index.shtml> (visited on 25 October 2012).

[1253] The Office of the UN High Commissioner for Human Rights was created by the General Assembly of the UN in its resolution 48/41 of 20 December 1993. See the resolution at <http://www.un.org> (visited on 25 October 2012).

[1254] The General Assembly adopted the resolution 60/251 of 3 April 2006 which decided to establish the Human Rights Council in replacement of the Human Rights Commission and this time as a subsidiary organ of the General Assembly (see para. 1 of the resolution).

[1255] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd ed., Cambridge University Press, Cambridge, 2009, p. 555.

[1256] Ruhashyankiko, Nicodeme, "Study of the Question of the Prevention and Punishment of the Crime of Genocide", Sub-Commission on the Promotion of Human Rights, 1978 , UN Doc. E/CN.4/Sub.2/416.

[1257] Idem, paras. 611-627.

[1258] Whitaker, Benjamin., "Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide", UN Doc. E/CN.4/sub.2/1985/6.

[1259] See Commission of Human Rights Resolutions 1998/10 of 3 April 1998, 1999/67 of 28 April 1999, 2001/66 of 25 April 2001, 2003/66 of 23 April 2003 and 2005/62 of 20 April 2005. See these resolutions at

Furthermore, pursuant to ECOSOC's competence, one year after the UN Secretary-General Action plan on the prevention of genocide was launched in 2004, ECOSOC made a follow-up with regard to the prevention of genocide as contained in that Secretary-General Action plan. For instance, it endorsed the Commission on Human Rights" request to the Secretary-General to make available a report on the implementation of his five point action plan and on the activities of the Special Adviser on the prevention of genocide."[1260] The point here is not to discuss the content of these studies and reports. The point in giving these examples is to give an indication on the kinds of action that the ECOSOC is competent to take to prevent genocide at the primary level. Indeed, such studies on that matter may be relevant for the prevention of genocide because they may suggest means to prevent genocide at the primary level. The examples related to the Human Rights Commission show how the ECOSOC could discharge its responsibility with regard to the prevention of genocide at the time the Commission on Human Rights was still under its authority, but also that nothing would preclude it from creating a human right body to deal with the prevention of genocide at this level. Indeed, it remains the competence of the ECOSOC to set up commissions as well as ad hoc mechanisms in order to address matters falling within its competences.[1261]

Whether the ways available to the ECOSOC may contribute to the prevention of genocide may depend on how it does it and on who the addressees of its recommendations are. Arguably, if ECOSOC creates mechanisms with concrete mandate to prevent genocide, it could have a significant effect to the prevention of genocide.[1262] Regarding the addressee of its recommendations, article 62(2) on recommendations related to human rights does not mention the addressee of these recommendations and it has been interpreted as giving to ECOSOC the

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<http://www2.ohchr.org>, visited on 25 October 2012).

[1260] Economic and Social Council Decision 2005/295 of 25 July 2005 on the Convention on the Prevention and Punishment of the Crime of Genocide, available at <http://www.un.org> (visited on 25 October 2012). The request by the Commission on Human Rights was made in its resolution 2005/62 of 20 April 2005, available at <http://www2.ohchr.org>, visited on 25 October 2012).

[1261] See those commissions and ad hoc mechanisms at <http://www.un.org/en/ecosoc/> (visited on 25 October 2012).

[1262] See for instance Schabas, A. William, "Preventing Genocide and Mass Killing: The Challenge of the United Nations", Report published by the Minority Rights Group (MRG), 2006, p. 11. If as Schabas has noted, for decades the ECOSOC's main accomplishments have been actually those of its commissions, especially the Commission on Human Rights which has been set up by ECOSOC at its first meeting of 10 December 1946, those bodies may be reinforced to be more effective and this may presumably contribute to the prevention of genocide.

discretion to decide the addressee(s) of its recommendations.[1263] If that is true, ECOSOC may also address its recommendations to all states, or to any appropriate body whatsoever in order to promote respect for and observance of human rights for all throughout the world.[1264]

3.4.2.2. Prevention of genocide at the secondary and tertiary levels

Since the legal basis for action by the ECOSOC at both secondary and tertiary levels has the same source and the means of action are the same, the two levels are discussed together.

To start with, it must be said that in dealing with human rights matter (related to genocide or not), ECOSOC actions have not been (and are not) subjected to the prior existence of threat to international peace and security. In addition to the provisions of the Charter mentioned above, its resolutions 1235(XLII) of 1967[1265] and 1503(XLVIII) of 27 May 1970[1266] are evidence to this. Both resolutions gave the authorisation to the Commission on Human Rights to examine information relevant to gross violations of human rights and fundamental freedoms [1267] without requiring that those violations constitute threat to international peace and security. This is also applicable with regard to the violations of human rights that may lead to genocide.

In the past, ECOSOC has got to deal with matters related to the prevention of genocide through its Commission and through its own actions. For instance, in 1992 as the war raged in Bosnia and Herzegovina, the Commission met in special session on two occasions, sessions that led to

[1263] Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., Volume II, Oxford University Press, Oxford, 2002, p. 992. For recommendations related to economic, social, cultural, educational, health, article 62 (1) of the Charter makes it explicit that they will be addressed to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

[1264] Simma, Bruno et al. (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., Volume II, Oxford University Press, Oxford, 2002, p. 992.

[1265] Economic and Social Council Resolution 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (1967), available at <http://www.un.org> (visited on 25 October 2012).

[1266] Economic and Social Council Resolution1503((XLVIII) of 27 May 1970, available at <http://www.un.org> (visited on 25 October 2012).

[1267] This Resolution 1235 (XLII), gave the authorization to the Commission on Human Rights to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa and in the Territory of South West Africa… and to racial discrimination as practiced notably in Southern Rhodesia… and decided that the commission make a thorough study of situations which reveal a consistent pattern of violations of human rights. Resolution1503((XLVIII) authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a Working Group … to consider all communications.. with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission.

the appointment of a special rapporteur and an urgent mission on the ground.[1268] This also happened in the conflict in Rwanda which serves as a good example of the work of the special rapporteur on situations of genocide.[1269] Indeed, pursuant to the Commission on Human Rights resolution 1992/72, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reported some violations of human rights that could lead to genocide.[1270] For instance, after the mission he conducted to Rwanda in April 1993, the Special Rapporteur Mr. Bacre Waly Ndiaye reported that:

> "The cases of intercommunal violence brought to the Special Rapporteur's attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason. Article II, paragraphs (a) and (b) (of the Genocide Convention), might therefore be considered to apply to these cases."[1271]

Although not much has been done to prevent the escalation of that conflict, the Commission on Human Rights had done something on what it was supposed to do. The Secretary-General of the UN has acknowledged that the Special Rapporteur on Extrajudicial Killings described many warning signs in Rwanda the year before the genocide happened but that no one paid attention to them.[1272]

In a similar situation, after the visit to Darfur in 2004 as the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir warned that there were strong indications of grave violations of international humanitarian law and human rights.[1273] This might have contributed to triggering subsequent Security Council resolution 1564 on the establishment of an international commission of inquiry to investigate reports of violations of international

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[1268] Schabas, A. William, "Preventing Genocide and Mass Killing: The Challenge of the United Nations", Report published by the *Minority Rights Group(MRG),* 2006, p. 18.

[1269] Report by the Special Rapporteur on Extrajudicial, Summary Arbitrary Executions on the mission he conducted in Rwanda from 8 to 17 April 1993, in UN DOC E/CN.4/1994/7/Add.1 of 11 August 1993 paras. 78-79.

[1270] See Resolution 1992/72 of the Commission On Human Rights on Extrajudicial, Summary or Arbitrary Executions, available at <http://www.unhchr.ch> (visited on 25 October 2012).

[1271] Idem, para 79.

[1272] United Nations Secretary-General Kofi Annan's Action Plan to Prevent Genocide, Press Release SG/SM/9197 AFR/893 HR/CN/1077, Geneva, 07 April 2004, available at <http://www.un.org> (visited on 25 October 2012).

[1273] Report of the Special Rapporteur, Ms Asma Jahangir, Addendum, Mission to the Sudan, UN Doc. E/CN.4/2005/7/Add. 2 of 6 August 2004, para. 57. Asma Jahangir was Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions from 1998 to 2004. See <http://www2.ohchr.org> (visited on on 25 October 2012).

humanitarian law and human rights law in Darfur by all parties and to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.[1274]

The possible role of the ECOSOC in the prevention of genocide has not been and is not limited to the Human Rights Commission.[1275] Indeed, its role in the prevention of conflicts (which may lead to genocide) was taken into account by the General Assembly in its resolution 55/217 of 6 March 2001 on the causes of conflict and the promotion of durable peace and sustainable development in Africa.[1276] In that resolution, the General Assembly requested the ECOSOC to create an ad hoc advisory group on countries emerging from conflict, with a view to assessing their humanitarian and economic needs and elaborating a long-term programme of support for implementation that begins with the integration of relief into development.[1277] The ECOSOC responded to this request of the General Assembly by adopting the resolution 2002/1 which created a framework for (an) advisory group(s) on African countries emerging from conflict.[1278] In this framework, the Economic and Social Council has set-up two ad hoc advisory groups on Guinea-Bissau[1279] and Burundi.[1280]

Strictly speaking, nowhere these resolutions and decisions talked about the prevention of genocide, but the actions thereof are susceptible of preventing genocide. The reason to mention these examples here is not only because the prevention of conflicts is itself a prevention of genocide (in a way) since it is hard to imagine a genocide that happens where there is no conflict, but also because it is important to show that existing instruments and practice through which the

[1274] See Resolution 1564 of the Security Council of the United Nations (18 September 2004), para. 12, available at <http://www.un.org> (visited on 25 October 2012).

[1275] It is important to precise that this Human Rights Commission (that was a subsidiary body of the ECOSOC assisted by the UN High Commissioner for Human Rights) has been replaced in 2006 with the United Nations Human Rights Council by the General Assembly Resolution A/Res/60/251 of 3 April 2006 which decided to establish the Human Rights Council in replacement of the Human Rights Commission and this time as a subsidiary organ of the General Assembly (see para. 1 of the resolution).

[1276] See Resolution 55/217 of the General Assembly of the United Nations (6 March 2001), para. 7 available at <http://www.un.org> (visited on 25 October 2012.

[1277] Ibidem.

[1278] Resolution E/2002/1, Ad Hoc Advisory Group on Group on African Countries Emerging from Conflict, 15 July, 2002, available at <http://www.un.org> (visited on 25 October 2012).

[1279] See ECOSOC Decision 2002/304 of 25 October 2002 establishing the Ad Hoc Advisory Group on Guinea-Bissau, available at <http://www.un.org> (visited on 25 October 2012).

[1280] See ECOSOC Decision 2002/304 of 22 August 2003 establishing the Ad Hoc Advisory Group on Burundi, available at <http://www.un.org> (visited on 25 October 2012).

ECOSOC can operate also may play an important role in the prevention of genocide.

Furthermore, either on basis of reports of its subsidiary organs and ad hoc mechanisms or by itself, the ECOSOC has the power under the Charter not only to address its recommendations to the General Assembly, all states and specialised agencies,[1281] but also to furnish information to the Security Council and to assist the Security Council upon its request as stated in article 65 of the Charter,[1282] including information related to a situation of a potential genocide or an on-going genocide.

However, like for some other organs of the UN, it must be said that the decisions of the ECOSOC at all these levels of prevention (as well as at the primary level) face some challenges to the prevention of genocide. Among them, two examples will be mentioned here. First, the fact that ECOSOC decisions/resolutions are not binding to its addressees may limit the effect of its actions on the prevention of genocide because the implementation of its decisions depends on the will of the addressees.[1283] A second challenge is that the prevention of genocide has not been expressly included in the Charter of the UN which may make the ECOSOC not give it top priority. Also, there is no mechanism to check the actions of the ECOSOC. These challenges make the prevention of genocide by the ECOSOC relatively ineffective.

3.5. The International Court of Justice

3.5.1. The basis of the competence of the ICJ to address the prevention of genocide

Like other organs of the United Nations, the ICJ was not mentioned in article VIII of the Genocide Convention as one of the competent organs of the United Nations that can play a role in the prevention of genocide. However, unlike other organs of the United Nations which were not expressly mentioned, in its next article, the Genocide Convention specifically refers to the ICJ: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[1284]

[1281] See article 62(1) of the Charter of the United Nations.

[1282] See article 65 of the Charter of the United Nations.

[1283] Simma, Bruno et al. (eds.),*The Charter of the United Nations: A Commentary*, 2nd ed., Volume II, Oxford University Press, Oxford, 2002, p. 986.

[1284] Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by resolution

Article IX makes the ICJ competent with regard to the "application or fulfilment" of the present Genocide Convention.[1285] Moreover, article VIII of the Genocide Convention is also relevant for the competence of the ICJ. Under that article, other organs may seek advisory opinions related to the prevention of genocide. Also, states may base on it to ask the court to order provisional measures to prevent genocide. The discussion in this subsection will be limited to examining the competence of the ICJ and the action it can take in the prevention of genocide at the three levels of prevention.

3.5.2. When and how can the ICJ act to prevent genocide?

3.5.2.1. Prevention at the primary level

The question here is whether the ICJ has jurisdiction to rule in a dispute involving state failure to adopt preventive measures to give effect to the rules on the prevention of genocide at the primary level. Given the nature of the obligation as discussed above, the answer is in principle affirmative because the obligation to prevent genocide starts from the time there is a need to take preventive measures and not from the time genocide starts. The court may rule that the state concerned is breaching its obligation to prevent genocide and may order it to adopt preventive measures to give effect to the provisions of the Genocide Convention. Being binding on the parties concerned, such decisions may play a preventive role.[1286] To date, there has been no such a decision by the ICJ because no such a claim has been brought before it. A detailed analysis on the extent to which states concerned may be held responsible at the primary level and who may bring such a claim are questions whose answers require a prior discussion on some rules on international responsibility. This is beyond what is aimed at here.

The ICJ can also be asked to give advisory opinions related to the prevention of genocide. For

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260 (III) A of the United Nations General Assembly on 9 December 1948, at <http://www.un.org> (visited on 25 October 2012).

[1285] This is a specific competence in addition to its general one laid down by articles 92 to 96 of the UN Charter as well as the ICJ Statute (which forms the integral part of the Charter). See Charter of the UN and the annexed Statute of the ICJ. The concrete actions to prevent genocide by the ICJ based on some of the provisions of the Charter and its annex will be discussed at each level of the prevention.

[1286] See article 94 of the Charter of the UN which reads: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

instance, in its advisory opinion on the reservation to the Genocide Convention, the ICJ confirmed that reservations were only permissible if they were not incompatible with the object and purpose of the Genocide Convention and also said that the principles underlying this convention were binding on all states.[1287] It might be difficult to evaluate the exact effect this opinion as well as its other pronouncements on genocide[1288] have had on the prevention of genocide. However, they certainly are important in the understanding of the nature of the obligation to prevent genocide which is essential for its implementation.

3.5.2.2. Prevention at the secondary level

The ICJ exercised the power vested in it by article IX of the Genocide Convention to rule on cases in which signs of genocide exist. At the request by Bosnia in the case against the Federal Republic of Yugoslavia, the International Court of Justice held in 1993 that it possessed jurisdiction to order provisional measures requiring the Federal Republic of Yugoslavia, to "take all measures within its power to prevent commission of the crime of genocide."[1289] Also, invoking article VIII of the Genocide Convention, Bosnia-Herzegovina had asked the Court to "act immediately and effectively to do whatever it can to prevent and suppress" the acts of genocide.[1290]

Though the court had not yet determined that the Genocide Convention actually applied to that case, it ordered that "the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be

[1287] Reservation to the Convention on Genocide, Advisory Opinion: I.C.J. Reports1951, p. 15-30.
p. 24. See also a detailed discussion on this in Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd edition, Cambridge University Press, Cambridge, 2009, p. 616-619.

[1288] For instance the Court has said in the DRC v. Rwanda Case that the prohibition of genocide is a peremptory norm of international law. It has also said in Barcelona traction case that the prohibition of genocide has an *erga omnes* character. International Court of Justice, Case concerning armed activities on the Territory of the Congo (New application: 2002) Republic of the Democratic of Congo v. Rwanda), (Case No 126), Judgment, 3 February 2006, para. 64, available at <http://www.icj-cij.org/> (visited on 25 October 2012) and International Court of Justice, Case concerning the Barcelona Traction, Light and Power Company, Limited (New application: 1962) Belgium v. Spain Judgment, 5 February 1970, paras. 33 and 34, at <http://www.icj-cij.org/> (visited on 25 October 2012).

[1289] International Court of Justice , Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J Reports 1993, p. 3, para. 52(A) 1.

[1290] Idem, para. 47.

subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group".[1291]

3.5.2.3. Prevention at the tertiary level

The role of the ICJ at the tertiary level is to decide on disputes related to the breach of the obligation to prevent genocide when genocide has started. In theory, depending on the period the court reaches such a decision, this can have a preventive effect because it can dissuade the state concerned and other states from being responsible for that breach in the future. In the judgment on merits in the case Bosnia-Serbia, the ICJ confirmed again its role and authority in dealing with cases of genocide and found Serbia and Montenegro responsible for the breach of the obligation to prevent genocide that occurred in Bosnia.[1292] However, this decision came too late to prevent what happened in Bosnia.

In other cases on genocide, the ICJ has either lacked jurisdiction, or the case is pending for a long period. For instance, in the case instituted by the Democratic Republic of the Congo against Rwanda,[1293] the DRC contended that Rwanda had violated *inter alia* the Genocide Convention.[1294] But the ICJ lacked jurisdiction because Rwanda had made a reservation on article IX of that convention.[1295] Also, in 1999, Croatia instituted proceedings before the Court against Serbia and Montenegro that it had breached its legal obligations to Croatia under the Genocide Convention for genocide committed between 1991 and 1995 and requested the Court to hold Serbia and Montenegro responsible.[1296] At the moment of the writing, the case is still pending before the Court.

[1291] Idem, para. 52A(2).

[1292] International Court of Justice, Case concerning the application of the convention on the prevention and punishment of the crime of genocide, (Bosnia-Herzegovina v. Serbia- Montenegro), (Case No. 91) Judgment, 26 February 2007, available at <http://www.icj-cij.org> (visited on 26 October 2012).

[1293] International Court of Justice, Armed activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J Reports 2006, p. 6, available at http://www.icj.cij.org (visited on 26 October 2012).

[1294] Idem, para. 11(b).

[1295] Idem, paras 64-69.

[1296] International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide(Croatia v. Serbia and Montenegro), Preliminary Objections, Press release of 10 April 2008, paras. 4-6, available at <http://www.icj.cij.org> (visited on 26 October 2012).

Though the prevention of genocide by the ICJ at all levels is not negligible, it should be noted that in addition to the challenge related to the length of the procedure which might be difficult for the ICJ to reach a decision that would have an effect on the suppression of an on-going genocide, some other challenges are worth considering. For instance, like for other organs of the UN, for the action (decisions) by the ICJ to be effective, they need to be enforced by actions of the Security Council[1297] (unless states concerned are willing enough to implement the Court's decisions). Also, neither all states are parties to the ICJ nor have they all accepted the jurisdiction of the ICJ. It has been argued in this work that there is a customary rule on the prevention of genocide, but the fact that there is no equivalent customary rule that gives compulsory jurisdiction to the ICJ in case of the breach of the obligation to prevent genocide, the court may happen to lack jurisdiction in cases related to the breach of the obligation to prevent genocide.[1298] This constitutes a challenge to the prevention of genocide by the ICJ.

Another challenge is that, given the nature of the ICJ, there is no way it can intervene in situations where states lack interest and/or standing to bring a claim before it on a violation of the obligation to prevent genocide by a given state. Neither individuals nor organisations have *locus standi* before the ICJ, although international organisations can request advisory opinions.

3.6. Preliminary conclusions

In this section, it is concluded that the competence of organs of the UN to take action in preventing genocide derives from the Charter of the UN and that each of the principal organs of the UN discussed in this chapter is competent to take actions. The actions by those organs are capable to have effect on the prevention of genocide (if they are taken at the right time). Like for states, the theory on the prevention of genocide through the primary, secondary and tertiary levels is applicable to the UN. However, the challenge is that the complementarity between these organs at each level is highly essential for the prevention to be effective. In fact, not only are there some overlaps between the functions of these organs which can have negative effect on the prevention of genocide, but also the fact that the obligation owed to everybody in this way (without any hierarchical coordination between them) may easily be breached by everybody. Each of the mentioned organs takes action (or should take it) in its way without any

[1297] See article 94(2) of the Charter of the United Nations.
[1298] The Case between DRC v Rwanda given above is a good example.

coordination. This lack of coordination in the prevention of genocide within the UN system may weaken the prevention of genocide (among other many challenges shown in this section). And though the coordination is not the only change that is needed for the prevention of genocide, it is highly desirable for the prevention of genocide by the UN to be effective.

Conclusion

The first and foremost question that this chapter has had to answer was whether the United Nations has a legal obligation to prevent genocide. It was answered in the affirmative. Indeed, this chapter demonstrated why and how the United Nations is bound by the obligation to prevent genocide. While it was argued that the obligation of the UN to prevent genocide derives from general international law, the competence to take action in preventing genocide derives from the Charter of the UN. The Charter does not refer to genocide as such and this has been explained as being due *inter alia* to the uncertainty on the legal existence of the crime of genocide at the time the Charter was adopted.[1299] Yet, as interpreted in this chapter, the Charter contains provisions that prohibit the use of force but also creates an organization and organs vested with powers to put in place preventive measures that may be susceptible of contributing to the prevention of genocide. That is why, at the time of adoption of the Genocide Convention (3 years after the Charter), the Charter was referred to in article VIII. That article expressly made a reference to the competent organs of the United Nations and on appropriate measures to be taken under its Charter in order to make prevention of genocide possible. There would have been no need to refer to the Charter of the UN if the latter did not have provisions under which genocide could be prevented. Accordingly, article VIII of the Genocide Convention has referred to all provisions of the Charter that can be useful in preventing genocide.

The reference to the competent organs of the UN in the Genocide Convention was not by coincidence. It was drafted by the UN itself and adopted under its auspices. By referring to the

[1299] As shown earlier, the United Nations recognized genocide for the first time as an international crime in 1946 (one year after the adoption of the Charter). Yet the Charter which was adopted in 1945 was drafted in response to what had just happened during the World War II. Indeed, not only there had been aggression by the enemy states, but also the extermination of Jews which, in the actual sense falls within the definition of genocide. It has been thus argued that the drafters of the Charter expressly mentioned aggression and not also genocide because genocide did not legally have a name. The Charter was drafted in the mood or spirit to avoiding another scourge of war which had caused sorrow to mankind. It could probably have mentioned genocide in the Charter had it been recognised so in international law by then.

Charter, a bridge between the two texts was created, because the UN was regarded as an important entity for the operationalization of that convention. Bridging was indispensable because the Charter has not used the word genocide. Bridging was easier than amending the Charter.[1300] Moreover, it was clear that one of the mechanisms to implement the convention was to use competent organs of the UN. That is why it is argued that to discharge the UN from this obligation would make the rules on the prohibition of genocide redundant, because without the action or involvement of the UN, the chances of those rules being successfully implemented may be low in many cases. This view is consistent with some of the arguments on the retention of article VIII that; (a) since the convention was a concrete application of the Charter, it was desirable to include an article which made clear the relation between the Charter and the Convention; (b) since there was no international tribunal to enforce universal repression of the crime of genocide, the competent organs of the United Nations were best fitted to see to the application of the Convention.[1301] This is a relatively clear alternative because as shown before, there are many difficulties in the implementation of this obligation by States themselves. It can therefore be maintained that the prevention of genocide may not be effectively done without the involvement of the UN.

The action by the UN is not conditioned to a prior report by any state. If the action to be performed by the organs of the UN falls within the competence of the UN, it logically follows that it must not wait until it is informed by whomever, because the Charter from which its competence derives does not require that. Furthermore, under both the Charter and customary international law, action to prevent genocide by the United Nations is not territorially limited.

It has been shown that each of the principal organs of the UN discussed in this chapter is vested with the power to take actions that are capable to have effect on the prevention of genocide. However, the overlap between the functions of UN organs and the lack of coordination has been identified as a big challenge that needs to be addressed. Arguably, the proposed Organisation for the Prevention of Genocide (OPG) and related fund suggested in the previous chapter would provide a solution to this challenge because it would coordinate the works of all the actors

[1300] On the value of this article, Ruhashyankiko argued that the value of an article specifying the role of the United Nations in the prevention of genocide is especially evident because until some special agency is set up, there is no other international organization to see to the implementation of the Genocide Convention.

[1301] Official Records of the General Assembly, Third Session. Part I. Sixth Committee, Annexes, pp. 411-412 cited by Ruhashyankiko, Nicodeme, "Study of the Question of the Prevention and Punishment of the Crime of Genocide", Sub-Commission on the Promotion of Human Rights, 1978, UN Doc. E/CN. 4/Sub.2/416, para. 288.

involved in the prevention of genocide. The existing office of the Special Adviser for the prevention of genocide is a good sign toward the same result, but there is a need of a stronger body. In addition to what was suggested in relation to states, that body should have independence from the UN organs and the capacity and authority to investigate from early stages and recommend measures to the relevant actors (including organs of the UN) to take appropriate action before the escalation of the conflict. The International Atomic Energy Agency (IAEA) discussed in chapter two can serve as one of the examples of how such a body can work with the UN organs. If despite this, the conflict has escalated, it should also (if given means to do so) determine that genocide is imminent or is being committed and recommend that the Security Council takes rapid and decisive action that may include the use of force where necessary.

Without being too ambitious, it must be said that, for a timely use of force to be possible, a permanent force under UN command would be needed to stop killings at their very start. The creation of such force is possible even without the amendment of the Charter. If the world has found genocide an odious scourge and has committed itself to prevent it[1302] in order to liberate mankind from it,[1303] it should follow that it be serious about its prevention by putting in place serious mechanisms to effectively prevent it from happening.

The challenges with regard to prevention of genocide by the UN raise the question of whether or not the UN can be legally held responsible for the breach of the obligation to prevent genocide when its organs have failed to do so. However, this is not answered in this work.[1304] Instead, it is now opportune to examine in the next chapter whether the concept of Responsibility to Protect has addressed the challenges mentioned in this chapter as well as in the previous ones and how it may contribute to the obligation to prevent genocide by different actors.

[1302] See article I and VIII of the Genocide Convention.

[1303] See preamble of the Genocide Convention.

[1304] A work on the legal consequences of the breach of the legal obligation to prevent genocide (by states and the UN) is highly desired in order not only to complete the present work but also to see whether and to what extent this could contribute to the prevention of genocide.

Chapter VIII. Prevention of genocide and the concept of the responsibility to protect

Introduction

Many challenges have been identified in the three previous chapters with regard to the prevention of genocide by territorial states, non-territorial states and the UN. This chapter addresses the question whether and to what extent this relatively new concept is a (new) means to the prevention of genocide. It does not look at this concept from all perspectives nor does it enter in the whole debate that has surrounded its legality, legitimacy and implementation.

It proceeds in four sections. The first section gives a brief summary of the background and evolution of the concept of the responsibility to protect. While the second section considers the responsibility to protect by territorial states in comparison with the obligation to prevent genocide by territorial states at the three levels of prevention, the third section discusses the responsibility to protect by non-territorial states and by the UN, in comparison with the obligation to prevent genocide by them at the three levels. The fourth and final section discusses the challenges of the R2P vis-à-vis the prevention of genocide.

1. Background and evolution of the concept of the R2P

Given the manifest failure to prevent genocide in Rwanda and in Bosnia, the international community sought to build a new international consensus on how to respond in the face of massive violations of human rights and humanitarian law.[1305] The Canadian Prime Minister Jean Pierre Chrétien announced in the 2000 UN General Assembly the establishment of an International Commission on Intervention and State Sovereignty (ICISS).[1306] Launched in September 2000, the International Commission on Intervention and State Sovereignty (ICISS) was expected to come up with new ways of reconciling the seemingly irreconcilable notions of

[1305] The Responsibility to protect, Report International Commission on Intervention and State Sovereignty (ICISS), December 2001, p. VII, available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (visited on 1 November 2012).

[1306] ICISS, the Responsibility to Protect, Research, Bibliography, Background, Supplementary Volume to the Report of the ICISS, p. 341.

intervention and state sovereignty.[1307]

This commission came up with a new concept: the responsibility to protect (R2P). In explaining this concept, the commission noted that "the responsibility to protect means the "responsibility to prevent", the "responsibility to react," and the "responsibility to rebuild".[1308] This concept was later referred to by the UN High-Panel on Threats, Challenges and Change in its report of 2004: A more Secure world: Our Shared Responsibility which emphasized that:

> "sovereign governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community." [1309]

Endorsing this High Panel report, the UN Secretary-General noted in his 2005 report: "In Larger Freedom: Towards Development, Security and Human Rights for all":[1310]

> "I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary *raison d"être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required".[1311]

The concept has evolved since then. After some changes of the initial concept by the ICISS,[1312] the R2P was unanimously accepted by governments in the 2005 UN World Summit Outcome.[1313] This concept was endorsed in two paragraphs (138, 139) and it is worth mentioning them here. The paragraph 138 states that:

[1307] Ibidem.

[1308] ICISS Report, para. 2.29.

[1309] A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, 2004, para. 201, available at <http://www.un.org> (visited on 23 November 2012).

[1310] In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, 2005, para. 135, available at <http://www.un.org> (visited on 23 November 2012).

[1311] Ibidem.

[1312] For an extensive analysis on the evolution and practice of the R2P see Bellamy Alex J., Davies Sara E., *Global Politics and the R2P: From Words to Deeds*, Routledge, Florence, KY, USA, 2010.

[1313] See the 2005 UN World Summit Outcome Document (WSOD) adopted by the General Assembly, UN Doc A/60/L.1 of 15 September 2005, available at <http://www.un.org> (visited on 1 November 2012).

> ""Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

And paragraph 139 states that:

> "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

In paragraph 140 states added that they fully supported "the mission of the Special Adviser of the Secretary-General on the prevention of genocide".

One year after the endorsement of the R2P by the General Assembly, the Security Council adopted the Resolution 1674 in which it reaffirmed the provisions of the paragraphs 138 and 139 regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[1314] The Security Council referred to the concept of responsibility to

[1314] Security Council Resolution 1674 of 28 April 2006 on the Protection of Civilians in Armed Conflicts, para. 4, available at <http://www.un.org> (visited on 12 November 2012).

protect in some of its subsequent resolutions such as the resolution 1706 of 2006 in which it was requiring Sudan to protect its population under threat of violence[1315] and in resolution 1894 of 2009 in which it endorsed again the concept of responsibility to protect.[1316] This latter resolution was adopted ten months after the first report of the UN Secretary-General on the implementation of the Responsibility to protect.[1317]

In this report, the Secretary-General noted that the R2P has three components or "pillars": the protection responsibilities of individual States; the international community's role in assisting States to fulfil their responsibilities (capacity-building); and the international community's residual responsibility for timely and decisive response.[1318] In other words, while pillar one is confirmation of the responsibility of each state to protect its populations against genocide, crimes against humanity, ethnic cleansing and war crimes, pillar two is the commitment of the international community to assist States in meeting those obligations. Pillar three is the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.[1319]

After this report was presented by the Secretary-General to the General Assembly in July 2009, the latter held for the first time, a debate on the responsibility to protect in the same month.[1320] Despite some concerns about this concept, in their statements, the vast majority of member states was positive about this concept and showed the will to commit themselves to the prevention and

[1315] Security Council Resolution 1706 of 31 August 2006 on the Expansion of the Mandate of the United Nations Mission in Sudan (UNAMIS) to include Darfur, para. 2 in the preamble, available at <http://www.un.org> (visited on 12 November 2012).

[1316] Security Council Resolution 1894 of 11 November 2009 on the Protection of Civilians in Armed Conflict, para. 7 in the preamble, available at <http://www.un.org> (visited on 12 November 2012).

[1317] Implementing the Responsibility to Protect , Report of the Secretary-General, 12 January. 2009, A/63/677, available at <http://www.unhcr.org/refworld/docid/4989924d2.html> (visited on 12 November 2012). The Security Council has referred to the R2P in the Situation in Libya in Resolutions 1970(2011), 1973(2011), 2040(2012) and on the Situation in Yemen in Resolution 2014(2011). The General Assembly has also referred to it in its Resolutions 66/176(2011) and 66/253(2012) on the situation in Syria, available at <http://www.un.org> (visited on 21 November 2012).

[1318] Ibidem. For more discussion and comments on this see also Welsh Jennifer, "Implementing the Responsibility to Protect", *Oxford Institute for Ethics, Law, and Armed Conflict*, 2009, p. 2, available at <http://www.elac.ox.ac.uk/downloads/r2p_policybrief_180209.pdf> (visited on 12 November 2012).

[1319] UN General Assembly, Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677.

[1320] Report on the General Assembly Plenary Debate on the Responsibility to Protect by the International Coalition for the R2P, 15 September 2009, available at <http://www.responsibilitytoprotect.org/ICRtoP%20Report-General_Assembly_Debate_on_the_Responsibility_to_Protect%20FINAL%209_22_09.pdf> (visited on 12 November 2012).

halting of atrocity crimes.[1321] Thus, the call by a few states to renegotiate the concept was not successful and the concept was kept the way it was adopted in the 2005 World Summit because the vast majority believed that the challenge was to implement the R2P not to renegotiate it.[1322] The vast majority also supported the three pillars of the R2P as suggested by the Secretary-General.[1323] The edifice of the R2P was maintained on those three pillars. The result of this debate was the General Assembly resolution which at the same time recalled the 2005 world summit outcome on the R2P and took note of the Secretary-General report and decided that the issues on the implementation of the R2P was to continue to be under its consideration.[1324]

In 2011, the General Assembly did have indeed another thematic debate on "The role of regional and sub-regional arrangements in implementing the responsibility to protect."[1325] This was following two reports of the Secretary-General on the same topic.[1326] The objectives of the debate "were to reconfirm that the responsibility to protect was an evolving principle, to serve as an opportunity for cross-regional exchanges on lessons learned and best practices, and to offer a forum for considering new ideas and approaches to enhancing global, regional, and sub-regional cooperation on the responsibility to protect."[1327] Like the previous debate, this one was rather about the implementation of the R2P. Likewise, the Secretary-General report of 2012 on R2P continued with measures related to its implementation which concerns the timely and decisive response with a focus on the Charter-based tools available to respond to situations of concern and the partnerships that could be utilized.[1328] Finally, the Report of 2013 assessed the causes

[1321] Implementing the Responsibility to Protect, The 2009 General Assembly Debate: An Assessment. Report of the Global Centre for the Responsibility to Protect, 2009, p. 9, available at <http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf> (visited on 12 November 2012).

[1322] Bellamy Alex J., Davies Sara E., *Global Politics and the R2P: From Words to Deeds*, Routledge, Florence, KY, USA, 2010, p. 43.

[1323] Idem, p. 44.

[1324] See General Assembly Resolution 63/308 on the Responsibility to Protect of 7 October 2009, available at <http://www.un.org> (visited on 13 October 2012).

[1325] General Assembly Debate on the Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect, 12 July 2011, Document GA/11112.

[1326] Early warning, Assessment and the Responsibility to Protect, Report of the Secretary- General, 14 July 2010, UN A/64/864. See also The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect, Report of the Secretary-General, 28 June 2011, A/65/877–S/2011/393.

[1327] General Assembly Debate on the Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect, 12 July 2011, Document GA/11112.

[1328] Responsibility to Protect: Timely and Decisive Response, Report of the Secretary-General, 25 July 2012, A/66/874-S/2012/578.

and dynamics of atrocity crimes and violations and provided examples of initiatives that States can take to prevent them.[1329] In all these reports and debate thereof, there has been no proposal that resulted in changing the edifice of the R2P as endorsed in 2005. The question about how this concept constitutes a mechanism to prevent genocide will be examined in the next sections.

2. Prevention of genocide by territorial states under the R2P

This section examines how prevention of genocide by territorial states is dealt with under the R2P. This is done through the three levels of prevention.

2.1. Prevention of genocide at the primary level under the R2P

In the concept of R2P the notion of prevention at the primary level was not used as such. Yet, in the explanation of its scope, there are reasons to think that it may aim at measures that can have effect on the prevention of genocide in the form developed in chapter five of this work on the measures of territorial states to prevent genocide. This relation and contribution of the R2P to the prevention of genocide at the primary level is what is examined here.

The responsibility of a state to protect its own population is expressly set out in paragraph 138 of the UN Summit Outcome Document which noted *inter alia* that each individual State has the responsibility to protect its populations from genocide (among other international crimes) which entails the responsibility to prevent it through appropriate and necessary means. [1330] However, this paragraph did not provide guidance on which measures may be taken by states.

In his subsequent report on the implementation of the R2P, the Secretary-General observed that since genocide (and the other atrocity crimes) requires permissive conditions; measures to be taken must address those conditions.[1331] Those conditions include seeds of intolerance, bigotry and exclusion which can be root likely to grow into something horrific like genocide (or other atrocity crimes).[1332] They also include social, economic and political systems that have no self-

[1329] Responsibility to Protect: State Responsibility and Prevention, Report of the Secretary-General of 9 July 2013, A/67/929–S/2013/399.
[1330] See the WSOD.
[1331] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 21.
[1332] Ibidem.

correcting mechanisms in place to discourage and derail such impulses.[1333]

Furthermore, it has been suggested in literature on the R2P that, before crises emerge, states must reflect on their own institutions and governance approaches by proactively self-structure their security, justice, political, and economic sectors to provide a solid buffer between the people and the interests of potential perpetrators.[1334] Some more or less concrete measures were later suggested in order to prevent genocide (and other atrocity crimes) by addressing their root causes. These include legislative measures as well as various other measures.

About the legislative ones, the Secretary-General noted in the said report on the implementation of the R2P that states should become parties to and embody in national legislation, relevant international instruments on human rights, international humanitarian law and refugee law so that the four specified crimes and violations and their incitement are criminalized under domestic law."[1335] Also, there should be criminal laws, rules and procedures that are designed to protect the vulnerable and the disenfranchised, while ensuring that impunity is not accepted either nationally or globally. [1336] Furthermore, these laws are designed in a way that ensures that all segments in the society affords equal access to justice and to judicial redress for violations of their fundamental rights, as part of an overall effort to strengthen the rule of law.[1337]

In addition to these laws (legislation), some other measures may contribute to promoting human rights. The report of the Secretary-General did not enumerate all measures that could be taken in that regard but did not exclude any, as long as they can contribute to keeping an environment that may not lead to genocide. Moreover, the ICISS had suggested some earlier. It had for instance noted that preventive strategies must work "to promote human rights, to protect minority rights and to institute political arrangements in which all groups are represented."[1338] According to the ICISS, efforts include for every state, a firm national commitment to ensuring fair treatment and fair opportunities for all citizens which provides a solid basis for conflict prevention. It added

[1333] Ibidem.

[1334] Gerber, Rachel, "Prevention: Core to the Responsibility to Protect", in. Weiss G. Thomas et al., "The Responsibility to Protect: Challenges & Opportunities in Light of the Libyan Intervention", in *e-International Relations*, November 2011, p. 30, available at <http://www.e-ir.info/wp-content/uploads/R2P.pdf> (visited on 03 December 2012).

[1335] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 17.

[1336] Ibidem.

[1337] Ibidem.

[1338] ICISS Report, pp. 21-22.

that the sovereign state needs to undertake efforts to ensure accountability and good governance, protect human rights, promote social and economic development and ensure a fair distribution of resources.[1339] Likewise Francis Deng said that since conflicts resulted not from difference but from how those differences are managed: gross inequalities, a denial of fundamental rights and civil liberties, and exclusion structural prevention should mean that issues of diversity are addressed through a constructive management of diversity.[1340] This supposes measures to be taken before the conflict with the potential to lead to genocide emerges. In the report on implementing the R2P mentioned above, the Secretary-General was of almost the same view that "it is evident that states that handle their diversity well, foster respect among disparate groups, and have effective mechanisms for handling domestic disputes and protecting the rights of women, youth and minorities are unlikely to follow such a destructive path",[1341](referring to mass violence).

The Secretary-General added that states can seek technical assistance from the UN, their neighbours and regional agencies to help oversee the implementation of the relevant international human rights and humanitarian standards[1342] mentioned above. This technical assistance may be useful in enhancing another key preventive measure by states to train the police, soldiers, the judiciary and legislators since they are critical actors in every society.[1343] Moreover, the population needs to be educated on the prevention of genocide (and other atrocity crimes) as well.[1344] During the 2009 General Assembly debate on implementing the R2P, some states spoke of the importance of increasing education and public awareness to prevent mass atrocity crimes.[1345] Some argued that training programs on human rights, mediation, conflict prevention, crisis management and good governance would be beneficial in the long term.[1346] As the

[1339] Idem, p. 19.
[1340] See <http://www.un.org/News/Press/docs/2011/ga11112.doc.htm>, (visited on 15 July 2012).
[1341] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 15.
[1342] Idem, para. 22.
[1343] Idem, para. 25.
[1344] See Responsibility to Protect: State Responsibility and Prevention, Report of the Secretary-General of 9 July 2013, A/67/929–S/2013/399, para. 63.
[1345] Implementing the Responsibility to Protect, The 2009 General Assembly Debate: An Assessment. Report of the Global Centre for the Responsibility to Protect, 2009, p. 9, available at <http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf> (visited on 3 December 2012).
[1346] Ibidem.

Secretary-General has noted, if principles related to the R2P are to take full effect and be sustainable, they must be integrated into each culture and society without hesitation or conditions.[1347]

There have been critiques that R2P may be everything and nothing because of its comprehensiveness.[1348] However, though the prevention of genocide (and other atrocity crimes) can be an imprecise science,[1349] especially at this primary level, this level is at the same time recognised as a priority in avoiding the occurrence of genocide.[1350] My view would therefore be that a much more precise framework of prevention is necessary at this level. This requires a robust and in-depth multidisciplinary and coordinated research.

My main observation here is however that the concept of the responsibility to protect addresses the conditions which may lead to genocide, ethnic cleansing, crimes against humanity and war crimes without either making it clear what are the causes of each of them, or precising that they may have the same causes and therefore be prevented by the same means. In the current form, it appears as if it has been assumed that they have the same causes and that they develop in the same manner. This may result in seeing R2P as everything and nothing as mentioned above. Another observation is that the R2P did not pay much attention to the measures at this level probably because from its inception it was designed to find a solution to mass atrocities which made it be rather oriented on further levels of prevention where signs are clear or when those crimes are being committed.

Despite these challenges in the implementation of the R2P at this level, it can nonetheless still be said that the R2P at this level may correspond well with what has been discussed *supra* about the obligation of territorial states to prevent genocide at the primary level. Indeed, states have the obligation/responsibility to create conditions that do not give chance to the emergence of risks of genocide. As explained, the means may include legislation as well as other kinds of measures (political, administrative, educational, economic…). If they are adopted and implemented, they

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[1347] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 20.

[1348] Genser, Jared et al., *The Responsibility to Protect*, Oxford University Press, Oxford, 2011, p. 72.

[1349] Gerber, Rachel, "Prevention: Core to the Responsibility to Protect", in. Weiss G. Thomas et al., The Responsibility to Protect: Challenges & Opportunities in Light of the Libyan Intervention", *e-International Relations*, November 2011, p. 29, available at <http://www.e-ir.info/wp-content/uploads/R2P.pdf> (visited on 03 December 2012).

[1350] Evans, Gareth, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Bookings Institution Press, Washington D.C, 2008, p. 41.

can surely contribute to the prevention of genocide from the very primary level. This is not to say however that the concept of the responsibility to protect has added something to what the substantial obligation to prevent genocide entails to states as explained in chapter five of this work. Many people have lauded this concept for its potential contribution to the prevention of genocide, but this was because the prevention of genocide had not been explained or understood correctly and substantially at least with regard to the territorial states.

Effective preventive actions at the primary level may make actions at further levels unnecessary and as supporters of the R2P at the earlier phase argue, there is no point in waiting to halt a massacre if early engagement might avert it entirely.[1351] However, when measures at this level have failed or have not been taken, territorial states need to take further actions to avert or stop genocide.

2.2. Prevention of genocide at the secondary and tertiary levels under the R2P

The reason to treat these two levels together lies in the fact that the concept paid not much attention to them and gave so little but similar indication on what should be done that can prevent genocide at both secondary and tertiary levels.

Some measures have been proposed by the Secretary-General in his report on the implementation of the responsibility to protect that can have effect on the prevention of genocide at the secondary level. For instance, the R2P suggests that states punish individuals who commit or incite to commit genocide (among other crimes).[1352] In fact, the UN World Summit Outcome Document expressly mentioned the incitement of the R2P crimes as one of the crimes to be prevented.[1353] When a state is unable to prosecute those individuals who are accused of inciting crimes, it has been suggested that it should refer them to the International Criminal Court or other international tribunals and assists them in locating and apprehending them.[1354] Apparently, these same measures can be also used at the tertiary level because not only the measures are not

[1351] Gerber, Rachel, "Prevention: Core to the Responsibility to Protect", in. Weiss G. Thomas et al., "The Responsibility to Protect: Challenges & Opportunities in Light of the Libyan intervention", *e-International Relations*, November 2011, p. 28, available at <http://www.e-ir.info/wp-content/uploads/R2P.pdf> (visited on 03 December 2012).

[1352] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 18-19.

[1353] See WSOD, para. 138.

[1354] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 18-19.

used in sequences but also the concept of R2P referred to the commission of the crimes as well as to the R2P as a ground of action to end them.

There has been not much elaboration on what more can be done by territorial states to implement the R2P to prevent genocide at the secondary and tertiary levels. However, by recognising that states have the primary responsibility to protect their populations from genocide, it is implied that they should do it at each level to ensure that it does not happen or that when it starts it gets stopped. In fact, saying in paragraph 138 of the Outcome Document that states prevent those crimes by all necessary and appropriate means may be understood as including measures at each level.

Not elaborating on further measures that may be susceptible of preventing genocide at the secondary and tertiary levels may have been due to the context in which the concept was conceived. Indeed, it seems that the authors of this concept were driven by the assumption that genocide is always committed by states or condoned by them. Though it has been argued that the structure of the responsibility to protect lies on the equal size, strength and viability of each of its supporting pillars,[1355] those who created the concept put much focus in explaining what the international community should do in preventing genocide (and other atrocity crimes) in other states which have failed to prevent those crimes. This can be explained by the fact that the commission that created this concept was itself indeed created to find ways on how to respond in the face of massive violations of human rights and humanitarian law where states have failed to prevent them. For the purpose of this work, there is not much interest in dwelling at length on the reasons why it has not been made clear in the concept of R2P about all the measures of territorial states which can have effect to the prevention of genocide at the secondary and tertiary levels. It is instead important to notice that for the little contained in it, there is no substantial difference between what the concept of responsibility to protect demands territorial states to do and what I have discussed in chapter five of this work on what the obligation to prevent genocide demands states to do at these levels.

This is not to say however that the insufficiency of clear measures of territorial states that can prevent genocide at these levels makes the R2P irrelevant for the prevention of genocide at those levels. The fact that it demands territorial states to take necessary and appropriate measures encompasses all measures at all levels. And again, as said above, the fact that the prevention of

[1355] Idem, summary.

genocide has been undeveloped for long time, if the responsibility to protect is respected the way it is, it can have some significant effect on the prevention of genocide. So, its contribution on the prevention of genocide is possible when its implementation is possible. In the next section, I examine what the R2P entails to non-territorial states and the UN with regard to the prevention of genocide.

2.3. Preliminary conclusions

In this section it is concluded that though in the concept of R2P not much focus has been put on the role of territorial states, this role has nonetheless been recognised in it for the prevention of genocide and other atrocity crimes. Under the R2P, territorial states are required to put in place measures that may contribute to the prevention of genocide. At the primary level, the measures include legislation as well as other kinds of measures (political, administrative, educational, economic…). It is noticed that there is no elaboration on measures that could be taken at the secondary and tertiary levels. However, the fact that territorial states are required to take necessary and appropriate measures, the R2P encompasses all measures at all levels. This being said, it has been observed that the concept did not add anything to what the substantial obligation to prevent genocide entails to states as explained in chapter five of this work.

3. Prevention of genocide by non-territorial states and by (or through) the United Nations under the R2P

The reason to treat non-territorial states and the UN together is simply that the concept of the R2P has put them together.[1356] This section investigates the measures that may be taken by non-territorial states on the prevention of genocide and by or through the UN at the three levels of prevention.

3.1. Prevention of genocide at the primary level under the R2P

In part of paragraph 138 of the UN World Summit Outcome document it is noted that the international community should, as appropriate, encourage and help States to exercise their

[1356] See for instance Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, paras. 30 and 44.

responsibility and support the United Nations in establishing an early warning capability.[1357] Part of paragraph 139 added this: "we also intend to commit ourselves, as necessary and appropriate, to helping states build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist those which are under stress before crises and conflict break out."[1358] The R2P demands states as members of the international community to take action in helping to prevent genocide and other mass atrocities when the host state is unable to prevent them alone.[1359] It is maintained within the framework of this concept that the prevention cannot be a national affair, and other states are required to assist in the prevention.[1360] Under the R2P, States take actions mainly through the UN.

Those actions may come in the form of development assistance and other efforts to help address the root causes of potential conflict; or efforts to provide support for local initiatives to advance good governance, human rights, or the rule of law.[1361] This is what was the spirit of the conceivers of the R2P who observed that to prevent the four crimes required to tackle what they called their root causes (i.e: poverty, political repression and uneven distribution of resources).[1362] According to them, this means to address political needs and deficiencies (e.g: democratic institution and capacity building; constitutional power sharing, power-alternating and redistribution arrangements..) and to tackle economic deprivation and the lack of economic opportunities (e.g: development assistance and cooperation to address inequities in the distribution of resources or opportunities).[1363] On the measures that aim at economic development, the Secretary-General for instance recognised later in his report on the implementation of the R2P that economic development is an important tool to reduce risk of violence because it gives the capacity to resolve domestic tensions peacefully and fully and suggested an increase of general development assistance.[1364]

Preventing by tackling the root causes also means strengthening legal protections and institutions (e.g: efforts to strengthen the rule of law, enhancing protections for vulnerable groups, especially

[1357] See WSOD, para 138.
[1358] Idem, para 139.
[1359] ICISS Report, para 3.3.
[1360] Ibidem.
[1361] Idem, paras 3.18- 24.
[1362] Idem, paras 3.19.
[1363] Idem, paras 3.21- 22.
[1364] Implementing the responsibility to protect: report of the Secretary-General, 12 January 2009, A/63/677, para. 28.

minorities) and embarking upon needed sectoral reforms to the military and other state security services (enhanced education and training for military forces).[1365]

More specifically, the Secretary-General has suggested some measures[1366] that can help to prevent genocide at the primary level. I will mention three. The first is to encourage States to meet their responsibilities under pillar one. This can entail confidential or public suasion, education, training and assistance.[1367] The second is to help states to build their capacity to protect. This includes assistance to give the poor and minority groups a stronger voice in their societies, enhancing equality and social justice, raising their education levels and increasing their opportunities for meaningful political participation. The Secretary-General maintained that this would have a net positive effect on preventing crimes related to R2P unless it is distributed in a way that exacerbates differences.[1368] States and the UN also have the responsibilities to refrain from taking actions that would fuel tensions among racial, religious or ethnic groups rather than they prevent them. The third kind of action is to help states to exercise their responsibilities. This includes strengthening the capacity of the security sector in order to help weak states to have security forces capable of implementing their responsibility to protect.

With regard to how actors of the R2P implement their responsibility at this level, the concept of R2P asserts that it is the responsibility of states and the UN without clearly separating who does what as if they always act together. But since the report of the Secretary-General does not exclude actions performed separately, it may not be definitely said that they have to act together all the time. Indeed, with regard to encouraging states to meet their obligations relating to the R2P, the report gave examples of the UN bodies that are well placed to do that but added that when this is reinforced by parallel and consistent member states diplomacy, it will be more persuasive.[1369] This does not solve the problem of the approach of the R2P related to the lack of precision on who does what and how. There is no clear channel and coordination whatsoever through which this assistance is to be done. The need of precision in this regard has been also suggested in literature. For instance, Gareth Evans has noted that there is a need to "sort out who should do what and when: immediately, over a medium transitional period and in the longer

[1365] ICISS Report, paras 3.21- 22.
[1366] See Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 28.
[1367] Idem, para. 30.
[1368] Idem, para. 43.
[1369] Ibidem.

term" and then allocating the roles and coordinate them effectively both in relevant capitals and the ground."[1370]

All in all, the idea in what is explained above about the current form of the R2P is to prevent genocide before the conflicts and crisis starts and that corresponds to what has been discussed in chapters six and seven of this work related to the prevention of genocide by non-territorial states and by the UN at the primary level. Indeed, like for the prevention of genocide in the two said chapters, the concept of responsibility to protect also includes that the prevention of genocide by non-territorial states and by the UN involves measures that tackle the root causes of genocide. Also, though to a different extent, the two chapters and the present one recognise the obligation (responsibility in the concept of R2P) of states and the UN to prevent genocide by tackling its causes.

Thus, the concept of the responsibility to protect was not a novelty. Indeed, as it is recognised at the creation of the concept, the foundations of it lie in legal obligations already existing in international law.[1371] What has been affirmed in chapter six and seven is not a suggestion of new rules on the prevention of genocide at the primary level either. It is an interpretation of rules that exist since long. Nothing in the R2P suggests any new means to prevent genocide by non-territorial states and by the UN that is not explained in chapter six and seven of this work. However, this is not to say that the R2P means nothing to the prevention of genocide at the primary level. Again, given the still existing need to prevent genocide (and other atrocity crimes) at the time of the birth of the R2P, coupled with the inexistence of a clear framework of the obligation to prevent genocide under international law, the R2P has got the attention that the obligation to prevent genocide has lacked for many years.

It can nonetheless be said that, since the R2P corresponds with what has been explained in the prevention of genocide at the primary level, if the R2P is respected, it can have some positive effects to the prevention of genocide. However, the challenges at this level need more thought and more research for future better protection. Among the areas to focus on in future thoughts and research is the need of a strong early-warning system that has the capacity to collect information, from the earliest phase, to understand the context of each situation and foresee where some factors on the ground may lead to in the future, to understand what is needed as

[1370] Evans, Gareth, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Bookings Institution Press, Washington D.C, 2008, p. 147.
[1371] Idem, p. 40.

assistance, the priorities compared to the needs and to know what suits where.

3.2. Prevention of genocide at the secondary level under the R2P

The concept of R2P requires states and the UN (or through the UN) not only to provide assistance to states in need of it in order to implement their responsibilities to protect before the crisis or conflicts break out, but also to continue and take actions when there is a conflict that may lead to the four crimes that include genocide. This is what the Secretary-General called pillar three.[1372]

Part of paragraph 139 of the World Summit Outcome Document asserts that "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with chapters VI and VIII of the Charter, to help to protect populations from genocide…"[1373] This document did not go in details to give all measures that may be taken. However, some of these measures have been pointed out by the ICISS before and by using a broad notion of "peaceful means", this document did not exclude any measure as long as it is in accordance with chapters VI and VIII. The measures provided for by these chapters include negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.[1374] The ICISS was more specific with regard to measures that may have effect on the prevention of genocide (and other atrocity crimes) by saying that some cases of international support for prevention efforts may take the form of inducements; in others, it may involve a willingness to apply tough and perhaps even punitive measures.[1375] The ICISS used the form of direct prevention which is interesting at the secondary level.[1376] The instruments in direct prevention may take the form of positive inducements or, in more difficult cases, the negative form of threatened "punishments".[1377] According to the ICISS, these positive and negative measures may be political and diplomatic, economic or threat to apply international legal sanctions.

[1372] See UN General Assembly, Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 49.
[1373] See the WSOD, para. 139.
[1374] See article 33 of the Charter of the United Nations.
[1375] ICISS Report, para. 3. 25.
[1376] Idem, para 3. 25-43.
[1377] Ibidem.

While the political and diplomatic direct prevention may include positive inducements such as international appeals, dialogue and mediation, they may also constitute negative measures such as the threat or application of political sanctions, diplomatic isolation, suspension of organization membership, travel and asset restrictions on targeted persons, "naming and shaming," and other such actions.[1378] In his report on the implementation of the R2P, the Secretary-General also confirmed the need to use diplomatic positive actions by persuading leaders to protect their populations and negative actions (diplomatic sanctions) such as isolation from their peers and the non-eligibility for election to leadership posts in sub-regional, regional or global bodies.[1379] This report also noted the need to take targeted sanctions such as travel bans and others related to financial transfers, luxury goods and arms in order to prevent genocide (and other atrocity crimes).[1380]

For economic direct prevention, the ICISS has suggested measures that may include promises of new funding or investment, or the promise of more favourable trade terms as well as other measures of coercive nature such as threats of trade and financial sanctions; withdrawal of investment; threats to withdraw International Monetary Fund or World Bank support; and the curtailment of aid and other assistance.[1381]

The threat to seek or apply international legal sanctions was also suggested in the concept of R2P. These may include the threat and actual use of the International Criminal Court and the apprehension of suspects of the crimes that may lead to genocide. During the 2009 General Assembly debate on implementing R2P, it has rightly been emphasized that "there is no R2P with impunity".[1382] These crimes may be the direct and public incitement to commit genocide.[1383] They may also include persecution on racial, ethnic, national or religious

[1378] Idem, para. 3. 27.
[1379] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 57.
[1380] Ibidem.
[1381] ICISS Report, para 3. 27.
[1382] Implementing the Responsibility to Protect, The 2009 General Assembly Debate: An Assessment. Report of the Global Centre for the Responsibility to Protect, 2009, p. 8, available at <http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf> (visited on 12 November 2012).
[1383] Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, paras. 54-55.

ground.[1384] The Kenya situation has been overwhelmingly referred to as an example of where some of these measures have been used successfully.[1385] Indeed, the UN diplomatic efforts that led to the agreement between the parties in conflict contributed in stopping it from escalating to a tragedy. The appeals by various personalities in the UN[1386] for the indictment of individuals involved in crimes committed in Kenya presumably led to the decision of the prosecutor of the ICC to request to open an investigation *proprio motu*.[1387]

All the above examples of measures that may be taken at the secondary level correspond well with article 41 of the Charter of the UN.[1388] This article includes complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[1389] The actions explained are not the only ones at this level under the R2P; they have been given as illustrative.

It is also worth to consider whether the R2P provides for new obligations to prevent genocide at the secondary level. What the concept of the responsibility to protect suggests with regard to the prevention of genocide as summarised above is part of what I have discussed in Chapters six and seven of this work. The main idea common to this section and chapters six and seven was to see whether non-territorial states and the UN have the obligation to prevent genocide and it is found that for both, the obligation/responsibility to prevent genocide exists. The difference is however that, unlike the R2P, the general obligation to prevent genocide discussed in earlier chapters have tried to get out of the abstraction of the broad obligation by showing more or less clearly the legal framework of preventive actions by non-territorial states and the organs of the UN at the secondary level. More specifically, the R2P framework does not suggest solutions that would be addressing the challenges involved but it also does not clearly show to what extent states are

[1384] See article 7, (1)(h) of the Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> (visited on 03 December 2012).

[1385] See for example Bellamy Alex J., Davies Sara E., *Global Politics and the R2P: From Words to Deeds*, Routledge, Florence, KY, USA, 2010, p. 52, Evans, Gareth, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Bookings Institution Press, Washington D.C, 2008, p. 54, Abiodun, Williams, "The Responsibility to Protect and Peacekeeping", in Weiss G. Thomas et al., "The Responsibility to Protect: Challenges & Opportunities in Light of the Libyan Intervention", *e-International Relations*, November 2011, p. 32.

[1386] See Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 55.

[1387] See International Criminal Court, Situation in the Republic of Kenya, available at <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (visited on 6 December 2012).

[1388] See article 41 of the Charter of the UN.

[1389] See article 41 of the Charter of the UN.

legally permitted and required to prevent genocide at the secondary level.

This leads to the conclusion that the R2P has not added much to what is the content of the obligation to prevent genocide by non-territorial states and the UN at the secondary level in the form shown in chapters six and seven of this work. However, as said in the previous section, given the attention given to the R2P worldwide compared to the prevention of genocide *per se*, it is prudent to say that if it is implemented the way it is, it can have some significant positive effect to the prevention of genocide.

3.3. Prevention of genocide at the tertiary level under the R2P

In previous chapters of this work, the discussion of the prevention of genocide at the tertiary level has focused on the use of force as a measure of the last resort when other measures have been taken at earlier levels but have failed or have not been taken at all and the genocide has started to be committed. This approach will be used here as well. However, since measures are not taken in sequences, measures taken by actors of the prevention of genocide /R2P at earlier levels (primary and/or secondary) may continue to apply at the tertiary level.

The concept of the R2P demands states and the UN as members of the international community to take action in order to prevent genocide (and other mass atrocities) when the host state is unwilling, unable to prevent it or is the perpetrator itself.[1390] From its inception, the first issue the ICISS thought to consider was "to turn the whole weary debate about the "right to intervene" on its head, and to recharacterise it not as an argument about any "right" at all, but rather about a "responsibility".[1391] It observed that:

> "the expression "humanitarian intervention" did not help to carry the debate forward, so too do we believe that the language of past debates arguing for or against a "right to intervene" by one state on the territory of another state is outdated and unhelpful. We prefer to talk not of a "right to intervene" but of a "responsibility to protect".[1392]

Indeed, according to the Commission, "the emerging principle in question is that intervention for human protection purposes, including military intervention in extreme cases, is supportable when

[1390] See para. 139 of the WSOD.

[1391] Evans, Gareth, "Responsibility to Protect: Unfinished Business", in G8 Summit 2006: Issues and instruments (The Official Summit Publication), 15-17 July 2006, available at <http://www.crisisgroup.org/home/index.cfm?id=4269> (visited on 12 November 2012).

[1392] ICISS Report, para, 2.4.

major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator".[1393] The Commission mentioned some instruments which in the view of its members would support the notion that there is an emerging guiding principle in favour of military intervention for human protection. Those are the wide variety of legal sources including sources that exist independently of any duties, responsibilities or authority that may be derived from Chapter VII of the UN Charter as well as fundamental natural law principles; the human rights provisions of the UN Charter; the Universal Declaration of Human Rights together with the Genocide Convention…[1394] In this respect, the Commission suggested six criteria for military intervention for human protection purposes to be legally justified.[1395] Those are the just cause,[1396] right intention,[1397] right authority,[1398] last resort,[1399] proportional means,[1400] and reasonable prospects".[1401]

Though without the same details as the ICISS document, it is noted in the 2005 WSOD that the heads of states and governments took the commitment to be "prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional

[1393] Idem, p. 16.
[1394] Ibidem.
[1395] See ICISS Report, para 4.16, p 32.
[1396] ICISS Report paras. 4.18-4.26. The ICISS noted that the use of force for the human protection purposes is justified in case of "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 or 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.
[1397] ICISS Report, paras 4.33- 4.36. The ICISS noted that the purpose of the intervention must be to halt or avert human suffering instead of other states interests.
[1398] ICISS Report, para 6.1-6. 28. The ICISS noted that it is in absolutely no doubt that there is no better or more appropriate body than the Security Council to deal with military intervention issues for human protection purposes. It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty.
[1399] ICISS Report, paras. 4.37- 4.38. The ICISS was of the opinion that the Security Council must resort to a military intervention only in the most extreme situations (after having tried other preventive measures). For instance the commission said that every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored.
[1400] ICISS Report, paras. 4.39- 4. 40, The commission suggested that military action can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place. Military intervention is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all.
[1401] ICISS Report, paras. 4.41- 4. 43. The ICISS maintained that the means have to be commensurate with the ends, and in line with the magnitude of the original provocation. The effect on the political system of the country targeted should be limited, again, to what is strictly necessary to accomplish the purpose of the intervention."

organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide….". Measures under chapter VII include those in article 42 which involve the use of force in case the actions in article 41 would be inadequate or have proven to be inadequate.[1402] In his report on the implementation of the R2P, the Secretary-General noted that the collective measures may indeed be authorised by the Security-Council under article 42, the General-Assembly under the "Uniting for peace" procedure, or by regional or sub-regional arrangements under article 53 of the Charter of the UN, with the prior authorisation of the Security Council.[1403] This alternative of an action by the General Assembly and regional organisations had also been pointed out earlier by the ICISS.[1404]

Neither the WSOD nor the report of the Secretary-General made explicit reference to the six criteria suggested by the ICISS for the use of force to be justified. However some of them may be implied in what is said in these documents. For instance, under the WSOD, there may be recourse to actions authorised by the Security Council under chapter VII when peaceful measures are inadequate and the national authorities are manifestly failing to protect their populations from genocide (and other atrocity crimes). This may imply the just cause and right intention criteria (protect the population from genocide…), last resort (peaceful measures are inadequate and the national authorities are manifestly failing to protect their populations from genocide), the right authority (authorisation of the SC).

The threshold of manifestly failing to protect the population from genocide may be subject of criticism for being a vague threshold and therefore susceptible of manifestly delaying the action. While this threshold may indeed be interpreted so narrowly and therefore delay action, I recognise the difficulty in making it clear. For the purpose of this work however, this threshold does not pose much difficulty because it can be understood as the same threshold for action at the tertiary level, *i.e* when genocide has started to be committed and the territorial state is either manifestly unable, unwilling to prevent it, is about to commit it or is already committing it itself. Moreover, this is not the most difficult issue here. The biggest issue is the question of how the concept of the R2P deals with the problem when the Security Council fails to take action and genocide is being committed in a given state.

[1402] See article 42 of the Charter of the UN.

[1403] See Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 51, 52, 55, 57, 58, 59).

[1404] See ICISS Report, paras 6.29-6.30 and 6. 31- 6.35.

Some commentators have argued that the 2005 WSOD did not exclude unilateral use of force in case the Security Council fails to authorise it to save people. For instance, Stephen Stedman has maintained that the WSOD has succeeded Kofi Annan's agenda which had included a new norm, the R2P to legalise humanitarian intervention.[1405] Alicia L. Bannon has gone even further to argue that the World Summit Outcome Document "strengthens the case for unilateral action in the absence of UN action."[1406] She based her argument on two things: First, that "if nations have no sovereign right to commit or passively permit atrocities against their own populations, then they cannot object on sovereignty grounds to coercive actions halting the commission of those atrocities". And second, the agreement asserts a "responsibility" for the international community, acting through the United Nations, to protect populations from genocide and declares that the United Nations is "prepared" to take "timely and decisive" coercive action if peaceful means prove inadequate. She added that the pledge to prevent another Rwandan genocide must be looked at as overriding purposes of the WSOD. She noted that "it would be perverse to argue that members of the international community cannot respond individually to vindicate the purpose of the agreement, particularly in light of the Charter's commitment to human rights."[1407] She observed therefore that "rather than acting illegally, states would be acting in a legal void opened by U.N inaction and with the purpose of addressing an institutional failure".[1408] Carsten Stahn also observed that "the text of the World Summit Outcome Document does not firmly state that the UN collective security action constitutes the only option for responding to mass atrocities through the use of force."[1409]

This interpretation has however been overwhelmingly rejected by others who have argued in the contrary. In the report of the Secretary-General of the UN on the implementation of the responsibility to protect, the three options were recalled *viz* the action authorized either by the Security Council, under the regional arrangements and by the General Assembly.[1410] The

[1405] Stedman, Stephen John ,"UN Transformation in an Era of Soft Balancing", *International Affairs*, Vol. 83, No. 5, 2007, pp. 933-944, p. 938.
[1406] Bannon, L. Alicia, "The Responsibility to Protect: The UN World Summit and the Question of Unilateralism", *Yale Law Journal*, Vol. 115, No. 5, 2006, pp. 1157-1165, p. 1161.
[1407] Idem, p. 1162.
[1408] Ibidem.
[1409] Stahn, Carsten, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm"?, *American Journal of International Law*, Vol. 101, No. 1, 2007, pp. 99-120, p. 109.
[1410] See Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 58 and 63.

Secretary-General recognized in that report that the United Nations is still far from developing the rapid response military capacity needed to handle the unfolding atrocity crimes referred to in paragraph 139,[1411] but he did not suggest a unilateral military action as an alternative to handle this issue in case the UN cannot. Instead, he gave the alternatives of actions by the General Assembly under the "Uniting for Peace" and Regional arrangements under Chapter VIII.[1412] Commentators have been clearer than the Secretary-General on this by affirming that "R2P as agreed in the WSOD is very clear in its confinement of military measures to those authorized by the Security Council".[1413] For instance, analysing the conformity of the Russian claim that its military action in Georgia was to stop it from perpetrating the crime of genocide (among other crimes) in South Ossetia, Evans Gareth who co-chaired the ICISS noted that "in the absence of UN Security Council approval, there is no legal authority for an R2P-based military intervention".[1414] Unlike those who found the basis as to a unilateral military action in the 2005 WSOD, Evans Gareth based his argument on the same document but by interpreting it as making it "clear beyond argument that any country or group of countries seeking to apply forceful means to address an R2P situation … must take that action through the Security Council."[1415] Likewise, Schabas noted that it is clear that the endorsement of the concept of a "responsibility to protect" in the WSOD is in no way a confirmation of the use of force to protect human security in the absence of Security Council authorization.[1416] By contrast, Schabas observed that it is only an important reminder to the Security Council to work much better than it has by carrying out its responsibility to intervene in appropriate cases, where minorities are at great risk and human dignity is in jeopardy.[1417]

As said above, there seems to be an overwhelming majority which supports the interpretation that the WSOD excluded any unilateral military action. As noted by Edward C. Luck, former Secretary-General Special Advisor on the R2P, some leading diplomats even described the WSOD as having "killed" or "buried" the R2P, meaning that "they had once again resisted the

[1411] Idem, para. 64.
[1412] Ibidem.
[1413] Genser, Jared et al., *The Responsibility to Protect*, Oxford University Press, Oxford, 2011, p. 67.
[1414] Evans, Gareth, "Russia, Georgia And The Responsibility to Protect", *Amsterdam Law Forum*, Vol. 1, No. 2, 2009.
[1415] Ibidem.
[1416] Schabas, A. William., "Preventing Genocide and Mass Killing: The Challenge for the United Nations", Report, Minority Rights Group International, 2006, p. 14.
[1417] Ibidem. See also ICISS Report, December 2001, p. 49.

adoption of the humanitarian intervention as a unilateral, coercive and largely military doctrine."[1418]

This interpretation does not resolve the problem of the endangered human beings since in some cases the Security Council does not authorize the military intervention even when genocide is being committed. It is in cases where the Security Council is not willing or is unable to reach a decision under Chapter VII to authorize a military action or when it cannot do it promptly that a unilateral military action may be needed. The argument that the R2P came to remind the Security Council to do its job better does not add anything to the concept. In fact, if the Security Council has failed to discharge its responsibility it is not because it has forgotten its responsibilities. It is due to other reasons as already shown earlier. Reminding only without providing solutions to the obstacles that cause it not to do its job well is marching on the same place without making a step forward. The desirable way could have been to explicitly propose rules or criteria that should guide the Security Council in how it deals with situations of genocide (and other crimes related to the R2P). During the 2009 debate on the Secretary-General report on implementing the responsibility to protect, there were some suggestions to reform the SC which would not only be about a composition that takes into consideration the contemporary realities but also remove the veto or at least prohibit its use on decisions that concern the prevention of atrocity crimes.[1419] However, no consensus was reached on these suggestions.

The already existing alternatives suggested is to seek support for military action from the General Assembly meeting in an Emergency Special Session under the established "Uniting for Peace"[1420] procedure and through the regional arrangements do not solve the problem either. For instance, the ICISS which suggested this first was itself not optimistic about the likelihood of a decision by the General Assembly which requires the two-thirds majority especially there has been either no majority in the Security Council or a veto imposed or threatened by one or more

[1418] Luck, C. Edward, "Building a Norm: The Responsibility to Protect Experience", in Rotberg I. Robert, (ed), *Mass Atrocity Crimes: Preventing Future Outrage*, Brookings Institution Press, Washington DC, 2010, p. 115.

[1419] Implementing the Responsibility to Protect, The 2009 General Assembly Debate: An Assessment. Report of the Global Centre for the Responsibility to Protect, 2009, p. 5, available at <http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf> (visited on 12 November 2012).

[1420] UN General Assembly Resolution 377 A(V) "Uniting for peace" (3 November 1950), available at <http://www.un.org> (visited on 13 December 2012).

permanent members.[1421] The Secretary-General was also not optimistic because "the decisions of the General Assembly are not legally binding on the parties."[1422]

For the alternative of collective intervention to be pursued by a regional or sub-regional organization acting within its boundaries, [1423] the ICISS found a difficulty which is still valid today. This is the fact that the Charter requires enforcement action by regional organizations always to be subject to prior authorization from the Security Council.[1424] This is a challenge because even if there have been cases where approval has been sought *ex post facto*, like in Liberia and Sierra Leone which have been interpreted by some commentators as a precedent and basis for future legal justification of military action by regional arrangements without the express authorization of the Security Council,[1425] this has not been supported by subsequent practice.[1426]

Apparently, none of these alternatives is ensuring an effective prevention of genocide. No one disagreed however on the fact that in most cases where the human beings are at high risk of genocide, there is a need of a prompt military action to halt that. Yet, the concept of the R2P does not go further than to suggest an intermediary solution in order to release human beings from those sufferings. Arguably, given the ICISS view that the military intervention would occur only in extreme cases, in respecting the listed conditions, it would have probably been a good opportunity to suggest that in those extreme cases of human sufferings, where the UN fails to take any action to avert them (due to any reason whatsoever), a military action to save the lives of endangered human beings could be justified. This was avoided but the continuing concern about these extreme situations and the human sufferings cannot be avoided. Gareth Evans has rightly observed that: "Hard as it may be for many to instinctively accept, if there is one thing as bad as using military force when we should not, it is not using force when we should".[1427] He said this urging the UN to take action when the need to do it arises, in order to halt the crimes

[1421] See ICISS Report, para. 6.30.

[1422] See Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January 2009, A/63/677, para. 63.

[1423] See ICISS Report, p. 49.

[1424] The ICISS referred to article 53 of the Charter of the UN.

[1425] See for example Deen- Racsmány, "A Redistribution of Authority Between the UN and Regional Organizations in the Field of Maintenance of Peace and Security", *Leiden Journal of International Law,* Vol. 13, No. 2, 2000, pp. 297-331, Simma, Bruno, *The Charter of the United Nations:* A commentary, 2nd ed., 2002, p. 863.

[1426] The ECOWAS later sought authorization of the Security Council before its intervention in Cote d"Ivoire. See Gray Christine, *International law and the Use of Force*, 3rd ed., Oxford University Press, 2008, p. 419.

[1427] Evans, Gareth, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Bookings Institution Press, Washington D.C, 2008, p. 128.

related to the R2P. This need does not disappear when the will of the UN to take action is lacking. The need to save people being engulfed by ruthless regimes which decide to wipe them out completely will always be urgent. That is why the R2P could have gone further to give more revolutionary alternatives.

Though these challenges may unsurprisingly hinder the effect of the R2P on the prevention of genocide at the tertiary level, its potential contribution to it cannot be denied, especially because of the level of awareness it has strengthened among actors. Where the level of awareness is high, it might be expected that the level of will may also follow (though not always). And where the level of will is high, the chances of prompt and robust action are high. Though the Libya case is not about genocide as such, it can serve as a successful example of the R2P with regard to a prompt and robust action. It can be hoped that, since the concept is still under consideration, it can presumably be so in the right direction in addressing challenges that limit its effectiveness in the future.

3.4. Preliminary conclusions

Various measures by non-territorial states and (through) the UN to prevent genocide under the R2P have been identified. They fit the three levels of prevention. With regard to the two actors (non-territorial states and the UN), it has been argued in this section that the fact that they have been put together should not be construed as requiring them to always act together. They may also take actions separately. However, it is argued that this concept should have separated them in order to show more clearly the responsibility of each of them (*i.e* who does what, when, where and how). The future development should address this. Other serious challenges are related to the measures to prevent genocide under the R2P. Among them, the R2P did not provide a new alternative to address the issue of use of force by non-territorial states in case the Security Council (and the General Assembly to some extent) are unable to authorise it in order to put an end to an on-going genocide. Be it as it may, it has been noticed that the R2P has got an attention that the obligation to prevent genocide has lacked for many years. Whether this attention may be exploited in a way that may contribute to the effective prevention of genocide may depend on how its challenges are addressed. The next section will discuss those challenges further and will show why (and how) addressing them would contribute to the prevention of genocide.

4. R2P and prevention of genocide: challenges ahead

Since the adoption of R2P by the General Assembly in its 2005 resolution, academic and policy debates have continued over whether the R2P has a legal status, whether it should have that status and whether identifying that legal status matters.[1428] For the reasons mentioned in the previous section, these questions are relevant here as well but only in as far as the prevention of genocide is concerned. In other words, the question here is whether the R2P has acquired a legal status and if so whether this would add anything to the prevention of genocide and if not whether it should be acquired in order to give effect to the prevention of genocide. In either affirmative or negative answer, the question whether the current form of the R2P has contributed to the prevention of genocide is attached to the main question and is therefore briefly addressed as well.

On the question whether the R2P has acquired legal status in international law, Alex Bellamy and Ruben Reike[1429] have argued that the responsibility of a state to protect is best understood as a political commitment to implement and act in accordance with the already existing legal obligations.[1430] Likewise, Banda and Welsh argued that this concept helps in establishing a political and moral imperative rather than creating a new legal obligation upon states.[1431] Other authors have come to the conclusion that the general concept of R2P, at least when it comes to individual states, has not yet ripened into a norm of customary international law.[1432] Arbour's argument is that the heart of the R2P doctrine already rests upon an undisputed obligation of international law: the prevention and punishment of genocide.[1433]

Others have recognised that the concept is evolving and may become legal in the future. For instance, Gareth Evans has described the R2P as an international norm with potential to evolve

[1428] See for instance Sheri, P. Rosenberg, "Responsibility to Protect: A Framework for Prevention", *Global Responsibility to Protect ,* Vol. 1, 2009, pp. 442–477, p. 445.

[1429] Bellamy, J. Alex and Reike, Ruben, *The Responsibility to Protect and International Law*, Martinnus Nijhoff Publishers, Leiden, Boston, 2011, p. 94.

[1430] Ibidem.

[1431] Welsh, M. Jennifer and Banda, Maria, "International Law and the Responsibility to Protect: Clarifying or Expanding States" Responsibilities?", in Bellamy, J. Alex and Reike, Ruben, *The Responsibility to Protect and International Law*, Martinnus Nijhoff Publishers, Leiden, Boston, 2011, p. 119-138.

[1432] See Fastenrath, Ulrich et al., *From Bilateralism to Community Interest: Essays in Honour of Simma, Bruno* Oxford University Press, Oxford, 2011, pp.2 98-305.

[1433] Arbour, Louise, "The Responsibility to Protect as a Duty of Care in International Law and Practice", High Commissioner for Human Rights address to the Dublin's Trinity College on November 23, 2007, available at <http://www.ochcr.org> (visited on 12 November, 2012).

further into a rule of customary international law.[1434] This has been shared by Thomas G. Weiss who has also noted that the R2P has certainly the potential to evolve further in customary international law.[1435]

It appears therefore that despite the efforts by the ICISS and the subsequent resolution by the UN General Assembly that adopted the 2005 Outcome document,[1436] as well as further considerations/debates in order to explain and develop this concept,[1437] there is not enough indication that this concept has acquired its own independent legal status in international law. Moreover, it should be said that this concept neither constitutes a new law nor creates a new legal obligation on the prevention of genocide and arguing otherwise would be somehow too pretentious. It could be an emerging concept though and considering its progress as shown earlier, maybe it could become a legal principle in the future. If it does, that will be a positive development in the prevention of genocide but not the ideal because as shown above, in its form, it faces and will face difficulties in its implementation.

But why would it matter much for the prevention of genocide that the R2P acquires a legal status? Carsten Sahn noted that there are doubts whether the R2P was meant to be an emerging hard norm of international law at all.[1438] He based his reasoning on the fact that if it were meant so, it should equally be possible to attach it with legal consequences in case of non-compliance.[1439] This would give it a legal authority to make it legally enforceable and therefore have more effect to the prevention of genocide. In the current form of the R2P however, this exercise would seem to be impossible because of the uncertainties surrounding its legal status. These uncertainties include the vagueness on who should do what, when, where and how. For instance, it appears to be a responsibility for everybody including international and national civil societies as well as individuals.[1440] That means that even where the R2P would be a legal

[1434] Evans, Gareth, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Bookings Institution Press, Washington D.C, 2008, p. 52.

[1435] Weiss G. Thomas, "Whither R2P"?, in Weiss G. Thomas et al., "The Responsibility to Protect: challenges & opportunities in light of the Libyan intervention", in *e-International Relations*, November 2011, p. 9, available at <http://www.e-ir.info/wp-content/uploads/R2P.pdf> (visited on 03 December 2012).

[1436] See the WSOD.

[1437] Implementing the Responsibility to Protect, The 2009 General Assembly Debate: An Assessment. Report of the Global Centre for the Responsibility to Protect, 2009, p. 5.

[1438] Stahn, Carsten, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm"?, *American Journal of International Law,* Vol. 101, No. 1, 2007, pp. 99-120, p. 118.

[1439] Ibidem.

[1440] See Implementing the Responsibility to Protect, Report of the Secretary-General, 12 January

principle, it would need to first be clearly defined in order to determine the responsibilities of each actor and the circumstances under which each actor exercises it. Hence, in the process to develop this concept into a legal principle, it would be desirable that it first be defined in a way that makes it clear who has that responsibility to do what task and within what territorial limits and with which means in a way that would make it possible to make the actor responsible in case of its breach.

Does the current status of the responsibility to protect make it devoid of any possible contribution to the obligation to prevent genocide? It was said in the WSOD that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. However, this was just reiterating rules that existed before. Furthermore, it was said in the same document that the R2P entails the prevention of such crimes, including their incitement, through appropriate and necessary means, but for genocide, this also existed before as it has been demonstrated earlier in this work.

The concept of R2P places the responsibility on the international community as a whole to protect people from genocide and other atrocity crimes. Yet, not only this international community is not a legal person *per se,* and even if it were so, still the problem would be to determine how their task is either divided or shared among states and the UN in implementing the R2P. For instance, non-territorial states may not always act through the UN, but it has not been clearly shown what they can do to prevent genocide in other states and under which circumstances. Moreover, even where these two things would be determined, the temporal issue and territorial competence and limitation would still be a problem which is not answered by the R2P. For instance the concept of R2P did emphasize the role of the Security Council in the prevention of the core crimes of international law but it did not put in place guiding principles in that exercise and it provided for no alternative in case the Security Council fails to prevent them from happening. This makes the high expectations that many people have got from this concept be highly far from being reached.

However, though this concept is not a new legal principle as already explained above and though measures suggested in the R2P already existed within the existing rules of international law, the relevance of the R2P as far as the obligation to prevent genocide is concerned is not

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2009, A/63/677, para. 59.

insignificant. Indeed, the concept of the R2P came during the period in which there were so many uncertainties on what the obligation to prevent genocide entails. The fact that it has been put to a larger public debate, it might have contributed and may still do so in the future in raising the awareness of a large public (especially the political world as well as the academic one) on the necessity to prevent genocide and other international grave crimes using the existing (but either misunderstood or neglected) rules of international law. It is however extremely difficult to scientifically demonstrate its exact contribution especially because of its lack of independence. In fact, even where the international community has referred to it in the decisions to act,[1441] nothing proves that it would not have still acted the same way even without it because the rules of international law on the basis of which it has acted existed before its existence.

Conclusion

One of the questions that this chapter has had to examine is related to what the concept of the R2P entails. This question implies another question whether this concept could have effect on the prevention of genocide. The chapter also had to look at the challenges of the R2P vis-à-vis the prevention of genocide.

After the background and evolution of that concept were explained in the first section, the responsibility of territorial states to protect its population from genocide and other atrocity crimes was examined in the second. This was done in comparison with the obligation to prevent genocide as discussed earlier in this work. In that way, the R2P was discussed within the three levels of prevention theory to see how it can have effect on the prevention of genocide at the three levels. At the primary level, the R2P has been interpreted to include the responsibility to create conditions that do not give chance to the emergence of risks of genocide using such means like legislation as well as other kinds of measures which may include political, administrative, educational and economic measures. At the secondary and tertiary levels, except the suggestion that territorial states punish individuals who commit or incite to commit genocide, the R2P does not go far in suggesting other measures at these levels. It was assumed however that the recognition in the R2P that territorial states have the primary responsibility to protect their

[1441] See for instance Security Council Resolution 1973 of 17 March 2011 on Libya. In the preamble of this Resolution the Security Council reiterated the responsibility of the Libyan authorities to protect the Libyan population. This resolution is available at <www.un.org> (visited on 14 December 2012).

populations from genocide implies that they take every appropriate measure to prevent genocide at every level.

The concept of R2P asserts in addition to territorial states that it is the responsibility of non-territorial states and the UN to protect the populations from genocide. This was treated in section three. R2P does not however clearly show what the tasks of each are. Yet, there is no evidence that it was meant in R2P that they would have to act together all the time in which case there would still be need to know how that could be operationalized. In whatever case, the measures that may be taken by non-territorial states and/or through the UN at the primary level include to encourage territorial states to meet their responsibilities, to help them to build their capacity to protect as well as to help them exercise their responsibilities. At the secondary level, measures include positive and negative political and diplomatic ones which involve various possible measures. Though the idea that the obligation of states to prevent genocide is not limited by territory shown in chapter six of this work is almost reiterated also by the R2P, the difference is that, unlike the R2P, chapter six and seven have tried to show the legal framework of preventive actions by non-territorial states and the organs of the UN in a separate way. At the tertiary level, the R2P requires collective action through the Security Council and under chapter VII of the Charter of the UN in order to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity where territorial states have manifestly failed to protect them. The use of force authorized by the SC is among possible measures under the R2P. This concept failed however to reach a consensus on criteria that would not only guide the SC in deciding to authorize the use of force in order to put an end to those crimes but also bind it to do so in case those crimes occur. The concept also failed to provide for alternatives in case of the absolute failure of the SC to take action.

On the issue related to the challenges of the R2P vis-à-vis the prevention of genocide, it has been noticed that the responsibility to protect has not acquired an independent legal status. This could not be established under the current status of international law. So, the R2P is yet to be seen as a legal obligation. However, on the question whether in its current form it may be a new means to prevent genocide, it can be agreed with Schabas that in its substance, the R2P is the same with the duty to prevent genocide and therefore, for the purpose of this work, the duty to prevent genocide, being a legal obligation, is much more reliable because as it has been said by Schabas

again, it is "subject to application and sanction by the courts."[1442] The obligation to prevent genocide carries with it the legal weight that it can be enforced. However, for the advocates of the R2P and those who would like to find the R2P as legal principle and would act accordingly to prevent genocide; that is well and good. After all, it does not matter if the prevention of genocide is achieved in the name (or under the umbrella) of the R2P. But whenever the obligation is breached, the breach will be of the obligation to prevent genocide. In fact, relying only on the R2P may render the obligation to prevent genocide weak. I argue that had the obligation to prevent genocide been clear enough before the conception and development of this concept, there would have been little need to develop the R2P at least as far as the prevention of genocide is concerned. This is not the same as saying that R2P is not relevant. Since in the prevention of genocide all means that would contribute to the prevention of genocide are relevant, R2P may be one of those means despite the challenges it faces. It must be recognised that, given the fact that this concept came during the period in which there were so many uncertainties on what the obligation to prevent genocide entailed, this concept and its explanation helped in raising the awareness on the necessity to prevent genocide, and to some extent, it reaffirms how the international community acknowledges its existing but dormant duty to prevent genocide.

[1442] Schabas, A. William, *Genocide in International Law, The Crime of Crimes*, 2nd edition, Cambridge University Press, Cambridge, 2009, p. 533.

Chapter IX. Summary and General Conclusions

1. Summary

The main question that this work has treated is what the obligation to prevent genocide in international law entails to its bearers. This implied also the question about who those bearers are. The aim was to examine whether and to what extent international law should be understood/interpreted/developed in a way that it allows or enables a more effective prevention of genocide in order to achieve the goal for which the laws on the prohibition of genocide have been put in place. It thus provided an assessment of the international legal regime on the prevention of genocide and on what that obligation requires its bearers to do, when, where, and how, while at the same time identifying where there are shortcomings and suggesting how things can be improved. The context, research question, objective, sources and structure of the work have been given in chapter I on the general introduction.

Before going far in those legal questions, a primary question related to the main one needed an answer. This is the question what prevention itself means. Being a word used in different fields, prevention is elaborated on in chapter II in order to explain its meaning and structure in some of those fields, namely public health, non-proliferation of nuclear weapons, criminology, environmental law and torture. For all those fields, prevention means to avert harm from occurring. It requires taking appropriate preventive measures at the right moment. For some fields like public health and criminology, the structure of prevention is explicitly divided in different temporal divisions which are the primary, secondary and tertiary levels. The primary level consists of the period before the existence of signs of harm. While the secondary level is the period when there are symptoms/signs of harm, the tertiary level is when the harm is occurring. For each level, there are preventive measures tailored to it in order to avoid that the situation becomes worse. For those other fields which do not use this temporal division as such, it has been shown from the nature of the preventive measures needed that these levels are also implied. In Chapter III, the question becomes to know what that meaning of prevention and structure means to the prevention of genocide (*i.e* whether it can apply to genocide as well). This required first to show how genocide comes to occur. In other words, there was a need to show the process to genocide. The factors of genocide were explained. And the phases through which

those factors lead to genocide were also shown. It was found that genocide does not happen spontaneously. It passes through tangible factors in different phases. It was thus shown how the prevention structure through temporal divisions can be applied to these factors and phases in order to prevent genocide from happening. It was found that that structure is applicable to the prevention of genocide.

This led to the question whether that structure is what was envisaged in the rules on the prevention of genocide and what should be the preventive measures by each bearer of that obligation in international law within that structure. This was treated in a series of chapters that followed. They treated the obligation to prevent genocide in international law. Indeed, chapter IV looked at the prevention of genocide in international law. This involved examining the origin and adoption of the Genocide Convention. After showing the origin and adoption of the Genocide Convention from a prevention perspective, this chapter also examined the meaning of prevention in international law. It was found that neither the Genocide Convention nor any other source of international law gave a particular meaning to that word. It was therefore found that the ordinary meaning of that word as explained in previous chapters is the one to be used in international law as well.

This chapter also examined what the obligation to prevent genocide means. It was found that that obligation means to obligate its bearers to take all necessary preventive actions in order to avert genocide from occurring. The nature of that obligation to prevent genocide dictates that it has two faces: positive and negative. While the positive face requires the bearers to take necessary actions to prevent genocide from occurring, the negative one requires bearers to refrain from taking actions that would lead to genocide or acts of genocide *per se*. It was also shown how the obligation to prevent genocide is an independent one, not absorbed by the obligation to punish as it has been considered quite often. The chapter also elaborated on who the bearers of the obligation to prevent genocide are under both the Genocide Convention and customary international law and when this obligation is due. It was found that all territorial states and non-territorial states are bearers of the obligation to prevent genocide and that the three temporal divisions fits the prevention of genocide in international law.

A next question arose to know what preventive measures should be required to each bearer. In other words, the question was to know what the obligation to prevent genocide entails to each bearer and what is owed to them at each level in the structure of prevention. Chapter V treated

what that obligation entails to territorial states at the different levels. A number of measures have been invoked and tested to see whether they may be applicable in international law and whether and the extent to which they can contribute to the prevention of genocide. Those measures vary depending on the level in the process. At the primary level, a number of measures which include legislative ones have been given and explained to show their potential to prevent genocide and how they fit in the international law scheme. If the measures suggested are taken and implemented at the primary level, there may not be need of a secondary level. If not, measures that include judicial ones need be taken at the secondary level. They also include other different measures such as political, economic and educational ones. It was argued that if those measures are taken and implemented at the right time, it may prevent those symptoms from getting worse to lead to genocide; thus making the third level unnecessary. Moreover, when genocide has started, a number of available preventive measures at the tertiary level have been elaborated on to show their potential to put an end to genocide before it gets worse. However, for all the measures at each level, some challenges have been identified. These include the fact that there exist no national preventive mechanisms for the prevention of genocide that can coordinate and monitor the implementation of the available preventive measures at each phase. Another serious challenge is the fact that in many cases, territorial states may be either unable to take measures to prevent genocide, unwilling to do so or may themselves be planners of the commission of genocide.

Those challenges led to another chapter on what non-territorial states may do to prevent genocide. This was treated in chapter VI in which it was argued that non-territorial states are obligated to prevent genocide as long as they have means to do so and it is in accordance with international law. It was elaborated on various preventive measures available to non-territorial states. Some of those measures are not dependent on the lack of will or ability of territorial states to take action. They may be taken regardless of whether or not territorial states are willing or able to take action to prevent genocide. These include the legislation that creates a mechanism that can prevent their own organs from engaging in activities that may fuel tensions among the populations of territorial states. That legislation should also create mechanisms that do not allow harbouring people who engage in criminal activities related to genocide within any territorial state. That legislation is necessary at the primary level. At the secondary level, other measures have been elaborated on and tested to see whether and to what extent they can prevent genocide

in territorial states. Some of those measures available to non-territorial states include the implementation of universal jurisdiction in order to punish suspects of international crimes that may lead to genocide wherever they are committed and regardless of the nationality of the suspects.

When these measures have not been successful, measures that are needed at the tertiary level have been explained and tested to see whether and to what extent they can contribute to the prevention of genocide. Since at this level genocide is on-going, the focus has been put on the use of force to put an end to it. Under some conditions, it has been found that non-territorial states may use force to stop genocide from continuing.

Many challenges have been identified at each level of prevention by non-territorial states. They include the fact that the obligation to prevent genocide is owed to everybody without any coordination in the determination of who has the capacity to take action and the portion of action each non-territorial state concerned should take. This led to another chapter on what the obligation to prevent genocide entails to the UN in order also to see whether the role of the UN can solve the challenges in previous chapters. It was found that the UN has the obligation to prevent genocide under general international law. It was also found that the Charter gives the competence to the organs of the UN to enable them to take actions to prevent genocide at each level of prevention. However, like for states, there is no coordination on how those organs act to prevent genocide. This has negative effects on the prevention especially at early phases where most organs have been found to have similar competences and it is difficult to divide the tasks among them. Another challenge is that at early phases there is a problem that the recommendations of the organs of the UN may not be binding upon states and other actors concerned. At a late phase, the challenge is that the UN depends on the will and means of states in implementing the actions taken by the UN organs. For instance, the fact that the UN does not have its own army which can be ready at any time to intervene to stop genocide when it starts weakens the UN capacity to prevent genocide.

The development and challenges in the previous chapters led to another chapter on the relatively new concept of the Responsibility to Protect in order to address the question whether and to what extent this relatively new concept is a (new) means to the prevention of genocide. It has been shown that this concept came into existence due to the many failures of the international community to prevent genocide and other massive atrocities that have been committed. It was

found that this concept and its explanation helped in raising the awareness on the necessity to prevent genocide and to some extent it reaffirms how the international community acknowledges its existing but dormant duty to prevent genocide. It was shown that it has the potential to contribute to the prevention of genocide but at the same time it was warned that if the debate is exclusively oriented to making it an independent legal obligation, it will neither be possible nor will it be necessary in its current form. It was instead said that the content of that concept is in a way part of the content of the legal obligation to prevent genocide.

2. Conclusions and recommendations: Towards a world without genocide?

This work has come to a number of conclusions. One of the main ones is that the ordinary meaning of prevention and its scope dictate that it be carried out in a structured way: primary, secondary and tertiary levels. This structure is not only applicable to the prevention of genocide in international law but also indispensable. Therefore, the prevention of genocide in international law is not limited to the phase when genocide is being committed as it has been considered in the past. That tendency to deal with late phases of the process to genocide is wrong and presumably explains the failure to prevent genocide in a number of examples. To prevent genocide requires dealing with factors that may contribute to leading to genocidal conflicts, *i.e* to tackle and address the root causes before the symptoms of genocide appear, in order to create an environment that does not give chance to the emergence of the symptoms that may lead to genocide. In all fields where prevention is paramount, the earliest phase (primary) has been found to be the most important one because if it is successful, it may serve the purpose of prevention to the maximum. In the case of genocide also, prevention at that phase is indeed the most important part since it precludes even the symptoms of genocide from occurring. Given the fact that this phase is very important in the prevention of genocide, international law should be understood to include it. Other phases are important as well. In fact, prevention being a continuous process, it requires not only to stop the harm from starting but also to halt it when it has started. Prevention of genocide is therefore a process not limited to what must be done before the symptoms. It continues to address those symptoms (after they appear) and to address the perpetration of genocide. This being said, this work has come to the conclusion that prevention of genocide should be understood as a continuous process which intervenes at every level of the

process to genocide. Where international law is not clear enough, this work has shown in details how it should be improved from the earliest phases to the latest ones. It concludes that preventing genocide requires that international law be applied through the primary-secondary-tertiary-based approach. This means that the bearers of obligation to prevent genocide need to take concrete measures at each level without the need to first amend the Genocide Convention. This conclusion can solve the problem of emptiness that has characterized the concept of prevention in international law for many years. The model in this work can contribute to filling this concept with clear and tangible measures all along the whole process to genocide.

This conclusion cannot be relevant if the obligation to prevent genocide is not an independent legal obligation. Indeed it has been concluded that, contrary to how it has been considered in the past, this obligation has its own legal status. It is not and could not be absorbed by the obligation to punish genocide.

With regard to the bearers of this obligation, this work has concluded that states parties to the Genocide Convention are not the only bearers of the obligation to prevent genocide because this obligation has acquired a customary law status. That is why it was also concluded that states non-parties to the Genocide Convention and the UN are also bearers of the obligation to prevent genocide. The findings highlighted in the chapters related to what each of those bearers of the obligation to prevent genocide should do to prevent genocide are significant. The work concluded however that prevention of genocide cannot be effective if the task for each bearer is not clearly shown and if the challenges involved are not addressed. That is why the conclusions of this work are accompanied by recommendations of how some serious challenges should be addressed.

Firstly, all territorial states should put in place legislation that addresses the prevention of genocide at the primary level. Such legislation should *inter alia* penalise genocide and crimes that may lead to it. It should also provide for universal jurisdiction in order not only to dissuade potential perpetrators anywhere in the world, but also to enable them to prosecute them in case they actually commit those crimes. At the secondary level all territorial states should enforce those laws wherever they are breached. This is the same at the tertiary level. Since the lack of monitoring and coordination mechanism in the actions by territorial states is a challenge to the prevention of genocide as identified in this work, the legislation should include the creation of national preventive mechanisms to prevent genocide by territorial states. Pursuant to existing

rules on the prevention of genocide, there is nothing that can preclude territorial states from creating such mechanisms since they are necessary for the prevention of genocide. Therefore, this work does not recommend that there be an amendment of the Genocide Convention (or an adoption of an additional protocol) in order to solely require such mechanisms. However, if an amendment of the Genocide Convention (or an adoption of an additional protocol to it) is ever initiated for other challenges, it is desirable that it includes those national preventive mechanisms to make the point clear for territorial states. The powers that such an amendment (or additional protocol) should require for independent national mechanisms include to initiate, undertake and monitor educational programs that educate to accommodate difference on each category of people with the focus to children and the youth (but of course without excluding adults who, in most cases are the ones who inject the virus in the minds of their children).

Secondly, the work of these national mechanisms needs to be reported to a relevant body in the prevention of genocide. This body does not exist. There is therefore a need for states and the UN to create an organisation for the prevention of genocide (OPG) not only in order to monitor and coordinate the actions of territorial states (directly or through the channel of national preventive mechanisms) but also to monitor and coordinate the actions of non-territorial states and the UN. In order for this organisation to be capable of doing its work in an effective way, a fund for the prevention of genocide (FPG) should be created and it should be administered by the organisation for the prevention of genocide. This will contribute to the enforcement of the rules on the prevention of genocide if it is an independent body and should be equipped with appropriate means to enable it to work from the very early phases of the prevention. It should therefore be composed of independent persons from different disciplines in order to be able to deal with the different factors of genocide. It would develop guidelines on how bearers of the obligation to prevent genocide should deal with those factors and phases of genocide and the modes of intervention at each level of prevention. This Organisation for the Prevention of Genocide should be created without necessarily involving an amendment of the Charter (even though the amendment of the Charter would make it much clearer and presumably much more efficient). It can be done by either amending the Genocide Convention or adopting an additional protocol to the Genocide Convention. This amendment (or protocol) is possible, and the bearers of the obligation to prevent genocide should not wait long before they understand its dire necessity. In fact, by the time the Genocide Convention was adopted, nobody was thinking about

an international organisation. But today the world has evolved and time has come for the world to learn from experience and precedents. The example of Jean Jacques Gautier dovetails nicely with this area and can serve as a ground for a hope that such an amendment or adoption of an additional protocol can be possible in the future. In 1977 Jean Jacques Gautier founded the Swiss committee for the prevention of torture which later became Association for the prevention of torture with the idea to have a universal mechanism for the prevention of torture by regularly inspecting places of detention.[1443] This idea was espoused by the Council of Europe which adopted the convention on the prevention of torture. This convention created the Committee for the Prevention of Torture with the mandate to visit places of detention. The idea was also espoused by the UN which adopted the optional protocol to the CAT which also created international and national preventive mechanisms to visit the places of detention.[1444] Learning from this experience does not only bring the hope that such an amendment or protocol is possible but also serves as a good example on what such an amendment or protocol should include.

Thirdly, there is a need to put in place a permanent military force for the prevention of genocide to solve problems related to the challenges of delays in getting military troops to stop genocide (when the UN has authorised it). This can be possible even without necessarily involving the amendment of the Charter. The ideal is to have such a force together all the time. However, this suggestion may be criticized for being unrealistic because of the huge costs that it can involve. Yet, those who would criticize it might have the difficulty to prove that it would be more expensive than how it is now where billions of dollars are spent to deal with the consequences of genocidal conflicts. In case this idea to have such force together paid by the UN would be opposed, an alternative suggestion is to require each state to have a stand-by military unit or brigade kept at home (under the responsibility of that state) but ready to serve for the purpose of prevention of genocide immediately when the decision to do so has been reached. This does not require extra money for the UN until the force starts to be used by the UN. It can even be believed that such readiness itself can play a big deterrent role in the prevention of genocide and would be an economic way to do things.

Fourthly, where no decision to end an on-going genocide can be reached by the UN for whatever

[1443] See Jean-Jacques Gautier *et la Prévention de la Torture: de l'Idée à l'Action*, p. 5, available at <http://www.apt.ch/content/files_res/jjg_2003-1.pdf> (visited on 12 August 2013).
[1444] Ibidem.

reasons, depending on their military capacity, and under the conditions set in this work, non-territorial states should use force to end genocide which is a grave breach of international law. This can be done without the need to amend the Charter but where the amendment could be possible and initiated, it is desirable that it be explicitly included in it in order to end the almost interminable debate on that.

Fifthly, the concept of the Responsibility to Protect with regard to the prevention of genocide in the three major phases as said above is not a new or an emerging principle. The prevention of genocide within that structure is what was there before this concept was developed but has been neglected, misused or simply violated in practice. What is needed is to adjust it by clarifying some obscure provisions and by adding what is missing in order to make it effective in the future and this concept has helped in that regard, despite its challenges. The Responsibility to Protect should therefore be used to serve the obligation to prevent genocide instead of absorbing or suffocating it. It should be developed in a direction that enhances the obligation to prevent genocide instead of weakening it. There is a risk that trying to make it an independent legal principle may distract the attention that should be given to the obligation to prevent genocide.

Sixthly, there is a need to educate and raise the awareness of the people of the world on the necessity to prevent genocide. States and the UN should do this by initiating, promoting and encouraging researches by intellectuals concerned with the prevention of genocide. Education could help in addressing the issue of lack of political will that has characterized this area as shown through some instances in this work. Indeed, for too long, too many of those who were able to do something to prevent genocide have not been willing to do so. Yet, the political will is the engine to make the proposed model for the prevention of genocide work. Education will contribute to progressively establish a culture of prevention among the people and it may presumably have a positive impact because if the sensitivity of the public on the necessity to prevent genocide is developed, the latter could influence the political leaders to act, where necessary, in order to prevent genocide. The challenge is that those capable states as well as intellectuals from the most capable parts of the world may be not very much concerned with the prevention of genocide because they may not be pressed by its imminence at their doors as it is in those other parts of the world where genocide is much more likely. Yet, intellectuals from the latter areas are a few and in many cases, they are silenced by the regimes in place or they lack the means to conduct research that would make a difference. Even the few, who may dare to

undertake such research despite those challenges, may have an insignificant audience and this may make their voices lack significant outcome.

Seventhly, since another way to address the political will would presumably be to hold the bearers of that obligation responsible if they breach it, with the legal consequences pertaining to that; the bearers of that obligation should work on the clarification of that area and on making it possible. That will allow law to play its role. Law does not make people become angels, but it limits them from doing evil things or abstaining from what they ought to do, the violation of which results in legal consequences against the violators. This area on the responsibility for the breach of the obligation to prevent genocide was not treated in depth in this work but there is a need to treat that question in order to see whether and to what extent holding the bearers of the obligation to prevent genocide responsible could contribute to making the prevention of genocide effective. Genocide is the crime of crimes because of the unspeakable damages and pains it causes. The bearers of the obligation to prevent genocide need to be more serious in applying the existing rules of international law on the prevention of genocide and finding new solutions to the challenges surrounding that area in order to avoid that this odious crime happens again. Otherwise it will regretfully happen again and again.

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Samenvatting

Dit proefschrift behandelt de vraag wat de verplichting om genocide te voorkomen meebrengt voor zijn dragers volgens het internationaal recht. Dit impliceerde ook de vraag wie die dragers zijn. De hoofdvraag van dit onderzoek werd opgeworpen vanwege langdurige stilstand van het Genocideverdrag met betrekking tot het antwoord op de preventie van genocide. De inhoud van de verplichting om genocide te voorkomen is grotendeels verwaarloosd. Dit houdt verband met het feit dat het concept van preventie zelf niet wordt verduidelijkt in het Genocideverdrag. Niet alleen wordt de betekenis van dit concept preventie niet verduidelijkt in het Genocideverdrag, ook bevat het internationaal recht in zijn algemeenheid niet veel aanwijzingen over de inhoud van dit concept. Bovendien is het meeste academische onderzoek naar de preventie van genocide verricht door historici, filosofen en sociale wetenschappers en niet door juristen. Het doel van dit proefschrift is dan ook geweest dat gat te vullen door de internationaalrechtelijke regeling van de preventie van genocide te evalueren, door te evalueren wat, wanneer en hoe deze regeling de dragers van internationaal recht verplicht op te treden, door te identificeren wat de tekortkomingen van die regeling zijn en door suggesties te doen ter verbetering ervan. Daarmee is onderzocht of en in hoeverre het internationaal recht zodanig moet worden begrepen/geïnterpreteerd/ontwikkeld dat het een effectievere preventie van genocide toestaat of mogelijk maakt, teneinde het doel te bereiken waarvoor regels met betrekking tot het verbod van genocide zijn vastgesteld. Het is beperkt tot de verplichtingen van staten en de VN om genocide te voorkomen en er is niet (uitgebreid) ingegaan op vragen naar hun verantwoordelijkheid in geval van het niet-nakomen van die verplichtingen.

Dit onderzoek is niet beperkt tot specifieke landen als *case study*. In het onderzoek zijn enkele voorbeelden gegeven van staten waarin genocide voorgekomen is, zonder overigens een specifieke regio of staat in het achterhoofd te hebben, teneinde de theoretische argumentaties te verifiëren. Aangezien genocide een mondiaal probleem is, was het onderzoek ook mondiaal.

Een groot deel van het werk bestaat uit de uitwerking van de betekenis en de reikwijdte van het concept preventie en van de middelen, instrumenten en methoden die beschikbaar zijn voor staten en de VN om genocide te voorkomen tijdens het gehele genocideproces, dat wil zeggen vóór en tijdens de genocide.

De juiste methode in dit onderzoek was de analyse van de algemene literatuur en juridische materialen. Algemene literatuur over het concept preventie is gebruikt om de betekenis en strekking van dat begrip in het algemeen te verduidelijken. Wetenschappelijk onderzoek op diverse gebieden, zoals volksgezondheid, criminologie, economie, milieu en sociologie is gebruikt. Aangezien de gewone betekenis van de termen bovendien relevant is bij de interpretatie van internationaal recht, is het gebruik van deze algemene literatuur nuttig geweest omdat het heeft bijgedragen aan het ophelderen van de betekenis en de reikwijdte van het begrip preventie en de verplichting onder internationaal recht tijdens de verschillende fasen in de processen die leiden tot genocide om genocide te voorkomen. Wat betreft de juridische materialen zijn internationale verdragen en gewoonterecht gebruikt om de "*ratio legis*" van het Genocideverdrag, de inhoud van de verplichting om genocide te voorkomen en zijn structuur en grenzen te laten zien. Als bijkomende wijze van het bepalen van de rechtsregels is ook rechtspraak gebruikt, om te laten zien hoe instrumenten van internationaal recht zijn geïnterpreteerd en toegepast door gerechten met betrekking tot de preventie van genocide. Ook is juridische doctrine gebruikt om regels en beginselen van het internationaal recht met betrekking tot de preventie van genocide die niet voldoende zijn gedefinieerd in internationale verdragen te verduidelijken. Andere juridisch relevante bronnen zoals resoluties van bevoegde organen van de VN zijn gebruikt en geanalyseerd om de mate te laten zien waarin zij kan hebben bijgedragen aan de ontwikkeling van internationaal recht op het gebied van de preventie van genocide en om de statenpraktijk en die van de VN bij het nemen van maatregelen om genocide te voorkomen te laten zien en te bespreken.

Om de vragen te beantwoorden die in dit boek gesteld zijn, is het verdeeld in negen hoofdstukken. De context, vraagstelling, doelstelling, bronnen en structuur van het werk zijn behandeld in hoofdstuk I over de algemene inleiding. Alvorens zo ver in te gaan op de juridische vragen, behoeft een primaire vraag die gerelateerd is aan de hoofdvraag beantwoording. Dat is de vraag wat preventie zelf betekent. Omdat het woord gebruikt wordt op verschillende terreinen is preventie uitgewerkt in hoofdstuk II, teneinde de betekenis en de structuur ervan uit te leggen op een aantal van deze terreinen, namelijk volksgezondheid, non-proliferatie van kernwapens, criminologie, milieurecht en marteling. Op al deze terreinen betekent preventie het voorkomen dat kwaad plaatsvindt. Het vereist het nemen van passende preventieve maatregelen op het juiste moment. Op sommige terreinen, zoals volksgezondheid en criminologie, is de structuur van

preventie expliciet opgedeeld in verschillende temporele onderverdelingen, die de primaire, secundaire en tertiaire niveaus zijn. Het primaire niveau bestaat uit de periode vóór het bestaan van tekenen van schade. Terwijl het secundaire niveau de periode is waarin er symptomen/tekenen van schade voorkomen, is het tertiaire niveau de periode waarin de schade zich voordoet. Voor elk niveau bestaan er preventieve maatregelen die zijn afgestemd om te voorkomen dat de situatie verslechtert. Voor andere terreinen, die geen gebruik maken van deze tijdsonderscheidingen als zodanig, is uit de aard van de vereiste preventieve maatregelen gebleken dat deze niveaus ook worden geïmpliceerd. In hoofdstuk III wordt de vraag beantwoord wat die betekenis van preventie en structuur betekent voor het voorkomen van genocide (dat wil zeggen of ook kan worden toegepast op genocide). Daarvoor is eerst vereist te laten zien hoe het komt dat genocide voorkomt. Het was, met andere woorden, nodig het proces tot genocide te laten zien. De factoren van genocide werden toegelicht. En de fasen waardoor deze factoren leiden tot genocide werden ook getoond. Geconcludeerd werd dat genocide spontaan voorkomt. Het gebeurt door tastbare factoren in verschillende fasen. Daarmee werd getoond hoe de preventiestructuur door middel van tijdsonderscheidingen toegepast kan worden op deze factoren en fasen zodat voorkomen kan worden dat genocide voorkomt. Er werd vastgesteld dat deze structuur toepasselijk is op genocidepreventie.

Dit leidde tot de vraag of die structuur is wat voorzien was in de regels ter voorkoming van genocide en wat de preventieve maatregelen binnen die structuur moeten zijn, die genomen moeten worden door iedere drager van die verplichting naar internationaal recht. Dit werd behandeld in een reeks hoofdstukken die volgde. Deze hoofdstukken behandelden de verplichting tot voorkoming van genocide naar het internationaal recht. Hoofdstuk IV bekeek de voorkoming van genocide in het internationaal recht. Dit hield onderzoek in naar de oorsprong en adoptie van het Genocideverdrag. Na de oorsprong en adoptie van het genocideverdrag te hebben laten zien vanuit een preventieperspectief bestudeerde dit hoofdstuk ook de betekenis van preventie in het internationale recht. Geconcludeerd werd dat noch het Genocideverdrag, noch enige andere bron van internationaal recht een specifieke betekenis geeft aan het woord. Daarom werd geconcludeerd dat de gewone betekenis van het woord, zoals uitgelegd in de voorafgaande hoofdstukken, de betekenis is die ook in het internationaal recht moet worden gebruikt.

Dit hoofdstuk onderzocht ook wat de verplichting tot genocidepreventie betekent. Het bleek dat de verplichting zijn dragers verplicht tot het nemen van alle noodzakelijke preventieve

maatregelen ter voorkoming van genocide. De aard van die verplichting tot genocidepreventie schrijft voor dat die twee 'gezichten' heeft: positief en negatief. Terwijl het positieve gezicht van de dragers eist dat ze allen noodzakelijke maatregelen nemen om te voorkomen dat genocide voorkomt, eist het negatieve gezicht van de dragers dat ze zich onthouden van acties die zouden leiden tot genocide of van genocideacties *per se*. Getoond werd ook hoe de verplichting tot genocidepreventie een onafhankelijke verplichting is, die niet is opgenomen in de verplichting om te straffen, zoals vaak wel wordt aangenomen. Het hoofdstuk werkte ook uit wie de dragers van de verplichting tot genocidepreventie volgens zowel het Genocideverdrag als het internationaal gewoonterecht zijn en wanneer deze verplichting geëffectueerd moet worden. Gevonden werd dat alle territoriale en niet-territoriale staten drager van de verplichting tot genocidepreventie zijn en dat de drie temporele onderscheidingen passend zijn voor de verplichting tot genocidepreventie in het internationaal recht.

De volgende vraag die opkwam was welke preventieve maatregelen voor iedere drager vereist zouden zijn. Met andere woorden, de vraag was wat de verplichting tot voorkoming van genocide meebrengt voor iedere drager en waartoe zij verplicht zijn op ieder niveau in de preventiestructuur. Een aantal maatregelen is ingeroepen en getest om erachter te komen in hoeverre ze van toepassing kunnen zijn in het internationale recht en in hoeverre ze kunnen bijdragen aan de voorkoming van genocide. Deze maatregelen variëren afhankelijk van het niveau in het proces. Op het eerste niveau is een aantal maatregelen, inclusief wetgevende maatregelen, genoemd en uitgewerkt om hun potentieel tot het voorkomen van genocide te tonen en om te laten zien hoe ze in het internationaal recht passen. Als de genoemde maatregelen geïmplementeerd worden op het primaire niveau kan het zijn dat het tweede niveau niet nodig is. Zo niet, dan is het nodig maatregelen, inclusief rechterlijke, te nemen op het tweede niveau. Deze houden ook andere maatregelen in, zoals politieke, economische en onderwijsmaatregelen. Betoogd werd dat als deze maatregelen genomen worden en op het juiste moment worden geïmplementeerd, zij kunnen voorkomen dat de symptomen zodanig erger worden dat ze tot genocide leiden, daarmee het derde niveau overbodig makend. Voor het geval genocide gestart is, is bovendien een aantal beschikbare preventieve maatregelen op het derde niveau uitgewerkt om hun potentieel tot het stoppen van de genocide te tonen voordat die erger wordt. Van alle maatregelen op ieder niveau zijn evenwel ook enkele uitdagingen geïdentificeerd. Deze omvatten het feit dat er geen nationale preventieve mechanismen bestaan voor genocidepreventie, die de

implementatie van de beschikbare preventieve maatregelen in iedere fase kan coördineren en monitoren. Een andere serieuze uitdaging is het feit dat in veel gevallen territoriale staten ofwel niet in staat zijn maatregelen te nemen om genocide te voorkomen, ofwel niet bereid zijn om dat te doen of zelf plannen genocide te plegen.

Die uitdagingen leidden tot een hoofdstuk over wat niet-territoriale staten kunnen doen om genocide te voorkomen. Dit werd behandeld in hoofdstuk VI, waarin betoogd werd dat niet-territoriale staten verplicht zijn genocide te voorkomen voor zover zij de middelen hebben om dat te doen en dat in overeenstemming is met internationaal recht. Verschillende preventieve maatregelen die beschikbaar zijn voor niet-territoriale staten werden uitgewerkt. Enkele van die maatregelen zijn niet afhankelijk van de wil of het vermogen van territoriale staten om actie te ondernemen. Ze kunnen onafhankelijk van de wil van territoriale staten om actie te ondernemen worden genomen ter voorkoming van genocide. Ze houden onder meer wetgeving in die een mechanisme creëert dat kan voorkomen dat hun eigen organen deelnemen in activiteiten die spanningen vergroten tussen de bevolkingsgroepen van territoriale staten. Die wetgeving zou ook mechanismen moeten creëren die het niet toestaat onderdak te bieden aan mensen die betrokken zijn bij criminele activiteiten die gerelateerd zijn aan genocide in een territoriale staat. Deze wetgeving is nodig op het eerste niveau. Op het tweede niveau zijn andere maatregelen uitgewerkt en getest om te zien in hoeverre ze genocide kunnen voorkomen in territoriale staten. Sommige van de maatregelen die beschikbaar zijn voor niet-territoriale staten omvatten de implementatie van universele jurisdictie, teneinde verdachten van internationale misdrijven die kunnen leiden tot genocide te straffen, ongeacht waar ze zijn gepleegd en ongeacht de nationaliteit van de verdachten.

Voor wanneer deze maatregelen niet succesvol zijn geweest, zijn maatregelen die nodig zijn op het derde niveau uitgelegd en getest, om te zien in hoeverre zij kunnen bijdragen aan de preventie van genocide. Aangezien genocide op dat niveau reeds gaande is, is de focus gelegd op het gebruik van geweld om genocide te stoppen. De uitkomst was hier dat niet-territoriale staten onder enkele voorwaarden geweld mogen gebruiken om genocide te stoppen.

Vele uitdagingen zijn geïdentificeerd op elk niveau van preventie door niet- territoriale staten. Zij omvatten het feit dat de verplichting om genocide te voorkomen tot eenieder gericht is, zonder coördinatie van de vaststelling wie de capaciteit heeft om actie te ondernemen en van het aandeel in die actie iedere betrokken niet-territoriale staat. Dit leidde tot een hoofdstuk (VII)

over wat de verplichting tot voorkoming van genocide meebrengt voor de VN, om te zien of de rol van de VN de in de vorige hoofdstukken geschetste uitdagingen kan oplossen. Naar voren kwam in dit hoofdstuk dat de VN volgens het algemeen internationaal recht verplicht is genocide te voorkomen. Ook kwam naar voren dat het Handvest bevoegdheden aan de organen van de VN geeft om hen op ieder niveau van de voorkoming van genocide in staat te stellen. Evenals voor de staten is er evenwel geen coördinatie van de handelingen van deze organen tot het voorkomen van genocide. Dit heeft negatieve effecten voor de preventie, in het bijzonder in de vroege stadia, in welke de meeste organen vergelijkbare bevoegdheden blijken te hebben en het moeilijk is de taken tussen hen te verdelen. Een andere uitdaging in de vroege stadia is het probleem dat aanbevelingen van de organen van de VN niet bindend voor staten en andere betrokken actoren kunnen zijn. In een laat stadium is de uitdaging dat de VN afhankelijk is van de wil en de middelen van de staten om maatregelen van de VN te implementeren. Een voorbeeld is dat de capaciteit van de VN om genocide te voorkomen verzwakt wordt doordat het geen eigen leger heeft dat op ieder moment klaarstaat om in te grijpen teneinde genocide te stoppen.
De ontwikkeling en de uitdagingen in de vorige hoofdstukken leidden tot hoofdstuk (VIII) over het relatief nieuwe concept ‘the Responsibility to Protect’, om de vraag te behandelen of en in hoeverre dit relatief nieuwe concept een (nieuwe) mogelijkheid biedt voor het voorkomen van genocide. Getoond werd dat dit concept ontwikkeld is als reactie op de vele mislukkingen van de internationale gemeenschap om genocide en andere massale wreedheden die gepleegd zijn te voorkomen. Naar voren kwam dat dit concept en de uitleg ervan geholpen heeft bij het verhogen van het bewustzijn van de noodzaak om genocide te voorkomen en dat het tot op zekere hoogte herbevestigd hoe de internationale gemeenschap zijn bestaande maar ‘slapende’ plicht om genocide te voorkomen erkent. Gebleken is dat het potentieel heeft om bij te dragen aan de preventie van genocide, hoewel tegelijkertijd gewaarschuwd werd dat als het debat exclusief gaat over het tot onafhankelijke rechtsplicht maken ervan, het noch mogelijk, noch noodzakelijk zal zijn in zijn huidige vorm. In plaats daarvan werd betoogd dat de inhoud van het concept op een bepaalde manier de inhoud is van de verplichting tot voorkoming van genocide.
Dit proefschrift vat een aantal conclusies samen in hoofdstuk IX. Een van de belangrijkste is dat de gewone betekenis van preventie en het bereik daarvan voorschrijft dat het uitgevoerd wordt op een bepaalde manier: het eerste, tweede en derde niveau. Deze structuur is niet alleen van toepassing op de preventie van genocide in het internationaal recht, maar ook onmisbaar.

Daarom is de preventie van genocide in het internationaal recht niet beperkt tot de fase waarin genocide plaatsvindt, zoals in het verleden wel werd aangenomen. Die neiging om te handelen in de late fasen van het genocideproces is verkeerd en verklaart vermoedelijk het mislukken van het voorkomen van genocide in een aantal gevallen. Genocide voorkomen vereist het aanpakken van factoren die kunnen bijdragen aan genocideconflicten, dat wil zeggen het aanpakken en behandelen van de onderliggende oorzaken voordat de symptomen van genocide naar voren komen, teneinde een milieu te creëren het opduiken van de symptomen die tot genocide kunnen leiden geen kans geeft. Gebleken is dat op alle terreinen waarop preventie van het grootste belang is de vroegste (eerste) fase is, omdat succes dan het doel van preventie maximaal dient. In het geval van genocide is preventie in die fase ook van het grootste belang omdat dat voorkomt dat zelfs de symptomen van genocide voorkomen. Omdat deze fase zeer belangrijk is bij het voorkomen van genocide moet internationaal recht zo begrepen worden dat het deze fase omvat. Andere fasen zijn ook belangrijk. Sterker nog, omdat preventie een continu proces is vereist het niet alleen dat voorkomen wordt dat dit kwaad een begin heeft, maar ook dat het gestopt wordt wanneer er wel een begin van is. Genocidepreventie is daarom niet een proces dat beperkt is tot datgene wat moet gebeuren voor er symptomen zijn. Het omvat ook de behandeling van die symptomen (nadat ze zich hebben voorgedaan) en het aanpakken van het plegen van genocide. Dit gezegd zijnde komt dit boek tot de conclusie dat genocidepreventie begrepen moet worden als een continu proces dat ingrijpt op ieder niveau van het genocideproces. Waar het internationaal recht niet duidelijk genoeg is, heeft dit boek gedetailleerd laten zien hoe het verbeterd kan worden, vanaf de vroegste fase tot de laatste. Het concludeert dat genocidepreventie vereist dat internationaal recht toegepast wordt door middel van de eerste-tweede-derde-gebaseerde aanpak. Dit betekent dat de dragers van de verplichting tot voorkoming van genocide op ieder niveau concrete maatregelen moeten nemen zonder dat aanpassing van het Genocideverdrag nodig is. Deze conclusie kan het probleem van de leegte die het preventieconcept in het internationaal recht vele jaren gekenmerkt heeft oplossen. Het model in dit werk kan bijdragen aan het vullen van dit concept met duidelijke en tastbare maatregelen voor het gehele genocideproces.

Deze conclusie kan niet relevant zijn als de verplichting tot voorkoming van genocide niet een onafhankelijke juridische verplichting is. Geconcludeerd is inderdaad dat, in tegenstelling tot hoe

dat in het verleden overwogen is, de verplichting zijn eigen juridische status heeft. Zij is niet en kan niet opgenomen zijn in de verplichting genocide te bestraffen.

Wat betreft de dragers van de verplichting heeft dit werk geconcludeerd dat de staten die partij zijn bij het Genocideverdrag niet de enige dragers zijn van de verplichting tot voorkoming van genocide, omdat de verplichting de status heeft verworven van internationaal gewoonterecht. Dat is de reden dat geconcludeerd werd dat ook staten die geen partij zijn bij het Genocideverdrag en de VN drager van de verplichting tot voorkoming van genocide zijn. De bevindingen waarop de nadruk is gelegd in de hoofdstukken die gaan over wat elk van de dragers van de verplichting om genocide te voorkomen moet doen zijn significant. Het boek heeft evenwel geconcludeerd dat genocidepreventie niet effectief kan zijn als de taak van elke drager niet duidelijk wordt gemaakt en als de uitdagingen niet het hoofd wordt geboden. Om die reden bevat dit werk aanbevelingen over hoe sommige serieuze uitdagingen het hoofd zouden moeten worden geboden. Ten eerste moeten alle territoriale staten wetgeving aannemen die over de genocidepreventie op het eerste niveau gaat. Dergelijke wetgeving moet onder andere genocide en misdrijven die daartoe kunnen leiden strafbaar stellen. Ze moet ook universele jurisdictie inhouden; niet alleen om potentiële plegers van genocide waar dan ook ter wereld te ontmoedigen, maar ook om het mogelijk te maken dat ze vervolgd worden als ze deze misdrijven daadwerkelijk plegen. Op het tweede niveau moeten alle territoriale staten die wetten handhaven wanneer ze overtreden worden. Dit geldt ook voor het derde niveau. Omdat een uitdaging voor genocidepreventie die in dit werk geïdentificeerd is een gebrek aan een toezichts- en coördinatiemechanisme voor de acties van territoriale staten is, zou die wetgeving ook het in het leven roepen van nationale preventiemechanismen ter voorkoming van genocide door territoriale staten moeten inhouden. Op grond van de bestaande regels over genocidepreventie is er niets dat het territoriale staten kan beletten zulke mechanismen in het leven te roepen, aangezien ze noodzakelijk zijn voor de voorkoming van genocide. Om die reden beveelt dit boek niet aan het Genocideverdrag aan te passen (of om een aanvullend protocol aan te nemen) met het enkele doel zulke mechanismen te verplichten. Als evenwel ooit het initiatief genomen wordt tot het aanpassen van het Genocideverdrag (of tot het aannemen van een aanvullend protocol) teneinde andere uitdagingen het hoofd te bieden, dan is het wel wenselijk dat het die nationale preventieve maatregelen bevat, teneinde dat punt duidelijk te maken voor territoriale staten. De bevoegdheden die een dergelijke aanpassing (of aanvullend protocol) zou moeten voorschrijven voor onafhankelijke nationale

mechanismen omvatten het initiëren van, uitvoeren van en toezicht houden op educatieve programma's die het accommoderen van verschil tussen verschillende categorieën van mensen onderwijst, met een focus op kinderen en jeugd (zonder natuurlijk volwassenen uit te sluiten die in de meeste gevallen het virus in de geesten van hun kinderen injecteren).

Ten tweede moet het werk van deze nationale mechanismen gerapporteerd worden aan een relevant lichaam ter preventie van genocide. Een dergelijk lichaam bestaat niet. Daarom moeten staten en de VN een organisatie voor de preventie van genocide (OPG) oprichten, niet alleen om de acties van territoriale staten (direct of door middel van nationale preventiemechanismen) te monitoren en te coördineren, maar ook de acties van niet-territoriale staten en de VU te monitoren en te coördineren. Om deze organisatie in staat te stellen zijn werk effectief te doen moet een fonds voor de preventie van genocide (FPG) in het leven geroepen worden, welk beheerd zou moeten worden door de organisatie voor de preventie van genocide. Dit zal bijdragen aan de handhaving van de regels ter voorkoming van genocide als het een onafhankelijk lichaam is terwijl het uitgerust moet worden met passende middelen om het in staat te stellen zijn werk vanaf de zeer vroege fasen van preventie te doen. Het zou daarom samengesteld moeten worden van afhankelijke personen van verschillende disciplines, opdat het in staat is om te gaan met de verschillende factoren van genocide. Het zou richtlijnen ontwikkelen over hoe dragers van de verplichting tot genocidepreventie om moeten gaan met die factoren, met de fasen van genocide en met de modellen van interventie op ieder niveau van preventie. Deze Organisatie voor de Preventie van Genocide zou in het leven geroepen moeten worden zonder dat aanpassing van het Handvest nodig is (ook al is aanpassing van het Handvest duidelijker en zou het vermoedelijk efficiënter zijn). Dit kan worden gedaan door ofwel het Genocideverdrag aan te passen, ofwel een aanvullend protocol bij dit verdrag aan te nemen. Deze aanpassing (of dit protocol) is mogelijk en de dragers van de verplichting tot genocidepreventie zouden niet te lang moeten wachten voordat ze de bittere noodzaak ervan begrijpen. In de tijd dat het Genocideverdrag werd aangenomen dacht niemand aan een internationale organisatie. Maar vandaag is de wereld geëvolueerd en is de tijd gekomen voor de wereld om van ervaring en precedenten te leren. Het voorbeeld van Jean Jacques Gautier dat in dit werk wordt gegeven sluit goed aan bij dit terrein en kan dienen als een basis voor de hoop dat een dergelijke aanpassing of aanname van een aanvullend protocol mogelijk is in de nabije toekomst. In 1977 richtte Jean Jacques Gautier het Zwitserse comité ter voorkoming van

marteling op, die later de Vereniging ter voorkoming van foltering werd, met het idee een universeel mechanisme ter voorkoming van foltering te hebben door regelmatig detentiecentra te controleren. Dit idee werd omarmd door de Raad van Europa, die het Verdrag ter voorkoming van foltering aannam. Dit verdrag riep het Comité voor de Preventie van Foltering in het leven, dat een mandaat heeft om detentiecentra te bezoeken. Het idee werd ook omarmd door de VN, die een aanvullend protocol bij het verdrag tegen foltering aannam, welk ook internationale en nationale preventieve mechanismen in het leven riep tot het bezoek van detentiecentra. Het leren van deze ervaring doet niet alleen de hoop rijzen dat een dergelijke aanpassing of dergelijk protocol mogelijk is, het dient ook als een goed voorbeeld voor wat een dergelijke aanpassing of in een dergelijk protocol moet omvatten.

Ten derde is het nodig een permanente militaire eenheid in het leven te roepen ter voorkoming van genocide om problemen op te lossen die gerelateerd zijn aan de uitdaging van vertraging bij het stoppen van genocide door militaire eenheden (wanneer de VN dat geautoriseerd heeft). Dit is zelfs mogelijk zonder aanpassing van het Handvest. Het ideaal is deze eenheid altijd te hebben. Deze suggestie kan evenwel als onrealistisch bekritiseerd worden wegens de enorme kosten die ze zou kunnen meebrengen. Degenen die de suggestie zouden bekritiseren zouden echter wel eens moeilijkheden kunnen ondervinden bij het bewijzen dat die duurder zou zijn dan dat het is om miljarden dollars te besteden aan de consequenties van genocideconflicten. Als het idee een dergelijke eenheid te hebben die betaald wordt door de VN wordt tegengehouden, is een alternatieve suggestie iedere staat te verplichten een militaire eenheid of brigade thuis stand-by te hebben (onder de verantwoordelijkheid van die staat), die klaarstaat om het doel van genocidepreventie onmiddellijk te dienen wanneer de beslissing wordt genomen dat te doen. Dit vereist geen extra middelen voor de VN totdat deze eenheid door de VN wordt ingezet. Zelfs kan worden aangenomen dat een dergelijke paraatheid zelf een grote afschrikwekkende rol kan spelen bij de voorkoming van genocide, terwijl die een voordelige manier kan zijn om de zaken aan te pakken.

Ten vierde zouden niet-territoriale staten, wanneer door de VN om welke reden dan ook geen beslissing kan worden genomen om een in gang zijnde genocide te stoppen, afhankelijk van hun militaire capaciteit en onder de voorwaarden die in dit werk uiteen zijn gezet, geweld moeten gebruiken om de genocide, die een zware schending van het internationaal recht is, te beëindigen. Dit is mogelijk zonder aanpassing van het Handvest, maar waar een aanpassing

mogelijk zou zijn, zou het wenselijk zijn het expliciet op te nemen teneinde het zo'n beetje oneindige debat erover te beëindigen.

Ten vijfde is het concept van de *Responsibility to Protect* met betrekking tot genocidepreventie in de drie hoofdfasen, zoals hiervoor werd uitgelegd, niet een nieuw of opkomend principe. De preventie van genocide binnen die structuur bestond al voordat dit concept werd ontwikkeld, maar deze is genegeerd, misbruikt of simpelweg geschonden. Wat nodig is, is dat het wordt aangepast door onduidelijke bepalingen te verduidelijken en door toe te voegen wat ontbreekt om het in de toekomst effectief te maken. Dit concept heeft in dat opzicht geholpen, ondanks zijn uitdagingen. De *Responsibility to Protect* moet derhalve worden gebruikt om de verplichting tot genocidepreventie te dienen in plaats van die te absorberen of te verstikken. Zij zou in een richting moeten worden ontwikkeld die de preventieverplichting versterkt in plaats van verzwakt. Er bestaat een risico dat wanneer gepoogd wordt het een onafhankelijk rechtsbeginsel te maken, dat mogelijk afleidt van de aandacht die gegeven zou moeten worden aan de verplichting tot voorkoming van genocide.

Ten zesde is er een noodzaak de bevolking van de wereld te onderwijzen in de noodzaak van genocidepreventie en hun bewustzijn daarvan te vergroten. Staten en de VN zouden dit moeten doen door onderzoek van intellectuelen die begaan zijn met genocidepreventie te starten, te promoten en aan te moedigen. Onderwijs zou kunnen helpen bij het aanpakken van het punt van het gebrek aan politieke wil, die dit terrein gekenmerkt heeft, zoals dit werk in een aantal gevallen heeft laten zien. Te lang zijn te velen die iets konden doen ter voorkoming van preventie niet bereid geweest datgene te doen. Politieke wil is evenwel de motor die het voorgestelde model voor genocidepreventie zou moeten laten draaien. Onderwijs zal bijdragen aan de geleidelijke totstandbrenging van een cultuur van preventie onder de mensen en het kan vermoedelijk een positief effect hebben, want als de gevoeligheid van het publiek ten aanzien van de noodzaak om genocide te voorkomen wordt ontwikkeld, kan het politieke leiders beïnvloeden om waar nodig te handelen om genocide te voorkomen. De uitdaging is dat de capabele staten, evenals intellectuelen uit de meest capabele delen van de wereld zich wel eens niet vreselijk bezig zouden kunnen houden met genocide, omdat ze niet de druk voelen van haar onmiddellijke aanwezigheid, zoals dat het geval is in de andere delen van de wereld waar genocide veel waarschijnlijker is. Maar er zijn niet veel intellectuelen uit die andere delen en in veel gevallen wordt hen het zwijgen opgelegd door plaatselijke regimes of hebben ze niet de

middelen om onderzoek te doen dat het verschil zou kunnen maken. Zelfs de weinigen, die dergelijk onderzoek zouden kunnen starten ondanks de die moeilijkheden, zouden wel eens een gering publiek kunnen hebben, hetgeen ervoor zou zorgen dat hun stem geen significante betekenis heeft.

Ten zevende zouden de dragers van die verplichting, omdat een andere manier om de politieke wil aan te pakken vermoedelijk zou zijn om hen verantwoordelijk te houden als ze die verplichting schenden, met de juridische gevolgen van dien, moeten werken aan de verduidelijking van dat terrein en aan het mogelijk maken ervan. Daarmee zou het recht zijn rol kunnen vervullen. Het recht zorgt er niet voor dat mensen engelen worden, maar het beperkt hen in het doen van kwaad of het zich onthouden van wat ze zouden moeten doen. De schending daarvan leidt tot juridische gevolgen voor de schenders. Dit onderdeel van de verantwoordelijkheid voor de schending van verplichting tot genocidepreventie werd niet diepgaand behandeld in dit werk, maar het is wel nodig die vraag te behandelen, om te zien of en in hoeverre het verantwoordelijk houden van de dragers van de verplichting tot genocidepreventie zou kunnen bijdragen aan het effectief maken van genocidepreventie. Genocide is de misdaad der misdaden vanwege de onuitsprekelijke schade en pijn die het veroorzaakt. De dragers van de verplichting tot voorkoming van genocide moeten de bestaande internationaalrechtelijke regels serieuzer toepassen en nieuwe oplossingen vinden voor de uitdagingen die aan het terrein verbonden zijn, opdat voorkomen wordt dat deze afschuwelijke misdaad weer voorkomt. Anders zal die helaas steeds weer opnieuw voorkomen.

Curriculum Vitae

Etienne Ruvebana (1977) studied Law at the National University of Rwanda (LL.B, 2004). He did his LL.M in international law and the law of international organisations at the University of Groningen in the Netherlands(2007). In September 2009 he started his PhD research on the prevention of genocide under international law. Before he started it, he was a University Lecturer of Public Law at the Kigali Independent University in Rwanda. He also served as the head of Department of Law and Acting Dean of the Faculty of Law of that University before September 2009. In 2008, he authored a book on the responsibility of states and international organisations for the omission to prevent genocide of Tutsi in Rwanda, published in the *Editions Rwandaises*. In 2009 he authored an article on the protection of the environment during armed conflicts in the *Revue Scientifique* of the Kigali Independent University. In 2010 he authored an article on the achievements and challenges of Gacaca Courts in Rwanda in solving the extreme legal and social problems of genocide, published by the Commission Nationale de Lutte contre le Genocide. In 2011, he authored a chapter on Victims of the Genocide Against the Tutsi in Rwanda published (in an edited book) by Intersentia. In 2013, he co-authored an article on the legacy of Gacaca Courts in Rwanda, published by the International Criminal Law Review. In 2014, he got appointed as Lecturer in the School of Law of the University of Rwanda. In addition to his PhD fields of research, his interests include the responsibility of states and international organisations for their wrongful acts, the use of force in international law and criminal international law.