

R2P: Does The UN Security Council Have A Legal Obligation To React?

By Svenja Berrang¹

1) Introduction

Peters (2009) wrote regarding the obligations of the UN Security Council (SC) under the concept of R2P:

'A state which grossly and manifestly fails to discharge these duties has its sovereignty suspended. Starting off from human needs leads, in a system of multilevel governance and under the principal of solidarity, to a fall-back responsibility of the international community, acting through the Security Council, for safeguarding humanity. In that perspective, the Council has under very strict conditions the duty to authorize proportionate humanitarian action to prevent or combat genocide or massive and widespread crimes against humanity. The exercise of the veto by a permanent member in such a situation should be considered illegal or abusive.'²

This article will examine if Peters is right. Does the SC or its member states acting through it have any legal obligation arising from R2P itself or from international law in general to authorise military interventions in order to end ongoing mass atrocities or is it a mere moral obligation?³

In order to answer this question, we will first set out the concept and elements of R2P, before we examine in a second step if R2P places a legal obligation on the SC or its member states to react to mass atrocities. Thirdly, we consider if such an obligation arises from any rule in international law.

2) Development, Concept and Elements of R2P

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) – a panel of international experts founded by the Canadian Government – released its final report: the birth of R2P.⁴ In its report, ICISS re-conceptualized the concept of state sovereignty by putting the primary responsibility to protect its people on the state itself.⁵ Only if the state is 'unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect'.⁶

ICISS has elaborated three elements of R2P: the responsibility to prevent, the

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²A. Peters, *Humanity as the A and Ω of Sovereignty*, EJIL 20 (2009), 513.

³See: *Ibid*, 538.

⁴S. Zifcak, *The Responsibility to Protect* in M. D. Evans (ed), *International Law*, 510-511.

⁵N. F. Dastoor, *The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect*, 22 *Harvard Human Rights Journal* (2009), 25, 27.

⁶ICISS, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, XI, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> accessed 10/01/2014.

responsibility to react, and the responsibility to rebuild.⁷ The responsibility to react includes apart from non-forcible coercive measures the possibility of military interventions.⁸ However, ICISS has imposed six cumulative criteria on military interventions: just cause, right intention, last resort, proportional means, reasonable prospects, and right authority.⁹ As right authority ICISS identified primarily the SC.¹⁰ Since ICISS was aware of the problems regarding the SC's accountability in the event of humanitarian catastrophes, it recommended a code of conduct for the five permanent members of the SC (P5): they should not use their veto power to prevent an otherwise majority resolution if their own state interests are not at stake.¹¹

Three years after the release of the report, the UN Secretary General and his High Level Panel on Threats, Challenges and Change recommended the adoption of R2P to the World Leaders' Summit in 2005.¹² Due to tough negotiations, the 2005 World Summit Outcome endorsed only a compromise, enshrined in Para. 138 and 139 of the Outcome document.¹³ The crimes which trigger R2P were limited to genocide, war crimes, ethnic cleansing, and crimes against humanity.¹⁴ The criteria established by ICISS to legitimize military interventions were abolished.¹⁵ The SC should rather decide on a case-by-case basis if a military intervention is deemed necessary.¹⁶ All participating states agreed that a SC authorisation is mandatory for any collective action.¹⁷ The code of conduct proposed by ICISS was rejected already very early during the negotiations.¹⁸

The World Summit Outcome was reaffirmed by SC Resolution 1674 in 2006 and in 2009 during a UN General Assembly debate.¹⁹ A prominent matter on which states could agree during the debate was again the need of SC authorisation for any use of force under R2P.²⁰

3) Responsibility to React: Does the SC Have a Legal Obligation to React?

All concepts of R2P have one thing in common: the responsibility to react lies solely with the SC.²¹ However, the centrality of the SC to the enforcement of R2P is also rather problematic.²² In the last 12 years of R2P's existence, the SC has shown the same inconsistency and selectivity in decision-making as before.²³ This led eventually to an uneven and rare enforcement of the responsibility to react to end mass atrocities where

⁷*Ibid.*

⁸*Ibid.*, 29 para 4.1.

⁹*Ibid.*, 32 para 4.16.

¹⁰*Ibid.*, 48 para 6.7, 49 para 6.14.

¹¹ICISS, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 51 para 6.21, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> accessed 10/01/2014.

¹²*The Responsibility to Protect*, 513.

¹³*Ibid.*, 514; see also: A. J. Bellamy, *Responsibility to Protect: the global effort to end mass atrocities*, 66-67, 96.

¹⁴ *The Responsibility to Protect* in M. D. Evans (ed), *International Law*, 515; 2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 138.

¹⁵A. J. Bellamy, *Responsibility to Protect: the global effort to end mass atrocities*, 96.

¹⁶2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 139.

¹⁷ *The Responsibility to Protect*, 515.

¹⁸A. Hehir, *The Responsibility to Protect: Sound and Fury Signifying Nothing?*, 24 *International Relations* (2010), 218, 220.

¹⁹*The Responsibility to Protect*, 516-518.

²⁰*Ibid.*, 519.

²¹*Ibid.*; G. Evans, M. Sahnoun, *The Responsibility to Protect*, 81 *Foreign Affairs* (2002), 99, 107.

²²N. F. Dastoor, *The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect*, 22 *Harvard Human Rights Journal* (2009), 25, 31.

²³See: *Sound and Fury Signifying Nothing?*, 24, *The Responsibility to Refine*, 25 and 32.

necessary.²⁴ A fact that consequently will lead to the weakening of the whole concept of R2P.

ICISS being aware of this problem, proposed in its report a secondary responsibility of the UN General Assembly to authorise military interventions according to Art. 10 of the Charter of the United Nations (UNC) as well as a code of conduct for the P5.²⁵ Furthermore, it was proposed by legal scholars to abolish the P5's veto rights.²⁶ Besides, Dastoor (2009) suggests the formation of a Sub-Committee to the SC dealing exclusively with R2P matters.²⁷ All these suggestions require a reform of the SC, and although long overdue, it is very likely that every reform touching the P5's veto power has to fail.²⁸

Therefore, this article will rather try to impose a legal obligation on the SC directly, with the states acting through it, to authorise military interventions if and when a situation addressed by R2P arises and all criteria of R2P are fulfilled. Special consideration has to be given to the consequences for the veto right of the P5 here also; authorisation stands and falls with the validity of a veto.²⁹

A. Art. 39 UNC

Since mass atrocities are likely to take place only within the boundaries of one state without any impact on neighbouring states, we have to review first the SC's legitimation to authorise military interventions to end such mass atrocities.

According to Art. 39 UNC, the SC can take measures if and when it has determined a threat to or breach of peace. Traditionally, this encompassed only inter-state conflicts.³⁰ After the Cold War, the SC adopted a broad view of international peace and security.³¹ The SC confirmed the existence of such threats or breaches even where a conflict only took place within a state.³²

Nowadays, an inter-state conflict is no longer necessary to authorise actions under Chapter VII of the UN-Charter, according to the SC.³³ Since no judicial review of SC resolutions is possible, and the SC is free to determine itself how it defines breaches of or threats to peace.³⁴ Consequently, it recognized in SC Res. 1674, reaffirming R2P, that mass atrocities can establish a threat or breach in terms of Art. 39 UNC.³⁵

²⁴ See for ex.: Darfur, and most prominently Syria; G. Evans, M. Sahnoun, *The Responsibility to Protect*, 81 *Foreign Affairs* (2002), 99, 107.

²⁵ICISS, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 48 para 6.7, 51, para 6.21, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited on 10.01.2014).

²⁶N. F. Dastoor, 'The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect', 22 *Harvard Human Rights Journal* (2009), 25, 31.

²⁷*Ibid.*, 25-62.

²⁸See: *Ibid.*, 31; A. Hehir, 'The Responsibility to Protect: "Sound and Fury Signifying Nothing"?'', 24 *International Relations* (2010), 218, 225.

²⁹See: A. Peters, 'Humanity as the A and Ω of Sovereignty', *EJIL* 20 (2009), 513, 539.

³⁰ICISS, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 50 para 6.16, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited on 10.01.2014).

³¹*Ibid.*

³²S. Zifcak, 'The Responsibility to Protect' in M. D. Evans (ed), *International Law*, 524; see: SC Res. 688 (1991) for Iraq and SC Res. 794 (1992) for Somalia.

³³ICISS, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 50 para 6.16, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited on 10.01.2014).

³⁴S. Zifcak, 'The Responsibility to Protect' in M. D. Evans (ed), *International Law*, 524.

³⁵M. L. Labonte, 'Whose responsibility to protect? The implications of double manifest failure for civilian protection', *The International Journal of Human Rights* 16:7 (2012), 982, 987.

B. Legal Obligation Evolving from R2P Itself

Peters (2009) deduces the SC's legal responsibility to react from R2P itself as an emerging legal norm.³⁶ The main weakness of her thesis is its failure to address how R2P became a legal norm; she seems just to assume it.³⁷

R2P is not included in a treaty, to impose legal obligations it thus has to be a part of customary international law.³⁸ Customary international law requires consistent state practice and *opinio iuris*.³⁹ The concept of R2P lacks both.⁴⁰

There is almost no state practice.⁴¹ Though the intervention in Libya and the measures taken in Darfur are examples for the application of R2P, there are even more examples where R2P was not invoked albeit its criteria were fulfilled.⁴² The most prominent example is Syria: For more than two years the SC cannot decide to take effective measures.⁴³

Opinio iuris, i.e., the view that R2P is a binding legal norm, is even harder to establish.⁴⁴ States were able to express their opinion in the 2005 World Leaders' Summit and in the 2009 UN General Assembly debate. And although the concept was accepted widely in the General Assembly debate, there could not be reached a consensus on its legal character.⁴⁵

Furthermore, the carefully chosen wide wording of the 2005 World Summit Outcome argues against a widespread *opinio iuris* in favour of R2P.⁴⁶ Especially when it comes to the responsibilities of the international community in Para. 139 of the Outcome, states fell back on a discursive formulation normally merely used in political declarations.⁴⁷ They only declared to be 'prepared to take collective action, [...], through the Security Council, [...], on a case-by-case basis'.⁴⁸ A formulation which is clearly contrary to any legal obligation to react as soon as the criteria of R2P are fulfilled.⁴⁹ Especially the fact that the SC has the possibility to make decisions on a case-by-case basis clearly argues against a binding obligation.⁵⁰ This implication was confirmed by statements of the P5 to the resolution on Libya.⁵¹ Moreover, even the most optimistic called R2P only an emerging legal norm.⁵² In consequence, R2P is not a legally binding norm. The SC is

³⁶*Ibid*, 539-540.

³⁷*Ibid*.

³⁸ *The Responsibility to Protect*, 522.

³⁹*Ibid*.

⁴⁰*Ibid*, 522-523.

⁴¹*Ibid*, 522.

⁴² *The Responsibility to Refine*, 25 and 32.

⁴³C. Stahn, *Between Law-Breaking and Law-Making: Syria, Humanitarian Intervention and 'What Law Ought to Be'* (2013), 1, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343582 accessed 07/01/.2014.

⁴⁴ *The Responsibility to Protect*, 522-523.

⁴⁵*Ibid*, 523.

⁴⁶C. Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *The American Journal of International Law* (2007), 99, 108-109.

⁴⁷*Ibid*, 108.

⁴⁸2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 139.

⁴⁹C. Stahn, 101 and 109.

⁵⁰*Ibid*.

⁵¹A. Hehir, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect', *International Security* 38:1 (2013), 137, 150.

⁵²See: C. Stahn, 99, 100 and 106.

not obliged to take any action to end mass atrocities under R2P.

C. Art. 41 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts

Stahn (2007) indicates another approach to impose a legal obligation on states acting through the SC: Art. 41 (1) ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles).⁵³ Art. 40 (1) ILC Draft Articles enshrines the legal responsibility of the international community for serious breaches of *ius cogens*. Serious breaches are thereby defined as breaches involving 'a gross or systematic failure by the responsible State to fulfil the obligation'.⁵⁴ As a consequence of such breaches of *ius cogens* Art. 41 (1) ILC Draft Articles imposes a legal obligation on the international community, and not only the states affected, to cooperate to end such a breach through lawful means.⁵⁵ This idea of responsibility and duty of cooperation was taken up by R2P.⁵⁶

Applying Art. 40, 41 ILC Draft Articles to the issue being raised here could lead to a legal obligation of the member states of the SC to vote either in favour of an authorisation of a military intervention or to at least not prevent such a resolution, consequently entailing the legal obligation of the P5 to refrain from the use of their veto.

The crimes that are supposed to trigger the responsibility to react of the SC – the prevention of genocide, war crimes, ethnic cleansing, and crimes against humanity⁵⁷ – are part of *ius cogens*.⁵⁸ A serious breach of one of these norms would cause the application of Art. 41 (1) ILC Draft Articles.

Though Art. 41 (1) ILC Draft Articles leaves it to the states which form of cooperation they choose, as a last resort only a military intervention could be left as an effective lawful means.⁵⁹ R2P gives the sole power to authorise military interventions to the SC.⁶⁰ to ensure the required cooperation to end the breach of *ius cogens*, the member states of the SC would thus be obliged to abstain from preventing a corresponding resolution. Meaning eventually that the P5 would have a legal obligation not to use their veto, also.

But what would happen if a State does not comply with the suggested obligation and, for example, uses its veto? What would be the consequence? A blocking of the SC can only be dissolved if the veto would be void. Only this could lead to an effective and consequent enforcement of the responsibility to react. The ILC draft articles themselves

⁵³*Ibid*, 115-116.

⁵⁴Art. 40 (2) ILC Draft Articles.

⁵⁵Art. 41 (1) ILC Draft Articles; Art. 41 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Report of the International Law Commission on the Work of its fifty-third session (2001), UN Doc. A/56/10, para 3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited on 11.01.14).

⁵⁶C. Stahn, 99 and 116.

⁵⁷2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 138.

⁵⁸See: Art. 26 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Report of the International Law Commission on the Work of its fifty-third session (2001), UN Doc. A/56/10, para 5, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited on 11.01.14); D. Shelton, *International Law and 'Relative Normativity'* in M. D. Evans (ed), *International Law*, 155.

⁵⁹*Ibid*, para 2.

⁶⁰See: C. Stahn, 99 and 120.

do not entail any specific consequence if a state refuses to cooperate. Peters (2009) therefore suggests interpreting Art. 27 (3) UNC and its implication of unanimity between the P5 in the light of R2P.⁶¹ She thereby assumes again that R2P is a part of international law and even more an obligation *erga omnes*, which it is both not, as shown above.⁶² But moreover it is hardly understandable how she gets from the requirement of unanimity to 'the legal irrelevance of an abusive veto'.⁶³ Art. 27 (3) UNC only requires unanimity because of the veto right of the P5. It only stipulates that no decision can be made without the affirmative vote of the P5. Neither does it put any requirements on the vote of the P5 nor is there any room for such an interpretation.

Furthermore, the veto of a P5 is more than an internal procedural problem, it is the decision of a state not to take measures according to Art. 39 UNC, which is the right of every sovereign member state of the SC.⁶⁴ the consequences of ignoring such decisions could be fatal to the UN system. Therefore, the failure of a state to cooperate might only lead to the responsibility of the state itself under the ILC Draft Articles, not to the invalidity of its vote respectively its veto.⁶⁵ Unfortunately, a legal obligation under Art. 40, 41 ILC Draft Articles has to fail anyway because they are not legally binding. They are neither part of a treaty nor of customary international law, so at the moment they cannot impose any legal obligation on states.⁶⁶

D. The Prevention of Genocide as *ius cogens*?

The judgement of the European Court of Human Rights (ECtHR) in *Stitching Mothers of Srebrenica and Others v The Netherlands* opens another opportunity to impose a legal obligation on the member states of the SC to react when facing mass atrocities.

In *Stitching Mothers of Srebrenica and Others v The Netherlands*, the claimant sought to hold the Netherlands and the UN responsible for not preventing the genocide in Srebrenica.⁶⁷ The ECtHR assumes in its judgement the prevention of genocide to be *ius cogens*.⁶⁸ If the ECtHR would be right, this could in consequence lead to a legal obligation of the member states of the SC to vote in favour of any resolution preventing genocide.⁶⁹ Any attempt to prevent such a resolution, *i.e.*, a veto, would be void according to Art. 53 of the Vienna Convention on the Law of Treaties (VCLT).⁷⁰

E. Obligation to prevent genocide

⁶¹A. Peters, 'Humanity as the A and Ω of Sovereignty', EJIL 20 (2009), 513, 540.

⁶²*Ibid.*

⁶³*Ibid.*

⁶⁴*Ibid.*

⁶⁵A. Peters, 'Humanity as the A and Ω of Sovereignty', EJIL 20 (2009), 513, 540.

⁶⁶Art. 41 draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Report of the International Law Commission on the Work of its fifty-third session (2001), UN Doc. A/56/10, para 3, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited on 11.01.14)

⁶⁷M. J. Ventura, D. Akande, 'Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention', <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/> (last visited on: 10.01.2014).

⁶⁸*Ibid.*

⁶⁹A. Z. Borda in a response to M. J. Ventura, D. Akande, 'Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention', <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/> (last visited on: 10.01.2014).

⁷⁰T. Schweisfurth, *Völkerrecht [International Law, sb]*, 85 para 141: Art. 53 VCLT applies *mutatis mutandis* to unilateral acts; see also: D. Shelton, 'International Law and "Relative Normativity"' in M. D. Evans (ed), *International Law*, 156: *ius cogens* as norm from which no derogation is allowed.

Art. I of the Genocide Convention enshrine two distinct obligations: the obligation to prevent and the obligation to punish genocide.⁷¹ The obligation to prevent genocide arises 'at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'.⁷² It is an obligation of conduct and not of result⁷³ – contrary to the criteria for military interventions under the responsibility to react entailed in the ICISS report.⁷⁴ Though this obligation varies from state to state depending on its legal capacity to prevent respectively to influence the committal of genocide, the outcome of the measures to be taken is of no relevance for its obligation.⁷⁵

The obligation to prevent genocide entails a corresponding duty to react.⁷⁶ This duty continues to exist even when the SC is called upon.⁷⁷ Since states have the legal obligation to take any measure necessary within their powers and within the limits of international law to prevent genocide⁷⁸ (and this duty does not end when the SC deals with it⁷⁹), someone can convincingly argue that the member states of the SC have the legal obligation under Art. I of the Genocide Convention to issue any resolution that prevent genocide including the authorisation of a military intervention if and when necessary. It is clearly in the capacity of the member states of the SC 'to influence effectively the action of persons likely to commit, or already committing, genocide'⁸⁰ by their voting behaviour. It is likely that issuing such an authorisation is the best way in which they can influence the committal of genocide. For example in Rwanda where the member states of the SC could have saved hundreds of thousands of lives if they have acted on their duty and authorised a military intervention without delay.⁸¹ According to the ICJ ruling in *Bosnia and Herzegovina v Serbia and Montenegro*, they have the legal obligation to take such a measure.⁸²

However, as discussed the mere legal obligation is not enough to enforce the responsibility to react effectively. The blocking of the SC, although it might be illegal, can only be dissolved if any veto of a P5 would be void. The veto would be void if Art. 53 VCLT would be applicable *mutatis mutandis* on an illegal veto. This requires the prevention of genocide to be *ius cogens*. The application of Art. 53 VCLT is not precluded by Art. 103 UNC.⁸³ Art. 103 UNC does not apply to the relationship between SC resolutions and *ius cogens*.⁸⁴

Art. 53 VCLT defines *ius cogens* as:

'a norm accepted and recognized by the international community of States as a whole

⁷¹W. Schabas, *Genocide in International Law: The Crime of Crimes*, 528.

⁷²Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), ICJ Reports 2007, 43, 222 para 431.

⁷³*Ibid*, 221, para 430.

⁷⁴ICISS, *Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, 32 para 4.16, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited on 10.01.2014).

⁷⁵Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), ICJ Reports 2007, 43, 221 para 430.

⁷⁶*Ibid*, 233, para 461.

⁷⁷*Ibid*, 220, para 427.

⁷⁸*Ibid*, 221, para 430.

⁷⁹*Ibid*, 220, para 427.

⁸⁰*Ibid*, 221, para 430.

⁸¹See: W. Schabas, *Genocide in International Law: The Crime of Crimes*, 547-552.

⁸²Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), ICJ Reports 2007, 43, 221 para 430.

⁸³M. N. Shaw, *International Law*, 127.

⁸⁴*Ibid*.

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'.⁸⁵

This definition is now accepted as the general definition of *ius cogens*.⁸⁶ It entails three criteria: First, the norm in question must be binding for a vast majority of states; second, it has to be universally accepted as non-derogatory, whereby the vast majority of states should suffice; and third, derogation from the norm in question is actually not allowed.⁸⁷

The aim of *ius cogens* is to protect fundamental interests of the international community as a whole, since to respect the norm in question is supposed to be profound for humanity as such as it entails elementary considerations of humanity.⁸⁸ Hence, to establish a norm as *ius cogens* the norm is often said generally to protect common interests of humanity or to share a common concern of mankind.⁸⁹

The ECtHR in *Stitching Mothers of Srebrenica and Others v The Netherlands* only touches the question concerning the status of the prevention of genocide.⁹⁰ It seems to assume the *ius cogens* status of this obligation by referring to the *ius cogens* status of the prohibition of genocide.⁹¹ Due to the prohibition's strong influence on international law, evidenced by Art. 53, 64 VCLT, the *ius cogens* status of a norm cannot be assumed.⁹²

Since the ECtHR does not offer a proper answer to our question, we are thrown back to the general criteria of *ius cogens* enshrined in Art. 53 VCLT. While we could likely affirm the first criteria and although the prevention of genocide can be said to entail elementary considerations of humanity⁹³, the affirmation of the second and third criteria, as set out above, is highly unlikely. Though the *ius cogens* status of the prevention was argued in Kosovo intervention in 1999 as well as by Judge Lauterpacht in a Bosnia case before the ICJ, the majority of states refused this argumentation and held the Kosovo intervention to be illegal.⁹⁴ Until today the obligation to prevent genocide is not assumed to prevail over other norms of international law but rather to be subject to them.⁹⁵ Accordingly, the ICJ stated in *Bosnia and Herzegovina v Serbia and Montenegro* that 'it is clear that every State may only act within the limits permitted by international law'.⁹⁶ The view of the ICJ is confirmed by the concept of R2P itself. Although one of the crimes triggering R2P is genocide, the responsibility to react and with it the prevention of genocide is still bound by a SC authorisation.⁹⁷ The same

⁸⁵Art. 53 VCLT.

⁸⁶J. Wouters, S. Verhoeven, *The Prohibition of Genocide as a Norm of Ius Cogens and Its Implication for the Enforcement of the Law of Genocide*, 5 *International Criminal Law Review* (2005), 401, 402.

⁸⁷*Ibid.*, 402-403.

⁸⁸*Ibid.*, 403; *International Law and 'Relative Normativity'*, 150.

⁸⁹ *International Law and 'Relative Normativity'*, 148.

⁹⁰M. J. Ventura, D. Akande, *Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens – Implications for Humanitarian Intervention*, <http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/> accessed 10/01/2014.

⁹¹*Ibid.*

⁹²*Ibid.*

⁹³See: C. Kreß, *The Crime of Genocide under International Law*, 6 *International Criminal Law Review* (2006), 461, 463-466.

⁹⁴W. Schabas, *Genocide in International Law: The Crime of Crimes*, 530-531.

⁹⁵*Mothers of Srebrenica*.

⁹⁶Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), ICJ Reports 2007, 43, 221 para 430.

⁹⁷2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 138-139.

argumentation can be found in legal literature regarding humanitarian interventions and R2P, the prevention of genocide is no exception to the prohibition of use of force – a peremptory norm itself.⁹⁸ If, however, the prevention of genocide would be part of *ius cogens*, the discussion might not only have another outcome also the problem would lay elsewhere.

Since derogation from the prevention of genocide is possible as well as it is not accepted universally as non-derogatory, the obligation to prevent genocide cannot be assumed to be part of *ius cogens*.

4) Conclusion

Peters was not right. Albeit the member states of the SC have a legal obligation to authorise military interventions to prevent and to end genocide, an enforcement of this obligation is not possible. The use of a veto can neither be held illegal nor abusive, since the obligation to prevent genocide is not part of *ius cogens* and therefore Art. 53 VCLT is not applicable. This is even truer for war crimes, crimes against humanity, and ethnic cleansing, where it is not even clear if there is a legal obligation to prevent such crimes.⁹⁹

The concept of R2P is not able to change this outcome. R2P is no legal norm contrary to what Peters claims. Hence, any obligation under the responsibility to react has to remain a moral one for the SC as well as for its member states.

⁹⁸See: W. Schabas, *Genocide in International Law: The Crime of Crimes*, 533.

⁹⁹Due to the limits of this article, an analysis concerning this issue was not possible. An obligation to prevent war crimes could be affirmed due to Common Art. 1 to the Geneva Conventions, the obligation to prevent crimes against humanity is questionable. Furthermore if the *ius cogens* character of the prevention of genocide is questionable this will be even truer for the prevention of war crimes and crimes against humanity.

