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## The Responsibility to Protect and International Justice

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## THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL JUSTICE

*Elizabeth F. Defeis\**

In his address to the United Nations General Assembly in 2008, Pope Benedict XVI noted that while the “responsibility to protect has only recently been defined it was always present implicitly at the origins of the United Nations, and is now increasingly characteristic of its activity.”<sup>1</sup> He noted further that “The principle of ‘responsibility to protect’ in ancient Roman law was the foundation of every action taken by those in governments with regard to the governed.”<sup>2</sup>

Nevertheless, only in this century has the norm of Responsibility to Protect (“R2P”) come to the forefront and gained international acceptance. In 2005, at the U.N. Summit, 150 world leaders recognized a responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>3</sup> The primary responsibility to protect populations from such mass atrocities rests with the individual state as an aspect of sovereignty. When states fail in this responsibility, other states, through the United Nations are committed to “use appropriate diplomatic, humanitarian, and other peaceful means” to protect threatened populations.<sup>4</sup> If these means fail, the Security Council may authorize collective measures to deal with the situation.<sup>5</sup>

Resistance to the acceptance of R2P is primarily predicated upon concerns of state sovereignty. The key elements of sovereignty, as recognized since the Peace of Westphalia in 1648, are legal equality of nations, autonomy and non-interference by other states.<sup>6</sup> During the last century, however, the parameters of sovereignty have changed. Professor Louis Henkin, one of the great international law scholars of our time, has long urged that the “S” word, “Sovereignty”, be banished; that it be relegated to a shelf in history.<sup>7</sup> Although at one time, sovereignty stood as a barrier to the recognition of human rights as a matter of international

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<sup>1</sup> Pope Benedict XVI, Address to the General Assembly of the United Nations (April 18, 2008), transcript available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html).

<sup>2</sup> *Id.*

<sup>3</sup> United Nations World Summit, September, 14-16 2005, *2005 World Summit Outcome*, ¶ 139, U.N. Doc. A/60/L.1 (Sept. 15, 2005) [hereinafter UN World Summit].

<sup>4</sup> G.A. Res. 60/L.1, ¶ 139, U.N. Doc. A/Res/60/L.1 (Sept. 15, 2005).

<sup>5</sup> The UN Security Council has since endorsed R2P in resolutions concerning the protection of civilians in armed conflict and peacekeeping in southern Sudan and Darfur. See U.N. Security Council Resolution 1674 (2006), S.C.Res. 1674, U.N. Doc. S/RES/1674 (April 28, 2006); S.C. Res. 1755, U.N. Doc. S/RES/1755 (April 30, 2007).

<sup>6</sup> Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”? Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. Int'l. L. & For. Aff. 361, 1364 (2005).

<sup>7</sup> LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 10 (Martinus Nijhoff Publishers 1995).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

concern, today the concept of sovereignty has eroded.<sup>8</sup> R2P reconceptualizes sovereignty and stresses, which are inherent in the concept of state sovereignty, accountability and responsibility to one's own vulnerable population.<sup>9</sup>

The criticism of R2P centers on the use of military force as authorized by the Security Council to protect vulnerable populations from mass atrocities. Some claim that this provision is humanitarian intervention with another name.<sup>10</sup> Under the doctrine of humanitarian intervention, a state may intervene in another state's affairs when gross violations of human rights are occurring and when the state in which the violations are occurring is unable or unwilling to act.<sup>11</sup> The doctrine of humanitarian intervention, although recognized under classic international law, was replaced by the collective security system established under the U.N. Charter.<sup>12</sup>

In contrast, proponents argue that R2P is not a substitute for humanitarian intervention. Rather, it entails a threefold responsibility on the part of states to prevent, react and rebuild when confronted with mass atrocities.<sup>13</sup> This three-fold responsibility could be discharged in many ways including education, diplomacy, and sanctions, among other methods. I would argue that the pursuit of international justice, accountability and development of the rule of law can and should be incorporated into each of these responsibilities.

One of the great breakthroughs in international law in the last century has been the acceptance of human rights as a matter of international concern.<sup>14</sup> As set forth in the UN

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<sup>8</sup> Louis Henkin, *Lecture: The Robert L. Levine Distinguished Lecture Series That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera* (Feb. 23, 1999), in 68 *Fordham L. Rev.*, Oct. 1999, at 1, 4 (discussing the Holocaust as being the trigger for the acceptance of human rights concerns trumping state sovereignty).

<sup>9</sup> UN World Summit, *supra* note 3, ¶ 138.

<sup>10</sup> See Gareth Evans, President, Int'l Crisis Group, *Address to SEF Symposium 2007: Delivering On The Responsibility To Protect: Four Misunderstandings, Three Challenges And How To Overcome Them* (Nov. 30, 2007); David Moszkowicz, *Humanitarian intervention: the elephant in the room?*, *THE BROKER* (June 13, 2010), available at <http://www.thebrokeronline.eu/en/Online-discussions/Blogs/The-Responsibility-to-Protect/Humanitarian-intervention-the-elephant-in-the-room>.

<sup>11</sup> See David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 *U. Tol. L. Rev.* 253, 264 (1992) (defining humanitarian intervention as those instances in which a nation unilaterally uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces); Anthony Clark Arend & Robert J. Beck, *INTERNATIONAL LAW AND THE USE OF FORCE* 113 (Routledge ed., 1993) (defining humanitarian intervention as the use of armed force by a state (or states) to protect citizens of the target state from large-scale human rights violations there); Louis Henkin, *Humanitarian Intervention*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* 383 (Louis Henkin & John L. Hargrove eds. 1994); Louis Henkin, *Use of Force: Law and U.S. Policy*, *RIGHT v. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 40-41 (Council on Foreign Relations Press ed., 1989)

<sup>12</sup> Compare W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 *YALE J. INT'L L.* 279, 279 (1985) (arguing that the collective security system envisioned by the U.N. has not successfully replaced unilateral action by states, it has merely changed to make it more palatable) and *RIGHT v. MIGHT*, *supra* note 11, at 38 (arguing that the U.N. Charter has significantly shaped the actions of states with some exceptions).

<sup>13</sup> Rep. of the Int'l Comm'n on Intervention and State Sovereignty; *The Responsibility to Protect*, ¶¶ 3.1, 4.1, 5.1 (Dec. 2001) available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

<sup>14</sup> Henkin, *supra* note 7; see also *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 *I.L.M.* 1027 (1984); *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at

RESPONSIBILITY TO PROTECT

Charter, one of the four purposes of the U.N. is to promote and protect human rights.<sup>15</sup> However, during its early years, the United Nations was reluctant to address human rights violations of member states directly. To do so, it was argued, would interfere with matters that were essentially within the jurisdiction of the state and, thus, would violate Article 2(7) of the UN Charter, which deals with state sovereignty.<sup>16</sup> Article 2(7) of the UN Charter states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>17</sup>

Thus, despite the mass atrocities that occurred in the 1970's, such as those that occurred in Uganda and Cambodia, Article 2(7) served as a barrier to UN action. Instead, member states stepped in to address the violations under the previously discarded principle of humanitarian intervention.<sup>18</sup>

The principle that an individual has rights against his or her own government to be protected through international law was, at first, viewed as a violation of sovereignty. Indeed there are some states today that still take this view.<sup>19</sup> However, it gradually became accepted that individuals possess rights that could be protected by international law, even against his or her own government. Thus, a culture of human rights has developed.<sup>20</sup>

At the same time that acceptance of human rights as a matter of international concern was developing, so was the principle that individuals could be held responsible for violations of international law. These developments were crystallized in 1945 through the Nuremberg Tribunals, in which high-level Nazis were put on trial for violations of interna-

193, U.N. Doc. A/34/46 (1980), reprinted in 19 I.L.M. 33 (1980); Int'l Convention on the Elimination of All Forms of Racial Discrimination art. 5, Mar. 7 1966, 660 U.N.T.S. 195; International Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Int'l Convention on Economic, Social and Cultural Rights art. 1, Jan. 3, 1976, 993 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Jan. 12, 1951, 78 U.N.T.S. 277; Universal Dec'l of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>15</sup> U.N. Charter art. 1, ¶ 3.

<sup>16</sup> Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 Wis. Int'l L.J. 703, 705 (2006) (discussing the reading of the U.N. Charter as very limited and the desire of U.N. members to protect their own interests first and foremost).

<sup>17</sup> U.N. Charter, art.2, ¶ 7.

<sup>18</sup> Robert Kolb, *Note on Humanitarian Intervention*, 849 Int'l. Rev. of the Red Cross 119, 124-25 (2003) (discussing situations involving humanitarian intervention were justified and accepted by the international community).

<sup>19</sup> See Tang Jiaxuan, Foreign Minister, People's Republic of China, Address to the U.N. General Assembly, U.N. GAOR, 54th Sess., 8th plen. Mtg. at 16, U.N. Doc. A/54/PV.8 (Sept. 22, 1999) (criticizing humanitarian intervention as interfering with national sovereignty); see *Summit in Turkey; In Words of Yeltsin and Clinton: Examining Terrorism and Human Rights*, N.Y. TIMES, Nov. 19, 1999, at A13 (quoting comments made by Russian President Boris Yeltsin that even humanitarian interference is unjustified when dealing with the internal affairs of a state); see also Organization for Security and Co-Operation in Europe, *Final Report: 1999 OSCE Review Conference*, at 35, OSCE Doc. RC. GAL/175/99 (Nov. 10, 1999) (stating that one state stressed that humanitarian intervention should not be used improperly as a mechanism to interfere in the internal affairs of other states).

<sup>20</sup> LOUIS HENKIN, *THE AGE OF RIGHTS* 15 (1990).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

tional law, including war crimes, crimes against humanity and crimes against the peace.<sup>21</sup> At one time, heads of state enjoyed absolute immunity from the jurisdiction of other states as an aspect of sovereign immunity. However, the Nuremberg trials established that even heads of states can be held criminally responsible for violations of international law; the third principle states:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.<sup>22</sup>

These principles were affirmed by the General Assembly in 1946 and adopted by the International Law Commission in 1950.<sup>23</sup>

One of the most important developments in international law in the last two decades has been the creation of the International Criminal Court and other tribunals to deal with mass atrocities. As a result, a rich jurisprudence and case law has developed. The first post-Nuremberg tribunal was established in 1993 to deal with massive violations of human rights that had occurred and were on going in the former Yugoslavia. After several years of internal strife and ethnic cleansing, it was ascertained that 8,000 men, both young and old, were killed after being taken from a U.N. safe haven while U.N. Peacekeepers watched.<sup>24</sup> In the wake of these atrocities, in 1993, the Security Council adopted Resolutions 808 and 827 creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY").<sup>25</sup> The ICTY can exercise its jurisdiction over crimes of genocide, crimes against humanity, violations of the laws and customs of war, and grave breaches of the Geneva Convention.<sup>26</sup>

In 1994, 800,000 Rwandan men, women and children, mostly Tutsis, were massacred during a few short months due to civil strife.<sup>27</sup> Once again the international community was unable or unwilling to prevent this genocide from occurring. Again, through Security

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<sup>21</sup> Int'l Military Tribunal v. Hermann Goering, Nuremberg Trials, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf)

<sup>22</sup> *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/CN.4/SER. A/ 1950.

<sup>23</sup> The U.N. General Assembly affirmed the Nuremberg principles in 1946 with Resolution 95(I) and directed the codification of the principles into International Law. See G.A. Res. 95 (I), at 188, U.N. Doc. A/RES/95(I) (Dec. 11, 1946). The U.N. General Assembly established the International Law Commission in 1947 through Resolution 174 (II) and tasked the Commission with the codification of the Nuremberg Principles into International Law in Resolution 177(II). See G.A. Res. 174 (II), at 105, U.N. Doc. A/RES/174(II) (Nov. 21, 1947); see also, G.A. Res. 177(II), at 111, U.N. Doc. A/RES/177(II) (Nov. 21, 1947). The International Law Commission codified the Nuremberg Principles in 1950 but the General Assembly has never formally adopted the codified version of the Nuremberg Principles, instead it invited member states to furnish their observations to the Commission so that the observations could be taken into account in the codification. See G.A. Res. 488 (V), U.N. Doc. A/Res/488(V), at 77 (Dec. 12, 1950).

<sup>24</sup> Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824, 826 (1999) (discussing the horrendous state of human rights in Kosovo at the time of NATO intervention); Abi Daruvalla, *Anatomy of a Massacre*, TIME, April 21, 2002 available at <http://www.time.com/time/magazine/article/0,9171,901020429-232505,00.html>.

<sup>25</sup> See Sec. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993).

<sup>26</sup> See *id.*

<sup>27</sup> See ALISON LIEBHAFSKY DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (Human Rights Watch 1999), available at <http://www.books-by-isbn.com/1-56432/>.

RESPONSIBILITY TO PROTECT

Council Resolution, the International Criminal Tribunal for Rwanda (“ICTR”) was established to deal with those most responsible for these crimes.<sup>28</sup> Similar tribunals have since been established to deal with mass atrocities that have occurred in Cambodia and Sierra Leone.<sup>29</sup> While the jurisdictional statute of the ICTY requires that the crimes be committed during an armed conflict, the ICTR statute requires simply that the crimes be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, or religious grounds.<sup>30</sup>

In 1998, the last great international institution of the 20th century, the International Criminal Court (“ICC”), was created through a treaty signed in Rome by over 120 states.<sup>31</sup> The International Criminal Court is now operative and has jurisdiction over war crimes, genocide, crimes against humanity and will, in the future, have jurisdiction over crimes of aggression.<sup>32</sup> To date, the Court has opened investigations into four situations: Northern Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur.<sup>33</sup> The Court has indicted fourteen people including President Al-Bashir of Sudan.<sup>34</sup> The ICC’s first trial, of Congolese militia leader Thomas Lubanga, began on 26 January 2009.<sup>35</sup>

Through the case law developed in these *ad hoc* international criminal tribunals, we now have a consistent jurisprudence of international criminal justice that has evolved from Nuremberg. Standards for prosecuting mass atrocities, including genocide, mass murders and mass rapes, and standards for liability for command responsibility and liability for aiding and abetting in mass atrocities, have been established. Heads of state, priests and nuns and military leaders have all been called to account.<sup>36</sup>

In conjunction with these mechanisms, and sometimes substituting for criminal prosecutions, truth commissions, reconciliation commissions and traditional justice have been utilized to deal with the aftermath of mass atrocities. Some, of course, are more successful than others.<sup>37</sup> Truth Commissions are generally constituted to investigate situations of human rights violations and other atrocities committed by governments against their own people.

<sup>28</sup> S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>29</sup> For Cambodia *see* G.A. Res. 57/228B, U.N. Doc. A/RES/57/228B (May 13, 2008); For Sierra Leone *see* S.C. Res. 1315, U.N. Doc. S/RES/1315 (August 14, 2000).

<sup>30</sup> *Supra* note 28, at art. III.

<sup>31</sup> Rome Statute of the International Criminal Court, Art. 1, U.N. Doc. A/CONF/183/9 (July 17, 1998).

<sup>32</sup> *Id.* at art. 123, ¶ 1 (referencing art.5, ¶ 1(d)).

<sup>33</sup> *See* the International Criminal Court’s webpage “Situations and Cases” for a brief description. <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>

<sup>34</sup> *See All Cases*, THE INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/>.

<sup>35</sup> *See* Press Release, International Criminal Court, Stay of Proceedings in the Lubanga Case is Lifted – Trial Provisionally Scheduled for 26 January 2009 (Nov. 18, 2008) (on file with author); Press Release, International Criminal Court, Information for the Media: Lubanga Trial to Resume on 5 May 2009 (Apr. 8, 2009) (on file with author); Press Release, International Criminal Court, The Lubanga Trial Will Resume on 7 January 2010 (Dec. 9, 2009) (on file with author).

<sup>36</sup> *See* Christopher Keith Hall, *The First Five Sessions of the U.N. Preparatory Commission for the International Criminal Court*, 94 AM. J. INT’L L. 773, 779 (2000); Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 237-38 (1997); David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT’L L. 111, 115-16 (2007-2008); Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 766 (2003); *Religion & Genocide*, COMMONWEAL, July 13, 2001.

<sup>37</sup> Robert I. Rotberg, *Truth Commissions and the Provisions of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE 3, 7 (Robert I. Rotberg & Dennis Thompson eds., 2000).

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

They are usually formed when an incumbent, usually authoritarian, government is ousted, and a new democratic form of government comes into power. The purpose of the Commissions is to answer any remaining questions about the possible violations committed by the ousted regime.<sup>38</sup> Truth Commissions may investigate and submit reports on their findings, but lack any power to impose punishment for violations that are found to have occurred.<sup>39</sup> Most Reconciliation Commissions are part of Truth Commissions, but seek to go further than simply identifying past wrongs and investigating how and why they occur. A commission that includes both truth and reconciliation seeks to bring to light past occurrences and bridge the gap between people in order to further the healing process and unity. Among the most successful was the Truth and Reconciliation Commission in South Africa, which stressed disclosure and forgiveness.<sup>40</sup>

Traditional justice utilizes existing customs and laws within a country to bring perpetrators of human rights violations to justice. The trial chief or elder often presides over the matter and renders judgment. For example, the traditional courts in Rwanda are unable to handle the sheer volume of cases dealing with genocide and thus transfer defendants charged with lesser offenses to customary courts, commonly referred to as Gacaca Courts.<sup>41</sup>

All of these developments and mechanisms should be considered in connection with the responsibility to prevent, react, and rebuild. Garth Evans, who co-chaired the International Commission on International and State Sovereignty ("I.C.I.S.S."), which first articulated the norm of Responsibility to Protect, refers to "tools in the toolbox" that should be used to meet the threefold responsibility to prevent, react, and rebuild.<sup>42</sup> International justice mechanisms and strengthening the rule of law should be an important part of that toolbox.

Prevention is the most important aspect of the R2P. It can take many forms and involve individual state action as well as action by the international community. Clearly, when human rights are protected and the rule of law is firmly in place, mass atrocities are less likely to occur. Therefore, efforts must be made and assistance provided to strengthen the rule of law in those areas most vulnerable. These efforts, of course, must start from within the society, but technical assistance towards achieving good governance and strengthening the rule of law can be a powerful preventative tool when offered by individual states, international organizations and NGO's.

In addition, the threat of criminal prosecution for leaders who might be responsible for committing mass atrocities is a preventative mechanism that should be utilized. With the creation of the ICC and the experience of ad-hoc tribunals that deal with mass atrocities, for the first time, the threat of international criminal prosecution as a deterrent is now possible.<sup>43</sup>

Furthermore, the increasing acceptance and utilization of universal jurisdiction for certain crimes such as genocide and crimes against humanity could be a deterrent. Universal

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<sup>38</sup> *Id.* at 3.

<sup>39</sup> Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 *DUKE J. COMP. & INT'L L.* 375, (1997).

<sup>40</sup> Desmond Tutu, *Foreword to Truth and Reconciliation Commission of South Africa Report*, available at <http://www.info.gov.za/otherdocs/2003/trc/>, (last visited Nov. 11, 2010).

<sup>41</sup> See *Introduction on Gacaca*, NATIONAL SERVICE OF GACACA JURISDICTIONS, available at <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm> (July 30, 2010); Sarel Kandell Kromer, *The Rwandan Reconciliation*, *WASH. POST*, Oct. 26, 2005, at B2; See Christopher Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 *NO. 2 HUM. RTS. BRIEF* 16 (2007) (discussing the problems that the Gacaca Courts have faced and continue to face).

<sup>42</sup> UN World Summit, *supra* note 3 at ¶¶ 3.4, 3.25.

<sup>43</sup> Tribunal, *supra* note 21; Principles, *supra* note 22; Henkin, *supra* note 24.

RESPONSIBILITY TO PROTECT

jurisdiction allows for prosecutions in national courts, if the state chooses to exercise such jurisdiction for the crimes, wherever they may occur.<sup>44</sup> An example of universal jurisdiction is the conviction of participants in the Rwanda Genocide in Belgian state courts.<sup>45</sup> Another example is the litigation in which Spain sought extradition of General Pinochet, the former President of Chile in the United Kingdom for torture committed in Chile, based upon principle of universal jurisdiction.<sup>46</sup>

While these prosecutions are fairly recent developments with relatively few convictions to date, a firm body of law has now developed. The possibility of international criminal justice, and the powerful deterrents it provides, should be considered in connection with the responsibility to prevent.<sup>47</sup>

While the mass atrocity or crisis is ongoing, R2P posits a responsibility to react, and once again, criminal prosecution can be utilized to deal with the major perpetrators. However, exercising this option can be difficult because of both substantive and procedural hurdles. Moreover, it is at this juncture that the peace versus the justice dilemma is often raised. If attainment of justice stands in the way of a negotiated peace, should prosecution be pursued? Are there some crimes, which are so grave that under no circumstances can immunity be granted?<sup>48</sup>

There are times when both peace and justice can be achieved. However, the peace process could be impacted by the demand of an alleged perpetrator is hampered by the unwillingness of an alleged perpetrator to avoid the criminal justice process by requiring amnesty for past crimes instead.<sup>49</sup> For example, in Uganda, the International Criminal Court has been charged by some with slowing or blocking the peace process by pursuing prosecutions of the Lord's Resistance Army. The Court has insisted on prosecutions despite the fact that many in Uganda and surrounding areas have attempted to reach a separate peace without further prosecutions. Some wish to see justice done, but with less impunity so that peace can be achieved.<sup>50</sup>

Likewise, this dilemma often presents itself in connection with the responsibility to rebuild in the wake of mass atrocities. Protection of vulnerable populations by the international community must be viewed together with justice concerns and rebuilding a devastated society. Both the international protection of the individual's human rights and prosecutions of sovereigns for international crimes are derogations from sovereignty, but have been accepted by the International community. However, just as the decision concerning the use of military

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<sup>44</sup> Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, available at <http://www.foreignaffairs.com/articles/57245/kenneth-roth/the-case-for-universal-jurisdiction>.

<sup>45</sup> See *Belgian Jury Convicts 4 in '94 Rwanda Massacre*, N.Y. TIMES, June 8, 2001, at A3; See *Belgium's Rwandan Genocide Trial*, REUTERS, June 8, 2001; See *Religion & Genocide*, COMMONWEALTH, July 13, 2001.

<sup>46</sup> See Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 312 (2001); See *Pinochet must go to Spain says Amnesty*, BBC NEWS, Jan. 21, 1999, available at <http://news.bbc.co.uk/2/hi/260124.stm>; See *Way Cleared for Pinochet Extradition*, BBC NEWS, Oct. 8, 1999, available at [http://news.bbc.co.uk/2/hi/uk\\_news/468589.stm](http://news.bbc.co.uk/2/hi/uk_news/468589.stm).

<sup>47</sup> See Rome Statute, *supra* note 31.

<sup>48</sup> See UN World Summit, *supra* note 3, ¶ 4.13.

<sup>49</sup> GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 117 (2008).

<sup>50</sup> John Pendergrast & Lisa Rogoff, *R2P, the ICC, and Stopping Atrocities in the Real World*, 13 Enough Strategy Paper at 3, Enough Project, available at <http://www.enoughproject.org/files/reports/responsibility2p.pdf>.



THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

force to prevent mass atrocities requires the balancing of legal and political factors, the decision to prosecute must be carefully weighed against prospects for peace and the need for post-conflict reconciliation. In addition to criminal accountability, other options are available and should be considered by the local population. These include traditional justice systems as well as truth and reconciliation mechanisms, which should be carefully examined in connection with the responsibility to rebuild.

The R2P concept should be celebrated and recognized for what it is: a work in progress. The goal is to develop an international legal norm or policy, which achieves international protection, international accountability, and the prevention and deterrence of future occurrences of mass atrocities and serious crimes. We must identify and tailor measures to prevent and respond to incidents of mass atrocity, as well as to rebuilding a devastated population. In implementing the international responsibility under R2P the international justice implications should be considered at every step of the way.