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*The Role of National Human Rights  
Institutions in the Prevention of Mass  
Atrocities – The Case of the Defensoría  
del Pueblo in Colombia*

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# Abstract

This thesis is an interdisciplinary study on the role of National Human Rights Institutions (NHRIs) in the implementation of the primary responsibility of States to prevent mass atrocities (MA) under pillar one of the Responsibility to Protect (R2P). It focuses on current international law (IL) to delimit the scope of the prevention obligations of States and assesses the relevant preventive measures to States' primary obligations under R2P. It then analyzes the role that NHRIs can play in their practical implementation. This thesis assesses the means and tools of the Colombian NHRI, the *Defensoría del Pueblo* (DP), in the prevention of MAs. In light of these findings, this dissertation outlines the prospects and challenges facing NHRIs in relation to the prevention of MAs.

*De lege lata* that current IL only requires States to prevent genocide and war crimes. The author argues *de lege ferenda* that to the extent that crimes against humanity rise to the level of *jus cogens* and thus carry *erga omnes* obligations, States could have a positive obligation to act to prevent their commission. As to the preventive tools, structural and direct preventive measures are relevant to the implementation of State's primary responsibility to prevent MAs. Even if NHRIs do not directly implement the obligations of States, they play an important practical role in monitoring the government's implementation of IL, including its MA prevention obligations. NHRIs can support the operationalization of preventive measures through their functions to promote a legal framework, to contribute to the implementation of the legal framework and through their control mechanisms. In the case of Colombia, the DP uses its mandate to promote and protect human rights to prevent the structural preconditions of MAs. The DP also prevents MAs more directly by flagging imminent risks and making recommendations to the authorities capable of taking the required action.

**Keywords:** *Responsibility to Protect, National Human Rights Institutions, Colombia, Defensoría del Pueblo, international law, international humanitarian law, international criminal law, international human rights law, genocide, war crimes, crimes against humanity, prevention, early-warning, interdisciplinary.*

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# Abbreviations

<b>AUC</b>	<i>Autodefensas Unidas de Colombia</i>
<b>CAT</b>	Convention Against Torture
<b>CIAT</b>	<i>Comisión Intersectorial de Alertas Tempranas</i>
<b>CIL</b>	Customary International Law
<b>DP</b>	<i>Defensoría del Pueblo</i>
<b>ELN</b>	<i>Ejército de Liberación Nacional</i>
<b>FARC</b>	<i>Fuerzas Armadas Revolucionarias de Colombia</i>
<b>ICC</b>	International Criminal Court
<b>ICISS</b>	International Commission on Intervention and State Sovereignty
<b>ICJ</b>	International Court of Justice
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>IDP</b>	Internally Displaced Person
<b>IHL</b>	International Humanitarian Law
<b>IHRL</b>	International Human Rights Law
<b>IL</b>	International Law
<b>IMT</b>	International Military Tribunal
<b>M-19</b>	<i>Movimiento 19 de Abril</i>
<b>MA</b>	Mass atrocity
<b>NHRI</b>	National human rights institution
<b>NPM</b>	OPCAT National Prevention Mechanism
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OPCAT</b>	Optional Protocol to the Convention Against Torture

<b>R2P</b>	Responsibility to Protect
<b>SAT</b>	<i>Sistema de Alertas Tempranas</i>
<b>SCSL</b>	Special Court for Sierra Leone
<b>UN</b>	United Nations
<b>UNSG</b>	United Nations Secretary-General
<b>WSOD</b>	World Summit Outcome Document



# INTRODUCTION

## 1.1 Introduction

### 1.1.1 R2P Background

Throughout the 20<sup>th</sup> and early 21<sup>st</sup> centuries, States for the most part stood by time and again while civilians were targeted by their governments, despite their declarations following World War II that such crimes must “never again” be allowed to happen. Emerging from a 2001 report by the *International Commission on Intervention and State Sovereignty* (ICISS)<sup>1</sup> - a Canadian-sponsored initiative established in 2000 - the Responsibility to Protect (R2P) represented the policy representation of the statement “never again” and aimed to halt mass atrocities (MAs) as imminent threats occurred. In the ICISS report, R2P redefined and extended sovereignty to include the primary responsibility of each State to protect its own people from MA crimes, and the collective responsibility of the wider international community to take whatever action is necessary to halt or avert such crimes in cases where a State would be unable or unwilling to protect its civilians.

The Heads of States and Governments at the United Nations (UN) General Assembly unanimously adopted the R2P principle at the 2005 World Summit in its resolution 60/1.<sup>2</sup> In paragraphs 138 and 139 of the World Summit Outcome Document (WSOD) the States agreed that the primary responsibility, to protect its own people from genocide, war crimes, crimes against humanity and ethnic cleansing, lies within the State itself. This responsibility entails the prevention of MA crimes, ‘including their incitement, through appropriate and necessary means.’<sup>3</sup> States also agreed that the international community should ‘encourage and help States to exercise this responsibility and support the UN in establishing an early-warning capability.’<sup>4</sup> They further agreed that in the case where a State is manifestly failing to protect its population from such crimes, the wider international community then has a collective ‘responsibility to use appropriate diplomatic, humanitarian and other peaceful means’, and should that be inadequate, ‘to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including

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<sup>1</sup> International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ (2001).

<sup>2</sup> UNGA Res 60/1 ‘World Summit Outcome Document’ (24 October 2005) UN Doc A/RES/60/1.

<sup>3</sup> *ibid* §138.

<sup>4</sup> *ibid*.

Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate<sup>5</sup>, in accordance with international law (IL).<sup>5</sup>

In its 2009 report on *Implementing the Responsibility to Protect* (2009 UNSG R2P report), the UN Secretary General Ban Ki-moon outlined a three-pillar strategy stemming from the agreed R2P principle.<sup>6</sup> This strategy stresses the value of prevention and, when it fails, of early and flexible response tailored to the specific circumstances of each case. The three-pillar approach consists of (1) the protection responsibilities of each State, (2) international assistance and capacity building, and (3) timely and decisive international response. Moreover, Secretary General Ban Ki-moon stressed in the report that renegotiating paragraphs 138 and 139 of the WSOD would be counterproductive and that the next step should be for member States and the UN to operationalize R2P.<sup>7</sup>

The idea that prevention is better than cure when it comes to MAs is widely accepted. In fact, the ICISS report had asserted prevention as the single most important dimension of R2P.<sup>8</sup> Moreover, the international political comfort level is greater with regards to prevention than it is with regards to other more forceful components, such as humanitarian intervention. In Bellamy's words, "[p]reventing atrocities saves lives, is less expensive than reaction and rebuilding, and raises fewer difficult questions about state sovereignty and non-interference."<sup>9</sup>

### **1.1.2 The interplay between R2P and NHRIs**

Taking into consideration the immediate need to translate the R2P principle into policy and the overwhelming importance of the prevention aspect of R2P, this thesis addresses the role, means and tools of National Human Rights Institutions (NHRIs) in the implementation of the prevention aspect of pillar one, the protection responsibilities of States.

This thesis investigates how NHRIs could use their mandate to protect and promote human rights and thereby make an important contribution to the implementation of R2P. In particular, it evaluates the ways in which NHRIs can make use of their mandate to prevent the occurrence, escalation and recurrence of MAs. This includes the monitoring of human rights before, during and after MA situations, for instance through an early-warning system. With the information NHRIs collect, they can advise governments on how to go about fulfilling their responsibilities in the matter of MA prevention.

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<sup>5</sup> *ibid* para 139.

<sup>6</sup> Report of the Secretary General, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677.

<sup>7</sup> *ibid* 28.

<sup>8</sup> ICISS report (n 1).

<sup>9</sup> Alex J. Bellamy, 'Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent' (Policy and Analysis Brief, The Stanley Foundation 2011) 1.

In the 2009 UNSG report, Ban Ki-moon points to the significant potential of NHRIs in this field when he mentions that strengthening the Colombian *Defensoría del Pueblo* (DP), has helped to address child recruitment and demobilization, gender-based violence in conflict and sexual exploitation related to the conflict.<sup>10</sup> The Colombian DP is a highly interesting NHRI to study with regards to the prevention of MAs as it established the most sophisticated early-warning system<sup>11</sup> where the risk reports are submitted to an Early-Warning Committee chaired by Colombia's Vice-President. Systems like these can play a significant role in the effective implementation of R2P. The thesis will more specifically analyze the ways in which the DP uses its mandate to prevent MAs.

### 1.1.3 Objective of the study

The objective of this thesis is threefold: first, to analyse the scope of the prevention obligations of States under the first pillar of R2P; second, to assess the role that NHRIs can play in the implementation of that aspect of R2P; and third, to evaluate how the Colombian DP in particular can use its mandate to prevent MAs.

The research is partly carried out in the field. Through the insights of local staff working with the DP in the prevention of MAs in Colombia, this study assesses opportunities and challenges of the DP in the implementation of Colombia's prevention responsibilities under the first pillar of R2P. Following this assessment, the author presents recommendations to enhance the capability of NHRIs in general and the DP in particular to prevent MA crimes.

This study is ultimately aimed at contributing to translating the R2P pillar one's promise into practice.

### 1.1.4 Research questions

The following three research questions will be answered in the subsequent chapters:

1. What is the scope of the obligations of member States to prevent MAs under pillar one of R2P?
2. What is the role of NHRIs in the prevention of MAs and thereby the implementation of the first pillar of R2P?

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<sup>10</sup> Implementing the Responsibility to Protect (n 6) para 25.

<sup>11</sup> Thomas Pogram, 'Fulfilling the Responsibility to Protect: Strengthening National and Collective Capacities to Prevent and Halt Mass Atrocities – The Role of National Human Rights Institutions, (First Meeting of National Focal Points, Jointly convened by the Foreign Ministries of Costa Rica, Denmark and Ghana, in association with the Global Centre for the Responsibility to Protect, 17 May 2011) <[http://tompegram.com/wp-content/uploads/2011/05/GCR2P\\_UN\\_Talk\\_Pogram.pdf](http://tompegram.com/wp-content/uploads/2011/05/GCR2P_UN_Talk_Pogram.pdf)> accessed 21 May 2012.

3. Through which means and tools stemming from its mandate can the Colombian DP contribute to the prevention of MA crimes in Colombia and thereby contribute to the implementation of R2P?

### **1.1.5 Limitations**

This thesis will only address the responsibility of States to prevent MA crimes under the first pillar of R2P. Given that many response measures also contribute to the prevention of MA crimes, they will thus be addressed under that angle. This thesis will not address pillars two and three: the responsibility of the international community to assist States in fulfilling this responsibility to respond to MAs in the case where a State manifestly fails to protect its population. Peace-building and transitional justice issues and mechanisms will not be addressed other than for their preventive aspects within the field of the work of NHRIs.

This research will assess the DP implementation of Colombia's prevention responsibilities under pillar one of R2P. To achieve this, a thorough examination of the domestic instruments establishing the DP and delimiting its mandate is in order. Apart from this exception, the analysis will be limited to Colombia's relevant international obligations.

In this thesis, the scope of the prevention responsibilities of States under pillar one of R2P will be delimited using IL instruments, including relevant International Human Rights Law (IHRL) and Humanitarian Law (IHL) treaties. As such, the means, tools and role of NHRIs in the enforcement of IHRL and IHL principles will then be outlined. The issue of whether IHL is applicable given the different phases of the Colombian armed conflict is however beyond the scope of this thesis.

### **1.1.6 Methodology**

The three research questions will be answered following an applied methodology, which generally serves the professional needs of practitioners and policy makers, as opposed to pure research that is undertaken for a predominantly academic constituency.<sup>12</sup> Whereas the first question will be answered through an applied doctrinal methodology, the two others will be answered using a qualitative empirical legal methodology.

The first question delimiting the scope of prevention under pillar one of R2P will be answered relying on an applied doctrinal methodology, as

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<sup>12</sup> Paul Chynoweth, 'Chapter 3 – Legal Research' in Ruddock & Knight (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29.

described in H.W. Arthurs' legal research styles.<sup>13</sup> This research style is most appropriate as this question relates to an expository research 'in law', namely the analysis of the R2P norm. The methods of doctrinal research are characterised by the study of legal texts for the discovery and development of legal doctrines. Such analysis usually makes reference to other external factors and seeks answers that are consistent with the existing body of rules.<sup>14</sup> In this case, the author relies upon international legal instruments as well as international jurisprudence to interpret those instruments. Since R2P is not in itself a legal norm, other documents leading to its formation, UN reports and political science research literature will also be used. This includes materials such as the ICISS report and doctrine on peace, conflict and security. The author relies on this combination of material by carrying out a systematic legal analysis.

The two other research questions relating to the role of NHRIs in the prevention of MAs and the ways in which the DP uses its mandate to implement the prevention aspect of the first pillar of R2P will be answered through a qualitative empirical legal methodology.<sup>15</sup> Looking at the implementation of R2P, these questions enquire into the meaning of the norm as a social entity. The social, political and legal processes involved can only be adequately understood through qualitative analysis. This interdisciplinary research method is most suited to answer such questions 'about the law'.<sup>16</sup>

For a better understanding of the structures and organizations of NHRIs and for increased effectiveness in answering the questions, the author is combining an analysis of documents and semi-structured individual interviews. The analysis of documents will provide evidence of policy directions, legislative intent and insights in perceived opportunities and practical challenges in the prevention of MAs.

In order to answer Question Two and assess the role of NHRIs in the implementation of the prevention aspect of the first pillar of R2P, the author will rely on soft law instruments such as the Paris Principles and the first pillar of R2P (protection responsibilities of States) as well as political science research literature. The author will also make use of legal doctrine and UN documents on the subject.

In answering Question Three and evaluate the means and tools of the DP in the implementation of Colombia's responsibilities to prevent MAs, the author will first rely on reports of governmental and non-governmental organizations and political science research literature to describe and explain the context in which the DP is operating. This is necessary to fully comprehend the challenges that the DP faces in its implementation of R2P. The author will also rely on IL instruments outlining Colombia's obligations

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<sup>13</sup> H.W Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law*, (Social Sciences and Humanities Research Council of Canada 1983).

<sup>14</sup> Paul Chynoweth (n 12) 29-30.

<sup>15</sup> Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in P Cane & HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford, OUP 2010).

<sup>16</sup> H.W Arthurs (n 13).

in regards to MA prevention, the first pillar of R2P, legal doctrine as well as reports of organizations collaborating with the DP.

Semi-structured individual interviews are most effective in helping to answer Question Three on the means and tools of the DP in the prevention of MAs<sup>17</sup> by enabling researchers to “move beyond the written sources, and ask probing, theoretically-driven questions of key participants in the events and processes of interest.”<sup>18</sup> The ‘process tracing’ method has been used to carry out the interviews. The goal of the process tracing method is to use the testimony of the most relevant actors to form a ‘theoretically-informed narrative’ of the process that is being researched.<sup>19</sup> This method was most appropriate here as the goal of the field research was to obtain specific information about events and processes that include specific decision-making mechanisms involving a limited set of actors in the deliberations, decisions and actions. The researcher has interviewed the most important and influential actors who have the most direct involvement, and who play a critical role in the prevention of MA at the level of the DP, as well as organizations and institutions playing an important role in collaborating with the DP.

In accordance with the aim of the process-tracing method a combination of both the positional and reputational sampling criteria to select the respondents for interviews was used to uncover as much information as possible on the means and tools of the DP in the prevention of MA.<sup>20</sup> The initial group of respondents was identified according to a positional criteria, meaning that they have been identified based on their known relevance to the research topic. The initial sampling therefore included staff of the DP as well as other actors working in the prevention of MA in collaboration with the DP. The chain-referral sampling method (also known as snowball sampling) has then been used to ensure that unknown or unexpected actors, that have held positions that were initially not considered relevant or important, are included in the sample. This combined positional and reputational sampling criteria will avoid missing key subjects from the sample of interview respondents. In order to avoid the risk that the sample be biased towards one particular direction (given that respondents often suggest referrals that share similar characteristics or outlook), the researcher ensured that the initial group of respondents be sufficiently diverse.<sup>21</sup> The author has interviewed one DP Early-Warning System (SAT) National Analyst, two former DP SAT Regional Analysts, one former Inter-Institutional Commission for Early-Warning (CIAT) employee, two staff members of the DP Specialized Office on Comprehensive Attention to Victims, two staff members of the Office of the Attorney General,<sup>22</sup> the Manager of the Swedish International

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<sup>17</sup> See Annex 1 for the interview guide that was used.

<sup>18</sup> Oisín Tansey, ‘Process Tracing and Elite Interviewing: A Case for Non-probability Sampling’ [2007] 40(4) PS: Political Science and Politics, 14 <<http://www.nuffield.ox.ac.uk/politics/papers/2006/tansey.pdf>> accessed 21 May 2012.

<sup>19</sup> *ibid* 10-11.

<sup>20</sup> *ibid* 21.

<sup>21</sup> *ibid* 18-19.

<sup>22</sup> *Procuraduría General de la Nación*.

Development Cooperation Agency (Sida) *Indevelop* program and one Colombian sociologist.

The results of the interviews have been used to inform the author of the means, tools and practical weaknesses of the DP in the prevention of MAs. The interviews responses have also been utilized to draw more general conclusions in relation to Question Two on the potential role NHRIs can play in the prevention of MAs.

### **1.1.7 Structure of the study**

In chapter Two, the thesis identifies the scope of the legal prevention obligations of States under the first pillar of R2P. This is assessed through the evaluation of the relevant international legal instruments and jurisprudence.

Once the legal scope of pillar one is assessed, chapter Three evaluates the relevant measures for its implementation. Chapter Three then goes on to assess the role that NHRIs can play in the implementation of these measures. This is addressed under three key elements: the promotion of an effective legal framework, the contribution to the implementation of legal frameworks and control mechanisms to support the legal framework and its implementation.

Chapter Four assesses the MA prevention means and tools stemming from the mandate of the DP. The institutional challenges of the DP in that area are then identified on the basis of the findings of the field study.

Chapter Five draws from the findings on the role of NHRIs in MA prevention and the case study of the DP and analyzes the prospects and challenges facing NHRIs in relation to the prevention of MAs. It further presents recommendations for a more comprehensive and effective contribution to the implementation of States prevention obligations to prevent MAs by NHRIs in general, and by the DP in particular.

## **1.2 Scope of States primary prevention obligations under R2P**

In the 2009 UNSG report, Ban Ki-moon summarized the R2P principle and outlined a three-pillar implementation strategy, stressing the value of prevention. Pillar one concerns the responsibility of the State to protect its population through prevention and response to the four MA crimes. Pillar two relates to the duty of the international community to assist States in fulfilling their pillar one responsibilities. Pillar three addresses the responsibility of the international community, where a State is manifestly failing to protect its population, to take timely and decisive responses through ‘appropriate diplomatic, humanitarian and other peaceful means’, and should that be inadequate, ‘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', in accordance with IL.<sup>23</sup>

The present study is interested in the implementation of the prevention aspect of the first pillar: the responsibility of States to protect their own populations from genocide, war crimes, crimes against humanity and ethnic cleansing. Prior to agreeing on R2P at the 2005 World Summit, States had legally committed themselves in some ways to preventing MAs. In chapter 2, these obligations will be analyzed to delimit the scope of the prevention obligations of States under pillar one.

### **1.3 Role of NHRIs in the implementation of States primary responsibility to prevent**

R2P added an agenda for action to the pre-existing legal obligations of States to prevent certain grave violations of IL. This agenda will be discussed, before evaluating how NHRIs can contribute to its implementation.

NHRIs are independent statutory bodies established by States with the mandate to promote and protect human rights. The means and tools available to a given NHRI for the promotion and protection of human rights depend on its mandate. They generally include the research, documentation, personnel training and public education in human rights issues. They can also involve the monitoring of human rights situations, audition of laws, submitting recommendations to the government, reporting to international bodies, holding inquiries and handling complaints.<sup>24</sup>

NHRIs have an important role to play in monitoring States' implementation of human rights. As it will be described below, their broad and conciliatory authority makes them well suited to promote and protect human rights. They thus play a crucial role in the practical implementation of human rights instruments at the national level. While States appoint the head of the institution, finance them, and make them accountable for their actions and spendings, NHRIs are to be independent from the State.<sup>25</sup> In fact, it is their independence that determines their legitimacy and credibility and hence their effectiveness.<sup>26</sup>

Experience shows that much of the information necessary for flagging imminent MAs is readily available. But experience also reveals that it is not sufficient to prevent MAs. The challenge is to systematically collect, analyze and transmit that information to those capable of acting. To provide

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<sup>23</sup> World Summit Outcome Document (n 2) para 139.

<sup>24</sup> Inter alia, Principles relating to the Status of National Institutions (The Paris Principles), UNGA Res 48/134 (20 December 1993).

<sup>25</sup> *ibid*, Composition and guarantees of independence and pluralism. For a discussion on the difficulties of NHRIs with respect to their independence and accountability, see: Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' [2006] 28 Hum Rts Q 904.

<sup>26</sup> International Human Rights Policy and UNHCHR, 'Assessing the Effectiveness of National Human Rights Institutions' (2005) 20.



information capable of effectively inciting preventive action, it is necessary to monitor trends, assess potential triggers and accelerators and understand the local context and culture.<sup>27</sup>

It is argued, in this thesis, that NHRIs are in an ideal setting to do so. Given their investigative nature and in some cases, quasi-judicial powers, they are in a privileged position to collect and analyze information in its local context. NHRIs can then transfer this information to those capable of acting, including through early-warning assessments of conflict-related violence or policy recommendations for the government. In doing so, NHRIs contribute to the prevention of R2P crimes. A detailed analysis of the potential capacity of NHRIs in this regard will be provided in chapter Three.

## **1.4 Case study of Colombia – Means and tools of the *Defensoría del Pueblo* in the implementation of R2P**

The Colombian DP constitutes a highly interesting example of the role that a NHRI can play in the prevention of MAs for many reasons. On the one hand, the DP is experienced with conflict-related violence as it is operating in the midst of the longest lasting internal armed conflict and humanitarian crisis in the Western Hemisphere.<sup>28</sup> On the other hand, the DP is enabled to effectively participate in the prevention of such conflict-related violence: it is fully compliant with the Paris Principles; it holds exceptional functions in the promotion and defence of both human rights and humanitarian law; and it established the most developed NHRI early-warning system that monitors and flags imminent risks of human rights violations against civilian populations. Despite all of this, the occurrence of conflict-related MAs persists. This points to the challenges that remain in generating institutional preventive action.<sup>29</sup> A detailed analysis of the opportunities and challenges of the DP in the prevention of MAs will be provided in chapter Four.

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<sup>27</sup> IPI Blue Papers, ‘Conflict Prevention and the Responsibility to Protect’ (7, Task Forces on Strengthening Multilateral Security Capacity 2009) para 20.

<sup>28</sup> Swedish International Development Cooperation Agency, ‘*Indevelop - Evaluación de Término Medio del Proyecto Embajada de Suecia – Defensoría del Pueblo, Colombia Acción Regionalizada para la Protección y Restitución de Derechos*’ (2011) 5.

<sup>29</sup> Pegram, ‘Fulfilling the Responsibility to Protect’ (n 11).

## **2. SCOPE OF STATES PRIMARY PREVENTION OBLIGATIONS UNDER R2P**

The research on the prevention aspect of R2P is limited its agreed primacy importance. Bellamy argues that this is in part due to the disagreements about how wide the scope of prevention should be.<sup>30</sup> Most scholars agree that R2P should not include all human security issues, but where should the line be drawn?

R2P involves expectations about the responsibilities of States with regards to their population. As mentioned in the introductory chapter, prior to agreeing on R2P at the 2005 World Summit, States had legally committed themselves in some ways to preventing MAs. These commitments are rooted in international humanitarian and human rights law.<sup>31</sup> Pillar one is therefore understood as a reaffirmation and codification of already existing legal norms.<sup>32</sup>

In this chapter, the scope of the primary prevention obligations of States under pillar one will be assessed by: 1) considering the definition of the MA crimes found in international criminal law instruments; and 2) examining its relationship with the evolving IL on the prevention of international crimes, namely applicable IHRL and IHL obligations.

### **2.1 R2P Prevention in the 2005 WSOD**

The scope of R2P as defined in the ICISS report was wider than the one agreed by member States at the 2005 World Summit. The former was building on the idea of human protection in situations where “a population is suffering serious harm, as a result of internal war, insurgency, repression or State failure.”<sup>33</sup> Its description of prevention covered the “root causes and direct causes of internal conflict and other manmade crisis putting populations at risk.”<sup>34</sup> Root causes were described as including poverty, repression and failures of distributive justice.<sup>35</sup>

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<sup>30</sup> Alex J. Bellamy, ‘Conflict Prevention and the Responsibility to Protect’ (2008) 14 *Global Governance*, 135-156.

<sup>31</sup> See section 2.3.1.

<sup>32</sup> Alex J. Bellamy, ‘The Responsibility to Protect – Five Years On’ (2010) 24(2) 143; *Ethics & International Affairs*, 24’ no. 2 (2010), pp. 143-169, 160; Edward C. Luck, ‘The United Nations and the Responsibility to Protect’ (2008) *The Stanley Foundation Policy Analysis Brief*, 4.

<sup>33</sup> ICISS report (n 1) xi.

<sup>34</sup> *ibid* ch 3.

<sup>35</sup> *ibid* 19-20.

At the World Summit, member States agreed to constrain the scope of the responsibility to protect their populations to four crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>36</sup> In the 2009 UNSG R2P report Ban Ki-moon delineated the protection responsibilities of States - pillar one, to inculcate appropriate values, including respect for human rights and diversity, tolerance, inclusiveness and individual responsibility;<sup>37</sup> to build institutions that facilitate protection, including the rule of law, rights-respecting legislation, civil society capacities;<sup>38</sup> and to consider the use of various learning devices and training capacities, including peer-review and NGO programmes.<sup>39</sup>

Ban Ki-moon has stressed that distinctions need to be drawn about what R2P is and is not.<sup>40</sup> In the words of Evans: “if R2P is to be about protecting everybody from everything, it will end up protecting nobody from anything.”<sup>41</sup> In order for R2P to keep its political pull, capable of “generating an effective, consensual response to extreme, conscience-shocking cases,”<sup>42</sup> it is important that it is not invoked improperly. The thesis will therefore take the four MA crimes as a point of departure for the following examination of existing obligations.

## 2.2 Massive human rights violations

There appears to be a preference for the idea that R2P should address only the direct and imminent causes or threats of genocide, war crimes, ethnic cleansing and crimes against humanity,<sup>43</sup> and not other massive human rights violations. Secretary-General's Special Advisor, Edward Luck, argues that R2P is not suited to deal with systemic human rights problems, which are not characterized by large-scale violence.<sup>44</sup> Bellamy explains that this position is based on the “understandable eagerness to defend RtoP's putative capacity to serve as a catalyst for timely and decisive international responses to MAs

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<sup>36</sup> The parts of paragraph 138 of the WSOD (n 2) relevant to pillar one reads: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The 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.”

<sup>37</sup> Implementing the Responsibility to Protect (n 6) paras 13, 15, 16, 20, 21, 27.

<sup>38</sup> *ibid* paras 14, 17-19.

<sup>39</sup> *ibid* paras 22-26.

<sup>40</sup> UN Secretary-General Ban Ki-moon, ‘Responsibility to Protect’ (Berlin Event on ‘Responsible Sovereignty: International Cooperation For a Changed World’, Berlin, July 2008) <<http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>> accessed May 21 2012.

<sup>41</sup> Gareth Evans, *The Responsibility to Protect* (Brookings, 2008) 65.

<sup>42</sup> *ibid*.

<sup>43</sup> International Coalition for the RtoP, ‘Report on the General Assembly Debate’ (2009) 6-8; Gareth Evans, ‘The Responsibility to Protect in International Affairs’ (Australian catholic University, Melbourne, November 2009).

<sup>44</sup> Edward C. Luck, ‘Implementing the Responsibility to Protect at the United Nations’ (lecture to the University of Queensland, Australia, August 2009) 10-11.

against perceived attempts to broaden the principle to such an extent that it loses this mobilizing capacity.”<sup>45</sup> Evans also argues in favour of a narrow definition of the scope of R2P based on a parallel reasoning.<sup>46</sup> When it comes to the primary responsibility of States to prevent MA crimes however, the author argues that an approach addressing both the structural and direct causes of MAs is in order.<sup>47</sup>

## 2.3 States legal obligations to prevent

The ICISS described R2P as a guiding principle for States that builds on a range of legal obligations and political responsibilities.<sup>48</sup> The negotiating history of the WSOD shows that these responsibilities were regarded as resting on existing IL.<sup>49</sup> Most would accept that although many parts of R2P are grounded in IL, the principle, as agreed in the WSOD, as a whole does not constitute a legal norm.<sup>50</sup> Pillar one alone is however understood as a reaffirmation and codification of already existing obligations,<sup>51</sup> as States had legally committed themselves through IHL and IHRL to preventing MAs before agreeing to the R2P norm in 2005.

The obligations of States to prevent MA crimes are most clearly developed in the enduring treaties relating to genocide and war crimes.<sup>52</sup>

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<sup>45</sup> Alex J. Bellamy, *Global Politics and the Responsibility to Protect* (Routledge, 2011) 93. See p. 67 for a discussion on how the case of regime-induced famine, military execution of civilians trying to flee the country, systematic use of torture and arbitrary killings as war crimes and crimes against humanity in North Korea was ignored.

<sup>46</sup> Evans (n 41) 69: “[i]t is very tempting to broaden R2P’s application beyond the actual or feared commission of mass atrocity crimes: it is the case that issues of civilian protection (from loss of life, injury, economic loss, and assaults on human dignity) are always involved in any deadly conflict, whatever its cause and whatever its scale, and in any significant human rights violation. And of course, it is true that some full-fledged R2P mass-atrocity situations evolve out of less extreme human rights violations, or out of general conflict environments. But, again, to widen the focus too much is dangerous from the perspective of undermining R2P’s utility as a rallying cry. If too much is bundled under the R2P banner, we run the risk of diluting its capacity to mobilize international consensus in the cases where it is really needed.”

<sup>47</sup> See section 3.1.2.

<sup>48</sup> ICISS report (n 1) xi.

<sup>49</sup> Ekkehard Strauss, ‘A Bird in the Hand is Worth Two in the Bush’ (2009) 1 *Global Responsibility to Protect* 291, 303.

<sup>50</sup> The legal status of R2P as a whole is beyond the scope of this thesis.

<sup>51</sup> See section 2.3.

<sup>52</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted by 9 December 1948, entered into force 12 January 1951) 78 U.N.T.S. 277 (Genocide Convention); Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S. 31 (GC I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S. 85 (GC II); Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, Geneva, entered into force 21 October 1950) 75 U.N.T.S. 135 (GC III); Convention (IV) relative to the Protection of Civilian in Time of War (adopted 12 August 1949, Geneva, entered into force 21 October

Moreover, conventional and customary international law (CIL) have defined the elements of genocide, war crimes and crimes against humanity.<sup>53</sup> In addition, the Statutes of the International Criminal Court (ICC),<sup>54</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>55</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>56</sup> as well as their jurisprudence have further developed the contours of international obligations relating to genocide, war crimes and crimes against humanity.<sup>57</sup>

The provisions of the *Rome Statute of the International Criminal Court*<sup>58</sup> (Rome Statute) are for the most part seen as a codification of the legal understanding on the elements of genocide, war crimes, and crimes against humanity.<sup>59</sup> Ethnic cleansing does not in itself constitute an international crime. Instead, it is understood as falling under other forms of MA crimes.<sup>60</sup>

In light of the relevant IL instruments and jurisprudence, this section will seek to determine the legal content of preventive obligations under the first pillar of R2P. Section 2.3.1 will define MA crimes. Section 2.3.2 will then go on to examine the various obligations to prevent MAs found in IL.

## 2.3.1 Legal definitions of MA crimes

### 2.3.1.1 Genocide

States have long had obligations with respect to genocide, which is defined in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>61</sup> (Genocide Convention) as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical,

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1950) 75 U.N.T.S. 287 (GC IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 U.N.T.S. 3 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 U.N.T.S. 609 (AP II). See 2.3.2.

<sup>53</sup> See section 2.3.1.

<sup>54</sup> Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

<sup>55</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted by the Security Council 25 May 1993, S/RES/827 25) (ICTY Statute).

<sup>56</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other 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 (adopted by S/RES/955 8 November 1994) (ICTR Statute).

<sup>57</sup> See section 2.3.2.

<sup>58</sup> ICC Statute (n 54).

<sup>59</sup> Luck (n 32) 4.

<sup>60</sup> See section 2.3.1. 4.

<sup>61</sup> Genocide Convention (n 52).

racial or religious group: 1) killing members of the group; 2) causing serious bodily or mental harm to members of the group; 3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; 4) imposing measures intended to prevent births within the group; and 5) forcibly transferring children of the group to another group”.<sup>62</sup> The Genocide Convention requires State parties to prevent and punish genocide,<sup>63</sup> as well as conspiracy, incitement, attempt to commit, and complicity in genocide.<sup>64</sup> However these obligations are not limited to the parties to the Convention. In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of 1951, the International Court of Justice (ICJ) recognized that the provisions of the Convention express pre-existing CIL and obligations *erga omnes*, that is obligations owed toward all other member States of the international community.<sup>65</sup>

The Statutes of the ICTY and ICTR both adopt the definition and description of punishable acts found in the Genocide Convention.<sup>66</sup> The Rome Statute also transposes the definition and description of punishable acts found in the Genocide Convention, with the exception of conspiracy.<sup>67</sup>

### 2.3.1.2 War crimes

Certain war crimes were codified under Article 6 of the Charter of the International Military Tribunal at Nuremberg (IMT).<sup>68</sup> The four Geneva Conventions of 1949 (Geneva Conventions)<sup>69</sup> subsequently codified rules of IHL elaborating on the war crimes adjudicated at Nuremberg. All States have now ratified the Geneva Conventions. In any case, the provisions are also binding upon all States as CIL.<sup>70</sup>

Article 8 of the Rome Statute more broadly defines war crimes, for the purposes of international criminal prosecution, as being “part of a plan or policy or as part of large-scale commission of such crimes.”<sup>71</sup> This definition includes breaches of the Geneva Conventions<sup>72</sup> and “other serious violations

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<sup>62</sup> *ibid* article 2.

<sup>63</sup> *ibid* article 1.

<sup>64</sup> *ibid* article 3.

<sup>65</sup> *Advisory Opinion on Reservations to the Genocide Convention* [1951] ICJ Rep, 23 et seq.

<sup>66</sup> ICTY Statute (n 55) para 4; ICTR Statute (n 56) para 2.

<sup>67</sup> ICC Statute (n 54) para 25.

<sup>68</sup> Charter of the International Military Tribunal (London Agreement of 8 August 1945) article 6.

<sup>69</sup> GC I, GC II, GC III, GC IV (n 52).

<sup>70</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ, §§79, 82.

<sup>71</sup> ICC Statute (n 54) article 8(1).

<sup>72</sup> *ibid* article 8(2)(a). These include wilful killing; torture or inhuman treatment; wilfully causing great suffering or serious injury; extensive destruction and appropriation of property; wilfully depriving prisoners of war or other protected persons of a fair trial and conscripting prisoners of war or children into military service; unlawful deportation, transfer or confinement; and taking of hostages.

of the laws and customs applicable in international armed conflict.”<sup>73</sup> The Rome Statute also prohibits serious violations of Common Article 3 to the Geneva Conventions in cases of non-international armed conflict.<sup>74</sup> Further, it expands on Common Article 3 prohibitions by adding the prohibition of “serious violations of the laws and customs applicable in armed conflicts not of an international character, within the framework of IL” in non-internationalized armed conflict.<sup>75</sup> Most of the definitions provided in the Rome Statute are considered to be the codification of CIL.<sup>76</sup>

### 2.3.1.3 Crimes against humanity

Crimes against humanity were first defined in the Charter of the IMT as encompassing: “murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during a war; or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the domestic law of the country where perpetrated.”<sup>77</sup>

Crimes against humanity have since been expanded in the Statutes of the ICTY, ICTR, Special Court for Sierra Leone (SCSL) and ICC.<sup>78</sup> The ICTY and ICTR Statutes add rape, torture and other inhumane acts to its

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<sup>73</sup> *ibid* article 8(2)(b). These include intentionally directing attacks against civilians, civilian objects or humanitarian and peacekeeping objects; intentionally launching attacks despite knowledge of disproportionate loss of life or injury to civilians, civilian objects or the natural environment; attacking undefended non-military objectives; killing or wounding surrendered combatants; improper use of flags and insignias resulting in death or injury; transfer of a civilian population into or out of occupied territories; intentionally directing attacks against objects cultural or historic, and not military, significance; unjustified mutilation or scientific experimentation; declaring that no quarter will be given; unjustified destruction or seizure of enemy property; failure to recognize in a court of law the rights and actions of nationals of a hostile party; compelling nationals to take part in military actions against their own country; pillaging; the use of certain weapons, ammunitions and methods of warfare, including the use of poisonous gases; committing outrages upon personal dignity, including humiliating and degrading treatment; committing sexual violence such as rape, sexual slavery, or enforced prostitution, pregnancy or sterilization; using civilian shields; using starvation as a method of warfare.

<sup>74</sup> *ibid* article 8(2)(c). These include actions against any person not taking active part in hostilities, including surrendered, sick, wounded or detained prisoners, violence to life and person, in particular murder, mutilation, cruel treatment and torture; outrages upon personal dignity; taking of hostages; and passing and execution of sentences without a judgment of a regularly constituted court with “all juridical guarantees which are generally recognized as indispensable.”

<sup>75</sup> *ibid* article 8(2)(e). These include, many, but not all, of the relevant elements listed in 8(2)(b). Excluded are prohibitions on methods and means of warfare, such as those indicated in Article 8(2)(b)(xxvii)-(xx).

<sup>76</sup> Gerhard Werle, *Principles of International Criminal Law*, (TMC Asser Press 2005) 286; C.f. Kofi A. Annan, ‘Two Concepts of Sovereignty’ p. 122, who claims that the Statute also takes into account recent developments within the work of the ad hoc Tribunals.

<sup>77</sup> IMT Charter (n 68) article 6(c).

<sup>78</sup> ICC Statute (n 54) article 7; ICTY Statute (n 55) article 5; ICTR Statute (n 56) article 3; UN Statute of the Special Court for Sierra Leone (adopted by Security Council A/RES/1315, 14 August 2000) (SCSL Statute) article 2.

enumeration of categories of acts constituting crimes against humanity.<sup>79</sup> The Rome Statute also adds the crimes of enforced disappearance of persons and apartheid<sup>80</sup> as well as clarifying language to the crimes of extermination, enslavement, deportation, torture and forced pregnancy.<sup>81</sup> The acts must be committed “as part of a widespread or systematic attack directed against any civilian population.”<sup>82</sup> The Rome Statute further requires “knowledge of the attack.”<sup>83</sup> The ICTY held that a “widespread” crime may be established by the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.<sup>84</sup> “Systematic,” on the other hand, consists of four elements: a political objective or ideology that drives the destruction, persecution or weakening of a community; perpetration of acts on a “very large scale” against a group of civilians, or the “repeated and continuous commission of inhumane acts linked to one another”; the preparation and use of “significant” public or private resources; and the implication of “high-level political and/or military authorities” in planning.<sup>85</sup>

### 2.3.1.4 Ethnic cleansing

The term ‘ethnic cleansing’ was coined in the early 1990s in response to deportation and forcible transfer of large numbers of civilians in the Balkans. In 1992, an expert group appointed by the UN Security Council defined ethnic cleansing as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”<sup>86</sup>

Ethnic cleansing is currently not a crime in its own standing under IL. Acts of ethnic cleansing are however understood to fall within the scope of genocide, war crimes and crimes against humanity,<sup>87</sup> such as: “genocide

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<sup>79</sup> ICTY Statute (n 55) article 5; ICTR Statute (n 56) article 3. The residual “other inhuman acts” clause of crimes against humanity has been interpreted by the SCSL to include offenses such as forced marriages. (*Prosecutor v Brima, Kamara & Kanu* (Appeal Judgment) SCSL-2004-16-A (2 February 2008)).

<sup>80</sup> ICC Statute (n 54) article 7.

<sup>81</sup> *ibid.* The prohibited acts under the ICC Statute are murder; extermination; enslavement; deportation, forcible transfer or enforced disappearance; imprisonment or severe deprivation in violation of international law; torture; sexual crimes including rape, and enforced prostitution, pregnancy or sterilization; persecution where based on certain group identity in connection with any other crime against humanity; and apartheid.

<sup>82</sup> ICC Statute (n 54) article 7; ICTY Statute (n55) article 5; ICTR Statute (n56) article 3; SCSL Statute (n78) article 2.

<sup>83</sup> ICC Statute (n 54) article 7.

<sup>84</sup> *Prosecutor v Blaskic* (Trial Judgment) IT-95-14-T (3 March 2000) para 142.

<sup>85</sup> *Prosecutor v Naletilic and Martinovic* (Trial Judgment) IT-098-34-T (31 March 2003); *Prosecutor v. Blaskic* (n 84).

<sup>86</sup> UN Security Council, Commission of Experts, *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), UN Doc S/35374 (10 February 1993) para 55. The report also found that “policy and practices...[of] ethnic cleansing... constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts also could fall within the meaning of the Genocide Convention.” *ibid* para 56.

<sup>87</sup> Evans (n 41) 12-13.



where ethnic cleansing entails an intent to destroy an ethnic group in part or in whole; crimes against humanity where there is systematic and widespread persecution based on ethnic identity in connection with any predicated element of crimes against humanity (in peacetime or war crime context); and war crimes where certain acts – such as forced deportation, sexual violence, and killing civilians are part of a plan or policy targeting an ethnic group in a wartime context.”<sup>88</sup>

Ethnic cleansing that meets the threshold of genocide is likely to be referred to as such. The term ethnic cleansing is however widely used also for crimes falling within the scope of crimes against humanity or war crimes.<sup>89</sup> Deportation and forcible transfer are the crimes most closely associated with ethnic cleansing.<sup>90</sup>

## **2.3.2 MA prevention obligations**

### **2.3.2.1 Duty to protect under IHRL**

The 'duty to protect' is a concept of IHRL that mainly provides that States have a positive obligation in certain circumstances to prevent private actors from infringing on the rights of other individuals.<sup>91</sup> In other words, in addition to ensuring that governmental actors refrain from committing violations, States must also take measures to prevent private individuals from committing human rights violations within their jurisdiction. The 'duty to protect' generally requires States to prevent, punish, investigate and redress human rights violations. While there is no such express provision in IL, it is widely accepted that States have this positive obligation in a wide range of areas under international human rights treaties.<sup>92</sup> This obligation is based upon the idea that the protection of rights under international human rights instruments must be effective in practice, and not merely theoretical.<sup>93</sup> This is also supported by the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian

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<sup>88</sup> Tarun Chhabra and Jeremy B. Zucker, 'Defining the Crimes' in Jared Genser & Irwin Cotler (eds), *The Responsibility to Protect – The Promise of Stopping Mass Atrocities in Our Time* (Oxford University Press 2012) 42.

<sup>89</sup> *ibid* 54

<sup>90</sup> *ibid*.

<sup>91</sup> Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in Louis Henkin (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), 72, 77-78.

<sup>92</sup> Sheri P. Rosenberg, 'Responsibility to Protect: A Framework for Prevention' 2009 1 *Global Responsibility to Protect*, 442, 452. It is outside the scope of this thesis to analyze the range of positive obligations under IHRL.

<sup>93</sup> *Golder v. United Kingdom* (Judgment) App. 445/170 Eur Ct HR (21 February 1975).

Law', adopted by the General Assembly in December 2005.<sup>94</sup> This soft law instrument provides that the obligation to respect, ensure respect for and implement IHRL and IHL includes the duty to take appropriate measures to prevent violations and to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.

The 'duty to protect' has developed as a standard of due diligence requiring States to take reasonable active steps as could be expected from other States under similar circumstances.<sup>95</sup> It is an obligation of conduct, rather than one of result. This means that if a State takes all reasonable measures to prevent a given human rights violation it will not be held accountable if the violation occurs.

The part of R2P that requires States to take action to prevent genocide, crimes against humanity, war crimes and ethnic cleansing indirectly rests upon established norms of IHRL, including the 'duty to protect'.<sup>96</sup> R2P thus presents an opportunity to improve the implementation of existing legal obligations relating to MAs, including the duty to protect as developed in IHRL.<sup>97</sup> At the same time, the legal foundations of R2P, comprising of IHRL,<sup>98</sup> can help support and specify the scope of States obligations to prevent under R2P.<sup>99</sup>

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<sup>94</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (adopted and proclaimed by UNGA resolution 60/147 of 16 December 2005) article 3.

<sup>95</sup> Rosenberg (n 92) 453-454.

<sup>96</sup> *ibid* 447.

<sup>97</sup> *ibid* 452-9; Strauss (n 49) 291.

<sup>98</sup> Most notably: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Genocide Convention (n 52); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UN Doc A/34/46 (CEDAW); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 10 December 1999, entered into force, 22 December 2000 (Optional Protocol to CEDAW); Convention on the Elimination of All Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UN Doc A/39/51 (CAT); Optional Protocol to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) GA res A/RES/57/199 (OPCAT); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UN Doc A/44/49 (CRC); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) UN Doc A/54/49 (Optional Protocol to CRC on children in armed conflict); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc A/RES/61/177 (ICED).

<sup>99</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] ICJ Judgement, General List No. 91. At para. 429 re international instruments providing an obligation on the States parties to it to take certain steps to prevent the acts it seeks to

### 2.3.2.2 Duty to prevent genocide

In its 2007 judgment on the implications of the Genocide Convention for States, *Bosnia and Herzegovina v. Serbia and Montenegro*,<sup>100</sup> the ICJ specified the obligations of States to prevent and punish genocide. The Court held that “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.”<sup>101</sup> The ICJ found that while one of the most effective ways to prevent criminal behaviour is to criminalize and punish it, the obligation to prevent is free standing.<sup>102</sup> Its scope is beyond the duty to punish and to call on the competent UN organs to take action. The Court found that the States’ obligation to prevent entails positive obligations “to employ all measures reasonably available to them so as to prevent genocide as far as possible.”<sup>103</sup> According to the ICJ, “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 genocide.”<sup>104</sup> Moreover, this duty to prevent begins at the time when the State knows, or should have known, that there was a serious risk of genocide occurring.<sup>105</sup>

The ICJ stated that while a criminal act is committed by individuals and entails individual accountability, the failure of a State to fulfil its obligation to prevent and punish under IL constitutes a breach of an international obligation.<sup>106</sup> On that ground, the ICJ used the standard of ‘proof at a high-level of certainty’ to decide if Serbia was responsible for failing in its obligation to prevent genocide.<sup>107</sup> To do so, the Court considered if Serbian authorities had exercised ‘due diligence’ in respect to the massacre at Srebrenica, and determined that they had not.<sup>108</sup>

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prohibit: “Many other instruments (other than the Genocide Convention) include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.”

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid* para 431.

<sup>102</sup> *ibid* para 427.

<sup>103</sup> *ibid* para 430.

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid* para 431.

<sup>106</sup> *ibid* para 174.

<sup>107</sup> *ibid* para 210.

<sup>108</sup> *ibid* para. 430. See also Edward C. Luck, ‘The Responsibility to Protect: Growing Pains or Early Promise?’ (2010) 24(4) *Ethics & International Affairs*, 349, 361.

### 2.3.2.3 *Erga omnes* obligation to prevent MAs?

The notion of *jus cogens* was introduced into treaty law through the Vienna Convention of the Law of Treaties as one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>109</sup> International crimes that rise to the level of *jus cogens* carry *erga omnes* obligations.<sup>110</sup> Such obligations are owed towards the international community as a whole and as a result, each and every member of the international community has a ‘legal interest’ in their observance and consequently a legal entitlement to demand respect for such obligations.<sup>111</sup>

It is recognized that most norms prohibiting MAs rise to the level of *jus cogens*.<sup>112</sup> To this extent, there is a debate about whether States are under a positive obligation to act to halt their commission.<sup>113</sup> As displayed in section 2.3.2.1, the ICJ found that States have the obligation to prevent genocide in accordance with the principle of due diligence. Because of the nature of the case, the ICJ only examined the Genocide Convention and did not discuss the obligation of States to prevent other MA crimes under IHRL and IHL. A number of authors use the Genocide Convention and its interpretation by the ICJ to support R2P with respect to the prevention of other MA crimes.<sup>114</sup> Strauss for instance maintains that the obligation to prevent genocide as an obligation *erga omnes* raises the question of a general obligation of States to prevent the other acts of the same type. He argues that the obligation to prevent genocide as assessed by the ICJ “could ultimately form the basis of providing guidance on the existence and scope of a duty or responsibility to protect.”<sup>115</sup> Luke Glanville similarly points out that despite refusing to rule on other MA crimes, the ICJ in *Bosnia v. Serbia* did

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<sup>109</sup> Vienna Convention of the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 53.

<sup>110</sup> M. Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (Fall 1996) 59 *Law and Contemporary Problems* 63-74, 64.

<sup>111</sup> *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, 3, 32.

<sup>112</sup> *Prosecutor v Kupreskic* (Trial Judgment) IT-95-16-T (14 January 2000) para 520. The ICTY recognized that “most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*.” Re the prohibition of war crimes: ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (n 70) 226, para 79; Report of the International Law Commission (23 April-1 June and 2 July-10 August 2001) A/56/10 (SUPP), 284. Re the prohibition against crimes against humanity: ILC A/56/10 (SUPP), 208, para 5; M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2<sup>nd</sup> revised ed, the Hague Kluwer Law, 1999) 210. Re the prohibition against genocide: ICJ *Advisory Opinion on Reservations to the Genocide Convention* (n 65) 23 et seq.

<sup>113</sup> Chhabra and Zucker (n 88) 56

<sup>114</sup> David Scheffer, ‘Atrocity Crimes: Framing the Responsibility to Protect’ in R.H. Cooper and J.V. Hohler (eds.), *Responsibility to Protect: The Global Moral Compact for the 21<sup>st</sup> Century* (Palgrave MacMillan 2009), 77, 80-81; Rosenberg (n 92) 461, 470.

<sup>115</sup> Strauss (n 49) 317.

acknowledge that States may carry obligations other than the prevention of genocide that “protect essential humanitarian values and which may be owed *erga omnes*.”<sup>116</sup> Glanville thus puts forward the compelling argument that “the other ‘responsibility to protect’ crimes could constitute breaches of peremptory norms, and their prevention may be considered *erga omnes*.”<sup>117</sup>

### 2.3.2.4 IHL obligation to ‘respect’ and ‘ensure respect’

Common Article 1 of the 1949 Geneva Conventions which reads: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”<sup>118</sup> is today generally seen as “quasi-constitutional” given its *erga omnes* character.<sup>119</sup> It is also considered as imposing on all States<sup>120</sup> an obligation to take a range of measures in order to induce state organs, private individuals and other contracting States to comply with the Conventions.<sup>121</sup> The obligation ‘to respect’ implies that States have the obligation “to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction.”<sup>122</sup> To ‘ensure respect’ on the other hand implies that States, “whether engaged in a conflict or not must take all possible steps to ensure that the rules are respected by all, and in particular by parties to the conflict.”<sup>123</sup> This includes the rules applicable both in times of war and in peacetime.<sup>124</sup> Lastly, ‘in all circumstances’ implies that “the application of the Convention does not depend on the character of the conflict.”<sup>125</sup>

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<sup>116</sup> *Bosnia v Serbia* (n 99) para 147.

<sup>117</sup> Luke Glanville, ‘The Responsibility to Protect Beyond Borders’ (2012) Vol. 12 (1) HRLR 26.

<sup>118</sup> GC I, GC II, GC III, GC IV (n 52) article 1. See also: Jean-Marie Henckaerts and Louise Doswald-Beck (International Committee of the Red Cross), *Study of Customary International Humanitarian Law* (Cambridge University Press, 2005), rule 144 ‘Ensuring Respect for International Humanitarian Law Erga Omnes’: “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.”

<sup>119</sup> *Prosecutor v Kupreskic* (n 112) paras 517-519; *ICRC Study of Customary IHL* (n 118) rule 140, FN. 78.

<sup>120</sup> The ICJ recognized Common Article 1 as part of customary international law as well as a general principle of humanitarian law applicable also in non-international armed conflicts *Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Advisory Opinion) General List No. 70 [1986] ICJ Rep 14, para 220.

<sup>121</sup> Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?’ (2010) 21(1) EJIL 125, 127.

<sup>122</sup> Laurence Boisson de Chazournes and Luigi Condorelli, ‘Common Article 1 of the Geneva Conventions revisited: Protecting collective interests’ (2000) 82 (837) *International Review of the Red Cross* 67.

<sup>123</sup> *ibid.*

<sup>124</sup> *ibid.* See also Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949, Vol. I* (International Committee of the Red Cross 1952) 26: “if it is to keep its solemn engagements, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of loyal enforcement of the Convention as and when the occasion arises.”

<sup>125</sup> *ibid.* 27.

This obligation to ‘respect and ensure respect’ is reiterated in Additional Protocol I<sup>126</sup> and applies not only to international armed conflicts, but also to non-international armed conflicts covered by Common Article 3.<sup>127</sup>

The Commentary to the Geneva Conventions highlights the fact that the provisions on the repression of violations have been considerably strengthened with the obligation to punish grave breaches of IHL: “The Contracting Parties are no longer merely required to take the necessary legislative action to prevent or repress violations. They are under obligation to search for, and prosecute, guilty parties, and cannot evade their responsibility.”<sup>128</sup> Article 1 is thus “deliberately invested with imperative force.”<sup>129</sup>

Fleck argues that Common Article 1 is to be recognized through the lens of “sovereignty as responsibility”.<sup>130</sup> In Fleck’s view, IHL imposes responsibility and legal accountability on States for their actions and omissions.<sup>131</sup>

### **2.3.2.5 Obligation to criminalize, prosecute, punish and take other measures contributing to the prevention of MAs**

The importance of criminalization, prosecution and punishment for effective punishment has been recognized by the ICJ in *Serbia v. Bosnia*: “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.”<sup>132</sup> In that sense, IL instruments as well as Statutes and jurisprudence of international tribunals specify the obligations of States with regards to the prevention of war crimes and crimes against humanity through criminalization, prosecution and punishment. This sub-section will assess these, as well as the obligations relevant to other measures that contribute to the prevention of MAs.

The Rome Statute provides for the investigation and prosecution of perpetrators of MAs before the ICC.<sup>133</sup> However, since not all States are

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<sup>126</sup> AP I (n 52) article 1 (4).

<sup>127</sup> Boisson de Chazournes and Condorelli (n 122): “While conflicts of a non-international character as defined by Add. Protocol II are not explicitly covered by the obligation to respect and to ensure respect, they can nonetheless be considered as indirectly falling within the purview of the provision, insofar as Protocol II is merely an elaboration of common Article 3 of the four Geneva Conventions, a fact stated in tis Article 1, paragraph 1.”

<sup>128</sup> Pictet (n 124) 27, fn1.

<sup>129</sup> *ibid* 27.

<sup>130</sup> Dieter Fleck, ‘International Accountability for Violations of the *Lus in Bello* : The Impact of the ICRC Study on Customary International Humanitarian Law’ (2006) 11(2) *Journal of Conflict and Security Law* 179, 182.

<sup>131</sup> *ibid* 181-8.

<sup>132</sup> *Bosnia v Serbia* (n 99) para 426.

<sup>133</sup> ICC Statute (n 54).

parties and due to its size and statutory mandate, the ICC can only prosecute a very limited number of offenders.

As per war crimes, States must incorporate IHL into their domestic legal system,<sup>134</sup> through the prosecution and effective punishment of individuals committing war crimes or ordering their commission.<sup>135</sup> States must investigate alleged cases of war crimes committed by their nationals, their armed forces, or on their territory and prosecute the suspects.<sup>136</sup> Where appropriate, States must also search for any person(s), regardless of nationality, who have allegedly committed war crimes, and bring them before their national courts.<sup>137</sup> Even if a home country does not investigate and prosecute, it has the obligation to extradite suspects of violations to another State for trial, provided that the latter has produced a *prima facie* case against the alleged violators.<sup>138</sup>

States are also required to disseminate IHL in both peacetime and time of armed conflict to the armed forces and the civilian population.<sup>139</sup> They must ensure that their organs and officials, in particular their armed forces do not commit war crimes on their own territory or beyond.<sup>140</sup> For this purpose, States must make legal advisers on the application of IHL available to military commanders.<sup>141</sup> Military commanders must be required to prevent the commission of war crimes by their subordinates,<sup>142</sup> if necessary to report breaches<sup>143</sup> and to impose disciplinary or criminal punishment.<sup>144</sup> IHL obligations are not only applicable to the direct involvement of States in armed conflict. States must also not encourage the commission of war crimes, and must use their influence to prevent or halt war crimes.<sup>145</sup>

With regards to crimes against humanity, States have not adopted any convention on the prevention of crimes against humanity. There is thus no codified obligation for States to prevent these crimes. Crimes against humanity are however prohibited under CIL, and therefore all States have the obligation to refrain from committing them.<sup>146</sup> Strauss argues that the

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<sup>134</sup> GC III (n 52) article 129, para 1: States must “enact all legislation necessary to provide effective penal sanctions.”

<sup>135</sup> Re obligation to prosecute grave breaches of the Geneva Conventions: GC I (n 52) articles 49-50, GC II (n 52) articles 50-51; GC III (n 52) articles 129-130; GC IV (n 52) articles 146-147; AP I (n 52) article 85). Re the prosecution and punishment of criminal offences connected with non-international armed conflict: AP II (n 52) article 6.

<sup>136</sup> GC I (n 52) article 49(2); GC II (n 52) article 50(5); GC III (n 52) article 129(2); GC IV (n 52) article 146(2). See also ICRC Study of Customary IHL (n 118) rules 157 and 158.

<sup>137</sup> For example GC IV (n 52) article 146.

<sup>138</sup> GC I (n 52) article 49(1).

<sup>139</sup> GC I (n 52) article 47; GC II (n 52) article 48; GC III (n 52) article 127; GC IV (n 52) article 144; AP I (n 52) article 83; AP II (n 52) article 19.

<sup>140</sup> Common Article 1 of the four GC (n 52).

<sup>141</sup> AP I (n 52) article 82. See also ICRC Study of Customary IHL (n 118) rule 141.

<sup>142</sup> AP I (n 52) article 86(2).

<sup>143</sup> *ibid* article 87(1).

<sup>144</sup> *ibid* article 87(3).

<sup>145</sup> ICRC Study of Customary IHL (n 118) rule 144.

<sup>146</sup> Danilenko ‘ICC Statute and Third States’ in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Vol. II, Oxford University Press 2002) 1890; Werle et al (n 76) 218.

contours of States obligations relating to crimes against humanity have been traced by the jurisprudence of international tribunals.<sup>147</sup>

A potential future source of obligations to prevent and punish crimes against humanity is the *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*,<sup>148</sup> which would emphasize the duty of States to prevent the commission of crimes against humanity and add inter-state cooperation in the prosecution of perpetrators.

### 2.3.2.6 Conclusions

The above-mentioned legal obligations of States under IHRL and IHL will now be summarized and analyzed, in order to draw a clear picture of the legal scope of the primary responsibility of States to prevent MA crimes under R2P.

With regards to genocide, all States must “employ all measures reasonably available to them so as to prevent genocide as far as possible.”<sup>149</sup> This is an obligation to prevent genocide with ‘due diligence’. As per the prevention of war crimes, Common Article 1 of the Geneva Convention similarly obliges States to do everything they can to ensure that all, under their jurisdiction, respect IHL. Further IHL provisions place specific obligations relevant to preventing war crimes on States. This notably includes the obligation to incorporate IHL in the domestic legal system, to disseminate IHL and to investigate, prosecute as well as punish IHL violations.

However in regards to crimes against humanity, in the absence of a convention, States have no clear obligation to prevent these crimes specifically. It can however be argued that the fact that crimes against humanity, and for that matter all MA crimes, rise to the level of *jus cogens* and thus carry *erga omnes* obligations, could establish the positive obligation on States to act to prevent their commission. Moreover, it has been suggested

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<sup>147</sup> Ekkehard Strauss, *The Emperor's New Clothes?: The United Nations and the Implementation of the Responsibility to Protect* (Nomos 2009) 34-35. Strauss maintains that similar to the case of genocide and war crimes, States must ensure that their organs and officials do not commit crimes against humanity. For this purpose, they “must not condone or tolerate any policy of widespread attacks against the civilian population by their organs or officials and prevent the commission of crimes against humanity by other within their jurisdiction. Beyond their organs and officials, States must not instruct, direct nor exercise overall control over groups or individuals to commit crimes against humanity. In addition, States must not aid or assist other States to commit crimes against humanity, e.g. through supplying weapons in the knowledge that they are being used for this purpose. According to the case law of the ad hoc tribunals further obligations imposed on States are more limited than those with respect to the crime of genocide and entail primarily that States must provide for the prosecution and punishment of those committing crimes against humanity. To this end, they must take jurisdiction over crimes against humanity occurring on their territory, but are not obliged to establish universal jurisdiction.”

<sup>148</sup> *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, drafted by the Crimes Against Humanity Initiative at the Whitney R. Harris World Law Institute of Washington University School of Law, August 2010. <<http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>> accessed 25 June 2012.

<sup>149</sup> *Bosnia v Serbia* (n 99) para 430.



that R2P could expand the pre-existing legal obligations of States. Chhabra maintains that the President of the General Assembly suggested an answer to the affirmative when stating that “it is for member States to consider if the responsibility to protect in its non-coercive dimension adds anything to the International Law Commission’s Articles or to the provisions of international human rights law and international humanitarian law.”<sup>150</sup> It could be argued from this basis that R2P could have expanded the pre-existing legal obligations of States to include an obligation to prevent crimes against humanity.

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<sup>150</sup> Chhabra and Zucker (n 88) 57; Office of the President of UNGA, Concept Note on the Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes against humanity, Jul. 17, 2009, available at <<http://www.un.org/ga/president/63/interactive/protect/conceptnote.pdf>> accessed 25 June 2012.

# **3. ROLE OF NHRIs IN THE IMPLEMENTATION OF STATES PRIMARY RESPONSIBILITY TO PREVENT**

R2P added an agenda for action to the pre-existing IL obligations of States to prevent certain grave violations of IL. The scope of R2P preventive measures range from those aimed at preventing peacetime atrocities to measures aimed at preventing atrocities committed in the context of an armed conflict. Moreover, direct preventive measures are not the only measures needed to prevent MAs; general structural measures addressing the root causes of MAs and armed conflicts are also required. As explained in the introductory chapter,<sup>151</sup> although NHRIs have broad mandates to protect and promote human rights, there are strong arguments for these institutions to devote special attention to the implementation of R2P preventive measures.

The first section of this chapter will specify the role of NHRIs in the implementation of States' legal obligations, and will then go on to discuss the major elements to be included in an effective prevention operational framework. The second section will analyze the role NHRIs can play in the practical implementation of States' MA prevention obligations and prevention operational framework.

## **3.1 Implementing States obligations to prevent under R2P**

### **3.1.1 NHRIs and the implementation of States legal obligations**

NHRIs can take many forms, such as Ombudsmen, Hybrid Human Rights Ombudsmen or Human Rights Commissions.<sup>152</sup> In all cases, NHRIs are not government departments and they should in fact be independent from the State.<sup>153</sup> As such, they do not implement the legal obligations of States directly. NHRIs rather contribute to the practical implementation of States' obligations through their mandate to promote and protect human rights, most notably with their monitoring functions. The scope of their agenda should be

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<sup>151</sup> See section 1.3.

<sup>152</sup> The categorization of NHRIs is beyond the scope of this thesis.

<sup>153</sup> Paris Principles (n 24) Composition and guarantees of independence and pluralism.

defined in terms of IHRL, including the States' international obligations to respect and ensure respect of human rights by non-state actors. This means that NHRIs should monitor the steps taken by the government to ensure that domestic law and practice constitute a framework that effectively addresses human rights violations by all. NHRIs should also make policy and legislation recommendations for more effective protection of citizens from human rights abuses.<sup>154</sup>

NHRIs occupy a unique position by being “within the State structure and yet independent and where necessary, critical.”<sup>155</sup> In order for a NHRI to be effective, members and staff should not receive any instruction from government ministers or other public officials directly or indirectly.<sup>156</sup> The funding ties can complicate this relationship as governments are urged to respect and ensure the independence of NHRIs while at the same time being required to fund them.<sup>157</sup> The autonomy from the State is crucial to enable NHRIs to effectively carry out their mandate, and where necessary investigate human rights abuses from the government and government actors.<sup>158</sup>

NHRIs do not have the power to compel authorities to respond to their recommendations directly. Although NHRIs should be able to investigate, they should not have judicial powers.<sup>159</sup> They are not a replacement or an alternative to a properly functioning judiciary whose findings are enforced. NHRIs can however constitute an effective complement to State institutions in the promotion and protection of human rights standards.<sup>160</sup> Pegram points out that their lack of formal coercive faculties does not necessarily diminish the accountability they are able to provide as “robust formal design may be of little consequence when confronted by a highly dysfunctional political and legal apparatus unwilling or unable to close the accountability circle.”<sup>161</sup>

NHRIs should nevertheless have the power to follow-up on their reports and recommendations.<sup>162</sup> Relevant authorities should be required to respond within a specified time to recommendations or findings made by their NHRI.<sup>163</sup> Amnesty International recommends that this should “include a suitable framework within which the NHRI may compel the relevant authority to explain and report to the NHRI, within a reasonable period of time as to why, for example, it has not followed and did not apply

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<sup>154</sup> Amnesty International, ‘National Human Rights Institutions: Amnesty International’s Recommendations for Effective Protection and Promotion of Human Rights’ (IOR 40/007/2001) 7.

<sup>155</sup> *ibid* 2.

<sup>156</sup> National Council on Human Rights Policy (n 26) 12.

<sup>157</sup> Webster Zambara, ‘Africa’s National Human Rights Institutions and the Responsibility to Protect’ (2010) 2 *Global Responsibility to Protect* 458, 464.

<sup>158</sup> Smith (n 25) 909.

<sup>159</sup> AI’s NHRIs recommendations (n 154) 15-16.

<sup>160</sup> *ibid* 2.

<sup>161</sup> Thomas Pegram, ‘National human rights institutions and their potential role in prevention and response to mass atrocities in Latin America’ in Monica Serrano (ed.), *Responsibility to Protect in Latin America* (Routledge Press, forthcoming 2011).

<sup>162</sup> National Council on Human Rights Policy (n 26) 21-22; AI’s NHRIs recommendations (n 154) 9.

<sup>163</sup> National Council on Human Rights Policy (n 26) 21-22.

recommendations made by human rights bodies or thematic mechanisms”<sup>164</sup> and that governments should “undertake an obligation to respond, within a reasonable time, to the case-specific as well as more general findings, conclusions and recommendations made by the NHRI.”<sup>165</sup> Moreover, Amnesty International suggests that the government’s response should be made public and in cases where the government fails or refuses to respond or implement recommendations, the NHRI should take all possible measures to press the government for a response. This includes through publicity by the media, parliament and the international community, for example by bringing the case to the attention of international human rights bodies.<sup>166</sup> Making use of the pressure tools available to them will help to change interests, behaviour, incentives, and ultimately raise the political cost of non-compliance.<sup>167</sup>

Moreover, NHRIs should also have the power to refer their findings and recommendations to courts or special tribunals for adjudication to secure compliance with their recommendations.<sup>168</sup> In the case where their recommendations to investigate and bring prosecutions are ignored, NHRIs should continue to insist that the relevant authorities take up the case. This includes through the necessary forms of domestic and international pressure, and when possible, by filing an action for judicial review challenging the decision of the prosecuting authorities.<sup>169</sup>

The potential role of NHRIs in the implementation of legal obligations differs from the one of non-governmental human rights organizations. NHRIs are established by the State, have different composition, structure, status as well as different tools available to them to hold the State bodies accountable with regards to human rights standards.<sup>170</sup> Their official status within government should help them engage and coordinate their activities with other institutions. It should also allow them to access information and documents that are not as easily accessible by NGOs and give rise to a closer engagement with government bodies.<sup>171</sup>

The privileged position of NHRIs as an intermediate between the State and its citizens presents a number of difficulties, the most notable being that they have to find a balance between engaging with State bodies while remaining independent.<sup>172</sup> If they are to influence State policy and decisions, NHRIs must establish a close relationship with government bodies and actors. Yet, in order to preserve their public legitimacy, they cannot be seen as a government subordinate. In order for NHRIs to remain independent and thus effective, they must not tolerate any State interference in their work.<sup>173</sup>

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<sup>164</sup> AI’s NHRIs recommendations (n 154) 9.

<sup>165</sup> *ibid* 18.

<sup>166</sup> *ibid*.

<sup>167</sup> Pegram (n 161).

<sup>168</sup> National Council on Human Rights Policy (n 26) 9; AI’s NHRIS recommendations (n 154) 15-16.

<sup>169</sup> AI’s NHRIS recommendations (n 154) 17.

<sup>170</sup> Smith (n 25) 909.

<sup>171</sup> *ibid*.

<sup>172</sup> *ibid* 946.

<sup>173</sup> *ibid* 945.

The performance of NHRIs in its contribution to the practical implementation of States' legal obligations heavily depends on its overall effectiveness. This thesis is concerned with the prospects and challenges facing NHRIs in relation to R2P specifically, and will thus not go through the various effectiveness benchmarks in detail.<sup>174</sup>

### 3.1.2 Relevant implementation measures

While it is the IL roots that give R2P its weight, history has shown that legal obligations are not sufficient to prevent genocide, war crimes and crimes against humanity. What is needed is a framework for targeted actions to prevent such crimes and to contribute to the implementation of the existing legal obligations.<sup>175</sup> That is exactly what R2P has generated. In addition to reformulating pre-existing legal obligations of States relating to MA prevention, R2P represents a stimulus to implement policy agendas such as early-warning, capacity building, protection of civilians, and the prevention of armed conflict in order to meet its international legal obligations.<sup>176</sup>

The prevention aspect of the first pillar of R2P faces almost no political opposition. The challenge is rather of an institutional and intellectual nature: "figuring out what needs to be done, how to do it, and who should do it."<sup>177</sup> The 2009 UNSG R2P report and the General Assembly debate that followed represent the first step in delimiting this operational framework. The three-pillar framework and general parameters outlined therein remain to be implemented. As acknowledged by Ban Ki-moon in his 2009 UNSG R2P report, much more work remains to be done in this field.<sup>178</sup> In fact, the specific contours of the prevention agenda is still being debated by academics.<sup>179</sup>

#### 3.1.2.1 Prevention of armed conflict and MAs

The first step of effective prevention is the identification of potential atrocity producing situations. The problem is that there are so many of them, including historical grievances and enmities; recent or bitterly rankling social traumas; arrogant elites prospering in the midst of widespread poverty; poor governance; poor education (including strong prejudice); rapid political, social, or economic dislocation; colonial occupation; war; and revolution.<sup>180</sup>

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<sup>174</sup> For general benchmarks on the effectiveness of NHRIs, see the Paris Principles (24) and National Council on Human Rights Policy (26).

<sup>175</sup> Strauss (n 49) 320.

<sup>176</sup> Bellamy (n 45) 198.

<sup>177</sup> Luck (n 32) 9.

<sup>178</sup> Implementing R2P (n 6) para 64.

<sup>179</sup> Bellamy (n 45) 80.

<sup>180</sup> Robert Gellately and Ben Kiernan, *The Specter of Genocide: Mass Murder in Historical Perspective* (Cambridge University Press 2003) 374-75.

Prevention of armed conflict and the prevention of MAs are not synonymous. Conflict prevention is a broad concept in comparison to R2P, which has a narrower and more focused agenda to prevent four specific crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity. It is widely accepted that armed conflicts create situations that have the potential to generate MA crimes. The prevention of armed conflict thus naturally contributes to halting MAs.<sup>181</sup> In line with this perspective, the ICISS and the Former UN Secretary-General Kofi Annan suggested that the prevention of armed conflict should be incorporated into the R2P agenda.<sup>182</sup>

On the other hand, not all armed conflict gives rise to MAs. Further, MA crimes also happen in peacetime. Considering these propositions, the International Peace Institute as well as the current UN Secretary-General Ban Ki-Moon maintained that the prevention of armed conflict and the prevention of MAs should not be subsumed under one another.<sup>183</sup>

This means that the two concepts must remain distinct and be approached separately in order to develop a suited agenda for action for each. It has been argued by Bellamy that what is needed to prevent MAs is an approach that: 1) reduces the risk of armed conflict (thereby reducing the primary enabling context); 2) addresses the risk of peacetime atrocities; and 3) includes steps to prevent atrocities within armed conflict.<sup>184</sup> Effective prevention requires an in-depth knowledge of the preconditions for MAs such as social divisions and extreme inequalities among groups.<sup>185</sup> It also requires to move beyond the tendency to believe that prevention ends when violence beings.<sup>186</sup> Indeed, prevention tools should be applied throughout all stages of a conflict: not only before the initial outbreak of violence, but also to prevent the continuance and escalation, as well as to prevent its recurrence.<sup>187</sup>

### 3.1.2.2 Structural and direct prevention

In his 2009 UNSG R2P report, Ban Ki-moon concretized the broad R2P agreement into specific areas of concern and argued for a 'narrow but deep' approach to the R2P policy agenda.<sup>188</sup> This holistic approach focuses on the four R2P crimes while involving measures ranging from security sector reform to equitable economic development.

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<sup>181</sup> UNGA, 'Report of the Secretary-General - Progress Report on the Prevention of Armed Conflict' A/60/891 (18 July 2006) 32.

<sup>182</sup> Bellamy, 'Mass Atrocities and Armed Conflict' (n 9) 2, making reference to the ICISS report (n 1); UNGA, 'Report of the Secretary General - In larger freedom: towards development, security and human rights for all' A/59/2005 (21 March 2005).

<sup>183</sup> International Peace Institute, 'Conflict Prevention and the Responsibility to Protect' No 7 IPI Blue Papers (2009); UNGA, 'Report of the Secretary General - Early warning, assessment and the Responsibility to Protect' A/64/864 (14 July 2010) 4.

<sup>184</sup> Bellamy, 'Mass Atrocities and Armed Conflict' (n 9) 3.

<sup>185</sup> Implementing R2P (n 6).

<sup>186</sup> *ibid* 1.

<sup>187</sup> Evans (n 41) 81, footnote 8.

<sup>188</sup> Implementing R2P (n 6) 8.

This approach has however been criticized by a number of academics arguing that a 'deep' R2P agenda will be hard to institutionalize and will prevent R2P from remaining a catalyst for decisive action.<sup>189</sup> Those academics argue that the four crimes should be used as a checklist for deciding whether a situation is worthy of R2P's attention, resources, and international engagement and intervention.<sup>190</sup> For instance, Evans considers that the preventive component of R2P should be confined in scope to direct prevention, where MAs are imminent, and that it should not be extended to structural prevention, the longer-term prevention efforts.<sup>191</sup> Bellamy similarly argues that R2P prevention measures must be constrained in two main ways: 1) by focusing on direct preventive measures, including early-warning, preventive diplomacy, preventive deployment and ending impunity, rather than more structural preventive measures; and 2) by aiming to prevent the four crimes in particular, rather than being concerned with armed conflict in general.<sup>192</sup>

Most of the world's governments and academics working on the prevention of MAs nevertheless agree that in order to address prevention effectively, root causes need to be taken seriously. In most cases, by the time MAs are imminent, the opportunity for prevention is dramatically reduced, if not erased.

Taking Evans' 'Prevention Toolbox' as a starting point for possible prevention measures,<sup>193</sup> it appears that States can implement their primary responsibility under R2P through the following 'structural prevention measures': promotion of good governance, promotion of membership in international organizations, supporting economic development, supporting education for tolerance, community peace-building, promotion of fair constitutional structures, promotion of human rights, promotion of rule of law, fighting corruption, reforming the security sector, shifting from military to civilian governance, developing confidence-building measures, and improving small weapons control. States can only implement two of the 'direct prevention measures', being through the establishment of legal dispute

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<sup>189</sup> Luck (n 32) 5 maintains that "an open-ended conception of R2P, moreover, would be impossible to operationalize or institutionalize. It would become one more case of the United Nations stretching a relatively discrete and well defined concept until it loses its shape, clarity, and meaning." Evans also argues that a wide prevention scope would undermine "R2P's utility as a rallying cry. If too much is bundled under R2P banner, we run the risk of diluting its capacity to mobilize in the cases where it is really needed." See Gareth Evans, 'The Responsibility to Protect: An Idea Whose Time Has Come... and Gone?' 22(3) *International Relations* (2008) 294-5.

<sup>190</sup> Bellamy, *Global Politics and The Responsibility to Protect* (n 45) 83.

<sup>191</sup> Gareth Evans, 'The Responsibility to Protect in International Affairs: Where to From Here?' (keynote lecture at the Australian Catholic University, Melbourne, 27 November 2009).

<sup>192</sup> Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge Polity Press 2009) chapter 4.

<sup>193</sup> Evans (n 41) 47. Evans elaborated the common prevention its 'Prevention Toolbox' that groups mass atrocity prevention measures in two categories. The first comprises structural preventive measures taking a longer term approach addressing the underlying causes of mass atrocity. The second category consists of direct measures taking a more responsive approach and addressing the immediate causes of mass atrocity producing situations.

resolution mechanisms and economic incentives. The other direct preventive measures tend to be more appropriate for prevention under R2P pillar two as they stem more from external pressure or assistance.<sup>194</sup>

The following sections as well as Chapter Four will consider the role NHRIs can play in the implementation of the above-mentioned prevention measures relevant to the primary responsibilities of States under R2P.

## **3.2 National Human Rights Institutions and Prevention under R2P**

As seen under section 3.1.1, NHRIs play a vital role in the practical implementation of States' international obligations. Their mandate allows them to engage with all relevant actors at the domestic level and interact with international mechanisms to protect human rights. Although NHRIs usually have a general mandate to promote and protect all human rights, there are strong reasons for them to pay particular attention to the prevention of MAs. First, MAs represent the most horrendous violations of human rights. Second, while there is an international consensus on R2P, individual States across the globe fail to prevent MAs. And third, preventing MAs requires active involvement from as many actors as possible, including NHRIs.<sup>195</sup>

Effective MA prevention depends on three main factors: detailed knowledge of the regions at-risk through analysis and early-warning; understanding by the policy-makers of the available prevention measures; and the institutional capability to take the necessary measures.<sup>196</sup> Every potential MA situation has its own dynamics. In order to get an accurate assessment of what is happening on the ground, the information needs to be assessed with a comprehensive understanding of all the factors at play. In particular, the "issues that are resonating, the personalities and local dynamics – political, economic, social, cultural, and personal – that are driving them."<sup>197</sup> Moreover, as stressed by Ban Ki-moon in his 2009 UNSG R2P report: "if principles relating to the responsibility to protect are to take full effect and be sustainable, they must be integrated into each culture and society without hesitation or condition, as a reflection of not only global but also local values and standards."<sup>198</sup> This is where the prevention potential of NHRIs resides,

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<sup>194</sup> This includes through preventive diplomacy, threat of political sanctions, aid conditionality, threat of economic sanctions, economic incentives, threat of international criminal prosecution, prevention deployment, non-territorial show of force, threat of arms embargo or end of military cooperation programs.

<sup>195</sup> A similar argument was put forward with regards to torture in Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and National Institutions and Regional Mechanisms Section of the OHCHR, 'Preventing Torture: An Operational Guide for National Human Rights Institutions' (2010).

<sup>196</sup> Evans (n41) 81.

<sup>197</sup> *ibid* 84.

<sup>198</sup> Implementing R2P (n 6) 12.



namely their critical role “in translating international human rights norms in a way that reflects national contexts and specificities.”<sup>199</sup>

NHRIs can also contribute to deterring future human rights violations, and halt their escalation to MAs through their general activities carried out under their mandate to promote and protect human rights. Most notably, NHRIs can contribute to the prevention of MAs by paying particular attention to the promotion and protection of economic, social and cultural rights (ESC rights) that constitute root causes of MAs.<sup>200</sup> With their broad and conciliatory powers, NHRIs are well suited to promote and protect ESC rights.<sup>201</sup>

Depending on their mandate, NHRIs can contribute to the practical implementation of the R2P prevention obligations of their governments through various activities throughout all stages of a conflict. That is, they may take steps: before the initial outbreak of violence; during it to prevent its continuance and escalation; and following the outbreak in order to prevent its recurrence. Many NHRIs have specialized sub-directorates dedicated to human rights issues of particular concern including internally displaced persons (IDPs), detainees, indigenous rights, environmental issues, social violence and land rights. Before the outbreak of a MA crisis, NHRIs can contribute to the prevention with various resources such as their documentation and expertise on local rights practices and collaboration with civil society organizations. One of the most useful prevention tools of NHRIs is their capacity to identify risk factors in sectors that have the potential to degenerate into a R2P crisis. As such, NHRIs may assist in the mapping of underlying causes of conflict escalation, identify challenges in demobilization and ascertain individual legal responsibility. After the outbreak of a crisis that has the potential to generate MA crimes, NHRIs can contribute to preventing MAs through mediation, monitoring of conflict situations, protection of vulnerable groups and individuals at risk, and prosecution of criminal acts.<sup>202</sup>

The involvement of NHRIs in the prevention of MAs arises from their general functions of monitoring their State’s compliance with its human rights obligations, including those regarding the prevention of MAs. NHRIs derive their authority in this field from two main international instruments: the *Paris Principles*,<sup>203</sup> which is the main source of normative standards for NHRIs; and the *Optional Protocol to the Convention against Torture*<sup>204</sup>

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<sup>199</sup> UN Secretary-General Ban Ki-Moon ‘Report on National institutions for the promotion and protection of human rights’ A/64/320 (24 august 2009) 4.

<sup>200</sup> Smith (n 25) 476: “Poverty and unequal access to education, housing, and health services often result in diminished opportunities for social progress and reduced quality of life. These usually constitute the root causes of conflict and need to be dealt with before, during, and after an outbreak of violence (in line with the R2P continuum). Practical strategies for addressing these issues include identifying areas of exclusion and developing policy proposals to deal with them, as well as monitoring government policies in relation to economic, social, and cultural rights.”

<sup>201</sup> National Council on Human Rights Policy (n 26) 18.

<sup>202</sup> Pegram (n 161).

<sup>203</sup> Paris Principles (n 24).

<sup>204</sup> OPCAT (n 98).

according to which States can designate their NHRI as a national preventive mechanism.

### **3.2.1 Paris Principles**

The Paris Principles were first adopted by NHRIs at an international workshop held in Paris in 1991 and marked the beginning of international cooperation and standardization of NHRIs. The UN Commission on Human Rights and the General Assembly later endorsed the Principles. They are now recognized as the principal source of normative standards for NHRIs. The Paris Principles are not legally binding upon States. They are rather recognized as the minimum conditions that a NHRI must meet to be regarded as credible by the international community.

The Paris Principles set broad and general standards for all NHRIs, regardless of their structure type. They establish that a NHRI should be rooted in the national Constitution or by a law that precisely lays out its role and powers in a mandate as broad as possible. The Principles also assert that NHRIs should be pluralist and should cooperate with a range of social and political groups and institutions, comprising of non-governmental organizations, judicial institutions, professional bodies and government departments. They further state that NHRIs should have an infrastructure that allows them to conduct their functions, as well as sufficient funding to allow the institution “to be independent of the government and not be subjected to financial control which might affect this independence.”<sup>205</sup>

The functions of NHRIs are described therein as “responsibilities”, suggesting their imperative status. The role of NHRIs in the prevention of MAs will be assessed below on the basis of the competence and responsibilities of NHRIs as elaborated in the Paris Principles. These will be divided under three overlapping key elements: the promotion of an effective legal framework; the contribution to the implementation of legal frameworks; and control mechanisms to support the legal framework and its implementation.<sup>206</sup>

#### **3.2.1.1 Promoting an effective legal framework**

The Paris Principles provide that NHRIs should make recommendations and proposals to governments on a range of matters relating to human rights, including existing and proposed laws.<sup>207</sup> Depending on their mandate, NHRIs will have the function to provide recommendations on draft legislation, identify deficiencies in existing law, and draft legal projects in accordance with international human rights standards. NHRIs may

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<sup>205</sup> Paris Principles (n 24) Composition and guarantees of independence and pluralism, 2.

<sup>206</sup> The Asia Pacific Forum of NHRIs et al (n 195) maintain that preventing torture requires an integrated strategy involving these three key elements.

<sup>207</sup> Paris Principles (n 24) Competence and responsibilities 3(b).

use this function to review existing and draft laws and other legislations to bring formal domestic legal provisions in line with existing international obligations. They should also encourage their governments to ratify international human rights instruments without reservations. In order to be effective, NHRIs should be enabled to review any law touching upon human rights and, where applicable, recommend any amendments that they deem appropriate. The recommendations NHRIs make to the government on their obligations overlaps with their monitoring functions.<sup>208</sup>

To contribute to the implementation of R2P, NHRIs could for example encourage governments to develop national action plans that include specific R2P strategies addressing structural causes of R2P such as legislation for the protection of minorities and elimination of political, social and economic discrimination.<sup>209</sup> They could also encourage the State to take specific steps or implement particular strategies to improve the domestic implementation of R2P.

### **3.2.1.2 Contributing to the implementation of the legal framework**

The Paris Principles also provide the methods of operation and powers of NHRIs. The Principles state that NHRIs may investigate, through the initiation and publication of inquiries, any issue falling within their competence without authorization from any higher authority.<sup>210</sup> They may also meet regularly and make their opinions and recommendations public.<sup>211</sup> NHRIs also contribute to the implementation of the legal framework through the training of public officials.

#### **3.2.1.2.1 Investigation**

The Paris Principles state that NHRIs may investigate any issue falling under their competence without authorization from any higher authority. To achieve this, they are entitled to hear any person and gather any evidence needed to investigate the matters falling within their competence.<sup>212</sup> In conflict situations, NHRIs should be able to record the facts and make public findings on those facts to allow NGOs and individuals to have a stronger factual basis to initiate proceedings. They should also document particular

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<sup>208</sup> See Section 3.2.1.3.2.

<sup>209</sup> These have been shown to be important measures to address structural causes of MAs. See Asia-Pacific Centre for the Responsibility to Protect, 'Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation' (8 June 2009) 21-23.

<sup>210</sup> Paris Principles (n24) Methods of operation (a).

<sup>211</sup> *ibid* 3(c)(d).

<sup>212</sup> *ibid* (b).

human rights problems that may occur in situations of conflict, including the recruitment of child soldiers or the use of sexual violence as a weapon.<sup>213</sup>

NHRI technical teams with forensic and medical expertise could be rapidly deployed to scenes of mass violations to carry out crime scene investigations, collect witness testimony and forensic analysis, as well as attest to the actions of the parties involved. This function can be useful to gather accurate reliable information in the immediate aftermath of a R2P crisis. It can thus help analyze the events leading up to MA situations and the conflicting reports coming from various sources. It can also refute attempts by officials to cover up or deny evidence of MAs. Pegram asserts that in controlled environments “this offer[s] one of the few channels of redress for victims of abuse by state officials.”<sup>214</sup>

Although their authority to investigate individual complaints may be restrained, NHRIs should monitor the activities of all relevant public and private bodies that may impact human rights, including businesses and individuals. Allegations of human rights violations and calls for prosecution following a robust investigation carry a high political cost. This might represent the only way to secure accountability of political actors where a functioning legal system is lacking.<sup>215</sup> (The value of the investigation function of NHRIs will be discussed in greater detail under Section 3.2.1.3.2 on the monitoring function.)

### **3.2.1.2.2 Training of public officials**

Another aspect of the preventive work of NHRIs is the education and training of public officials. The Paris Principles state that NHRIs should aim to make public officials and social actors more aware of human rights and their obligations through education and training.<sup>216</sup> In the 2009 UNSG R2P report, Ban Ki-moon underscores that “when aimed at critical actors in society, such as the police, soldiers, judiciary and legislators, training can be an especially effective tool for prevention purposes.”<sup>217</sup> This can be done through workshops with police and security forces on their obligations under IHRL and IHL. Ensuring that the authorities involved in a MA crisis understand the applicable IL and the potential consequences of its breaches contributes to changing the behaviour of State actors. R2P modules could also be introduced into human rights training aimed at State actors.<sup>218</sup>

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<sup>213</sup> Office of the United Nations High Commissioner for Human Rights, ‘National Human Rights Institutions – History, Principles, Roles and Responsibilities’ Professional Training Series 1(4) (2010) 141-142.

<sup>214</sup> Pegram (n 161).

<sup>215</sup> *ibid.*

<sup>216</sup> Paris Principles (n 24) Competence and responsibilities 3(f).

<sup>217</sup> Implementing R2P (n 6) para 25.

<sup>218</sup> This has been recommended to the ASEAN Intergovernmental Commission on Human Rights and the Responsibility to Protect (AICHR): Catherine Drummond, ‘The AICHR and the Responsibility to Protect: Opportunities and Constraints’ (Report No. 2, 2011) 28.

### 3.2.1.3 Control mechanism

NHRIs usually do not have legal enforcement powers, although some do possess some legal prerogatives before judicial bodies. They can however use some of their functions as control mechanisms. This includes through the cooperation with international mechanisms,<sup>219</sup> monitoring of atrocity producing situations<sup>220</sup> and the promotion of public awareness.<sup>221</sup> Some NHRIs also have quasi-jurisdictional functions.<sup>222</sup>

#### 3.2.1.3.1 Cooperation with international mechanisms

The Paris Principles assert that NHRIs should monitor and advise on State compliance with international standards and cooperate with regional and international bodies, such as treaty bodies and special procedures of the Commission on Human Rights. This includes attending hearings and producing parallel reports on the compliance of treaty prevention obligations based on the information they collect.<sup>223</sup> NHRIs should also cooperate with the UN and other regional, national and international institutions competent in the promotion and protection of human rights.<sup>224</sup> They may for example organize follow-up meetings with civil society and State bodies and promote national action to implement recommendations on the prevention of MAs.<sup>225</sup> Specific to the context of R2P, NHRIs may also “facilitate international fact-finding into whether national authorities have manifestly failed to protect their populations.”<sup>226</sup>

#### 3.2.1.3.2 Monitoring

NHRIs should monitor the government's compliance with their international human rights obligations and provide advice and recommendations.<sup>227</sup> The Paris Principles state that monitoring the general human rights situation as well as specific areas of concern is an essential function of NHRIs.<sup>228</sup> Moreover, no public entity should be exempted from this monitoring function. NHRIs should most importantly scrutinize law enforcement entities, including the police, the military, intelligence services and other security services. They should have all the investigative powers

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<sup>219</sup> See section 3.2.1.3.1.

<sup>220</sup> See section 3.2.1.3.2.

<sup>221</sup> See section 3.2.1.3.3.

<sup>222</sup> See section 3.2.1.3.4.

<sup>223</sup> Paris Principles (n 24) Competence and responsibilities 3(d).

<sup>224</sup> *ibid* 3(e).

<sup>225</sup> Similar measures were suggested to the IACHR: Drummond (n 218) 28.

<sup>226</sup> Pegram (n 161).

<sup>227</sup> Paris Principles (n 24) 3(a).

<sup>228</sup> *ibid*.

necessary to effectively carry out this function. As such, they should have the authority to initiate and publish inquiries falling within their general monitoring function. Such inquiries include monitoring, public hearings of witnesses and the release of public reports containing recommendations for action to the relevant authorities.

In a MA crisis, NHRIs can for instance monitor the situation of persons and groups at-risk, such as IDPs, to ensure that their rights are being respected.<sup>229</sup> NHRIs can also identify challenges in demobilization and make recommendations to the authorities that are capable of taking appropriate measures. In the context of their monitoring functions, NHRIs could request specific information on the actions taken by the government in the implementation of R2P.<sup>230</sup>

The monitoring function is crucial in shifting political action and raise public awareness on specific human rights issues. In cases where NHRIs have access to legal forums, they may initiate actions on behalf of individual victims, vulnerable groups or contest the legal standing of legislation.<sup>231</sup> When parties reject mediation efforts after the outbreak of a R2P crisis, information gathering may be the most useful tool available to NHRIs to prevent the escalation of violence. Reliable information may be scarce in such contexts and the gathering of information can help hold actors accountable for their actions.<sup>232</sup>

Detention facilities constitute a key-domain of rights violations, including possible atrocity-producing situations. Powers of access without prior authorization and jurisdiction over detention facilities are therefore crucial in effectively preventing MAs. This is particular relevant for cases of torture. The *Optional Protocol to the Convention against Torture* (OPCAT) sets specific functions for NHRIs in the prevention of torture. (This will be discussed in more detail under Section 3.2.2.)

#### 3.2.1.3.2.1 Early-warning

Of particular relevance to R2P Pillar One activities is the work of NHRI early-warning systems designed to monitor situations with the potential to spiral into human rights violations and MA crisis. After the outbreak of an MA crisis, the early-warning system can work in the prevention of its escalation. Pegram furthermore highlights that early-warning activities “may also provide powerful and concrete evidence that a State was aware of the risk of atrocities and yet manifestly failed to protect its population.”<sup>233</sup>

As Bellamy puts it: “international actors, states and local communities have a better chance of preventing the escalation of conflict into

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<sup>229</sup> This measure was recommended to NHRIs operation in conflicts situations. See UNHCHR (n 213) 141.

<sup>230</sup> This has been recommended to the IACHR: Drummond (n 218) 28.

<sup>231</sup> Pegram (n 161)

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.*

violence and MAs if they are warned about the impending threat. Advance warning provides decision-makers with evidence to support priority-setting and informs debate about appropriate responses to the threat of violent conflict.”<sup>234</sup> NHRIs are ideally placed to set up an early-warning system as they often fulfill the requirements of James Sutterlin’s criteria for an effective early-warning system, namely : 1) access to information; 2) analysis capabilities; and 3) a communication channel to decision-makers capable of authorizing timely and effective preventive measures.<sup>235</sup>

NHRIs could, when their mandate allows, establish an early-warning mechanism. This could be made possible even if early-warning is not an explicit function. For example, some NHRIs that have the mandate to develop strategies for the promotion and protection of human rights could use this function to justify the creation of an early-warning system.<sup>236</sup>

### 3.2.1.3.3 Promoting public awareness

NHRIs can contribute to deterring potential MAs by promoting public awareness through human rights education campaigns for the public.<sup>237</sup> The Paris Principles state that NHRIs shall publicize human rights and efforts to combat discrimination by increasing public awareness, especially through information and education and by making use of all press organs.<sup>238</sup> The ability of NHRIs to counter the government discourse may be critical in preventing potential MA crises.<sup>239</sup>

Although raising awareness through education and training already contributes to the implementation of R2P, NHRIs could do more by issuing factsheets and publicizing information through the media and educational curriculums explaining the R2P principle and the responsibilities of the State towards its population.<sup>240</sup>

By encouraging respect for human rights at the local level, NHRIs contribute to the prevention and escalation of violence and human rights that may lead to MAs. In the context of a MA crisis, NHRIs can reinforce their community-based training programmes and activities to promote the respect of the rights of minorities with different political views or cultural, ethnic or linguistic backgrounds. In cases where the root of the conflict lies in a

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<sup>234</sup> Bellamy, *Global Politics and The Responsibility to Protect* (n 45) 122.

<sup>235</sup> James S. Sutterlin, ‘Early Warning and Conflict Prevention: The Role of the United Nations’ in Klaas van Walraven (ed.), *Early Warning and Conflict Prevention* (The Hague: Kluwer, 1998) 125.

<sup>236</sup> A similar suggestion was put forward to the IACHR: Drummond (n 218).

<sup>237</sup> Paris Principles (n 24) Competence and responsibilities 3(f).

<sup>238</sup> *ibid* 3(g).

<sup>239</sup> Pegram: “[i]n de-contextualizing the roots of the conflict, governments throughout Latin America have promoted an often popular security discourse justifying force and ignoring human rights guarantees. Rising social conflict has been used as a pretext for draconian measures and delegation of power to security forces. Using its mandate in the broadest sense, *Defensorias* have responded by making politically potent links between separate human rights issues that officials often prefer to approach separately.”

<sup>240</sup> This was recommended to the AICHR: Drummond (n 218) 28.

situation of inequality, NHRIs can help the majority of the population to understand the nature of the grievances and press the need to address them. Where the crisis has resulted in a large number of IDPs, NHRIs can familiarise the persons in the areas where the persons are displaced on the rights of IDPs.<sup>241</sup>

#### **3.2.1.3.4 Quasi-jurisdictional function**

NHRIs have the ability to bridge conflicting positions and halt potential MA situations through their quasi-jurisdictional functions. The Paris Principles do not require NHRIs to handle complaints and petitions from individuals alleging that their human rights have been violated. However, where NHRIs have such quasi-jurisdictional competence, the Paris Principles state that NHRI's function may be based on: seeking an amicable settlement through conciliation, a binding decision or on the basis of confidentiality; informing petitioners of their rights and available remedies, and promoting access to them; hearing complaints and transmitting them to the competent authorities; and making recommendations to the competent authorities.<sup>242</sup> In such cases, NHRIs should have the authority to compel witnesses to appear before their monitors and call for evidence, and should be able to recommend sanctions in the case of refusal.<sup>243</sup>

Where a government is legally bound to respond to the reports of its NHRI, it is under greater pressure to answer for its actions and omissions in a public forum. This can act as an important accountability mechanism.<sup>244</sup> The standard NHRI function of passing on complaints to the implicated government body can however be problematic where it may endanger the complainants.<sup>245</sup>

### **3.2.2 Optional Protocol to the Convention against Torture**

OPCAT<sup>246</sup> was adopted by the UN General Assembly in December 2002 and entered into force in December 2006. It does not create new normative standards. OPCAT rather reinforces the obligations to prevent torture found under articles 2 and 16 of the *Convention against Torture* (CAT)<sup>247</sup> by establishing a system of regular unannounced preventive visits to

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<sup>241</sup> These measures were recommended to NHRIs operation in conflicts situations: UNHCHR (n 213) 141.

<sup>242</sup> Paris Principles (n 24) Additional principles concerning the status of commission with quasi-jurisdiction competence.

<sup>243</sup> *ibid* (d).

<sup>244</sup> Pegram (n 161).

<sup>245</sup> *ibid*.

<sup>246</sup> OPCAT (n 98)

<sup>247</sup> CAT (n 98)



places of detention by international and national mechanisms, namely the Subcommittee on Prevention of Torture and “national preventive mechanisms” (NPM) established in States that have ratified the Protocol.

OPCAT contains no specific requirement with regards to the structure of NPMs. A State may therefore set up a new Optional Protocol-based mechanism, designate the responsibility to an existing body (such as its NHRI) or to several mechanisms.<sup>248</sup> The Protocol however requires States to “give due consideration” to the Paris Principles when establishing NPMs.<sup>249</sup>

NPMs should be independent from the State<sup>250</sup> and have a mandate to conduct regular unannounced visits to all places where persons are deprived of their liberty.<sup>251</sup> They are also required to make recommendations on existing or draft legislations to the relevant authorities.<sup>252</sup> NPM should be granted access to all relevant information.<sup>253</sup> The NPM also has the right to follow-up on their recommendations and State parties are required to enter into dialogue with the NPM regarding implementation.<sup>254</sup> NPMs should also prepare an annual report of their activities, which should be made public and disseminated by the authorities.<sup>255</sup>

The mandate of NPMs differs in both its objective and scope from the investigative visits conducted by NHRIs, that aim to document and respond to individual complaints.<sup>256</sup> Existing NHRIs might therefore not meet all the requirements of OPCAT. Taking up a new mandate with a focus on prevention, rather than protection or investigation, will almost always require amendments to legislation, organizational restructuring and the provision of additional human, logistical and financial resources. NHRIs will also have to review their working methods, structure and professional composition.<sup>257</sup>

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<sup>248</sup> Asia Pacific Forum of NHRIs et al (n 195) 99.

<sup>249</sup> OPCAT (n 98) article 18(4).

<sup>250</sup> *ibid* articles 17, 18(1).

<sup>251</sup> *ibid* article 19(a).

<sup>252</sup> *ibid* article 19(b).

<sup>253</sup> *ibid* article 20.

<sup>254</sup> *ibid* article 22.

<sup>255</sup> *ibid* article 23.

<sup>256</sup> Asia Pacific Forum of NHRIs et al (n 195) v.

<sup>257</sup> *ibid* 100.

## **4. Case study of Colombia – Means and tools of the *Defensoría del Pueblo* in the Implementation of R2P**

The Colombian DP acts as a highly interesting example of the role that a NHRI can play in the prevention of MAs. In addition to being experienced with conflict-related violence, the DP is enabled to effectively participate in the prevention of instances of such violence. Most notably, the DP has exceptional functions to promote and defend both human rights and IHL and has established an early-warning system flagging imminent risks of mass violations of human rights and IHL against civilian populations.

This chapter starts by describing the context of the MAs in Colombia and assesses the State's MA prevention obligations. It then goes on to assess the means and tools available to the DP to prevent MAs. Finally, this chapter evaluates the practical challenges of the DP in its prevention capacity. It does so by looking beyond the work of the DP itself and makes an analysis of the institutional entanglement surrounding its work.

### **4.1 Background**

The internal conflict in Colombia is the longest lasting conflict of the Western Hemisphere and is very complex. The following sub-sections will describe the Colombian context and specificities. The information relating to the conflict is not intended to be exhaustive. It rather aims to provide a general idea of the context in which the DP is operating.

#### **4.1.1 Conflict history**

Colombia is a South American country of about 46 million inhabitants. It is an ethnically diverse State with 58% of the population identifying as mestizo, 20% white, 14% mulatto, and about 10% Afro-Colombians and Indigenous groups.<sup>258</sup> Colombia has one of the oldest democracies of the continent, yet it has been deeply affected by violence and a conflict that has been going on for over half a century. Historically, its

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<sup>258</sup>U.S. Department of State, 'Background Note: Colombia' (6 March 2012). <<http://www.state.gov/r/pa/ei/bgn/35754.htm>> accessed 21 May 2012.

rugged terrain made it difficult to establish State control over large parts of the territory.<sup>259</sup> High rates of poverty and a long history of inequalities and impunity have also contributed to crime and violence.<sup>260</sup>

In the 1950s and 1960s, a number of leftist guerrilla groups, with their own ideology and political and military strategies, formed as a response to State neglect and poverty.<sup>261</sup> The most significant movements included the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), *Ejercito de Liberacion Nacional* (ELN), and *Movimiento 19 de Abril* (M-19). The Liberal government of President Virgilio Barco (1986-90) succeeded in getting M-19 to demobilize and in incorporating them into the political process. However, the FARC and ELN are still in combat today.<sup>262</sup>

The cocaine mafia began to operate in the 1970s and within a short time, the drug trade developed the drug trade into a powerful industry with its own plantations, laboratories, transportation services and protection. Drug trafficking has helped to perpetuate Colombia's conflict by providing earnings to the left and right-wing armed groups. Institutional efforts to improve the situation in the country are now confronted by violence coming from the illegal armed groups linked to drug trafficking and other organized crime.<sup>263</sup>

To protect their lands from the leftist guerrillas, wealthy right-wing landowners organized to create paramilitary groups coordinated by the *Autodefensas Unidas de Colombia* (AUC) in the 1980s.<sup>264</sup>

The Liberal and Conservative parties, which dominated the political sphere through most of the 18<sup>th</sup> and 19<sup>th</sup> Century, were weakened by their perceived inability to resolve the causes of violence.<sup>265</sup> In 2002, Alvaro Uribe, an independent, was elected as President. Uribe had an aggressive plan to reduce violence in Colombia by addressing the problem of paramilitary groups, defeating the leftist guerrilla groups, and combating drug-trafficking.<sup>266</sup> Negotiations with the AUC paramilitaries resulted in a 2003 agreement in which the AUC agreed to demobilize its members by the end of 2005. After more than 30,000 members had demobilized, the group disbanded in 2006.<sup>267</sup> Demobilized members were accused of gross human rights abuses and collusion with the Colombian army in their fight against the FARC and ELN. According to the Justice and Peace Law,<sup>268</sup> paramilitaries that confess to their atrocities are offered dramatically reduced sentences. The demobilization process has been criticized for failing to provide adequate

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<sup>259</sup> June S. Biettel, 'Colombia : Issues for Congress, Congressional Research Service' 18 March 2011, 3 <<http://www.fas.org/sgp/crs/row/RL32250.pdf>> accessed 21 May 2012.

<sup>260</sup> *ibid* 9.

<sup>261</sup> *ibid*.

<sup>262</sup> U.S. Department of State (n 258).

<sup>263</sup> Biettel (n171) 3.

<sup>264</sup> *ibid* 14.

<sup>265</sup> *ibid* 4.

<sup>266</sup> *ibid*.

<sup>267</sup> *ibid* 3.

<sup>268</sup> Ley 975 de 2005 (Julio 25) *por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios* (Justice and Peace Law).

punishment for perpetrators and appropriate reparations to the victims.<sup>269</sup> On a side note, the Supreme Court has lately been investigating former members of the Colombian Congress accused of collaboration with paramilitaries. Thus far, over 120 members have been investigated, and approximately 40 have been convicted.<sup>270</sup>

#### 4.1.2 Recent dynamics

President Juan Manuel Santos took office in August 2010. He has taken Colombia in a new direction pursuing social, economic and political reforms.<sup>271</sup> Santos has publicly recognized the internal armed conflict, which had been denied by previous governments.<sup>272</sup> In June 2011 he signed Law 1448, also known as the Victim's and Land Restitution Law,<sup>273</sup> in the presence of the UNSG Ban Ki-moon. This law aims to return millions of acres of land to displaced persons and provide compensation to all victims of the conflict, including victims of the government's security forces.

While the number of FARC combatants is now dramatically reduced, the group still has thousands of fighters conducting illegal acts. Moreover, not all paramilitaries demobilized and from those that did, many have returned to paramilitary and criminal activities. One difficulty with the demobilization program has been to reintegrate demobilized forces into law-abiding civilian life. Widespread atrocities continue to be perpetuated by newly formed illegal armed groups whose members include re-armed paramilitaries. These new groups do not share the political ideology of the AUC, that is to defeat the guerrillas. They rather have purely criminal purposes, such as drug trafficking.<sup>274</sup>

#### 4.1.3 MA crimes in the context of the Colombian armed conflict

All sides to the conflict have committed atrocities. The MAs taking place in Colombia include: killings and attacks against civilians; forced displacement; child soldier recruitment; sexual violence; enforced disappearances and kidnappings; and anti-personnel landmine incidents. This

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<sup>269</sup> Biettel (n 259) 4.

<sup>270</sup> Human Rights Watch, 'World Report 2012: Colombia – Events of 2011' (2012).

<sup>271</sup> Biettel (n 259) 1.

<sup>272</sup> UNHCHR, 'Report on the situation of human rights in Colombia' A/HRC/19/21/Add.3 (31 January 2012) 4.

<sup>273</sup> Ley 1448 de 2011 (Junio 10) *por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones* (Victim's Law).

<sup>274</sup> Biettel (n 259) 6.

section will briefly describe each of these situations to paint the context in which the DP is operating.

#### **4.1.3.1 Killings and attacks against civilians**

There have been ongoing attacks and killings by the armed groups especially against: rights defenders; journalists; teachers; community leaders; candidates campaigning for elections; trade unionists; indigenous and Afro-Colombian leaders; leaders of displaced persons; and victims of paramilitaries seeking justice or land restitution. Colombia, in particular, has the highest number of trade unionists killed every year, worldwide. Threats to trade unionists are mainly attributed to paramilitary successor groups.<sup>275</sup>

Over the last decade the Colombian forces have committed a number of extrajudicial killings of civilians, in particular in the context of the “false positive” scandal.<sup>276</sup> This scandal broke in Soacha in 2008 when journalists discovered that the army was systematically killing civilians, dressing them in rebel uniforms and claiming them as combat kills. This was in response to the pressure to boost body counts and the policy in place of rewarding guerrilla combat kills. The murders occurred throughout Colombia and a number of brigades were implicated. A total of 51 members of the Colombian armed forces were subsequently dismissed. General Mario Montoya, the commander of the Colombian army, also stepped down following this scandal. The Office of the UN High Commissioner for Human Rights in Colombia (OHCHR-Colombia) estimates that this vague of “false positive” may have resulted in over 3,000 victims of extrajudicial killings by State forces, most of which occurred between 2004 and 2008.<sup>277</sup>

#### **4.1.3.2 Forced displacement**

As a result of the violent conflict, Colombia has the World’s second largest population of IDPs after Sudan. The UN High Commissioner for Refugees evaluates that Colombia has 4.3 million IDPs.<sup>278</sup> The main cause of displacement is the struggle of illegal armed groups for territorial control over natural resources and activities related to drug trafficking.<sup>279</sup>

Ethnic minorities such as indigenous and afro-Colombians have historically been among the most affected by forced displacement. This is mainly because ethnic minorities are often located in areas of high

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<sup>275</sup> HRW, ‘2012 World Report’ (n 270).

<sup>276</sup> The scandal was reported in Philip Alston, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Colombia’ A/HRC/14/24/Add. 2 (31 March 2010).

<sup>277</sup> *ibid.*

<sup>278</sup> UNHCR, ‘Number of internally displaced people remains stable at 26 million’, News Stories, 4 May 2009. <<http://www.unhcr.org/49ff0cc76.html>> accessed 21 May 2012.

<sup>279</sup> Sida’s Indevlop Report (n 28) 11.

commercial interest for mining and agricultural industries or in strategic areas for drugs and arms trade and for territorial control in the conflict hostilities.<sup>280</sup>

In response to the government's land restitution efforts, there has been a rise in killings, threats and attacks against leaders of displaced communities campaigning for land recovery.<sup>281</sup>

#### 4.1.3.3 Child soldier recruitment

Although both guerrilla and paramilitary groups have recruited children,<sup>282</sup> the FARC is considered to be the biggest recruiter of child soldiers.<sup>283</sup> The illegal organized armed groups are present in most departments and have the capacity to recruit children. In 2011, OHCHR-Colombia registered a disturbingly high number of crimes committed against children in numerous departments, including cases of recruitment and threats of recruitment.<sup>284</sup>

#### 4.1.3.4 Sexual violence

Although conflict-related sexual violence affects both men and women, it disproportionately affects women. About 20% of the women displaced by the conflict report the fear of sexual violence as the cause. The DP documented in 2008 that 15.8% of internally displaced women have been victims of sexual violence.<sup>285</sup> The magnitude of this issue has led the Constitutional Court to issue a decision in 2008 recognizing that sexual violence against women is “an habitual, extended, systematic and invisible practice in the context of the Colombian armed conflict ... [perpetrated] by all illegal armed groups, and in some isolated cases, by individual agents of the public security forces.”<sup>286</sup> The Constitutional Court also noted that internally displaced women were particularly vulnerable.<sup>287</sup>

Sexual violence is one of the conflict-related crimes with the highest level of impunity. This is due to particular obstacles that women face in reporting situations, the lack of legal actors training on gender issues, the lack

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<sup>280</sup> *ibid* 12.

<sup>281</sup> HRW, ‘2012 World Report’ (n 270).

<sup>282</sup> Amnesty International, ‘Annual Report 2011 - The state of the world’s human rights (Colombia)’ (2011).

<sup>283</sup> HRW, ‘2012 World Report’ (n 270).

<sup>284</sup> UNHCHR, ‘Report on the situation of human rights in Colombia’ (n 272) 14.

<sup>285</sup> Defensoría del Pueblo, Informe Defensorial ‘Promoción y Monitoreo de los Derechos Sexuales y Reproductivos de Mujeres Víctimas de Desplazamiento Forzado con Énfasis en Violencias Intrafamiliar y Sexual’, junio 2008. <[http://www.defensoria.org.co/red/anexos/pdf/02/ninez\\_08.pdf](http://www.defensoria.org.co/red/anexos/pdf/02/ninez_08.pdf)> accessed 21 May 2012.

<sup>286</sup> Republica de Colombia – Corte Constitucional, Sala Segunda de Revisión, Auto No. 092 de 2008 (14 april 2008).

<sup>287</sup> *ibid*.

of victim knowledge of their rights, as well as shame and fear experienced by victims.<sup>288</sup>

#### 4.1.3.5 Enforced disappearances and kidnappings

The OHCHR-Colombia noted that despite the existence of a rights-based legal framework protecting against enforced disappearance,<sup>289</sup> the magnitude and impunity of the phenomenon is alarming. By October 2011, the National Registry of Disappeared Persons recorded 62,745 disappeared persons, including 16,884 alleged enforced disappearances.<sup>290</sup>

With regards to kidnappings, the government's figures show an increase from the 213 kidnappings in 2009, to 282 in 2010. Amnesty International maintains that these are mostly attributed to criminal gangs, but that guerrilla groups are responsible for most conflict-related kidnappings.<sup>291</sup>

#### 4.1.3.6 Anti-personnel landmine incidents

Both the FARC and ELN plant anti-personnel landmines, which injure and kill hundreds of civilians every year. The OHCHR-Colombia noted a 33% increase in 2011 in the number of incidents related to such mines compared to 2010.<sup>292</sup>

#### 4.1.3.7 Torture

Torture is often used on victims before enforced disappearances or killings and it is therefore under-reported. It is also used to repress protest, obtain information or confessions and intimidate detainees.<sup>293</sup> The Colombian Coalition Against Torture asserts that the government's mechanisms in place are ineffective to prevent torture as it "continues to be systematic and generalised and there have been no investigations, trials or sentences handed down to perpetrators of torture."<sup>294</sup>

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<sup>288</sup> Sida's Indevalop Report (n 28)12, citing: Corporación Humanas, *Guía para llevar casos de violencia sexual. Propuestas de argumentación para enjuiciar crímenes de violencia sexual cometidos en el marco del conflicto armado colombiano*, Bogotá, julio 2009.

<sup>289</sup> Justice and Peace Law (n 273).

<sup>290</sup> UNHCHR, 'Report on the situation of human rights in Colombia' (n 272) 12.

<sup>291</sup> Amnesty International (n 282).

<sup>292</sup> UNHCHR, 'Report on the situation of human rights in Colombia' (n 272) 15.

<sup>293</sup> Justice for Colombia, News from Colombia, Colombian Government Refuses to Ratify Torture Convention, 20 July 2011. <<http://www.justiceforcolombia.org/news/article/1044/colombian-government-refuses-to-ratify-torture-convention>> accessed 21 May 2012.

<sup>294</sup> *ibid.*

## 4.2 Colombia's MA prevention obligations

Colombia endorsed the R2P concept as expressed in the 2005 WSOD.<sup>295</sup> In its statement at the General Assembly debate that followed the World Summit, Colombia affirmed the seriousness of MA crimes and its commitment to the concept of R2P as defined in the 2005 WSOD.<sup>296</sup> The representative of Colombia highlighted that national capacity would have to be strengthened in order to effectively protect civilians, in the following areas: rule of law and the elaboration of norms regarding rights enjoyment and democratic institutions. Colombia also noted the positive contribution of international cooperation in the matter.<sup>297</sup>

Colombia is a party to all major international human rights<sup>298</sup> and humanitarian law instruments.<sup>299</sup> It also became party to the Rome Statute in 2001.<sup>300</sup> However, as shown in Chapter 2, regardless of these ratifications all States have the obligation to prevent genocide and war crimes. In addition, Colombia could also have the obligation to prevent crimes against humanity as the thesis argues that it is *de lege ferenda*.<sup>301</sup>

The ratified international instruments relevant to the MAs mentioned in section 4.1.3 further specify the scope of Colombia's prevention obligations in relation to each of these crimes.<sup>302</sup>

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<sup>295</sup>State-by-State Positions on the Responsibility to Protect, <[http://www.responsibilitytoprotect.org/files/Chart\\_R2P\\_11August.pdf](http://www.responsibilitytoprotect.org/files/Chart_R2P_11August.pdf)> accessed 22 May 2012.

<sup>296</sup>Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect The 2009 General Assembly Debate: An Assessment*, August 2009. <[http://globalr2p.org/media/pdf/GCR2P\\_General\\_Assembly\\_Debate\\_Assessment.pdf](http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf)> accessed 22 May 2012.

<sup>297</sup> *ibid.*

<sup>298</sup>ICCPR (n 98) accessed 29 October 1969; ICESCR (n 98) accessed 29 October 1969; Genocide Convention (n 52) accessed 27 October 1959; ICERD (n 98) accessed 2 September 1981; CEDAW (n 98) accessed 19 January 1982; CAT (n 98) accessed 8 December 1987; CRC (n 98) accessed 28 January 1991.

<sup>299</sup>The four Geneva Conventions (n 52) accessed 8 November 1961; AP I (n 52) accessed 1 September 1993; AP II (n 52) accessed 14 Aug 1995.

<sup>300</sup>ICC Statute (n 54) accessed 12 Nov 2001.

<sup>301</sup>This argument is mainly based on the fact that crimes against humanity are *jus cogens* crimes that carry *erga omnes* obligations. See section 2.3.2.

<sup>302</sup>In addition to the instruments mentioned in footnote 298 and 299, Colombia has ratified: Optional Protocol to CRC on children in armed conflict (n 98) (accessed 25 May 2005); the Optional Protocol to CEDAW (n 98) 10 December 1999 (accessed 23 Jan 2009); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980 (accessed 6 Mar 2000); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980 (accessed 6 Mar 2000) and its 3 May 1996 amendment (accessed 6 Mar 2000); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (accessed 6 Sep 2000). Colombia has signed however not ratified the ICED (n 98) (signed 27 Sep 2007). Colombia has not signed nor ratified the OPCAT (n 98).



## 4.3 Defensoría del Pueblo

The example of the DP in Colombia provides interesting insights into the role a NHRI can play in preventing a R2P crisis. The DP, which is fully compliant with the Paris Principles<sup>303</sup> and responsible for promoting and protecting human rights and humanitarian law,<sup>304</sup> has numerous tools to support the prevention of MAs. This contributes to the practical implementation of the R2P obligations of the Colombian State.

Section 4.3.1 starts by describing the institutional set-up and mandate of the DP. Sections 4.3.2 and 4.3.3 assess the ways in which the institution uses its mandate to prevent MAs. Section 4.3.4 then analyzes the institutional challenges that the DP is facing in the prevention of MA crimes.

### 4.3.1 Institutional set-up

The DP is established by the Constitution of 1991 (Constitution)<sup>305</sup> and became operational in 1992 through the Law 24 of 1992 (Law 24).<sup>306</sup> Article 118 of the Constitution creates the position of *Defensor del pueblo*, the Head of the DP, as a member of the Public Ministry.<sup>307</sup> The organization and functioning of the DP is set out in Law 24.<sup>308</sup> The authority of the institution is concentrated in the *Defensor*, who assigns many leading positions within the institution. The House of Representatives elects the *Defensor* every four years from a list prepared by the President of the Republic.<sup>309</sup> Constitutionally, the DP is under the direction of the Inspector General.<sup>310</sup> In practice however, it has administrative and budgetary autonomy<sup>311</sup> and the Inspector General does not intervene in its functions and management.

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<sup>303</sup> ‘Chart of the Status of National Institutions’, Accredited by the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights, August 2011. The DP was reviewed in 2001 and October 2007. It is classified as ‘Status A’ (fully compliant).

<sup>304</sup> See sub-section 4.3.2.

<sup>305</sup> Constitution of Colombia 1991, promulgated 4 July 1991 (Constitution) article 277(2).

<sup>306</sup> Ley 24 de 1992 (diciembre 15), *Por la cual se establecen la organización y funcionamiento de la Defensoría del Pueblo y se dictan otras disposiciones en desarrollo del artículo 283 de la Constitución Política de Colombia* (Law 24).

<sup>307</sup> Constitution (n 305) article 118: “The Public Ministry will be exercised by the Prosecutor General of the Nation, the Public Defender, delegate prosecutors and agents of the Public Ministry before jurisdictional authorities, by municipal representatives and by other officials as stipulated by the law. It is the Public Ministry’s duty to safeguard and promote human rights, protection of public welfare and to oversee the official conduct of individuals holding public office.”

<sup>308</sup> Constitution (n 305) article 283; Law 24 (n 306).

<sup>309</sup> Constitution (n305) article 281; Law 24 (n306) article 2.

<sup>310</sup> Constitution (n305) article 277(2).

<sup>311</sup> Law 24 (n 306) article 1.

The DP is decentralized with offices in each of Colombia's 32 departments. This facilitates accessibility and close work with communities. The DP has four Directorates, eight Delegates working with specific subjects and four specialized units. The separate Directorates are charged with the implementation of the public services provided by the DP, in particular: 1) the attention and processing of complaints; 2) the promotion and dissemination of human rights; 3) resources and judicial actions; and 4) the National Public Defender System.<sup>312</sup> The Delegates work on the following separate areas: 1) rights of children, youth and women; 2) constitutional and legal affairs; 3) collective rights and the environment; 4) indigenous and ethnic minorities; 5) criminal and penal policy; 6) monitoring of public policies on human rights; 7) risk assessment of civilian population as a result of armed conflict (including the Early-Warning System); 8) and communication.<sup>313</sup> The DP also established four specialized offices to respond to the current situations. These units specialized on the following topics: 1) coordination for international cooperation; 2) health and social security; 3) attention to the internally displaced persons; and 4) integral attention to victims<sup>314</sup>

### 4.3.2 Mandate

The DP was created in 1991 as part of an effort to restructure the State in the midst of a democratic transition, the cessation of armed conflict and constitutional revision.<sup>315</sup> Articles 281 and 282 of the Constitution and Article 9 of the Law establish the responsibilities of the *Defensor*.<sup>316</sup> The provisions establish that it has a broad mandate to ensure the promotion, exercise and dissemination of human rights. The functions of the DP include: to guide and instruct Colombians in the exercise and defense of their rights before competent authorities or private entities; to disseminate human rights and recommend policies for teaching human rights; to invoke the right of *habeas corpus* and interpose actions of *tutela*;<sup>317</sup> to organize and direct public defense in the manner provided by law; to bring popular actions in matters relating to their competence; to submit draft legislation on matters related to its

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<sup>312</sup> *ibid* article 18.

<sup>313</sup> *ibid* article 9(13). The DP shall: "Appoint Delegate Defenders by subject area for the study and defence of particular rights."

<sup>314</sup> *ibid* article 10: "The Public Defender may delegate his/her functions to the Secretary General, National Directors, Delegate Defenders, Regional Defenders, Municipal Representatives and other officials of his/her Office, except the obligation to present annual reports to Congress."

<sup>315</sup> Pegram (n 161)

<sup>316</sup> See Annex 2.

<sup>317</sup> A *tutela* is a constitutional remedy to guarantee that the fundamental rights of citizens are protected. For instance, *tutela* actions may take place when a fundamental right has been threatened by the action or omission of a public authority or, in exceptional cases, private individuals.

competence; to make reports to Congress on the performance of its duties; and to carry out other functions prescribed by law.<sup>318</sup>

Thus a number of functions prescribed by law, that are included in the mandate of the DP,<sup>319</sup> comprise of the promotion and protection of IHL. A notable example of legislation granting IHL protective function to the DP is the Law 387 of 1997.<sup>320</sup> This legislation came as a response to the need to implement a tool for the prevention of massive human rights violations and breaches of IHL that emerged from the degradation of the internal armed conflict. Law 387/97 represents an effort to set standards for the DP's protective activities to prevent mass human rights violations and breaches of IHL, specifically internal displacement, through monitoring, analysis and risk warning.<sup>321</sup>

### 4.3.3 Means and tools to prevent of MA crimes

As explained in chapter 3, the prevention of the root causes of MAs involves numerous measures ranging from promoting tolerance to promoting social justice. Thus, arguably all of the DP's programs and activities aimed at enhancing the protection of human rights that – examples will be displayed in this section - contribute, either directly or indirectly, to the prevention of MAs. It is also worth highlighting that the MA prevention tools are not neatly separated from the response tools available to the DP. For instance, response tools fighting impunity can serve as deterrents against more systematic occurrences of MA crimes, and thus contribute to prevention. Prevention tools also entail those aiming at preventing the escalation of R2P crisis in Colombia.

The following sections will assess the means and tools available to the DP that are more clearly oriented towards prevention. The analysis strongly relies on the insights obtained in the semi-structured individual interviews with staff members and former staff members of the DP as well as with organizations working in collaboration with the DP.

#### 4.3.3.1 Moral Office

As stated in section 4.3.2 of the DP's mandate, the Constitution and the Law 24 entrusted the *Defensor* with important functions relating to the promotion and protection of human rights, monitoring of government actions,

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<sup>318</sup> Inter alia Constitution (n 305) article 282.

<sup>319</sup> *ibid* article 282(8).

<sup>320</sup> Ley 387 de 1997 (Julio 18), Reglamentada Parcialmente por los Decretos Nacionales 951, 2562 y 2562 y 2569 de 2001 *por la cual se adoptan medidas para la prevención del desplazamiento forzado; la atención, protección, consolidación y esta estabilización socioeconómica de los desplazados internos por la violencia en la República de Colombia.*

<sup>321</sup> DP booklet on SAT.

and mediation between the government and society.<sup>322</sup> Thus, in spite of the changes that it can generate through publicity, it appears that the power of the DP's Head is moral rather than coercive.<sup>323</sup> The use of the *Defensor's* moral authority and voice to denounce the state of certain human rights-related situations is referred to as *Magistratura Moral*, or Moral Office.<sup>324</sup> If it chooses to make its voice heard, it is a powerful tool to carry out its function as a human rights watchdog to raise public awareness.<sup>325</sup>

Respondents from the DP Specialized Office on integral attention to victims asserted that the Moral Office is the most "legitimate and effective" prevention tool available to the DP. They opined that even more important than the DP reports, is the use of the Moral Office to publicly denounce the situation described in the report.<sup>326</sup> Once information is denounced, it reaches society at large, including local governments, human rights NGOs and the communities in general. These bodies can then use the information to serve as watchdogs and follow up on particular situations. When aware that a community is at risk, local actors are better enabled to take protective measures thereby preventing MAs.

#### 4.3.3.2 Community Defenders

The work of *Defensor Comunitarios*, or Community Defenders, is aimed at supporting the Regional DP offices, most notably those working within communities that are highly affected by displaced persons. Community Defenders are situated in certain regions to strengthen the activities of the DP by promoting and protecting the rights of populations at-risk or whose human rights have been affected by the conflict.

Community Defenders work closely with IDPs, civil organizations working with IDPs and local governments. They might for instance advise civil society organizations working with IDPs on legal remedies for victims, or help local governments develop policies to implement human rights. They are often the only contact that the community has with a State institution, and can thus serve as a bridge between the community and the government.

In turn, Community Defenders also obtain information regarding threats of mass human rights violations from civil society organizations. In that case, they report this information to the DP Analyst of their region for the preparation of risk reports.<sup>327</sup>

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<sup>322</sup> Inter alia, Constitution (n 305) article 282; Law 24 (n 306) article 9.

<sup>323</sup> Law 24 (n306) article 27: "The Public Defender may not exercise judicial or disciplinary functions, except those assigned to his Office. His opinions and recommendations shall have the strength lent to them by the National Constitution, the law, society, their autonomy, moral characteristics and esteemed position within the State."

<sup>324</sup> This moral authority is most notably stated in Law 24 (n 306) article 9(3).

<sup>325</sup> United States Agency for International Development, 'Assessment of USAID/Colombia Assistance to the Public Ministry' (11 August 2011) 22.

<sup>326</sup> Interview with Staff members of the Specialized Office for Comprehensive Attention to Victims, DP, (Bogotá, Colombia, April 2012).

<sup>327</sup> See section 4.3.3.3 Early-Warning System.

#### 4.3.3.3 Early-warning system

In 2001, the DP implemented the *Sistema de Alertas Tempranas*, or Early-Warning System (SAT) for the prevention of massive human rights and IHL violations. It was created by USAID in collaboration with the government of Colombia. This instrument was put into place to promote a policy of prevention in the work of the DP and mobilize action from the State to prevent armed actors from committing human rights and IHL violations. In 2003, Resolution No. 250 created a DP Delegate for the Risk Assessment of The Civilian Population Resulting From Armed Conflict,<sup>328</sup> to support and provide strategic direction to the SAT.

The SAT plays a crucial role in developing policies to prevent mass human rights violations by monitoring incidents of the armed conflict and alerting the authorities to threats of massive violations of human rights. SAT consists of a national network of analysts conducting field investigations and issuing risk reports and follow-up reports regarding the potential threats or violations of human rights. The reports which contain recommendations on actions that prevent and mitigate the risk of violations, are presented to the authorities.

Information about the risks of mass human rights violations in a community is normally communicated by the DP Community Defenders<sup>329</sup> to SAT Regional Analysts. Regional Analysts are present in all regions of Colombia, with the exception of the peninsular region of San Andrés y Providencia where the conflict has not spread. The threats are evaluated and processed into risk reports drafted by the Regional Analysts and revised by staff at the central level of the DP Delegate for the Risk Assessment of The Civilian Population Resulting From Armed Conflict. The Director of the Delegate makes the final revision and issues the risk report. These reports contain three fundamental parts.<sup>330</sup> The first part describes the population at risk (for example, indigenous, afro-descendent). The second part makes an analysis of the region. The last part lists recommendations of protective measures to be implemented to prevent mass human rights violations. Protective measures are not only of military nature, they can also include social, economical and political measures.

There are three types of risk reports. The use of each is dependent upon the nature of the risk and the measures recommended for its mitigation.<sup>331</sup> The first type, “imminent risk”, implies a high probability of conflict and can be issued by the DP without review from authorities. These reports are directly issued to the competent authorities, including the police or the military, for immediate action. The second report type is classed as “circumstantial risk”. Those reports are characterised either as “focused”, affecting only one municipality, or “medium scope”, affecting numerous

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<sup>328</sup>*Defensoría Delegada para la Evaluación de Riesgos de la Población Civil como Consecuencia del Conflicto Armado.*

<sup>329</sup> See Section 4.3.3.2.

<sup>330</sup> This was explained in an Interview with a National Analyst at the DP (Bogotá, Colombia, April 2012).

<sup>331</sup> *ibid.*

municipalities. The third report type, “structural risk”, identifies and evaluates the progression and dynamics of the armed conflict in a particular region.<sup>332</sup> After the issuance of the initial risk report, the SAT analysts continue to monitor the situation and may write follow-up reports.

The “substantial risk” and “structural risk” reports are then verified and examined in an Inter-Institutional Commission for Early Warning (CIAT), in which the DP does not play an active role.<sup>333</sup> The Commission is coordinated by the Minister of Interior and composed of the following ministries and government agencies: the Presidential Agency for Social Action and International Cooperation; the Presidential Program for Human Rights; the Military Forces; the Minister of Defense; the Minister of Interior; and the National Police. The CIAT has one week to decide, by majority vote, whether to emit a legally binding ‘Early-Warning.’

If the CIAT does issue an Early-Warning, it confirms the level of threat identified by the SAT. Regardless of whether the CIAT issues an Early-Warning or not, the Committee makes recommendations to protect the members of the communities involved and to avoid, control or mitigate threats communicated in SAT risk reports. CIAT will also monitor the implementation of the recommended actions.<sup>334</sup>

SAT risk reports have been used at the international level to criticise the failure of the government to take protective measures. Specifically, Philip Watson, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions wrote in a 2009 report on Colombia that “the Government’s failure to act after notice from one of its own agencies is a stark dereliction of its responsibilities.”<sup>335</sup>

#### **4.3.3.4 Mechanisms to fight impunity**

The DP’s mechanisms that contribute to fighting impunity also contribute to the prevention of MA crimes. Not only do sanctions act as dissuasive prevention by demonstrating the efficiency of the justice system, but arresting and prosecuting a perpetrator also prevents them from reoffending. The DP has systems in place to guide citizens with human rights issues through the process of formulating a complaint. It can also contribute to fighting impunity by conducting an investigation, initiating legal actions and cooperating with international mechanisms.

##### **4.3.3.4.1 Assistance with complaints**

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<sup>332</sup>Terminology translation taken from USAID (n 325).

<sup>333</sup> The SAT President is a mere invited observer.

<sup>334</sup> CIAT’s review process is detailed in a Ministry of Interior and of Justice document: *Procedimiento Evaluación Informes de Riesgo y/ o Notas de Seguimiento – CIAT*, Código: AN-GT-P-02, Version: 01 (11 November 2010).

<sup>335</sup> Alston (n276) para 83.

The program consuming most of the DP's budget<sup>336</sup> is the system of Public Defenders that provides free legal services to indigent citizens in judicial processes.<sup>337</sup> This includes indigents as defendants in criminal cases, victims of human rights violations, and more controversially, former paramilitaries accused of human rights violations.<sup>338</sup>

The DP also provides certain legal and psychological assistance to victims of particular violations. Specifically, the Victims' Law assigns membership of the *Sistema Nacional de Atención y Reparación Integral a las Víctimas* (the system carrying out the implementation of the law) to the DP. As a result, since January 2012 the DP has been responsible for guiding, counselling and representing victims.<sup>339</sup>

#### 4.3.3.4.2 Investigation

The DP can conduct investigations and make recommendations to the government on different human rights issues and situations,<sup>340</sup> including MA situations. The authorities must help and provide the necessary information.<sup>341</sup> During its visits, the DP has full access to information and may summon any person to give a testimony.<sup>342</sup>

#### 4.3.3.4.3 Initiating legal actions

On its own initiative or upon petition of any person, the DP can file an action at the Constitutional Court to challenge or defend human rights regulations.<sup>343</sup> It can also file a public action in defence of the Constitution, the law, general interest, or individuals before any jurisdiction, public servant or authority.<sup>344</sup> The DP can moreover file a petition for protection, *habeas corpus*, unconstitutionality and class action.<sup>345</sup>

For example, following the 2002 Choco massacre, where 119 civilians that had taken refuge in a Church were killed, the DP filed a lawsuit against the State for failure to protect its citizens. The Court ordered the government to pay \$800,000 in compensation to the families of the victims.

The 'Indevelop' report of the Swedish International Development Cooperation Agency (Sida) found the Constitutional Court to be the DP's

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<sup>336</sup> About 75% according to: USAID (n 325) 23.

<sup>337</sup> Law 24 (n 306) article 21 states that the DP shall provide public defence for persons without resources.

<sup>338</sup> USAID (n 325) 23. The report also states that "[a] number of interviewees proposed moving the public defender function out of the National Ombudsman's office into the judicial system."

<sup>339</sup> Victim's Law (n 273).

<sup>340</sup> Law 24 (n 306) article 9(22).

<sup>341</sup> *ibid* articles 15-16.

<sup>342</sup> *ibid* article 28.

<sup>343</sup> *ibid* article 9(9).

<sup>344</sup> Constitution (n 305) article 282(5); Law 24 (n 306) article 9(9).

<sup>345</sup> Law 24 (n 306) article 24.

“closest strategic ally, by issuing decisions systematically in favour of human rights protection where different state bodies (executive and judicial) fail to do their constitutional duty.”<sup>346</sup>

#### **4.3.3.4.4 Cooperation with international organizations and mechanisms**

Since its creation in 1992, the DP has used its capacity to participate in meetings, roundtables and collaborations with international organizations. The DP is normally invited to events organized by international organizations to discuss topics related to the human rights situations in Colombia. This kind of collaboration serves to share information and thus strengthen the capacity of all organizations involved.

The DP has also developed relationships with numerous UN agencies to coordinate response activities following massive human rights violations. For example, following the 2002 massacre in Choco,<sup>347</sup> the DP and the OHCHR issued reports presenting the facts and asserting the State’s failure to protect, prevent and guarantee as obligated by IHL.<sup>348</sup>

The Office of the Prosecutor of the ICC<sup>349</sup> monitors local investigations into the “most serious crimes of concern to the international community as a whole,” including genocide, crimes against humanity and war crimes.<sup>350</sup>

#### **4.3.3.5 Promoting an effective legal framework and monitoring legislation and court orders**

Within its function to promote an effective legal framework,<sup>351</sup> the DP can contribute to preventing further MAs. For example, since laws that effectively protect witnesses decrease the chance of retaliation, they may make witnesses more comfortable with denouncing criminals. The promotion of such laws supports jailing criminals to prevent them from re-offending.<sup>352</sup>

The DP can monitor legislation to see if they are working as intended. In the case where legislation is not effective, it can denounce the issues and make recommendations for the achievement of better results.

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<sup>346</sup> Sida’s Indevelop Report (n 28) 6.

<sup>347</sup> See Section 4.3.3.3.2.

<sup>348</sup> Defensoría del Pueblo, ‘Humanitarian Resolution No. 012’ (25 May 2002). <<http://www.defensoria.org.co/red/anexos/pdf/02/res/humanitaria/humanitaria12.pdf>> accessed online 25 June 2012.

<sup>349</sup> Upon accession on 5 August 2002, Colombia had exercised its right to opt out of the ICC’s war crime jurisdiction pursuant to Rome Statute Article 124. Its opt-out period has expired.

<sup>350</sup> ICC Statute (n 54) article 5.

<sup>351</sup> Constitution (n 305) article 282(6).

<sup>352</sup> USAID (n 325) 35-36.



Furthermore, the DP can monitor the State's compliance with orders of judicial bodies, such as the Constitutional Court, on issues contributing to the prevention of MAs.

#### **4.3.3.6 Educative activities**

DP functions relating to educative activities include the dissemination of information on human rights and the recommendation of policies for teaching them,<sup>353</sup> as well as disseminating knowledge about the Constitution, especially on the social, economical, cultural, collective and environmental rights.<sup>354</sup> In that regard, the DP conducts educative activities on human rights and IHL directed topics to public officials and the population at large. Training of public officials can contribute to the prevention of MAs, most notably when military forces are trained on IHL. Activities aimed at the general public promote awareness, which is an important part of structural atrocity prevention. Since the population cannot exercise their rights fully if they are not aware of them, such activities have been an important instrument to strengthen rights consciousness and develop advocacy for effective protection within victimized communities.<sup>355</sup>

The DP has various educative programs including some that are broadcasted on radio and on television. An innovative program is the annual moot court competition in which more than 70 law schools have participated. The competition focuses on human rights topics and serves to stimulate the interest of students and deepen their knowledge on human rights.<sup>356</sup>

#### **4.3.3.7 Dispute resolution mechanisms**

The DP can act as a mediator for the collective petitions, put forth by civil organizations, that are directed at the government.<sup>357</sup> Regional DP offices regularly mediate between communities and the local government or armed forces.<sup>358</sup>

### **4.3.4 Institutional challenges of the DP in the prevention of MA**

Despite all the tools in place that contribute to the prevention of MAs, the occurrence of MA situations in Colombia persists. This points to the

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<sup>353</sup> Constitution (n 305) article 282(2).

<sup>354</sup> Law 24 (n 306) article 9(6).

<sup>355</sup> Sida's Indevalop Report (n 28) 6.

<sup>356</sup> USAID (n 325) 42-43.

<sup>357</sup> Law 25 (n 306) article 9(19).

<sup>358</sup> Interview with the Manager of Sida's Indevalop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012).

challenges that remain in generating institutional preventive action. Sida reported that in spite of society's high confidence in the DP, there is low confidence in their ability to influence other institutions to effectively protect communities.<sup>359</sup>

Since the DP does not have direct coercive powers, it relies heavily on the actions of other institutions to follow up on its recommendations and ultimately give force to its work. It is therefore crucial to look beyond its programmes and activities and analyze the institutional entanglement surrounding its operations in order to determine if its work contributes to actual prevention of MAs.

This section will assess the institutional weaknesses of the DP in the prevention of MAs. The analysis heavily relies on the insights obtained in semi-structured individual interviews conducted in the field study.

#### **4.3.4.1 Early-warning system**

##### **4.3.4.1.1 State linkages**

A major weakness of the SAT's work in the prevention of MAs relates to its connection with the CIAT. As described in section 4.3.3.2, the decision to issue a legally binding Early-Warning following the verification and examination of a SAT risk report is at the CIAT's discretion. A common concern of human rights organizations and international institutions with the system in place is that the risk reports detailing preventative measures against mass human rights violations are often not acted upon.<sup>360</sup> Indeed, in many cases, the CIAT disagrees with the SAT on the existence or severity of threats and decides not to issue an Early-Warning. Respondents explained that this situation was worse under Uribe's presidency as government ministries refused to accept evidence of armed conflict in order to be consistent with the State's position that there was no internal armed conflict in Colombia.<sup>361</sup>

Philip Watson, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions wrote in his 2009 report on Colombia that he "was told by some Government officials that political pressure may be a factor in the decision of CIAT not to issue an early-warning. Military and civilian officials may be concerned that a warning signals security failures and deters investments and development and press for a warning not to be issued or to be prematurely withdrawn."<sup>362</sup> The Sida's Indvelop Program Manager similarly explained that members of CIAT, such as the Military, might be

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<sup>359</sup> Sida's Indvelop Report (n 28) 13.

<sup>360</sup> See for example Alston (n 276) para 83: "I was given information about several instances in which killings had occurred after the Government had failed to respond to the SAT warnings." See also Human Rights Watch, 'Paramilitaries' Heirs – The New face of Violence in Colombia' (2010) 11.

<sup>361</sup> Interview with the Manager of Sida Indvelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012).

<sup>362</sup> Alston (n 276) para 84.

reluctant to validate risk reports because they may feel that their work is being criticised.<sup>363</sup>

The *Comision Colombiana de Juristas* argues that the CIAT as it is currently functioning invalidates the independence of the SAT in the formulation of preventive measures.<sup>364</sup> Respondents also expressed this view in interviews.<sup>365</sup>

Sida's Indevelop Program Manager suggested that a closer dialogue between the DP and the ministries and actors in the regions could help change this. She asserted the example that a better understanding of the work of the DP could help the ministries change their perception of the risk reports and realise that they do not aim to criticise their work. They could understand that the purpose of risk reports is rather to state facts that need to be considered in order to take appropriate protective measures. Human Rights Watch suggested reforming the CIAT to improve its performance by allowing for active participation by the representatives of the DP.<sup>366</sup> Instead of being a mere observer at CIAT, the SAT could be awarded a voting right to influence the decisions on actions to be taken following risk reports.<sup>367</sup> This would "ensure publicity of risk reports and transparency of the Committee's decision-making, and to ensure appropriate and timely responses to risk reports."<sup>368</sup>

According to Human Rights Watch, SAT has also suffered due to government delays in providing necessary funding.<sup>369</sup>

#### 4.3.4.1.2 Local authorities

Sida's Indevelop Program Manager maintained in an interview that an even bigger issue relates to the implementation of the protective measures at the local level.<sup>370</sup> Sida reports that "the military and police forces are even

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<sup>363</sup> Interview with the Manager of Sida Indevelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012).

<sup>364</sup> See Comisión Colombiana de Juristas, 'Capítulo 3 El debilitamiento de la independencia de la independencia del Sistema de Alertas Tempranas ha influido negativamente en la prevención del desplazamiento forzado', of the 'VI Informe de seguimiento a la aplicación en Colombia de las recomendaciones del Representante Especial del Secretario General de las Naciones Unidas para los derechos humanos de las personas internamente desplazadas,' (2011) 16. <[http://www.coljuristas.org/documentos/libros\\_e\\_informes/inf\\_2011\\_n1.pdf](http://www.coljuristas.org/documentos/libros_e_informes/inf_2011_n1.pdf)> accessed 25 June 2012.

<sup>365</sup> Interview with the Manager of Sida Indevelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012); Interview with former CIAT staff member (Bogotá, Colombia, April 2012).

<sup>366</sup> Human Rights Watch, 'Paramilitaries' Heirs – The New face of Violence in Colombia' (n 360) 13.

<sup>367</sup> Interview with the Manager of Sida Indevelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012).

<sup>368</sup> Human Rights Watch, 'Paramilitaries' Heirs – The New face of Violence in Colombia' (n 360) 13.

<sup>369</sup> *ibid* 4, 11.

<sup>370</sup> Interview with the Manager of Sida Indevelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012).

more hesitant to implement these decisions through effective protection measures on the ground.”<sup>371</sup> The report explains this problem with the fact that “action by the police and the military in the most affected and conflictive remote parts of the country are subject to local power structures dominated by illegal economic and armed groups which are precisely the sources of serious human rights violations.”<sup>372</sup> It has been suggested by Sida’s Indevelop Program Manager that local implementation could be improved; with a DP team collaborating with local authorities to construct a plan for the operationalization of the SAT and CIAT recommendations, which are adapted to the specific context, and to follow up the local implementation of these recommendations. She suggested that the same recommendation could be implemented with different measures, depending on the specific regional contexts.<sup>373</sup>

#### 4.3.4.1.3 Report publication

The fact that the DP does not publish all of SAT’s risk reports also limits the role it can play in the prevention of MAs. In 2011, only 74% of the reports were published.<sup>374</sup> USAID asserts that the information found in the SAT risk reports “may provide the best factual and current illustration of the type of human rights challenges that Colombia faces.”<sup>375</sup> Access to such information contributes to raising awareness. It follows that limiting the publication of risk reports also limits the level of public awareness that the DP could raise.

#### 4.3.4.2 Moral Office

As explained in section 4.3.3.1 on the Moral Office, the *Defensor* has more of a moral, than a coercive authority. The role of the institution is rather centralized in the functions of the *Defensor* as described in Article 282 of the Constitution.<sup>376</sup> It follows that the strength and effectiveness of the DP relies heavily on how actively the *Defensor* carries out its functions by making pronouncements and applying its powers of moral persuasion in the defense of human rights.<sup>377</sup>

As described in section 4.3.1 on the institutional set-up, there is a political aspect in the election of the *Defensor*. The President of Colombia chooses the candidates from which the House of Representatives elects a

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<sup>371</sup> Sida’s Indevelop Report (n 28) 5.

<sup>372</sup> *ibid.*

<sup>373</sup> Interview with the Manager of Sida Indevelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012).

<sup>374</sup> USAID (n 325) 41.

<sup>375</sup> *ibid.*

<sup>376</sup> See Annex 2.

<sup>377</sup> USAID (n 325) 23.

*Defensor*. This could allow a President to decide on the level of Moral Office that will be exercised by the DP. For example, if a President shortlists only candidates known to be discrete rather than express its concern in the face of human rights violations, it would guarantee that the Moral Office will not be exercised to its full potential. This could be useful for a President wanting to prevent the denouncement of certain government actions or inactions.

The present *Defensor* keeps a discrete and low profile and rarely makes use of the media in the execution of his duties.<sup>378</sup> Sida maintains that this may “legitimize the widespread inaction by those who make the difference between human rights violations and protection.”<sup>379</sup> Although documents produced by the DP contain crucial information about the humanitarian crisis and at-risk situations, it has a lesser impact in raising public awareness as it does not reach the population at large.

#### **4.3.4.3 Protection of groups and individuals at risk**

Certain groups and individuals remain at higher risk of being victims of MAs. This is especially the case for women and victims of displacement.

##### **4.3.4.3.1 Women**

An appropriate gender strategy in the work of the DP is lacking.<sup>380</sup> Although there is a DP Delegate for Women, Children and Youth, few resources are specifically directed towards women.<sup>381</sup> As previously stated, women are more vulnerable to certain MA crimes such as sexual violence and internal displacement. The lack of a sensible gender strategy impedes the effective prevention of these types MAs.

##### **4.3.4.3.2 Victims of displacement**

As mentioned in section 4.1.3.2, forced displacement makes civilians particularly vulnerable to MA situations. The Victims' Law, which provides for the restitution of lands, was thus seen to provide an enhanced opportunity for better human rights protection. The recent events show that this has not exactly been the case thus far. In response to the government's land restitution efforts, there has been a rise in killings, threats and attacks against leaders of displaced communities campaigning for land recovery.<sup>382</sup>

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<sup>378</sup> Sida's Indevelop Report (n 28) 6.

<sup>379</sup> *ibid.*

<sup>380</sup> *ibid* 6-7; USAID (n 258) 48.

<sup>381</sup> USAID (n 258) 48.

<sup>382</sup> Human Rights Watch, '2012 World Report' (n 270). See also: US Office on Colombia, 'Against All Odds: The Deadly Struggle of Land Rights Leaders in Colombia' (1 November 2011). This was also highlighted in an Interview with the Manager of Sida Indevelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012).

Staff members of the DP Specialized Office for Comprehensive Attention to Victims suggested in an interview that the *Defensor* could use its Moral Office to promote an effective governmental policy regarding the protection of leaders of displaced persons who are claiming back their lands.<sup>383</sup>

#### 4.3.4.4 Institutional capacity

The DP's strained financial resources limit its capacity to reach its full potential of human rights protection and MA prevention. Most notably, numerous respondents asserted that the DP could have a greater preventive impact if it had more resources allocated to increasing its presence in the regions and hiring more Regional Analysts.<sup>384</sup>

The USAID report points out a number of other institutional limitations. It notes that the temporary employment of DP training staff may have weakened the development of teaching material and questions the degree of effective integration of the training component in the institutional structure of the DP.<sup>385</sup> USAID also highlights that the DP has a limited capacity to review the policies and legislations “on which they should be leading moral authority.”<sup>386</sup> With regards to SAT, it maintains that the system in place lacks the capacity necessary to monitor the government's compliance with the risk reports and early-warnings due to the lack of resources. In addition, USAID points out that the persons interviewed “most commonly identified expanding the capacity of the SAT, including the mobility of its analysts, as key factors that would facilitate its effectiveness.”<sup>387</sup> In a 2010 report, HRW similarly urges the Colombian government to expand SAT.<sup>388</sup>

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<sup>383</sup> Interview with the Staff members of the DP Specialized Office on Comprehensive Attention to Victims, (Bogotá, Colombia, April 2012).

<sup>384</sup> Interview with SAT National Analyst at the DP (Bogotá, Colombia, April 2012); Interview with the Manager of Sida Indevelop Program at the Embassy of Sweden in Colombia (Bogotá, Colombia, April 2012); Interview with former Regional Analyst (Bogotá, Colombia, April 2012).

<sup>385</sup> Sida's Indevelop Report (n 28) 6.

<sup>386</sup> *ibid.*

<sup>387</sup> USAID (n 258) 48.

<sup>388</sup> Human Rights Watch, ‘Paramilitaries’ Heirs – The New face of Violence in Colombia’ (n 360) 15.

# 5. Conclusion

## 5.1 Summary of the findings

### 5.1.1 Scope of States primary prevention obligations under R2P

The analysis reveals *de lege lata* that current IL only requires States to prevent genocide and war crimes, and not crimes against humanity. With regards to genocide, all States must “employ all measures reasonably available to them so as to prevent genocide as far as possible.”<sup>389</sup> This is an obligation to prevent genocide with ‘due diligence’. As per the prevention of war crimes, Common Article 1 of the Geneva Convention similarly obliges States to do everything they can to ensure that all under their jurisdiction respect IHL.<sup>390</sup> Further IHL provisions place specific obligations, relating to the prevention of war crimes, upon States. This notably includes the obligation to incorporate IHL in the domestic legal system, to disseminate IHL and to investigate, prosecute and punish IHL violations.<sup>391</sup>

The thesis argues *de lege ferenda* that to the extent that crimes against humanity rise to the level of *jus cogens* and thus carry *erga omnes* obligations, States could have a positive obligation to act to prevent their commission.<sup>392</sup> The same IHRL-based methodological principles applied by the ICJ in assessing the obligation of States to prevent genocide could in theory apply to other MAs that also carry *erga omnes* obligations.<sup>393</sup> It is moreover argued that if R2P could expand on the pre-existing legal obligations of States,<sup>394</sup> it would have resulted in the inclusion of an obligation to prevent crimes against humanity.

### 5.1.2 Role of NHRIs in the implementation of States primary responsibility to prevent

The thesis displays that even if NHRIs do not directly implement the obligations of States, they play an important practical role in monitoring the

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<sup>389</sup> *Bosnia v Serbia* (n 99) para 430.

<sup>390</sup> Common Article 1 to the four Geneva Conventions (n 98); Pictet (n 124) 24-27; Boisson de Charzounes and Condorelli (n 122).

<sup>391</sup> See section 2.3.2.5.

<sup>392</sup> In *Bosnia v. Serbia* (n 99) the ICJ left this question open. See section 2.3.2.3.

<sup>393</sup> Strauss (n 49) 317; Glanville (n 117) 26.

<sup>394</sup> As put forward by Chhabra and Zucker (n 88) 57.

government's implementation of IL, in particular human rights obligations. Although NHRIs generally do not have a coercive force, they have various mechanisms available, to help them ensure compliance with their recommendations.

The thesis also addresses the operational framework that R2P adds to the pre-existing legal obligations of States to prevent MAs. The acts of implementation comprise of structural and direct measures aimed at preventing both armed conflicts and MAs. Moreover, the preventive tools should be applied throughout all stages of a MA crisis, not only to prevent the initial outbreak but also to prevent its continuance, escalation and recurrence. This work shows that a State's contribution to the cessation of MAs through both structural and direct preventive measures is pertinent to their primary responsibility to protect their populations.

The research reveals that NHRIs are well suited to contribute to the practical implementation of States' obligations to prevent the occurrence, escalation and recurrence of MAs by promoting and protecting human rights and using their mandate to take appropriate structural and direct preventive measures. Most notably, the study shows that given their investigative nature and in some cases, quasi-judicial powers, they are in a privileged position to collect and analyze information in its local context. NHRIs can then transmit the relevant information to the authorities capable of taking the appropriate preventive measures.

The thesis also displays that NHRIs can contribute to preventing MAs in other more indirect ways. Although the preventive means and tools available to each NHRI will depend on its particular mandate, the study reveals that NHRIs can generally contribute to the practical implementation of R2P by carrying out a number of its regular programmes and activities. Through these actions, NHRIs can contribute to preventing MAs by promoting a legal framework that effectively prevents MAs and working on the implementation of the legal framework, for instance by providing training to public officials on IL. NHRIs can also contribute to preventing MAs through their control mechanisms, this includes cooperating with international mechanisms, monitoring situations at-risk, promoting public awareness and where applicable, making use of their quasi-jurisdictional function.

### **5.1.3 Means and tools of the *Defensoría del Pueblo* in the implementation of R2P**

With specific regards to the Colombian DP, the study reveals that the institution uses its mandate to prevent the main MAs occurring in Colombia. It does so with a range of mechanisms and programmes. The DP most notably helps to address: killings and attacks against civilians; forced displacement; child soldier recruitment; sexual violence; enforced disappearances and kidnappings; anti-personnel land mines incidents; and torture. The DP is enabled to effectively participate in the prevention of such conflict-related violence by being fully compliant with the Paris Principles and having the



exceptional functions to promote and defend both human rights and humanitarian law. The institution contributes to the prevention of MAs with a wide range of tools. First, through its Moral Office, that is the use of the *Defensor's* voice and authority, the DP can denounce the state of certain human rights-related situations. Second, with its Community Defenders program, the DP is able to protect the rights of populations at-risk or whose human rights have been violated by the conflict. It does so by, for instance, advising civil society organizations working with displaced persons and the local government. Third, with its sophisticated early-warning system, SAT, the DP can monitor and flag imminent risks of violations of human rights against civilian populations and issue risk reports to the authorities capable of taking appropriate preventive action. Fourth, the DP contributes to preventing MAs through its mechanisms to fight impunity. The DP carries this out by providing assistance with complaints, including free legal services to indigent citizens and judicial processes, as well as legal and psychological assistance to victims of particular violations in the context of the implementation of the Victim's Law. The DP can also initiate legal actions, such as filing an action at the Constitutional Court to challenge the constitutionality of a certain law or filing a public action. Moreover, the DP can cooperate with international organizations and mechanisms to share information and thus, strengthen its capacity. Finally, the DP can contribute to prevent MAs by promoting an effective legal framework, monitoring legislation and court orders, providing training activities, and applying dispute resolution mechanisms.

Despite the prevention work of the DP in many areas, the occurrence of MAs persists. This points to the practical challenges that remain in generating institutional preventive action. The study reveals that the weaknesses of the DP in the prevention of MAs relate mainly to four areas of concern. First, a major weakness is in relation to the work of the SAT: the SAT risk reports are often not acted upon by the CIAT; the protective measures that are ordered are often not implemented at the local level; and the DP does not publish all of its SAT risk reports. Second, the study reveals that the *Defensor* is not using its Moral Office as it should for the optimal prevention of MA. Instead of using the media to make pronouncements and apply its powers of moral persuasion in the defense of human rights, the current *Defensor* prefers to execute his task in a more discrete way. This negatively affects the strength and effectiveness of the DP as a whole, and clearly has an impact on the capacity of the institution to prevent MAs. Third, the analysis revealed that there is a lack of effective protection for women and victims of forced displacement, who are at higher risk of being victims of MAs. Fourth, the study shows that the institutional capacity of the DP is limited by funding. This directly affects the availability of human resources and infrastructures, and restrains its ability to reach its full potential of human rights protection and MA prevention, specifically in the regions.

Recommendations to remedy those challenges are presented under section 5.3.

## 5.2 Analysis

MA are preventable, and this thesis has shown that NHRIs around the globe can contribute to their prevention. While R2P is regarded with suspicion by some governments fearing infringements of their sovereignty and NHRIs are well placed to contribute to the implementation of the first pillar of the principle, as they are seen to pose a lesser threat to the power and integrity of the State.<sup>395</sup> While NHRIs do not have a coercive force, when properly institutionalized they can play an important role in helping their governments meet their IL obligations.

There are strong arguments for NHRIs to undertake the prevention of MAs as part of their work. The most serious human rights violations, such as violations of the right to life and the right to physical and mental integrity, frequently involve MA crimes. Amnesty International suggested that NHRIs should prioritize their work, according to the seriousness of the violations alleged.<sup>396</sup> As such, many countries “will need to prioritize work on such violations, in order to be effective and credible in their work to protect and promote human rights.”<sup>397</sup>

The author argues that all NHRIs support the implementation of R2P through their programmes and activities, which promote a culture of human rights, and therefore prevent structural MA causes. Moreover, with their conciliatory nature, NHRIs are in an ideal position to monitor the implementation of ESC rights violations, which are precursors of MA situations.

The thesis shows that NHRIs can also use their other functions to contribute more directly to prevention. Its monitoring function appears to be of most relevance, as it is through this that NHRIs can collect information, analyze it in its local context and transmit it to those capable of acting along with recommendations. In that field, lessons can be learned from the DP, which has been working in the midst of MA situations since its creation in 1992. The DP has developed effective tools that are capable of halting MA crimes; both structurally through its general programmes and activities as well as more directly by flagging imminent risks. The case study on the DP has revealed that by monitoring events and the situation of vulnerable groups and individuals, NHRIs are in a privileged position to halt MAs. Most notably, early-warning mechanisms allow for MA prevention throughout all stages of a crisis: not only before the initial outbreak, but also during and post-conflict to prevent its continuance, escalation and recurrence. Depending on their mandate, other NHRIs could also create their own early-warning mechanism, even if early warning is not explicitly listed in their functions. For example, certain NHRIs that have the mandate to develop strategies for the promotion and protection of human rights could use this function to justify the creation of an early-warning system. Other NHRIs looking to

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<sup>395</sup> Zambara (n 157) 459.

<sup>396</sup> Amnesty International, ‘NHRIs recommendations’ (n 154) 11.

<sup>397</sup> *ibid* 4.

establish an early-warning mechanism could take inspiration from Colombia's SAT model.

The case study of the Colombian DP reveals that one of the primary shortcomings in effective MA prevention is that the institutional links of the DP are in many cases obstructing its work from having a practical effect. First, the Head of the DP, which has been elected through a process lacking independence safeguards, often refrains from publicly denouncing flagrant human rights violations. This highlights the importance of NHRIs in fulfilling the general benchmarks of the Paris Principles, particularly the requirement of independence, in order to optimize their effectiveness in the prevention of MAs. This lack of independence in the election of the Head of an NHRI can negatively affect its effectiveness. This can be detrimental to the human rights situation. As Amnesty International has put it: “[a]n ineffective NHRI which does not address human rights violations actively can be an instrument for impunity, rather than a tool to promote and protect human rights.”<sup>398</sup> Further, failure to criticize the work of government, when necessary, may make NHRIs lose their credibility.<sup>399</sup> Second, the authorities capable of enforcing the recommendations of the DP are often ignoring them. It is argued here that there are two prospective ways to ensure that NHRI recommendations are followed up: 1) NHRIs should be able to refer their findings and recommendations to a judicial body;<sup>400</sup> and 2) the implementation of a suitable framework that compels the relevant authorities to respond within a specified time to findings and recommendations of their NHRIs.<sup>401</sup> The issue remains that it is up to the government to set up these frameworks and undertake these obligations. Governments should consider undertaking such obligations to help them meet their international obligations, including those regarding MA prevention. In the case where their recommendations are ignored however, NHRIs should use every tool available to them to generate pressure on the government and raise the political cost of non-compliance.

The author argues that NHRIs could play a greater role in the prevention of MAs by mainstreaming and integrating R2P into their work. Instead of only contributing to preventing the structural causes of MAs by raising awareness through education and training programmes, NHRIs could take R2P-targeted actions. For example, NHRIs could issue factsheets and publicize information through the media and educational curriculums on the R2P principle and the responsibilities of the State towards its population. R2P training could be introduced into human rights training aimed at State actors. NHRIs could also encourage governments to develop national action plans that include specific R2P strategies addressing structural causes of R2P such as legislation for the protection of minorities and the elimination of political, social and economic discrimination. They could also encourage the government to take specific steps or implement particular strategies to improve the domestic implementation of R2P. Finally, in the context of their

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<sup>398</sup> *ibid* 7.

<sup>399</sup> *ibid*.

<sup>400</sup> *ibid* 15-16. National Council on Human Rights Policy (n 26) 9.

<sup>401</sup> Amnesty International, ‘NHRIs recommendations’ (n 154) 9.

monitoring functions, NHRIs could request specific information on the actions taken by the government in the implementation of R2P.

Reflecting upon the findings summarized in section 5.1 as well as the analysis above, recommendations to enhance the capacity of NHRIs to prevent MAs are put forward in section 5.3.

## 5.3 Recommendations

The following recommendations are advanced for States to improve the capacity of their individual NHRI to contribute to the implementation of R2P:

1. States should ensure that their NHRI is independent from the government in its functioning. This includes removing the involvement of the executive from the appointment process of the head of the NHRI. The independence of a NHRI is directly related to its effectiveness in carrying out its activities. States should also ensure that NHRI institutional entanglements do not invalidate or limit their independence.
2. States should ensure that their NHRI has sufficient funding to uphold its mandate. By promoting and protecting human rights, NHRIs support the prevention of the structural causes of MA crimes.
3. States should explicitly include R2P, in particular the prevention of MAs, in the mandate of its NHRI. This would enable NHRIs to design targeted measures aimed at preventing MAs. In addition, the State should be responsible for issuing information and reports on its domestic implementation of R2P.
4. States should include early-warning as a function of their NHRI. This would allow the NHRI to contribute to the prevention of MAs not only through structural measures, but also more directly by flagging imminent risks of MAs.
5. States should set up a framework that allows their NHRI to refer its findings and recommendations to a judicial body and undertake the obligation to respond within a specified time to findings and recommendations of their NHRIs. This would ensure that the work of their NHRI is followed-up and would ultimately help States meet their international obligation in respect to MA prevention.

The following recommendations are put forward to NHRIs to improve their role in the prevention of MAs in accordance with their mandate to protect and promote human rights:

1. NHRIs should explicitly include R2P in its agenda. This could involve: introducing R2P modules into educative programmes; opening a dialogue with the State on its implementation of R2P; and consider R2P issues in its reports and recommendations to authorities.
2. NHRIs should, when their mandate allows, establish an early-warning mechanism. This could be made possible even if early-warning is not explicitly listed in their functions. For example, some NHRIs that have the mandate to develop strategies for the promotion and protection of human rights could use this function to justify the creation of an early-warning system.

With specific regard to the DP in Colombia, the following recommendations are put forward to help overcome the institutional challenges that the DP is facing in the prevention of MAs.

1. The government of Colombia should adopt a new appointing procedure for the position of *Defensor* to assure the political independence of the work of the DP. The fact that the President of Colombia is the one shortlisting the candidates negatively affects the legitimacy and thus, the efficiency of the DP. An appointment procedure that leaves out the executive branch is crucial to distance the *Defensor* from the government of the day, and thereby assure the independence of the DP.
2. The *Defensor* should make greater use of its Moral Office to promote effective protective measures and other policies contributing to the prevention of MAs. Given the current context, the DP should focus on using its Moral Office to promote protective policies and measures for the leaders of displaced persons who are claiming the restitution of lands under the Victim's Law.
3. The DP should elaborate and implement a gender-based approach to its activities to pay greater attention to women's issues. Specifically, the issue of sexual violence against women should receive the due attention it deserves. The gender-based approach must involve the support and training of victims' associations, psychologists and lawyers. This would offer better protection to women, who are particularly vulnerable to MAs within the context of the Colombian armed conflict.

4. The government of Colombia should adopt legislation amending the functioning of the early-warning mechanisms. Most notably, the mandate of CIAT should be remodelled to give the SAT an active role in its decision-making process. The DP must also ensure that all risk reports are published. This would help raise public awareness on current situations and put pressure on the government to fulfill its preventive obligations in cases of MA threats. Moreover, the Colombian government should develop a clearer strategy for the implementation of risk reports and Early Warnings. The new strategy needs to involve the local authorities in the elaboration of regional plans for the implementation of the recommended measures, to ensure that the means taken reflect the specific local contexts. This must also comprise of monitoring mechanisms to ensure that the means chosen have the desired effect. The SAT should also work on having a more open dialogue with the members of CIAT; in order to improve the understanding of the latter on the nature of the work of the DP, and more specifically, the work of the SAT.
5. The DP should mobilize greater financial support from the international community to improve its institutional capacity. The additional financial support should most notably be used to expand the capacities in the regions and increase the number of Regional Analysts.
6. The government of Colombia should become a party to OPCAT. This could entail making the DP a NPM with a system of regular visits to places of detentions and could ultimately reinforce the DP's capacity to contribute to the prevention of torture.

# Annex 1

## Guía de Entrevista

1. ¿Podría describir brevemente en qué consiste o consistía su trabajo en la Defensoría del Pueblo?
2. ¿Usted trabaja o trabajó en la prevención de delitos atroces?  
Si es así, ¿Podría explicar las formas en las que estaban contribuyendo a la prevención? (Por ejemplo, SAT, un programa en particular, etc.)
3. ¿Cuál es el mandato de la Defensoría del Pueblo en relación con la prevención de delitos atroces?
  - ¿Cómo la Defensoría del Pueblo interpreta y usa su mandato legal para mejorar su capacidad de prevenir delitos atroces?
4. ¿Cuáles son los principales programas de la Defensoría del Pueblo que contribuyen a la prevención de delitos atroces?
5. ¿Qué podría hacerse para mejorar la capacidad de la Defensoría del Pueblo para prevenir delitos atroces?
  - a) *Magistratura moral*
  - b) Defensa efectiva con las instituciones públicas encargadas de la aplicación de medidas de protección
  - c) Participar con actores regionales, nacionales o internacionales
  - d) Mecanismos alternativos de solución de controversias/ mediación en relación con la prevención de conflictos
  - e) Otro
6. ¿La Defensoría del Pueblo colabora con otros actores interesados en la prevención de delitos atroces?
7. ¿En el contexto colombiano, cuáles son los principales retos en la prevención de delitos atroces ? (Por ejemplo, la corrupción, el informe selectivo, etc.)
8. ¿Ve usted algunas cuestiones de neutralidad en la forma en que la Defensoría del Pueblo lleva a cabo su mandato en lo que respecta a la prevención de delitos atroces? (Por ejemplo, la financiación internacional, la estructura de toma de decisiones, etc.)
9. ¿Cuales cree usted que son las mayores amenazas reales a la capacidad y actuación de la Defensoría del Pueblo para la prevención de delitos atroces?

## Interview Guide

1. Could you please tell me about your job description?
2. Have you been involved to some extent in the prevention of mass atrocity crimes? If so, could you elaborate on the ways in which you were contributing to the prevention? (e.g. early-warning system, a particular program, etc.)
3. What is the mandate of the *Defensoría del Pueblo* in relation to the prevention of mass atrocities?
  - How does the *Defensoría del Pueblo* interpret its legal mandate to engage in activities to prevent mass atrocities?
4. What are the main programs of the *Defensoría del Pueblo* that contribute to the prevention of mass atrocities?
5. What more could be done to better enable the *Defensoría del Pueblo* to prevent mass atrocity crimes?
  - a) Moral office
  - b) Effective advocacy with public institutions responsible for the implementation of protective action
  - c) Engage with national, regional and international actors
  - d) Alternative dispute resolution mechanisms in relation to conflict prevention and mediation
  - e) Other
6. Has the *Defensoría del Pueblo* engaged with any other national actors on peace and security issues?
7. In the Colombian context, what are the main challenges in the prevention and response to mass atrocities? (e.g. corruption, selective reporting, etc.)
8. Do you see any neutrality issues in the way the *Defensoría del Pueblo* is carrying out its mandate with regards to the prevention of mass atrocities? (e.g. foreign funding, decision-making structure, etc.)
9. What do you consider to be the main threats to the effective ability of the *Defensoría del Pueblo* to prevent mass atrocity crimes?



# Annex 2

## **Constitution of Colombia promulgated 4 July 1991.**

Constitution Art. 281:

The Public Defender shall be part of the Public Ministry and will exercise the functions under the maximum supervision of the Prosecutor General of the Nation. He/she will be elected by the Chamber of Representatives for a period of four years. From within a trio prepared by the President of the Republic.”

Constitution Art. 282:

“The Public Defender will safeguard the promotion, exercise and public dissemination of human rights, for which it will exercise the following functions:

1. Orient and instruct the residents of the national territory and Colombians abroad in the exercise and defence of their rights before competent authorities or entities of a private nature.
2. To disseminate human rights and recommend policies for the teaching thereof.
3. To invoke the right of habeas corpus and to instigate tutelage actions, without impairment of the right to aid interested parties.
4. To organize and direct the Office of the Public Defender in the terms indicated by law.
5. To instigate popular actions in matters related to its area of competence.
6. To present legislative bills on matters related to the area of its competence.
7. To present reports to Congress on the fulfilment of its functions and duties.
8. Any other functions or duties determined by law.

Constitution Article 283:

The law will determine the organization and functioning of the Office of the Public Defender.

## ***Ley 24 de 1992 (diciembre 15), Por la cual se establecen la organización y funcionamiento de la Defensoría del Pueblo y se dictan otras disposiciones en desarrollo del artículo 283 de la Constitución Política de Colombia***

Law Art. 9:

In addition to the powers indicated in the Constitution, the Public Defender shall have the following:

1. Design and adopt policies promoting and disseminating Human Rights in the Country with the Prosecutor General of the nations, in order to demand and defend them.
2. Direct and coordinate the work of the various divisions making up the Office of Public Defence.
3. Make recommendations and observations to authorities and private parties in the case of a threat against or violation of Human Rights and to oversee the promotion and exercise thereof. The Defender may make such recommendations public and report to Congress on the response received.
4. Perform diagnoses of general nature on the economic, social, cultural, legal and political situations in which individuals may find themselves with respect to the State.
5. Pressure private organizations so that they abstain from neglecting a right.
6. Disseminate knowledge of the Political Constitution of Colombia, especially the fundamental social, economic, cultural, collective and environmental rights.
7. Present an annual report to Congress on its activities in which will be included a listing of the type and number of complaints received, the measures taken to deal with it and results, express mention of officials refusing to cooperate or of individuals

implicated and the recommendations of an administrative and legal nature considered necessary.

8. Assist the Prosecutor General in the drafting of reports on the situation of Human Rights in the country.
9. Demand, refute or defend any rule related to Human Rights by own initiative or at the request of any person when indicated. Instate public action in defence of the National Constitution, law, general welfare or of individuals before any jurisdiction, public servant or authority.
10. Design the mechanisms needed to establish permanent communication and share information with governmental and non-governmental organizations on a national and international basis for the protection and defence of Human Rights.
11. Enter into agreements with national and international educational and research institutions for the dissemination and promotion of Human Rights.
12. Enter into contracts and issue administrative acts as required for the functioning of the Office, as well as to perform the legal and judicial representation of the institution, using the powers or mandates granted to it for this purpose as necessary.
13. Appoint Delegate Defenders by subject area for the study and defence of particular rights.
14. Exercise expenditure inherent to the Office as such, subject to the measures established in the Organic Law of the General Budget of the National and regulatory standards with respect to appropriations, additions, transfers, additions, transfers, expenditure agreements, programme for cash, payments and formation of payment reserves.
15. Present the Budget Proposal for the Office of Public Defence to the consideration of the National Government.
16. Administer the goods and resources allocated to the operation of the Office of Public Defence and assume responsibility for its correct assignment and use.
17. Appoint and remove employees from the Office, as well as define their administrative status.
18. Establish regulations needed for the efficient and effective functioning of the Office of Public Defence, all of that related to its organization and internal functions and the regulation of administrative processes not provided by law.
19. Be mediator for the collective petitions put forth by civic or popular organizations directed at public administration when they require it.
20. Oversee the rights of ethnic minorities and consumers.
21. Participate in the monthly meetings held by the Commission on Human Rights and Congressional Hearings, and at the holding of Special Hearings in order to establish joint policies in a coordinated fashion in defence of Human Rights according to the provisions of articles 56 and 57 of the Regulation of Congress (Law OS of June 17, 1992).
22. Present periodic reports to public opinion on the results of investigations, publicly denouncing the failure to acknowledge Human Rights.
23. To serve as mediator between users and public or private companies that render public services when they so request in the defence of their presumably violated rights.
24. Any other indicated in other legal measures.

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