A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

CARDozo LAW
Holocaust, Genocide and Human Rights Program
A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

Sheri P. Rosenberg

Benjamin N. Cardozo School of Law
Holocaust, Genocide and Human Rights Program
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FOREWORD

This is an important Paper that asks a series of questions that need to be addressed candidly and systematically if the international effort to transform the responsibility to protect from principle to practice is to be sustained and successful. As the Paper notes, the principle has been applied, with varied results, in a number of situations over the past five years. The tools employed have included both the pacific measures of Chapter VI of the UN Charter and, less often, the coercive ones of Chapter VII. No two situations are identical and neither should be the chosen remedies. As the chief architect of the UN’s strategy to implement the responsibility to protect over the past five years, I am as convinced as ever that the Secretary-General’s emphasis on the need for an early and flexible response is fully consistent with the intent of the heads of state and government at the 2005 World Summit when they pledged to uphold their responsibility to protect. It is also good policy. However, as this Paper underscores, questions about consistency and selectivity are bound to arise unless visible and energetic efforts are also made to develop and apply common standards for implementing the principle in practice. This Paper offers an essential early step in that process by posing and answering these questions in a candid, clear, and rigorous manner.

Having followed this Project with considerable interest from its early days, my sense is that its orientation has evolved—in my view quite productively—from an emphasis on applying legal standards of evidence to a much more nuanced understanding of the essentially political character of the responsibility to protect. The principle rests, first and foremost, on the understanding that protection begins with prevention. As the Paper points out, assessing the likelihood of possible future misconduct is a very different enquiry than assessing the evidence that a crime may have taken place in the past. Likewise, if policy were to focus primarily on responding to horrific crimes that have already been committed, then it would have already failed to offer the promise of more effective protection that is at the heart of the responsibility to protect. So the report speaks to both the legal and the political dimensions of the principle.

The principle of the responsibility to protect is firmly anchored in well-established legal standards and adds little new in that respect. Its added value is three-fold. One, it has attracted pledges from the world’s highest political authorities that they will implement existing law concerning the worst atrocity crimes and their incitement. Two, the wide public, parliamentary, academic, and political interest generated by the principle has increased the degree to which governments and non-state armed groups are likely to be held accountable for their actions in that regard. Three, the text of paragraphs 138, 139, and 140 of the 2005 Outcome Document provides an agreed upon framework for developing a reasonably coherent strategy for international, national, and civil society efforts to implement
the responsibility to protect. Through the annual series of reports by the Secretary-General and informal interactive dialogues of the General Assembly addressing aspects of this challenge, we have been able to expand the sense of ownership by the Member States, as well as their, and our, understanding of the complexities and opportunities for more effective implementation. The norms against atrocity crimes have long existed, but they have lacked these added political benefits that speak directly to the possibilities for holding States, international organizations, non-state armed groups, and individuals more politically accountable than in the past for their realization in practice as well as in law.

This report has not been prepared in a vacuum. The authors have sought the views of practitioners and other independent experts regularly along the way, from its conception to its publication. The result is a series of assessments and conclusions that are both timely and relevant to current policy-making challenges. My sense is that this interactive process has both informed and been informed by the work of the UN’s Joint Office on Genocide Prevention and the Responsibility to Protect. As a firm believer in the value of focused and purposeful exchange between those studying and those making policy, I am encouraged by the results on both sides of the ledger in this case. The authors should be commended for their effort in this regard.

Finally, as valuable and thoughtful as this Paper is, I would hope that one of its results will be to encourage others to continue this line of inquiry. The responsibility to protect, despite all the attention it has generated, remains a young and fragile enterprise. The more that scholars, analysts, and practitioners reflect on how to refine its application, the more it is likely to gain political support and popular legitimacy. This Paper is a promising step in that direction.

Dr. Edward C. Luck
Dean and Professor
Joan B. Kroc School of Peace Studies
The University of San Diego
Former Special Adviser to the United Nations Secretary-General on the Responsibility to Protect

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Nicolas Burniat
Legal Advisor, Belgian Mission to the UN

Senator Romeo Dallaire
Canadian Senator, Former Head of the UN Mission to Rwanda

Nicole Deller
Former Director, Programs for the Global Centre for the Responsibility to Protect; Former Senior Program Officer, Institute for Global Policy Responsibility to Protect-Engaging Civil Society Project

Hon. Gareth Evans AO QC
Chancellor of the Australian National University; Former President/CEO, International Crisis Group (2000-2009); Former Co-Chair, International Commission on Intervention and State Sovereignty (2000-01)

Dr. Edward Luck
Former UN Special Advisor on the Responsibility to Protect; Dean, University of San Diego, Joan B. Krok School of Peace Studies

Bill O’Neill
Former Special Advisor on Human Rights in the UN Mission to Kosovo; Program Director, Conflict Prevention and Peace Forum SSRC

Leila Sadat
Henry H. Oberschelp Professor of Law, Washington University School of Law; Director, Whitney R. Harris World Law Institute

William A. Schabas
Director, Irish Centre for Human Rights, National University of Ireland, Galway

Ekkehard Strauss
Human Rights Officer, UN Office of the High Commissioner for Human Rights

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EXECUTIVE SUMMARY

This Paper aims to advance the ability of States, regional organizations, international institutions and civil society to focus on the practical implementation of measures to prevent mass atrocities utilizing the R2P principle. The research achieves this aim by systematically developing a common standard against which relevant actors can assess incoming information to determine whether they have an obligation to act pursuant to their R2P commitments. It further develops coherent guiding principles for the application of the standard, and rigorously assesses the benefits of, and challenges to, the adoption of a common standard. The standard and its guiding principles take the salient features of, and build upon, well-established national and international practice in assessing existing risk levels as a basis for determining future developments with an acceptable level of certitude. The standard and criterion for application are further inspired and guided by international and national laws that share the normative concerns of R2P. The standard is as follows:

A situation should be considered in the context of R2P, if its examination establishes a real risk that exceptionally grave human rights violations, as described in genocide, war crimes, crimes against humanity and ethnic cleansing, are occurring or are likely to occur.

Based upon the detailed review of different areas of law, and consultations with stakeholders, the Project developed a set of principles, which should be respected in applying this Standard. The Standard may be used by governments, regional and international organizations, and civil society, all of whom are called upon to make assessments as to the applicability of R2P. This Paper does not suggest that the proposed Standard and guidelines are to be implemented as legally binding tests against which to gauge the appropriateness of action. Instead, the Standard aims at assisting relevant actors to determine, whether a situation could benefit from applying R2P. Like all standards guiding international relations, this Standard will be open to interpretation by a wide array of actors, but its flexibility will be bound by the common values shared by States and their populations: to prevent mass atrocities.
INTRODUCTION

Since the founding of the United Nations in 1945, States have committed themselves to protecting individuals from the scourge of war and the systematic discrimination that strips individuals of their dignity, and too often leads to atrocities. These commitments represent a longstanding consensus on the jointly held values of the peoples constituting the international community. Notwithstanding this consensus, since the end of World War II, and in particular during the 1990s, State and non-state actors have committed, and continue to commit, mass atrocities against populations across continents, cultures and societies. In response, the commitment to protect individuals from mass atrocities received a significant, and sorely needed, boost in the early 21st century. The last twenty years have witnessed a significant evolution in the nature and intensity of national, regional and international discussions over the legal, political, normative and institutional responses to the threat of genocide and mass atrocities.

At the core of this renewed attention to the prevention of, and reaction to, mass atrocities is the “Responsibility to Protect” (R2P). R2P reiterates the pledge by States to protect their populations from genocide, war crimes, crimes against humanity, and ethnic cleansing. It also represents a collective pledge that, as members of the international community, States will support each other and take appropriate lawful actions when a State fails to protect its own population.

As with any concept that addresses international peace and security, R2P has been, and continues to be, the subject of debate and discussion on its content, its legal status, its morality and its effectiveness. This Paper, which is the culmination of a multi-stage project undertaken by the Human Rights Program at the Benjamin N. Cardozo School of Law, aims to advance the ability of States, regional organizations, international institutions and civil society to focus on the practical implementation of measures to prevent mass atrocities through R2P. It focuses on measures to be taken at a point early enough that such prevention has a reasonable prospect of success. The Project seeks to achieve this aim by conceptualizing and operationalizing a narrow but critical subset of R2P through exploring the creation of standards to determine when States should act pursuant to their R2P obligations. Thus, less time is spent on whether States should act and instead time is spent examining how States should act to prevent or react to mass atrocity.

In line with the original concept of R2P and the definition adopted by all UN Member States in 2005, these R2P obligations are based on international law and range from structural prevention through capacity building and international assistance; to a range of peaceful measures carried out by regional organizations and the international community to more coercive measures; to long-term commitments to rebuild and assist populations with recovery and reconciliation. This Project seeks to identify and articulate a standard for implementation that, ideally, strikes at the mid-term prevention level. This mid-term prevention point is one in which a situation is developed enough that risk factors can be assessed with sufficient certainty to predict future developments and identifiable prevention tools are known, but not so far down the road that extreme coercive measures such as military intervention appear to be the only remaining “preventive” option. UN Member States have unambiguously stated that prevention is the single most important dimension of the R2P. The UN Secretary-General, Ban Ki-Moon, said in his 2009 Report on Implementing R2P “…if the international community acts early enough, the choice need not be a stark one between doing nothing or using force.” Nonetheless, debates over when a state must act pursuant to the obligations embodied within the R2P have, on multiple occasions, slowed the application of appropriate responses to prevent and protect, and permitted legal and political debates to lose focus on the real objective of protecting human lives. This Paper presents an approach that seeks to place clear boundaries on discussions over when the R2P applies in a given situation based on a range of sources that suggest the most appropriate form for the guidelines given the particular focus on mass atrocity prevention.

THE GOALS OF THE PROJECT ARE TO:

Promote the full continuum of R2P actions: While it is universally agreed that the best form of protection is prevention, the lack of common standards of assessment at early stages of potential mass atrocity situations makes it more difficult to apply R2P early in a crisis. This is one factor that leads to a continued focus and association of R2P with military intervention exclusively. Common
standards that span the full range of beneficial protection endeavors will help to ensure prevention is promoted forcefully where it is really needed.

**Target application of limited resources:** Given the constraints on time and resources that stakeholders can direct toward addressing mass atrocities, a common standard of assessment concerning which situations will benefit most from international assistance will ensure the most effective allocation of those limited resources.

**Enhance legitimacy:** A common standard of assessment, while inevitably open to interpretation by all parties, will, at the very least, begin to require parties to explain their reasoning from a common reference point. Actions that are taken will be seen as more legitimate if the standard is successfully applied; conversely, decisions not to take a certain course of action will also be seen as more legitimate.

**Reduce uncertainty:** A common standard, along with guiding principles, will increase the likelihood that all relevant stakeholders, from NGOs to national governments, focus on a timely discussion of appropriate action in any situation of stress, and reduce of the need to center the debate on whether the situation would benefit from the application of R2P.

The application of a common standard will contribute to greater consistency in outcomes of state action within the R2P framework. Like all standards guiding international relations it will be open to interpretation by a wide array of actors, with varying national, international, and issue specific interests, but its flexibility will be bound by the common value shared by States and their populations: to prevent mass atrocities.

This Paper sets forth the Standard of application that was developed between the years 2009-2012, along with the methodology that has steered the research, development and construction of the Standard and its Guiding Principles, and it serves as a guide for the implementation of the R2P. The Project pursued academic rigor, while at the same time consulting with relevant policy makers at the State, regional and international level along with members of civil society in order to ground the articulated standard in real world policy and practice.

Part I provides a brief overview of the development of the R2P. Part II describes the aims and goals of the Project. Part III sets forth the Project’s methodology. Part IV examines the relevant standards from across the legal spectrum. Part V sets forth the standard articulated by the Project and the guiding principles for its application. The Paper is brought to a close in Part VI with concluding remarks and annexes.
PART I:
EVOLUTION OF THE R2P

HISTORY OF THE R2P
R2P is rooted in the evolving and interrelated concepts of sovereignty as responsibility, international human rights obligations, and international humanitarianism. Fundamentally, R2P is a response to failures in the late 20th century to prevent and halt genocide and other forms of mass atrocities. In particular, Kofi Annan, then Secretary-General of the UN, expressed his concern to the 54th session of the General Assembly, in 1999, over the UN’s paralysis in the face of “massive and systematic violations of human rights” in Kosovo noting in particular: 1) The failure of the international community to live up to its "greatest calling"; and 2) The challenge to the role and credibility of the UN to maintain international peace and security posed by individual States and organizations of States, such as NATO, claiming responsibility to act in the face of mass atrocities.

The R2P’s most authoritative articulation is expressed in the 2005 World Summit Outcome Document (WSOD), also adopted as a General Assembly Resolution. This articulation finds its inspiration in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS report) entitled ‘The Responsibility to Protect’, the report of the High-level Panel on Threats, Challenges and Change (High-level Panel Report), and the report of the Secretary-General on the implementation of the Millennium Declaration (“In Larger Freedom”).

NORMATIVE FOUNDATION
The 2001 ICISS report situated the idea of R2P within the context of state sovereignty, but focused on the duties of protection a state owes its populations. This “sovereignty as responsibility” framework underpinned the elaboration of the R2P in the ICISS report. Where debates in the 1990’s over humanitarian intervention focused on the right of external actors to intervene (inherently state focused), the ICISS report emphasized the responsibilities of sovereigns and the rights of the victims of mass atrocities.

The R2P recalls that sovereignty has never been synonymous with a license to slaughter innocent civilians.

Rather, sovereignty has always rested on obligations to protect basic human rights—at least to refrain from massacring one’s own population. The R2P’s innovation lies in attempting to clarify, how the international community should protect populations within the territory of a sovereign state when the state in question struggles or fails to live up to these responsibilities. The ICISS report articulates the R2P as encompassing State responsibilities to prevent, react and rebuild in order to protect populations against genocide and mass atrocities, and calls for collective international action should a State be unwilling or unable to live up to its responsibility to protect.

Given the collective, international responses required to implement the prerogatives included within the concept of the R2P, discussion over doctrine formed part of the UN High-level Panel Report and its wider focus on UN reform. Former UN Secretary-General Kofi Annan endorsed the R2P in his report “In Larger Freedom,” in which he argued that securing international peace and security was fundamentally linked to collective endeavors to protect human security.

The release of these reports in anticipation of the UN General Assembly’s 2005 World Summit promoted discussion of the R2P within General Assembly debates as well as during the World Summit, and, after controversial discussions, the heads of State and government included paragraphs 138 and 139 on R2P in the WSOD, subsequently adopted by the General Assembly in Resolution 60/1.

In these two paragraphs, Member States accept a responsibility to protect their own populations from genocide, war crimes, crimes against humanity and ethnic cleansing. This responsibility includes a duty to prevent such crimes. Member States pledged to assist one another in fulfilling this responsibility. In addition, Member States recognized a responsibility on the part of the international community, through the UN, to utilize Chapters VI and VIII of the UN Charter to protect populations. Finally, Member States stated that they were “prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” In the years following the Summit, R2P has been reaffirmed in declarations and resolutions while the main challenges of interpreting the norm have not yet been resolved.
In 2008, Secretary-General Ban Ki-Moon reiterated that the R2P was firmly anchored in well-established principles of international law, including the customary law obligation to prevent and punish genocide, war crimes and crimes against humanity. R2P was not intended to detract in any way from the much broader range of obligations under international human rights, humanitarian and criminal law but rather was designed to ensure that States would take action in accordance with these obligations whenever there was a threat of mass atrocities.

Actions under paragraphs 138 and 139 of the WSOD were to be undertaken only in conformity with the Charter of the United Nations. In that regard, the R2P did not alter, but rather, reinforced the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.

The discussion about the implementation of R2P coincides with a broader discussion of a reform of UN peacekeeping, building on recommendations dating back from the lessons-learned from the failures in Rwanda and Srebrenica, including the need for a more effective strategy for protection of civilians in armed conflict and its aftermaths. Additionally, non-governmental organizations, civil society and academic institutions from across all regions of the globe are contributing to the debate over how to ensure that R2P successfully contributes to actual—and not merely rhetorical or theoretical—improvements in the prevention of genocide and mass atrocity. Part of this debate has been about whether R2P constitutes a political, legal or aspirational norm.

Most scholars and practitioners agree that as it currently stands, R2P as a whole is not a legal norm. A GA resolution, followed by statements and SC references, does not generally indicate that a norm has developed into customary international law. Others have argued that despite the fact that, from the standpoint of international law, the doctrine and practice of R2P are not legislative—not equivalent to either a Charter amendment of Chapter VI-VIII or an international treaty—the R2P is part of an ongoing process of developing the meaning of “threat to the peace” as applied by the Council under Chapter VI and VII of the Charter. R2P may also encourage a record of general practice, which might affect the sense of obligation that builds customary international law. In addition, the use of “responsibility” points towards a normative character for the principle. Overall, one of the R2P’s greatest contributions to date is its harnessing of disparate areas of international law to provide a useful framework for each one’s relevance and application to mass atrocity.

INSTITUTIONALIZATION:
INTERNATIONAL, REGIONAL AND NATIONAL

R2P began its institutionalization within the UN system with the 2007 appointment of Dr. Edward Luck as Special Advisor to the Secretary-General with particular attention to the R2P, a position that was designed to complement the UN Office of the Special Advisor on the Prevention of Genocide created in 2004.

Secretary-General Ban began a process of promoting the “operationalization” of the R2P within the UN with the release of his report on implementing the R2P in January 2009. This report moved away from describing the R2P as made up of the responsibilities to prevent, protect and rebuild described in the ICISS Report, and, instead, outlined three pillars of the “edifice” of the R2P. Pillar one focuses on “the protection responsibilities of the State” toward its own population, Pillar two on “international assistance and capacity building” to assist States in preventing the crimes and their incitement, and Pillar three on “the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection” through the Charter, including Chapters VI, VII and VIII. The Secretary-General stressed that R2P implementation should not be sequenced across the pillars, but remains flexible; it should “not rely on following arbitrary, sequential or graduated policy ladders that prize procedure over substance and process over results.” The overall UN strategy is guided by the catchphrase of moving from “promise to practice.”

The Secretary-General continued his promotion of UN implementation of the R2P with the release, in July 2010, of his report on early warning and assessment in the context of the R2P. During the GA interactive dialogue on the report, wide support for pillars one and two of the R2P was maintained. In July 2011, the Secretary-General presented his report on the R2P and the role of regional and sub-regional organizations followed by an informal interactive dialogue of the GA. In 2012 the Secretary General released his report on timely and decisive action.

The implementation, elaboration and institutionalization of the R2P has not been limited to the Secretariat of the
A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

UN, but has influenced, albeit indirectly, and in turn been influenced by, the work of regional, sub-regional and national governmental organizations. In fact, the introduction of the principle of R2P at the UN was preceded by the adoption of the “principle of non-indifference” within Africa, most notably set out in Article 4 (h) of the Constitutive Act of the African Union drafted in 2000. Eight Regional Mechanisms are considered to be part of an early-warning system for conflict, including the Intergovernmental Authority for Development, the Economic Community of West African States (ECOWAS), the Southern African Development Community, the Arab Maghreb Union, the East African Community (EAC), the Common Market for Eastern and Southern Africa and the Community of Sahel and Saharan States. ECOWAS has deployed forces in different situations involving mass atrocities within States.

EU Member States supported the commitment to the R2P in the WSOD as a reflection of one of the main objectives of the European Security Strategy (ESS) adopted in 2003, i.e. to contribute to building a “rule-based international order upholding and developing International Law.” Since 2005, the R2P has been reflected in the European Consensus on Development, a policy statement of EU Member States, the European Council, the European Parliament and the Commission on the common EU vision of development, signed on 20 December 2005, and in the update of the ESS issued on 11 December 2008. The EU has deployed field missions to support national governments and regional organizations to protect civilians and reduce conflict. It has developed a Strategic Partnership with the AU and agreed to its first Action Plan to commit greater support for the AU’s Peace and Security Architecture in 2007, followed by a second Action Plan for 2011-2013. The EU Situation Room became operational on 15 July 2011 as part of the European External Action Service Crisis Response Department, which provides early-warning of violent conflict to EU institutions and cooperates closely with similar entities in other regional organizations. The European Parliament referred to the R2P in a number of country-related resolutions since 2005. However, the EU has not arrived, thus far, at a coherent strategy for the implementation of the R2P.

Individual States have also begun to incorporate the R2P into their national policy agendas. A global network of the R2P “focal points” has developed with the goal of strengthening both local and collective capacities to prevent and halt mass atrocities. Currently there are 20 national focal points.

INVOCATION OF R2P FROM 2005 TO THE PRESENT

Since R2P was first adopted by UN Member States in the WSOD in 2005, situations of widely different origin, intensity, and circumstance have been described as “R2P situations.” The Secretary-General and his two Special Advisers referred to R2P in public statements on different situations of large-scale violence within Member States. However, in approximately sixty interviews carried out in the context of the Project with UN officials, representatives from UN Member States, academics and NGOs, including during regional workshops, not one interlocutor identified a current standard against which to measure the information gathered regarding potential R2P situations. Only one NGO provided a semblance of a standard and two other NGOs referenced the use of early warning models. Several individuals spoke of responding with “gut” reactions or “feelings.”

As a result, entirely successful situations of early warning and prevention have not been labeled with the moniker of R2P – as is perhaps the nature of successful prevention. Certain situations where a return to atrocities was successfully prevented, such as in Kenya or Guinea, where there were fears of further eruptions of violence and potential atrocities, have also not received a high profile within the R2P framework. It should be noted though,
that while they may not have been widely labeled as R2P situations, many have suggested that R2P guided the swift actions taken to avert mass atrocities in each situation. At the other end of the spectrum, rebuilding exercises after atrocities, such as in Burundi, have generally not been seen and discussed as R2P situations, despite the application of long-term peace-building measures as well as a relapse into violence at critical junctures, such as elections. Nor has R2P seemed to guide current action in Burundi where a fragile peace appears precarious.

Moreover, since Mohamed Bouazizi immolated himself in Tunisia in protest on 17 December 2010, sparking a wave of uprisings in North Africa and the Middle East, stakeholders have struggled to understand and agree upon the role of R2P in violent revolutions. This has been a particularly difficult question to answer as R2P was developed primarily as a response to a very different type of situation, the type of ethnic cleansing, crimes against humanity and genocide the world witnessed in the 1990s in Rwanda, Srebrenica, and Kosovo.

Finally, and perhaps most alarmingly, debates over the application of R2P have been most prominent in situations where conflict and the loss of life have already commenced; the main issue has been the legality, morality, and prudence of coercive forms of intervention, particularly military action. In spite of the fact that the multiple legal obligations of States that form the basis of R2P, demonstrate that it is a grave error to associate R2P primarily with military intervention for humanitarian purposes. Below are brief illustrations of the wide application of the R2P principle by different actors under different circumstances.

**Sudan**

R2P has been asserted in four three situations involving the Government of Sudan (GoS) since 2005. First, the twenty-year civil war between the North and South of Sudan, a war characterized by the type of atrocities R2P addresses, came to a conclusion with the Comprehensive Peace Agreement (CPA) signed in January 2005 by the GoS and the Sudan People’s Liberation Movement/Army (SPLM/A). Second, the populations in the region of Darfur have experienced mass atrocities leading to over 300,000 deaths and the displacement of approximately 3 million people since 2003. Third, in the run-up to the January 2011 referendum in Southern Sudan on the question of independence and secession from Sudan, concerns were raised as to the likelihood of mass atrocities occurring, and thus the need to uphold the R2P in order to ensure no such crimes would occur. Current concerns exist in the southern portion of North Sudan. Fourth, since June 2011 the populations in the region of South Kordofan and Blue Nile have experienced mass atrocities at the hands of the GoS and rebel groups, including, but not limited to, extra-judicial killings, forced displacement, and sexual violence resulting in (at the time of this writing) the internal displacement of over 1 million civilians, while more than 222,000 have fled to South Sudan and Ethiopia. Simply, the conflict in South Kordofan and Blue Nile is part of the conflict between the SPLM North (SPLM/N) and the GoS, and is related to the boarder tensions between North and South Sudan.

**Burundi**

Conflict involving mass atrocities has plagued Burundi for the past several decades, peaking in the middle of the 1990s. Regional and international responses to the violence that was marked by ethnic division commenced immediately, and led to a series of peace agreements and ceasefires from 2000 onwards. The efforts up until at least 2003, however, were focused primarily on conflict management and prevention rather than preventing atrocity crimes. While some suggest that efforts utilized in Burundi that predate the WSOD exemplify the best of the R2P, others suggest that a true R2P lens has yet to be applied. While focus remains on Burundi, it is seen as a past success story rather than an unfolding situation where the prevention of atrocities remains elusive, even if a fragile peace may be in place. Some frame the post- conflict recovery within the doctrine of the R2P.

**Democratic Republic of Congo (DRC)**

Against a situation of severe insecurity and economic stress, the specific application of R2P occurred with the increase in the number of rapes, happening on a mass scale, in Eastern DRC, in particular the province of North Kivu, after 2006. These crimes have been perpetrated by both state and non-state actors. The government of the DRC appeared (and continues to appear) unable, despite the presence of a sizable UN peacekeeping force, to halt the commission of atrocity crimes over a sustained period of time. This situation raises questions of the effectiveness of the application of R2P in long standing conflicts in essentially failed States.
Somalia
Inter-clan violence and civil war has been a permanent feature of Somalia for decades. At various points, different factions—both domestic and international actors—have assumed nominal positions of governance in the country, but at no point during these years of conflict has a central authority exercised even minimally effective control over the Somali people or the territorial land-mass. Warfare has been marked by killings and other atrocity crimes accompanying the eradication of state control. The absence of government has made action within a R2P framework particularly necessary but uniquely challenging.

Kenya
Following presidential elections in December 2007, violence erupted over the disputed outcome of the presidential contest between incumbent Mwai Kibaki and opposition leader Raila Odinga. The conflict included inter-ethnic violence and riots on a mass scale, resulting in over 1000 deaths, 100s of rapes, and more than 500,000 displaced persons. The international and regional response to the violence, both in terms of reaction and rebuilding in the short term, and longer-term measures intended to prevent repetition of the conflict, have been presented by many actors within the R2P framework.

Sri Lanka
In mid-2008, the Sri Lankan government commenced a military operation directed at the Liberation Tigers of Tamil Eelam (LTTE). By mid-2009, the LTTE had been pushed into a small area of the state, with over 150,000 civilians trapped behind the front line. Allegations surfaced that these civilians were being prevented from accessing safe areas or humanitarian assistance, and further that they were used as human shields and specifically targeted by forces on all sides. Set against decades of hostility and violence between groups, R2P as a framework of analysis, was part of the call both for Sri Lanka governmental forces to adhere to their responsibilities and for appropriate action by the international community.

Burma/Myanmar
Cyclone Nargis hit and decimated large parts of Burma in May 2008. The perceived inadequate domestic response to addressing the suffering of the worst-hit areas was further compounded by the government’s imposition of selective barriers to assistance from humanitarian agencies. The effects of natural disasters are not included within the scope of R2P as enumerated by the international community at that time; however, it was argued by some prominent humanitarian and human rights advocates that the Government’s apparent refusal to deliver humanitarian aid or permit external actors to do so amounted to a crime against humanity. Regardless, some suggest that the invocation of R2P enabled regional actors to convince Burma to allow in aid. There is growing concern over the violence being perpetrated against the minority Rohingya community. While there has long been severe and systemic discrimination against the Rohingya, including restrictive family planning policies, and the discriminatory deprivation of citizenship, 2012 saw increased tension between Buddhists and the Rohingya muslims, with alleged government support to the Buddhists, resulting in the deaths of at least 250 Rohingya. At the time of this writing, at least 140,000 persons remain displaced.

Georgia
In the region of South Ossetia, tensions between Georgia and Russia—and the inhabitants of this region—led to the intervention of Russian military forces in 2008. Russia claimed R2P as a central justification for the intervention, arguing that there was a need to protect Russians citizens living within South Ossetia, who allegedly faced the threat of mass atrocities. In opposition to this claim, Georgia asserted that the only risk of mass atrocities arose from the actions of South Ossetian forces against ethnic Georgians in this region.

Guinea
In September 2009, armed forces opened fire on political opposition supporters in a stadium in Conakry. Over 150 people were killed, and more than 1,000 seriously injured, including in widespread acts of sexual violence. A UN Commission of Inquiry concluded that crimes against humanity did occur and that individuals were targeted on the basis of both political affiliation and ethnicity. The International Criminal Court opened a preliminary inquiry into the events. It is important that the R2P framework continue to be applied after the November 2010 presidential run-off elections, even following transition to a new government and away from those in control at the time of the 2009 conflict.

Cote d’Ivoire
Following the frequently postponed presidential elections in 2010, clashes commenced between those supporting the sitting President Laurent Gbagbo against the supporters
of his presidential challenger, Alassane Ouattara. As these two groups had been engaged in recurrent armed conflict for many years, the very real potential for the conflict to return to previous levels of nationwide violence prompted various actors to view the situation through the lens of R2P. R2P was thus used to frame the actions required of national, regional and international actors to address the potential for such violence, resulting in a Security Council Resolution mandating action.

Kyrgyzstan
In June 2010, the mass violence against ethnically Uzbek populations commenced in the cities of Osh and Jalalabad, and subsequently spread across the country. The violence led to several hundred deaths, extensive injuries, and the mass displacement of primarily ethnic Uzbeks seeking safe haven from the targeted violence. R2P was invoked at an early stage of the crisis and was frequently utilized in calls for action from national, regional and international actors.

Libya
Colonel Muammar Gaddafi’s brutal response to protests, in particular his 22 February 2011 broadcast that he would “cleanse Libya house by house” until the protesting “cockroaches” surrendered, sparked an international response culminating in the establishment of a NATO-led no-fly zone over Libya to protect civilians under threat. NATO action was mandated by UN Security Council Resolution 1973 (2011), which, in its pre-ambular language, reiterated the responsibility of Libyan authorities to uphold its responsibility to “protect the Libyan population” and also referred the situation to the ICC and imposed an arms embargo, an asset freeze and travel restrictions on persons close to the regime.

Syria
At the time of writing, it is estimated that nearly 100,000 people have died as a result of President Bashir al-Assad’s military crackdown on protests calling for an end to his regime. The international community has had a fractured response: some States and regional bodies, such as the United States and EU, have issued numerous sanctions and embargoes and called for Assad’s resignation. Others, however, have resisted such action, namely China and Russia, which vetoed UN Security Council resolutions condemning Syria. Human rights groups and several EU and UN officials have invoked the R2P in calling for an end to human rights and humanitarian law violations in Syria since the unrest began in March 2011. During 2013, Ban Ki-moon described the situation in Syria as a “proxy war with regional and international players arming one side or another.” And some have voiced concern that strongly coercive action may halt an episode of mass killing, but may also have the effect of simply shifting the atrocities away from one population onto another.

These brief case descriptions illustrate the range of political, economic, and humanitarian factors present in the potential application of the R2P framework. They further illuminate how R2P remains open to different interpretations, and in the absence of universally accepted criteria to determine when a crisis should be categorized as an R2P situation, differing interpretations are to be expected. The inconsistent application of R2P has frequently left situations unaddressed at precisely those times when effective preventive measures could have been best undertaken. Additionally, R2P debates have too frequently focused on the role of the Security Council to the exclusion of other key actors. Thus, in order to shift the focus from whether R2P applies to the fundamental question of what is the appropriate action (or inaction) to be taken, a common standard of application would prove beneficial. Such a standard would reduce the confusion over R2P that has marked the first decade of its existence and lead to greater consistency of State action, thereby producing a legitimizing effect on the norm’s development.

PART II:
THE EVIDENTIARY STANDARDS PROJECT
THE AIMS AND ENDPOINTS
The goals of the Project, in addition to its key aims set out in the Introduction above, are straightforward: First, to increase the likelihood that all relevant stakeholders focus on a discussion of appropriate action in any situation of stress, and reduce the depth and duration of debate that is centered on whether a situation fits within R2P. At this point in the evolution of R2P, its potential to unite approaches in situations of potential or existing mass atrocities has been hamstrung by uncertainty as to whether it should be applied at all. This Project intends to act as a corrective to this obstacle. Second, the standard and guiding principles are intended to add a level of transparency and accountability to the deliberations over the application of R2P to a given situation. Ultimately, this will result in greater consistency in outcomes of State action. Relevant actors will be encouraged to provide justifications for action or inaction measured against the...
Standard and its Guiding Principles. Relevant stakeholders have been working to strengthen the understanding and the appropriate application of the concept, and this Project will help accurately to assess when to apply R2P.

It is important to disaggregate the different elements considered in an R2P focused analysis of a situation, and thereby isolate what this Project in particular is focused on.

The **first** element (the substantive dimension) is the type and character of gross human rights violations that are included within the scope of R2P. The decision was made at the 2005 World Summit to limit the scope of R2P to four acts: genocide, war crimes, crimes against humanity and ethnic cleansing. Each of these acts has substantive content from legal and policy-based sources.

The **second** element (the gravity dimension) focuses on the need to determine at what level of risk it is most useful to invoke R2P. This stems from a realization that the R2P will be rendered essentially meaningless if its three-pronged approach of prevent, react and rebuild is only applicable at the point at which the commission of one of the R2P acts has definitively occurred. The situation in Syria illustrates this point. Currently reasonable persons can disagree about which steps to pursue, leading to paralysis because the stakes have become far too high and complex. Instead, it is imperative to understand that R2P must be called into action at a specific level of gravity or seriousness of potential violations, with this level set at a point below that which an individual would be criminally liable or a State internationally responsible.

The **third** element (the temporal dimension) concerns the standard of proof that is applied to determine when the level of seriousness or gravity set out in the second element has been reached, and therefore when the R2P framework (and its corresponding set of responsibilities or potential legal obligations) is more relevant to third-party State or collective action. The development of such a standard is intended to reduce the technical haggling over whether or not situations fall within the R2P framework by encouraging (if not requiring) all stakeholders to measure information about a situation against a clearly articulated standard. As will be set out in Part IV below, the application and content of standards of evidence may differ according to the nature and form of the R2P intervention that is under consideration.

Despite the use of the terminology of “standards” or “guidelines,” it is important to emphasize that this Paper does not suggest that the product of this Project is to be implemented as legally binding tests against which to gauge the appropriateness of action. Instead, the standard aims to assist relevant actors to determine, whether a situation could benefit from applying the R2P framework. Toward this end, the authors discussed, with a wide range of stakeholders, whether the introduction of guidelines would make parties more or less likely to support the normative goals of R2P. And if the introduction of standards was expected to make support of the normative goals of R2P more likely, what should the standard be and how should it be set?

As will become clear through the examination of various areas of inquiry in Part III, the assessment of the likelihood of future conduct occurring is by its nature a very different inquiry than the assessment of whether a fact has been proven about a past event. The inquiry over whether R2P is a useful framework for addressing a given situation will often, perhaps always, have elements of both forward-looking and backward-looking investigations. This will include assessing whether sufficient acts have occurred to fall within an R2P framework and how likely atrocities are to occur in the future. Therefore, the analysis in Part IV will examine areas of legal inquiry with both prospective and retrospective assessments. The endpoint, which is a Standard of assessment accompanied by Guiding Principles,
is the result of the academic and practical research undertaken over two years.

**PRACTICAL UTILIZATION**

R2P is becoming part of the lexicon of a variety of actors involved in the prevention of, and reaction to, mass atrocities. These actors include:

- National governments from within the region—and those outside the region—from which the situation has arisen;
- Regional organizations;
- Various organs of international organizations, including the Security Council and General Assembly;
- The staff of the respective international organizations, including those located both inside and outside of the country or region where the situation is taking place;
- Civil society organizations, including those dealing specifically with R2P, those on-the-ground during a specific situation, and groups outside the area where the situation is taking place.

The standard should be utilized by a range of actors that are called upon to make assessments as to the relevance of the R2P framework, and will have value for each of these actors. This Standard can assist States in developing common and coordinated approaches to implementing the practical steps embodied in R2P. For those civil society organizations with presence on the ground or attempting to draw attention to mass atrocity situations, the standard will provide a common threshold against which calls for action can be more readily assessed. The standard will seek to remove the more overt politicking that can accompany claims over the necessity of States or inter-governmental organizations taking steps to exercise their responsibility to protect.

With respect to the UN system, the Secretary-General recently merged the Office of the Special-Advisor for the Prevention of Genocide with that of the Special-Advisor on the Responsibility to Protect. Reportedly, the new Joint Office was provided with the authority to convene heads of UN departments, funds and agencies in emergency situations in which populations are threatened by genocide, war crimes, ethnic cleansing or crimes against humanity.

It appears that this mechanism has not yet been used. The evidentiary standard could support the work of this convening function as well.

Given the very different roles and access to information that these actors have, the authors considered whether it might be prudent to suggest different standards for each of these actors. For example, the standard of proof required for a regional organization when the situation is occurring within that region may be lower than that for a State located at some distance, one which may lack the same level of understanding or information regarding a situation. As discussed further in Section V, the research revealed, however, that maintaining a uniform standard will prove more politically feasible and logical.

**PART III

METHODOLOGY**

**BACKGROUND RESEARCH**

The first stage of the Project involved compiling and analyzing written materials on three general topics: First, the concept of the Responsibility to Protect, through its creation, elaboration, adoption and implementation; second, the various areas of law, both national and international, from which the standards are to be constructed; third, in depth studies of instances since 2005 where the concept of R2P was discussed or ultimately applied to situations of mass atrocity.

The decision to focus the search for standards of proof on areas of national and international law was based on three rationales: First, although paragraphs 138 and 139 of the WSOD, dealing with R2P, are not legal documents, the language used to describe the acts that fall within the agreed upon parameters of R2P are legal acts—that is, genocide, crimes against humanity, war crimes and ethnic cleansing. Indeed, the very nature of the terminology of crime is a legal construct. It is therefore inevitable that notions emanating from law have played a primary role in determining the manner in which the concept is applied. As a result, it is important to ensure that an appropriate standard, emanating from law, for the application of the principle is developed.

Second, the nature of the Project, dealing with standards of assessment, is one with a normative and historical interconnectedness with the law. While all areas of inquiry (from science to philosophy) must grapple with questions
of assessing information against a set of variables, it is within the field of law that systematized examination of the application of such standards to fit a wide variety of investigations, led the Project to focus on legal standards of proof. Third, an underlying normative push of the Project, one that was essentially agreed to by all stakeholders consulted, is to argue for the systematized application of a consistent standard. While it is not the intention (or outcome) of the Project to argue for the application of judicial approaches to the determinations of whether an R2P lens is a useful means to analyze a given situation, the need for regularized and \textit{ex ante} approaches to evidence and standards of proof has led the Project to its focus on legal approaches.

The Project took an inclusive approach to the examination of areas of the law from which the accompanying standards of proof were ultimately extracted. The key determinant for whether an area of law was included was its connection to the goals and normative design of R2P: a focus on preventive action; the relationship between \textit{ex ante} and \textit{ex post} determinations of accountability or responsibility; and a concern with the protection of human life and physical integrity. The connection between R2P and each legal area will be set out in more detail in section IV.

\textbf{NOVEMBER 2010 MEETING}
\textbf{CARDOZO LAW, NEW YORK, NY}

The first external meeting conducted as part of the Project occurred at Cardozo Law School on November 17, 2010, with an accompanying public forum held in the Law School on the following day. The focus of this meeting was on the examination of each relevant area of law to be utilized in the Project. According to the application of the Chatham House Rule, the identity and affiliation of the participants will be kept confidential; this was a consistent feature throughout our meetings across the globe.

The selection of participants for this meeting focused on including experts in two areas, mirroring the two research areas set out above: experts on R2P and experts on the various areas of the law to be examined. These individuals came from across the spectrum of R2P stakeholders: governments, intergovernmental organizations, non-governmental and civil society organizations and academia. The backgrounds of those invited to this initial meeting were more heavily weighted to the legal profession than for the proceeding regional consultations given the meeting’s emphasis on relevant areas of law. The consultation involved a lightly moderated discussion over one day, structured by the conveners to cover an examination of the Project that would guide the future construction and elaboration of the standard.

It is important to address an issue that came up early in the course of the research. Some stakeholders pointed out that the Security Council is a purely political body, not bound by standards but rather subject solely to the political will of its members, thereby suggesting that standards would have no impact. However, it was generally agreed over time that this point is of minimal relevance to the Project given the Project’s scope and content. As stated above, the standard set forth herein is not intended as a legal standard. Rather, it is designed to be a common point of departure. Further, military intervention for humanitarian purposes is the only form of R2P activity that can be sought solely through the Security Council, and, as it is at the thick end of the R2P wedge, it is not likely to be often employed. All other activities may be undertaken by States, regional organizations, and even local communities.\textsuperscript{28} Finally, while the Security Council may be a political body, its discretion is not unfettered. It is bound by legal norms as set forth by the UN Charter and customary international law.

\textbf{INDIVIDUAL CONSULTATIONS WITH PERMANENT MISSIONS TO THE UNITED NATIONS}

The key role played in the application of R2P by UN bodies located at the UN Headquarters in New York City suggested the importance of consulting a variety of States’ Permanent Missions to the United Nations as part of the Project.

The selection of States was conducted based upon two factors (although the Project, time permitting, would have ideally liked to consult with every amenable State): first, equal representation across all regions across the globe; second, States were divided into four categories according to their general support for R2P. These categories were: strongly supportive, supportive, ambiguous and against. States were placed into each category according to their public pronouncements on R2P, especially statements made at the General Assembly consultations on R2P held in 2009-2011. The Project decided not to consult (at this stage) those States against R2P. Then, an equal proportion of States from within each category of support was included.
The individual consultations were conducted using a set of questions intended to examine the mission’s understanding and utilization of the concept of the R2P, and its stance on standards as considered by the Project.

CONCEPT PAPER
The authors completed a concept paper in May of 2011 that laid out the goals of the Project, the historical events that motivated its undertaking, and the areas of law from which the possible standards found support. Additionally, insights drawn from the research and interviews were set out, and potential options for the application of standards were set forth.

At that stage of the Project, it was important to ensure that the standards could function as practical and realistic boundaries in assessing the role of R2P; it was to this end that the Project had undertaken a wide-ranging consultation process, with stakeholders from a variety of relevant fields and from all regions across the globe.

The concept paper was therefore a preliminary step in the construction of the Standard, and a number of open questions and options remained. By presenting a range of available formulations for the nature of the standards, we hoped to spark discussion and seek insight. The concept paper set the stage for the regional fora in Africa, Asia, and Europe, and our meetings with a significant number of Permanent Missions to the United Nations in New York City.

The starting points for potential standards fell into five categories:

I. The protection responsibilities of each State towards its own population with respect to the R2P

II. The role of international assistance and capacity-building may require a standard of proof to determine either when such assistance is necessary or when such assistance should be sought by a State.

III. The role of peaceful and pacific measures under Chapters VI and VIII of the UN Charter.

IV. In the case that peaceful means may be inadequate, and if national authorities are “manifestly failing” to protect their populations, “timely and decisive” responses not including military intervention are available.

V. If the requirements for point (IV) have been met, a focus on the unique nature of military intervention as a potential component of R2P responses.

These examples blended a range of potential options that were discussed and deliberated on within the regional fora and in our discussions with a range of actors from all relevant disciplines and regions of the world. It was through this consultation process that the matrix of appropriate, relevant and potentially effective standards of proof for the assessment of R2P situations emerged.

It was from these starting points that the ultimate Standard has been drawn. For a thorough examination of the potential groupings, entry points, and standard content, see the Concept Paper, which is reproduced in the Annex.

REGIONAL FORA:
Europe; Ghana, Africa; Cambodia, Asia

In order to ensure that the Project was firmly grounded in the global realities of the application of R2P, consultations were conducted in Europe, Africa, and Asia. Each of the regional consultations had the same selection criteria for participants. First, actors were invited from as wide a variety of States within each region, and within each sub-region, as was possible given the relatively small size of the consultations. Second, participants were chosen to represent the full range of stakeholders involved with the R2P (in both present and future terms): governments, intergovernmental organizations, regional organizations, nongovernmental and civil society organizations and academia. According to the applied Chatham House Rule, the identity and affiliation of each participant are kept confidential.

The Europe consultation involved a series of individual meetings conducted across Europe. These consultations primarily involved the same set of questions that were utilized for the Permanent Mission meetings, and the questions can be found in the Annexes.

The consultations in Africa and Asia involved one-day closed meetings, followed by half-day public conferences. Each consultation involved a structured discussion over one day, lightly moderated and structured by the conveners, to cover an examination of the Project, to guide the future construction and elaboration of the standard.
CASE ANALYSIS
Over time, the role of the case analysis evolved. The authors came to understand that, from the perspectives of the stakeholders and political scientists, in-depth case studies would benefit the development of the standard more than originally conceived. Engaging with the conceptual debates over the cases where R2P was applied was viewed as being useful in establishing parameters for the universe of admissible cases and for elucidating the links between structures and agency. All situations studied occurred subsequent to the adoption of the R2P concept in the WSOD in 2005, although the factors that led to the conflict may have originated prior to this date. The situations to be examined were selected according to the following criteria:

Discussion of the R2P Framework: Each situation inspired discussion by a critical mass of stakeholders as to whether or not the acts occurring fell within the R2P framework. The Project aimed to present situations that fell across the spectrum of complexity as to the presence or absence of evidence, at the time the events were occurring, of one or more of the R2P acts – genocide, crimes against humanity, war crimes and/or ethnic cleansing.

International and regional responses: The Project also selected situations across the spectrum of speed and variety of international and regional responses to potential R2P acts occurring. The case illustrations presented sought to provide sufficient information to allow conclusions to be drawn as to whether any patterns in international/regional responses have begun to emerge in the decade of the concept’s existence.

Geographic representation: Having applied the two preceding criteria, the Project aimed to examine situations from across all geographic regions.

KEY FINDINGS
Because all regional meetings and interviews have been conducted under Chatham House Rule, this section summarizes the primary findings without any attribution.29

- There is tension between the need for flexibility (or fluidity) and the need for standards. On the one hand, the legitimacy function of the effort to protect populations under the R2P framework depends on its being perceived as impartial, consistent, and making a difference on the ground. On the other hand, given the idiosyncratic nature of each past, present, and future situation that may fall within the remit of R2P some flexibility is required.

- For some it is clear that once it is decided that ‘timely and decisive’ action is necessary, an on/off switch should be flipped. It is only after that determination is made that the flexibility kicks in – e.g. what should be done in any given situation; the flexibility is in the response rather than in answering the question of whether R2P acts are imminent or occurring.

- R2P is currently a political norm potentially developing toward a legal norm. No consensus was reached on whether the goals of R2P are best met through legalization or further grounding in politics and policy.

- There is general agreement, with the possible exception of one to two interlocutors, that the development of a standard for the application of R2P is a positive step forward.30

- More thought is required vis-à-vis the collection and analysis of information or evidence at the time a crisis is unfolding. The collection and analysis of information must follow a sound methodological approach, since it will often be contested.

- While crimes that fall under R2P were originally defined in international criminal law, an approach to R2P based upon criminal law is not sufficient.

- Consensus on standards or indicating factors would give regional organizations sufficient time to attempt to deal with local issues.

- There is a concern expressed by some, particularly in the Asia region, that the term “evidentiary” standards suggests a legal standard, which would not be useful in making the R2P a catalyzing force for action in the fact of mass atrocity.

- In depth case studies utilizing the Standard and Guiding Principles developed by the Project would be productive.
PART IV: STANDARDS FROM ACROSS THE SPECTRUM

METHODOLOGY OF EXAMINING VARIOUS SOURCES OF STANDARD

In examining the language that has been used in debates over the applicability of R2P, we have been struck by the frequency of concepts emanating from criminal law that have appeared to frame the debate. As will be examined in the following section, this urge to turn to criminal law is both dangerous and entirely understandable.

However, it is not clear that the normative rationale for international (or national) criminal responsibility of an individual is analogous to that embodied in the concept of the “responsibility to protect.” In seeking to determine the most appropriate and fair set of standards for R2P, this Project examined multiple source areas, highlighting the potential overlap in normative, political and legal concerns between each area and that of R2P. In this way, the final proposed standard and set of supporting guideline are grounded in the most relevant sources and hence will be more likely to garner widespread acceptance and support.

There are of course standards or guidelines of proof or evidence in a variety of fields of inquiry, including science, history, political science and law. However, it is within law that standards of proof are most associated with measuring an act, or series of acts, against *ex ante* standards. Moreover, the scope of R2P is bound by the four categories of crimes defined in international law and set out in the 2005 WSOD; thus, when approaching the R2P, stakeholders are necessarily searching for its practical meaning within the bounds of international law. For these reasons, this Project draws on legal areas for the source of its inspiration on the appropriate standard; this does not mean, however, that the standard is legally binding (or intended to be so), or that it should be utilized by legal departments to the exclusion of political officials. Rather, the steady evolution of R2P within the General Assembly and across stakeholders has involved moving it from a predominantly moral concern to one that can
be implemented with practical mechanisms, making an examination of legal sources particularly useful.

**THE URGE TO TURN TO CRIMINAL LAW TO INTERPRET R2P**

The use of international criminal law terminology within the WSOD has both comforted and confused all those dealing with R2P. The result of both compromise and principle, the R2P limits its application to protecting populations from four specific acts, three of which—genocide, war crimes and crimes against humanity—find detailed definition within international criminal law. The fourth act, ethnic cleansing is one possible form of a crime against humanity, and may be a component of both genocide and war crimes. The limitation of R2P to protection from genocide, war crimes, ethnic cleansing and crimes against humanity was introduced in a revised draft Outcome Document towards the end of the negotiations.

The negotiation history suggests that the additional language was added in order to limit the application of the R2P to situations where international law had already defined limitations to the principle of sovereignty. The use of acts that fell within the purview of international criminal law both marked off the application of R2P to a somewhat more defined set of events than in the original ICISS report, and suggested a common standard against which the constitutive acts of R2P could be measured. The ICISS described the foundation of R2P as lying in obligations inherit in the concept of sovereignty, the responsibility of the Security Council under the UN Charter to maintain international peace and security, specific legal obligations under international human rights and humanitarian law and national law, and the developing practice of States, regional organizations and the Security Council.

However, this formulation has resulted in much confusion. First, it should be self-evident that R2P cannot apply only at the stage at which responsibility under international criminal law for an individual culprit could be established. Such a standard would ensure the immediate demise of the normative concerns embedded within R2P, most of all its ability to proactively attempt to prevent imminent or on-going forms of mass atrocities based on existing legal obligations. Second, the level of “seriousness” or scale/ gravity necessary to trigger action under R2P is not automatically clear when examining the definition of the crimes from within either customary international law or, more narrowly, the Rome Statute of the International Criminal Court. Based on the broad agreement that R2P builds on existing legal obligations related to genocide, war crimes, crimes against humanity and ethnic cleansing, some suggested that any act falling within the definition of these crimes would “trigger” R2P. Others expressed concern that the broad definition of war crimes included acts which did not involve serious harm to populations, as described in the work of the ICISS, such as compelling prisoners of war to serve in the forces of a hostile power or the killing or wounding of combatants who had surrendered.

The negotiation history of the WSOD confirms that the application of R2P should be limited to exceptionally grave cases of violence against populations. Therefore, rather than exact legal definitions, the listed crimes should be considered ‘goalposts’ describing, in the best possible way, exceptionally grave situations that require action based on a collective responsibility.

As a consequence of the use of the language of criminal law, stakeholders have primarily turned to the standard of proof associated with individual criminal guilt to assess whether or not R2P should be invoked – that is, the standard of “beyond a reasonable doubt.” It is *prima facie* clear that this is a very high hurdle to pass in order to see whether the R2P doctrine is applicable. The normative goals of each system differ so markedly as to render this standard of evidence inappropriate.

International criminal law is ultimately designed to assess the individual culpability of those alleged to have committed the most heinous of crimes. This assessment of responsibility will occur after the incidents within which such crimes may have occurred. Moreover, the goals of criminal sanction – whether retributive, rehabilitative, deterrence-based or another goal – do not align completely with R2P’s focus on prevention. While certain leaders, governmental or otherwise, may play very important roles in the commission of, and the ability to end mass atrocities (or prevent them from occurring in the first place), R2P is still focused on the protection of potential victim populations, and addressing the threat of large-scale violence. There is little concern with allocating responsibility in terms of restitution or criminal sanction, but instead the concern is with ensuring the right actors take the most effective action to stop mass atrocity as soon as possible.
Similarly, it had been argued during the drafting period of the Genocide Convention that article II did not contain an abstract definition of genocide, but an enumeration of acts, which allow a finding of genocide based on the specific intent, without the actual destruction of the protected group. This suggests that the drafters attempted to capture risks for the purpose of prevention based on historic experience by means of criminal law rather than ensuring only accountability for perpetrators ex post facto. Similarly, German criminal law defines a category of crimes punishing the creation of an abstract risk rather than the violation of a concrete legal interest. The crime is accomplished, when the hazard has been created by an act considered to create a general risk for certain legal interests, e.g. drunken driving, without the requirement to prove the existence of a specific risk to a particular person or property in the situation at hand.55

Despite the divergence of goals and concerns, in the midst of R2P crises, stakeholders have either felt compelled to use the prosecutor’s standard of proof or have hidden behind this standard – as either a potential violating State or an entity that preferred not to trigger its own perceived international legal or moral obligation to act. This implicit use of the prosecutor’s standard of proof, if continued, will severely limit the ability of the R2P doctrine effectively to be engaged at an appropriately early stage of a potential mass atrocity situation. This is of concern as it makes it virtually impossible for R2P to effectively prevent and halt exactly the type of situation it was developed for and will permit stakeholders to avoid acting to protect populations as opposed to merely responding retroactively to mass atrocities. The development of the concept by the ICISS was based on an analysis of country cases where proactive action to protect populations had been lacking, such as East Pakistan, Cambodia, Uganda, Liberia, the Kurds in Iraq, Bosnia, Somalia, Rwanda, Haiti, Sierra Leone, Kosovo and East Timor.

THE SEARCH FOR ALTERNATIVE SOURCES
How to assess their relevance and applicability to the R2P
There are a variety of considerations in determining the relevance of standards of proof from one area of law for the political and normative framework of R2P: the relationship between State and individual responsibility; the ex ante or ex post nature of the judgment; whether it is private or public law at issue; whether domestic or international in origin; and the legal nature of the act concerned. There is a presumption that the stringency of a standard of proof has been chosen to reflect the nature of the consequences that will result if the standard is met.

Despite this understanding, it is quite apparent that while the substantive legal areas that could potentially support R2P are relatively well-developed, and further developing all the time, the standard of proof or evidence that has been set down for each area at issue is often far more uncertain and obscure. These alternative standards will nonetheless at least begin to animate our thinking about the standards applicable to the R2P framework.

Remaining Relevance of International Criminal Law
Despite the need to limit the role of prosecutorial standards of individual guilt in assessing the correct application of the R2P doctrine, it is important to understand how the multiple evidentiary standards incorporated within international criminal law will nonetheless necessarily influence this Project. First, the fact that the four R2P acts listed in the 2005 WSOD are international criminal law violations means that it is impossible to entirely remove R2P from international criminal law. Second, the applicability of international criminal law goes beyond the finding of individual criminal liability to act in concert with other forms of political, economic, humanitarian and diplomatic mechanisms to address imminent or on-going acts of mass atrocity. Finally, international criminal law has already adopted standards of proof that increase in their stringency in correlation with the intrusiveness of the proceedings at issue; as the focus of an inquiry moves from a preliminary examination, through the issue of admissibility, to the issuance of an arrest warrant, to the issuance of an indictment, and finally to the outcome of a trial, the standards of evidence required get more demanding. In this Paper, we limit this examination to the standards associated with the Rome Statute and the International Criminal Court (ICC).

Situation: The three mechanisms upon which a situation can be brought to the attention of the ICC for a preliminary examination – referral from the Security Council; referral by a State Party or referral through a declaration of a non-party State; and the Prosecutor acting on his own initiative – are not in fact subject to a standard of evidence as set out by the Rome Statute. Thus the potential impact that the conducting of a preliminary investigation by the ICC may have on a situation is not subject to any evidentiary burden at all, though all of the mechanisms are of course subject to bureaucratic and political hurdles.
Investigation: As set out in Article 53 of the Rome Statute, once a situation is referred to the ICC, the Prosecutor will undertake an investigation unless there is "no reasonable basis to proceed under the Statute." The three elements of the 'reasonable basis' are jurisdiction, admissibility and the interests of justice. The jurisprudence of the ICC has begun to give content to the requirements of a "reasonable basis" in the context of jurisdiction and admissibility. The Pre-Trial Chamber approved the investigation into post-election violence in Kenya, but required the Prosecutor to provide additional information and clarification on the question of the Court's jurisdiction.

The two elements of admissibility are complementarity and gravity of the case. While the substantive content of these two factors has begun to be addressed by the Prosecutor's Office and in the decisions of the ICC, and is partially elaborated in the Statute itself, the standard of evidence utilized in evaluating whether there is sufficient gravity (the essence of this Project) has not been made clear, although it may be implicit in the decisions of the ICC. The prosecutor's current policy guidelines lay out four factors to be considered in assessing gravity: (1) scale of the crimes; (2) nature of the crimes; (3) the manner of commission of the crimes; and (4) impact of the crimes.

Finally, Article 53 requires the stopping of an investigation if there are "substantial reasons to believe" that an investigation would not serve the interests of justice." With "substantial reasons to believe" representing a heightened standard, as compared to "reasonable basis," it is clear that choosing not to undertake an investigation for the 'interests of justice' is seen as requiring a greater rationale than that for undertaking an investigation that passes the jurisdiction and admissibility requirements.

Arrest Warrant: Once an investigation has been initiated, Article 58 sets out the evidentiary standard required for the issuance of an arrest warrant. The Pre-Trial Chamber is guided by whether it is satisfied that "[there] are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court." The evidentiary standard was met in the application against President Omar Hassan Ahmad al-Bashir of Sudan, for the charges of war crimes and crimes against humanity, and the content of this standard is implicit in the evidence presented to the Chamber. However, the Pre-Trial Chamber refused to issue a warrant against President al-Bashir on the charge of genocide based on a holding, that, as genocidal intent was not the only reasonable inference available, no charge of genocide should be included within the arrest warrant. The Prosecutor successfully appealed this decision to the ICC Appeals Chamber which found that the Pre-Trial Chamber's holding went beyond the requirements of a 'reasonable basis' under Article 58. The Appeals Chamber however did not expand on the proper interpretation of the 'reasonable basis' standard, referring the matter back to the Pre-Trial Chamber for future interpretations of the standard.

Indictment/Confirmation of Charges: In order to propound an indictment, the Prosecutor at the ICC is tasked with providing the Pre-Trial Chamber "with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged." The decisions in the Lubanga and Bemba cases have begun to spell out what "sufficient evidence" will require, including that the evidence must be "concrete and tangible," and sufficient to demonstrate "a clear line of reasoning underpinning its specific allegations." The Chamber has warned that, at this stage of the proceedings, "it may be impractical to insist on a high degree of specificity." "Substantial grounds to believe" has been tackled by the Chamber through the application of dictionary definitions, supplemented by reference to relevant case law, including that of the European Court of Human Rights. Substantial was shown to mean significant, solid, material or strong.

It is important to be reminded however, as seen in the Abu Garda Pre-Trial Chamber decision on the confirmation of charges, that the concerns of this confirmation process have already narrowed in on one or more particular individuals at this stage. The Chamber's decision concerning Mr. Abu Garda focused on the "scant and unreliable" evidence connecting him to the alleged crimes, rather than on the evidence of whether the crimes were committed at all.

Prosecution: The most stringent standard utilized is that of "beyond reasonable doubt" as required of the Trial Chamber under Article 66 for conviction of a crime. This standard was applied in the Lubanga decision; the first ICC conviction handed down on March 14, 2012. In that decision, Lubanga was found guilty of having committed the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate
actively in hostilities in the DRC between September 2002 and August 2003.

**Attempted crime:** An attempted crime is committed when the defendant has failed to commit the *actus reus* of the full offense while having the required intent to commit the full offense. Article 25 (3)(f) of the Rome Statute provides for liability in the case of attempted crime. This codification expresses pre-existing customary international law. With a view to the prevention of crimes, prosecution for attempted crimes could offer valuable guidance for the application of R2P.

In order to prevent guilty thoughts from becoming subject to criminal liability, national and international criminal law apply tests to distinguish attempts from mere preparatory acts. The Rome Statute applied a relatively low standard from French and American law requiring “action that commences [the crime’s] execution by means of a substantial step.” However, the facts establishing the action and the intent have to comply with the general standard of evidence "beyond reasonable doubt."

**PRELIMINARY JUDICIAL MEASURES:**

**International and Domestic**

Courts are often asked to impose coercive measures prior to their examination of the substantive merits of a dispute. The normative thrust for the application of preliminary measures by judicial bodies is similar to the preventive goals of R2P, which seek to prevent and halt R2P acts or any escalation of atrocities. Fearful that prior to hearing the arguments of both parties, actions may be taken that will exacerbate the dispute, courts are often asked to impose coercive measures prior to their examination of the substantive merits of a dispute.

**International:** Termed provisional measures under Article 41 of the Statute of the International Court of Justice (ICJ), the ICJ has been regularly called upon to protect parties from potential harm to their rights before the Court has had the opportunity to decide on the case before it. The substantive standard required under the Court’s jurisprudence for the application of provisional measures has focused on, first, the potential for “irreparable prejudice,” and second, that urgency is present in the need for such provisional measures.

With respect to the requirement of urgency, the Court has often utilized the standard that prejudicial action is “likely” to be taken prior to the Court delivering a final decision. However, in the context of serious allegations of mass atrocity in the case of Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), the Court implemented provisional measures on finding that “there is a serious risk that the rights at issue in this case … may suffer irreparable prejudice.” This wording suggests a different standard than “likely” in assessments by the Court.

**National:** The Project drew predominantly on US law in the examples of national law standards, but it is quite clear that comparative standards across national jurisdictions are not uniform.

US courts may issue preliminary injunctions in civil cases in order to prevent irreparable harm to either party and maintain the status quo prior to a final determination on the merits of the case. The US Supreme Court has recently required that the party seeking the injunction must demonstrate that this potentially irreparable injury is “likely to occur,” and is not a mere “possibility.”

Courts may issue civil protection orders (CPO) (often referred to as “restraining orders”) in order to give relief to past and potential victims of violence, primarily domestic violence. The party seeking the order has the burden of proving actual or imminent violence most frequently by a “preponderance of the evidence” standard, to show that the facts alleged in the petition occurred in the past and that the behavior is likely to continue.

The CPO, like the application of the R2P framework, is both retrospective and prospective, whereas other preliminary injunctions attempt only to predict and prevent future harms. It is clear that the language and understanding of standards of proof that aim to prevent future harms will differ from retrospective determinations of whether something did in fact happen. Perhaps most pointedly, the higher standard of proof required for the CPO over the preliminary injunction corresponds to the greater intrusion on privacy that the CPO represents. More intrusive and coercive forms of action for R2P should also perhaps be associated with stricter standards of proof.

**THE DUTY TO CARE AND RESCUE**

In some instances it is possible to hold public authorities responsible for their failure to protect an individual from
harms committed by a private actor. This responsibility is in the form of civil actions to seek monetary damages. In addition, seeking to require citizens to act as “good Samaritans,” certain countries (predominantly those that rely on a civil law system) impose a “duty to rescue” upon individuals, and in certain circumstances, a failure to undertake this duty to help others will lead to criminal sanctions against the timid Samaritan. These duties of care and of rescue share common moral foundations with R2P’s claims upon national governments to protect their own citizens and on third-party States to ensure protection of populations anywhere in the world. Of course, this sub-section presents many conceptual difficulties in applying domestic, private law duties to the international, public law obligations embodied in R2P; however, the conceptual and normative commonalities are not negligible, and are therefore worth exploring.

Public duties of care: Domestic tort law in some States provides the opportunity for individuals to sue the State for failing to protect them from third-party harm in certain instances. In the US, which utilizes a common law system, the general “public duty rule” means that while the government owes a general duty to all citizens, the limitations of resources and the impossibility of ensuring protection at all times means that no duty is owed to any one individual in particular, and therefore the government cannot be brought to court for a failure to protect. The exception to this rule centers on the State adopting a “special relationship” to the individual. This “special relationship” essentially involves an affirmative and direct assumption of protection responsibilities by the State in a particular instance, and the individual’s reliance on this affirmative undertaking that then did not materialize. These suits will involve the four elements of a tortious action: a duty to act because of the special relationship; a breach of this duty by the public authorities through their omission; that the omission was the cause-in-fact of the injury; and actual damage to the individual bringing the suit. The standard of proof needed to prove that a “special relationship” existed, as well as the standard needed to prove the elements of the lawsuit, is by a “preponderance of the evidence.”

In contrast, civil law countries often have a general duty of reasonable care placed upon municipalities, and such a duty is actionable. However, proving what conduct constitutes reasonable care by a municipal entity will often itself be subject to heavy qualification. When such acts or omissions are actionable, the civil law judge will rely on his or her conviction over whether a fact has been sufficiently proven, and no clear standard of evidence is present.

Duty to rescue: States have long debated whether they should require individuals to try to rescue those in danger. The common law family of States has generally placed no general duty upon individuals to help others in need. Using the US as emblematic of this set of standards, two general exceptions to this rule apply. First, if an individual volunteers to help, or is herself responsible for the danger itself, then he or she is required to intervene in some form. Second, if a “special relationship” exists either between the victim and individual who failed to rescue the victim or between the aggressor and the individual who failed to rescue the victim then a legal duty may be created. A complicated set of factors is utilized to determine when this exceptional duty to rescue does exist. In these potential tort actions, the standard of proof applied by the court for each element is generally, like that in public duty of care cases, that of a “preponderance of the evidence.” Many civil law States have made the “duty to rescue” an individual in peril a criminally enforceable requirement.

These criminal statutes examine the dangers that faced the rescuer, and the level of harm that occurred to the “victim” requiring the rescuing. There is also a wide gamut of required actions to be undertaken in order to fulfill this duty of rescue or assistance. As set out above, civil law jurisdictions have generally avoided providing detailed indications of the standard of proof required in different actions; instead, they rely on the conviction of the civil law judge that applies the (in this instance criminal) code to a particular action. It can be generally stated that those courts enforcing a criminal penalty concerning the duty to rescue must be persuaded that the evidence, by the “balance of probabilities,” suggests that each of the required elements has been proven.

THE OBLIGATION TO PREVENT VIOLATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

The core concerns of R2P are of course animated in the longer history of international human rights. There are, however, specific threads within the human rights framework that play a more forceful role within any discussion of R2P. Some human rights treaties include specific obligations to prevent, e.g. genocide, torture and racial segregation.
In its analysis of Article I of the Genocide Convention, the International Court of Justice determined that the Convention implies a positive obligation *erga omnes* for States to take action to prevent genocide. Preventing genocide is interpreted by the Court to be a positive obligation beyond the obligation to refrain from committing genocide and also goes beyond the obligation to punish. According to the Court, responsibility is incurred if the State manifestly fails to take all measures within its power to prevent genocide. The obligation to prevent is not an obligation of result, but rather one that requires the application of due diligence regarding the concrete situation at hand. The Court determined that the international responsibility of a State to prevent can be triggered through one of the acts, other than genocide itself, enumerated in Article III even though the nature of those acts is different in nature from criminal responsibility. For determining a breach of the obligation to prevent genocide, the Court moved from a criminal standard of proof “beyond any reasonable doubt” to “proof at a high level of certainty,” as the violation of the obligation to prevent did not result in individual criminal responsibility of the State organ. However, for a breach of the obligation to prevent to be deemed to have occurred, genocide must have been committed. The Court expressly refused to find whether there is a general obligation of States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. However, it is arguable that such duties are evolving into customary international law obligations incumbent upon all States, and include a duty to prevent all of the R2P acts.

In addition, the general obligation, found in many human rights treaties, to “respect” and “ensure” the rights within a treaty has been interpreted to contain not only a duty to refrain from violence but also a positive duty to take steps toward effective implementation of the treaty. On this basis, the obligations upon State actors encompassed within any human right have been broken down into obligations to respect rights by not committing direct violations against individuals, to protect individuals from violations of their rights by third party non-State actors, and to fulfill rights by stepping in to provide the content of the right.

Under the duty to protect, presented by the IACtHR in the Velasquez Rodriguez case against Honduras, and by the ECtHR in the Osman case against the United Kingdom, States may be held liable for their failure to take adequate measures to prevent violations, or for their lack of appropriate responses when violations have occurred, by non-State actors. Of course States are faced with operational difficulties, resource constraints, and the need to respect a variety of other human rights that limit their general coercive powers, and hence the Courts have found that the “duty to protect” is applicable only in certain circumstances. The IACtHR requires reasonable steps to be taken, and that a lack of due diligence on the part of the State will determine its liability, in the Velasquez Rodriguez case, for a State tolerating a pattern of forced disappearances. A State’s obligation is one of conduct rather than outcome (States are not expected to always achieve perfect prevention in order to have fulfilled their obligations), and acting with “due diligence” means utilizing all appropriate means at its disposal to minimize the risk of significant harm. This umbrella concept of “due diligence” could potentially mirror the nature of the conduct that States should (minimally) seek to fulfill under pillars two and three of the Secretary-General’s R2P framework.

For the ECtHR, the authorities must have “[known] or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”.

These standards of behavior having been set down, Courts have indicated differing standards of proof in the area of the duty to protect. The IACtHR in Velasquez Rodriguez stated it was “convinced” and that the facts were “clearly proven”; this corresponded to the Court’s statement that such serious charges required a standard of proof “capable of establishing the truth of the allegations in a convincing manner.” The ECtHR in Osman stated that the lack of reasonable preemptive steps taken by the State “must be established to [the Court’s] satisfaction.”

Similar to the outline of different pillars of R2P, the primacy of the State to fulfill its duty to protect is not absolute, and international mechanisms can be used to compensate for lack of effective action. Some UN human rights treaty bodies receive complaints from individuals claiming that their rights under the respective treaty were violated. The admissibility of such complaints
depends *inter alia* on the exhaustion of domestic remedies. According to the jurisprudence of the treaty bodies, local remedies must only be exhausted to the extent that they are both available and effective; it is an established principle in this context that complainants must exercise due diligence in the pursuit of available remedies. Treaty bodies request complainants to “demonstrate” that they exhausted all available domestic remedies, but accept arguments that further recourse to domestic remedies would have been futile in the light of previous precedent. Treaty bodies also consider extensive delays in decision-making on the part of relevant State institutions indicators for the lack of available effective remedies.\(^5\)

The “duty to protect” is just one element of a State's obligations to act to prevent potential human rights violations that occur as a result of the actions of third parties. It is self-evident that the rationale for protection of human rights and of the impetus for the doctrine of R2P are similar if not identical; the duty to protect concerns a State's obligations to help even when they are not the direct actor causing the violations, and therefore mirrors the role the international community is meant to play under R2P.

It is therefore important to note the general standard of proof applied by human rights tribunals in finding a State responsible for those violations that would reach the seriousness of R2P acts. This standard has usually been proof “*beyond a reasonable doubt,*” as seen for example in the ECtHR's decision in *UK v Ireland* (1978) concerning torture or inhuman or degrading treatment or punishment.

**TORTURE AND NON-REFOULEMENT OBLIGATIONS**

The international prohibition on torture is reflected in multiple conventions. As part of the obligation to prevent torture, States are prohibited from expelling or returning an individual to another State if there is a danger that the individual will be tortured in the destination State. This obligation is known as *non-refoulement*. The prospective nature of the evidentiary standard applied by bodies deciding whether to impose a *non-refoulement* obligation on an individual correlates strongly with the decision stakeholders must make over whether or not to intervene to prevent future atrocity crimes. In both situations, the establishment and assessment of facts related to the past and present have to be used to determine the probability of certain events occurring in the future.

The Convention Against Torture (CAT) requires that no one shall be expelled if there are “*substantial grounds for believing* that he would be *in danger of* being subjected to torture.”\(^54\) The Committee monitoring this Convention has noted that this standard entails a “foreseeable, real and personal risk.” The risk must be assessed on grounds surpassing “mere theory or suspicion” or “a mere possibility”; the risk need not be “highly probable” or “highly likely to occur” however. The Committee does not require that all the facts invoked by the author of a communication (the person seeking relief) be proved; rather, facts should be “*sufficiently substantiated and reliable.*” The Committee will look at a non-exhaustive list of criteria it considers pertinent to assess the personal risk to an individual of being tortured, including evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the receiving State, previous instances of torture/ maltreatment involving the person seeking relief, medical or other independent evidence to support a claim of past torture/ mistreatment, current assessment of the individual’s situation and/or the internal situation of the receiving State with respect to human rights, personal vulnerability of the individual, and evidence of the individual’s credibility.\(^55\)

The ECtHR has also interpreted its Convention’s prohibition against torture under Article 3 to include a *non-refoulement* obligation. The standard of proof utilized by the Court imposes the obligation if there are “*substantial grounds [to believe] that an individual would face a real risk* of being subjected to treatment contrary to Article 3” (emphasis added). Of course, the Court itself (most prominently in the concurring opinion of Judge Zupancic in the case of *Saadi v. Italy*)\(^56\) has acknowledged that this prognosis or probabilistic exercise is not the usual retrospective domain of assigning legal responsibility. The Court explained that using all evidence available, it would *examine the foreseeable consequences* of the proposed expulsion, “bearing in mind the situation [in the receiving country] and [the applicant’s] personal circumstances.” Thus, because of its necessarily speculative nature, the assessment must be conducted with care and rigor.

Similarly, domestic courts have actively interpreted and implemented their obligations under the Refugee Convention to ensure asylum for those with a “well-founded fear of persecution” on the grounds of race, religion, nationality, political opinion or membership
in a social group. The US Supreme Court has required an individual to show that this fear is based on a “reasonable possibility” of occurrence; 57 moreover, the US State Department has explained that the “substantial grounds to believe” standard from the Torture Convention should mean the risk is “more likely than not” to come to fruition. 58 The UK House of Lords requires the risk to have a “reasonable chance” or a “serious possibility” of coming to fruition. 59 These predictions are intended to protect individuals from serious harm, which, while not always reaching the level of atrocities that R2P aims to prevent, may certainly form elements of such acts.

INTERNATIONAL ENVIRONMENTAL LAW: Transboundary Harm

There are a series of concepts located within the overall frame of international environmental law that shed light on the standards applicable to R2P. The well-defined legal obligations upon States to prevent trans-boundary environmental harm are useful as are the general international law principles on prevention and the precautionary principles that begin to expand State concern prior to examining questions of legal responsibility for past harm.

It is a clearly established obligation of international law that States are required to take adequate steps to control and regulate the effect of their actions upon the physical environment of other States. International conventions dealing with specific areas of environmental law have emphasized that the nature of environmental problems are such that reparations and restitution will often be inadequate to compensate for irreversible damages. Therefore, a norm of harm prevention is ever present in examining the obligations States have to protect the environment. This core conception of harm prevention is a central component of R2P. In an analogous fashion, the harms included within R2P acts cannot be made whole by reparations or (the often impossible) restitution, and thus the standards utilized for transboundary environmental harm may assist in the construction of the standard this Project is working on.

One example of this obligation can be found in the International Law Commission’s 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. 60 The Draft suggests that the “State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.” First, the risk to be prevented must be of “significant” transboundary harm; the determination of this standard involves the combination of the probability of an event occurring and the level of harm that would occur in such a situation. Second, as with the discussion on the duty to protect in human rights law, a State’s obligation is one of conduct, not result, and it must act with “due diligence.”

The standard of proof used to assess this prevention obligation in the context of environmental law and transboundary harm has not been readily examined by tribunals or courts, with the ICJ’s opinions in international environmental law thus far focused on specific treaties and not general standards. It can be inferred, however, that the Court has not treated this area of concern as one for which a heightened standard of proof is appropriate, as it has not invoked the need for a strict standard given the “exceptional gravity” of the issue at hand (as had been the case with questions involving the use of force or genocide, as discussed below).

A further relevant concept from within international environmental law is that of the “precautionary principle.” This principle stands as a reaction to the very high standard of proof previously required in environmental cases, one that did not appreciate the reality of scientific uncertainty, and therefore limited the ability of States to require prevention of environmental damage. The precautionary principle thus is designed to require or permit a finding that preventive action should be undertaken even in the face of scientific uncertainty regarding the foreseeability of harm and the likelihood of its gravity. In essence, the utilization and application of this principle works to lower the standard of proof required before preventive action must be undertaken.

THE DUTY TO PREVENT OR REACT TO SERIOUS OR GROSS VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW

This sub-section examines the standards applied when assessing gross violations of human rights or international humanitarian law, including those violations occurring outside the territory of a State or committed by non-State actors. This is directly relevant to R2P since R2P concerns the actions of third-party States in their individual or collective roles in addressing atrocities outside their respective territories.
Tribunals examining these questions are faced with allegations over situations that have already occurred, and usually have already come to a conclusion. In addition, the role of individual criminal responsibility has already been addressed above. In addition, we have already examined obligations placed upon States not to contribute to harming other States within the context of international environmental law and trans-boundary harm. This section introduces State responsibility for those violations included within R2P.

Some of the most difficult questions in addressing these areas concern States’ obligations outside their territorial borders, and their responsibilities for conduct not directly carried out by the State itself. These questions are of particular relevance to the implementation of the R2P, as States are sensitive to the issues surrounding any decision to intervene in other States in order to protect populations from potential or existing mass atrocity and especially when non-State actors are involved in committing these crimes.

The question of actions where a State has control over territory outside the sovereign borders of that State can be seen in the ECtHR’s cases (such as Loizidou and Bankovic) and in the ICJ’s case law, e.g. the Israeli Wall case. The second element is one of attribution of conduct undertaken by a non-State actor or a third State so as to lead to a State itself being held responsible for the allegedly illegal international conduct. This is an area set out in detail under the ILC’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as well as jurisprudence from the ICJ (e.g. Bosnia-Herzegovina v. Serbia and USA v. Nicaragua), the ECtHR (e.g. Ilascu), and the International Criminal Tribunal for the Former Yugoslavia in the Appeal Chambers’ Judgment in the case of Tadic.

These tests of attribution and control have implicitly been answered using the same standards of proof associated with the serious allegations of State misconduct at issue in each of the cases.

The Complaints Procedure to the UN Human Rights Council (HRC) replaced the former 1503 procedure in addressing a “consistent pattern of gross and reliable attested violations of human rights and fundamental freedoms.” A Working Group on communications (WG), comprised of experts, reviews admissibility and merits of communications received from individuals, and the Working Group on situations examines the communications referred to it by the WG on communications and decides on recommendations for HRC action. While the procedure is confidential in nature, the admissibility criteria include a factual description of the alleged violations, including the rights which are alleged to be violated; submission by a person or a group of persons claiming to be the victim of violations and claiming to have direct and reliable knowledge of those violations, accompanied by clear evidence; and exhaustion of domestic remedies, except where it appears that such remedies would be ineffective or unreasonably delayed.

Some UN human rights treaty bodies developed early-warning and early-action procedures to prevent and respond to violations of treaty obligations. In 1993, The Committee on the Elimination of Racial Discrimination (CERD) developed a procedure for early-warning measures and urgent action in situations requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention. The procedure was established as a response to the call by the UN Secretary-General to contribute to the prevention of genocide by responding early and effectively to discrimination. CERD identified indicators for patterns of systematic and massive racial discrimination relevant in the context of genocide. In each situation brought to its attention, the Committee “assesses their significance in light of the gravity and scale of the situation, including the escalation of violence or irreparable harm that may be caused to victims of discrimination on the grounds of race, color, descent or national or ethnic origin.” According to its own account, the Committee has addressed situations falling within the scope of mass atrocities, such as the bombing of villages, the use of chemical weapons and landmines, extrajudicial killings, rape, and torture committed against minorities and indigenous peoples. Furthermore, the Committee has adopted decisions concerning situations of large-scale internal displacement, patterns of escalating racial hatred and violence, racial discrimination as evidenced in social and economic indicators, ethnic tensions, racist propaganda or appeals to racial intolerance, as well as the lack of an adequate legislative basis for the definition and criminalization of all forms of racial discrimination.

The CCPR can request reports from States parties at any time the Committee deems appropriate, which forms the
The breach must be of a preemptory norm of international law and all States’ duty to cooperate to end these violations. Turning to identifiably serious breaches of international law, the ILC’s Draft Articles on State Responsibility under Articles 40-41 focused on “serious breaches of obligations under preemptory norms of general international law”, and all States’ duty to cooperate to end these violations. The breach must be of a preemptory norm of international law (frequently referred to as a *jus cogens* violation), and it must be serious, defined as a “gross or systematic failure by the responsible State”. It is self-evident that the question of whether R2P acts are occurring and whether a State is “manifestly failing” to protect its population will have great commonalities with this examination. Article 41 sets out the consequences that will flow from a finding of a serious breach of a preemptory norm of international law: States are under a duty to cooperate to bring such a breach to an end, and must not recognize any such act as lawful or render aid or assistance to the responsible State or States. The standard of proof that will be applied to determine findings under these Articles will depend on the context in which they are invoked: i.e. use by an organ of the United Nations will have different standards than by an international judicial tribunal or an arbitral body.

**THE USE OF FORCE: EX ANTE & EX POST EVALUATIONS**

The use of force under international law is valid, in the age of the United Nations Charter, in only very limited circumstances. Its potential validity can be placed into two categories: the inherent right of self-defense (either individual or collective), or as authorized by the UN Security Council as provided for by Chapter VII of the Charter, including to protect populations at risk from R2P acts. This section does not address the legal, political or normative issues involved in the question of the use of force outside of these two avenues.

To work backwards, tribunals have been asked to assess the question of the validity of a claim of self-defense on several occasions, but there have not been (at this time) judicial findings on the validity of Security Council authorized uses of force. The ICJ examined the alleged illegal use of mines in the *Corfu Channel* case, decided in 1949 – although the case did not center on the assertion of self-defense by Albania. Here the Court declared its need for allegations to be proven by “**conclusive evidence**” and a “**degree of certainty**.” The Court’s assertion of a standard of proof was unfortunately missing in their more recent cases over *Military and Paramilitary Activities* and *Oil Platforms*; both “**sufficiency**” and “**conclusiveness**” were invoked, but any choice or clarification of this standard has so far been lacking.

It is the exclusive competence of the Security Council under Article 39 of the UN Charter to determine the existence of a threat to international peace and security; however, the General Assembly is not prevented from

Different UN entities have mandated commissions of inquiry to establish whether gross or serious violations of human rights and humanitarian law have been committed and to identify perpetrators. As a general approach, the commissions examine existing reports on violations of international human rights and humanitarian law, seek to verify the veracity of these reports through their own findings, and establish further facts regarding the violations. The commissions select incidents and areas they deem most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and generally focus on areas that have greater potential for effective fact-finding. The International Commission of Inquiry on Darfur identified “likely suspects” based on “a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.”

Within human rights law, the Committee on Economic, Social and Cultural Rights has examined the obligations included within the Covenant with respect to “international assistance and cooperation,” obligations that flow from the undertakings of Articles 55-56 of the UN Charter itself and have been additionally advanced by specific General Assembly resolutions on economic development. However, the Committee has not begun to indicate what standard of proof would apply in the situation, for example, whereby one State sought to demand the implementation of this concept against a set of duty-holders.

Turning to identifiably serious breaches of international law, the ILC’s Draft Articles on State Responsibility under Articles 40-41 focused on “serious breaches of obligations under preemptory norms of general international law”, and all States’ duty to cooperate to end these violations. The breach must be of a preemptory norm of international
A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

making determinations for the purposes of its own functions. Both organs have considered situations of mass atrocities in the past in the context of their mandates to maintain international peace and security. However, analysing such cases in more detail does not allow a clear conclusion that instances of mass atrocities always constitute threats to international peace and security. In past cases, the Security Council referred to "massive flows of refugees towards or across international frontiers"76 or "the consequences for the countries of the region"77 or underlined "the unique character of the present situation."78 In addition, the evidentiary standards applied by the Security Council and the General Assembly remain unclear.

From an ex ante perspective, it would be useful to set out the standards of proof required to support a claim for self-defense under the customary international law rule embodied in Article 51 of the UN Charter, or for the use of force as authorized by the Security Council. While there is a voluminous amount of material on the requirements that must be shown for such undertakings, in neither case has there been any robust indication of whether any standard of proof is in fact needed at all, or to whom this proof would be submitted and/or examined. The same problems that surround this issue are present in all coercive measures of prevention and reaction that may be taken under the R2P framework.

INTERNATIONAL ORGANIZATIONS AND RESPONSIBILITY

A final potential area from which to glean insight for this Project comes from the consistently evolving area of the international legal responsibility of international organizations. The question of whether and when international organizations can be held responsible for actions or omissions under international law is complex and controversial. Indeed, the ILC’s Draft Articles on the Responsibility of International Organizations (hereinafter the Draft) have received a multitude of comment and critique, although they have been referred to by certain national courts and the ECtHR in turn.79 Despite the title of the ILC’s work, and in turn the title of this sub-section, it is as important to examine the question of holding States responsible for actions taken in conjunction with, or in the context of, international organization activity, provisionally set out in Articles 57 to 62 of the Draft. With respect to R2P, given the framing of paragraph 139 of the WSOD to involve the Security Council as the primary actor to address atrocities of the type R2P responds to in the face of manifest failure by a sovereign State, this topic would be potentially applicable in situations where the UN or a regional organization fails to act appropriately in the face of potential or actual atrocities, or in situations whereby a State incurs responsibility for actions taken through international organizations. Yet the question of whether and what obligations are placed on different international organizations in the area of R2P is a separate topic outside the scope of this concept paper.

There has been an increasing volume of case law concerning attempts to hold States responsible for actions conducted under the auspices of international organizations. These cases have utilized the standards of proof that are associated with the primary rule of conduct at issue, i.e. concerning core human rights at the ECtHR where that Court applied the “beyond a reasonable doubt” standard. There has not yet been a separate examination or analysis on the standard of proof that might be utilized in assessing whether a State is failing in its international obligations in the context of an act of an international organization, or for the responsibility of an international organization itself for the organization’s acts. Whether this standard of assessment should necessarily be identical to that associated with the responsibility of a State will remain an open question at this time.

CONCLUSION

Analyzing various evidentiary standards has shown that the determination of the risk of a violation of international (and national) legal obligations in the future based upon present facts and circumstances has been addressed successfully by international and national courts. Standards that are set to determine the prospect of serious crimes or violations, and which seek to prevent such crimes prospectively, provide that the risk of such harm that must be demonstrated can be anywhere from the low end of “reasonable possibility” to the high end of “substantial risk.” In the middle lies the “real risk” that such harm might occur. The range is determined in part based upon the scope and gravity of the threatened harm balanced against the likelihood of occurrence. In general, courts, both international and national, engage in balancing the probability of an event occurring based upon the evidence available at the time of the decision, with the level of harm that would occur if such a situation would develop.
In the context of R2P, the level of harm that would occur must be, by definition, exceptionally grave, as R2P addresses only those crimes considered at the apex of international crimes. At the same time, engagement to prevent such crimes must be measured and reasonable in light of the precautionary principle as well as the prerogatives of sovereignty. As a result, the mid-level standard of “real risk” appears best suited to the objectives and goals of the responsibility to protect as agreed to by Member States and further articulated by the Secretary General, since it requires understanding unique risks and considering concrete scenarios. Additionally, it mirrors the language of the jurisprudence in cases comparable for their challenges to assess future developments based on present facts, in particular those that address non-refoulement as analyzed under the Convention against Torture and the ECHR. Moreover, international practice of fact-finding provides a sensible guide for the collection of evidence, and jurisprudence from the international criminal court provides guidance on assessing gravity.

PART V:
A COMMON STANDARD AND GUIDING PRINCIPLES FOR THE APPLICATION OF THE RESPONSIBILITY TO PROTECT

INTRODUCTION
According to past experience, mass atrocities do not evolve in a linear fashion and they rarely encompass an entire country at one given time. Therefore, preventive measures cannot be organized into neat categories of “structural” and “direct prevention.” What appear to be ongoing mass atrocities in one part of a country could only be the precursor to similar violence in another part; post-conflict peace-building, long-term and sustainable in its impact, might also have the objective of directly preventing a relapse into mass atrocities.

R2P can contribute to addressing a situation of mass atrocities at any stage of its development. The urgency and gravity of the situation can only be determined concretely according to the circumstances in a particular country at a given time. This assessment determines the nature and timeline of activities required by the government or by other UN Member States or the international community collectively.

While the Project contemplated five potential entry points for standards for the application of the R2P, discussed infra Part II and in the annexed Concept Paper, it became clear that separate standards are not required for each entry point, and, in fact, would further complicate and confuse matters, while also being potentially counter-productive. Moreover, graduated standards accompanied by graduated levels of proof based upon a balancing of the risk of mass atrocities with the level of intervention upon state sovereignty would be logically incorrect. These factors can only be assessed independently for two reasons. First, the fact that the level of infringement on sovereignty may be higher does not reduce the degree of risk of mass atrocities. Therefore, it would be incorrect to require a higher standard of proof where the contemplated level of engagement could be higher. Second, R2P is not prescriptive. As it does not dictate what should be done in a concrete case, it could not be known what level of infringement on sovereignty was anticipated at the point of determining whether the R2P obligations were triggered. Each case must be examined on its own, and all policy options for response must be fluid based upon exigencies in the country where the atrocities are being committed, or are threatened, and its place in the international arena.

A State’s responsibility to protect its own population is based on existing legal obligations which are in place independently of R2P at all times. It therefore is necessary to reflect standards of application related to these primary legal obligations. At the same time, with regard to the objectives of R2P outlined above, the standard must focus on the future risk aspect of R2P’s prevention requirement and thus combine prospective and retrospective standards. In the context of the R2P, it must be both proactive and reactive for the international community to be able to take consecutive, measurable steps that are effective in preventing and halting mass atrocities. Collective action must constantly seek to balance the urgent imperatives of population protection against the legal and normative value of sovereign equality and territorial control. The focus of any assessment must be on the foreseeable consequences of present action, which generally requires a lower threshold of evidence but a higher risk requirement in terms of imminence and/or gravity. The standard also reflects and addresses the tension between fluidity and prescriptive rigor. As the researchers discovered, the need for flexibility is more relevant with respect to the response to a given situation than in the question of whether R2P acts are imminent or occurring.
It was reiterated explicitly in the Secretary-General’s 2009 report on Implementing the Responsibility to Protect that the threshold for R2P measures under Chapter VI is lower than for enforcement action under Chapter VII. At the same time, the pillars outlined in that report have not been interpreted as neatly separated sets of activities that will be applied according to linear developments on the ground moving the situation from one pillar to the next according to clearly defined thresholds. Therefore, it is not necessary for there to be separate standards for each of the three pillars. Instead, the Standard and Guiding Principles provide for a framework to determine existing levels of risk as a basis for assessing future developments with an acceptable level of certitude. Given the specific rules within international law on the use of force, as well as current (as of July 2012) evident unwillingness to adopt guidelines on the use of military force under R2P, along with a generally accepted approach to R2P that involves defining a continuum of measurable steps to mitigate the risk of mass atrocities, it was not required to assign separate standards of proof for this category.

Any situation can be assessed for risks of mass atrocities following the proposed Standard and Guidelines. It is for the relevant stakeholders to determine the appropriate time for different forms of more or less intrusive action to prevent or halt mass atrocities. Given the need to target limited resources to those States and situations that truly require forceful early action to prevent mass atrocity, the standard can also be very useful in assessing where international assistance and capacity-building should best be utilized.

The following standard and guidelines offer an approach to assess how R2P applies to a situation where populations are at risk of mass atrocities and suggests a procedure for how to identify required action. It further proposes a methodology to determine whether a state is manifestly failing in its responsibility to protect. The standard and related guiding principles are intended to be utilized by States, international and regional organizations, civil society, academia and other actors called upon to determine the relevance of applying an R2P framework to a given situation. This standard and set of guiding principles may assist common and coordinated approaches to implementing the practical steps embodied in the R2P.

### STANDARD OF ASSESSMENT

A situation will be considered in the context of R2P, if its examination establishes a real risk that exceptionally grave human rights violations, as described in genocide, war crimes, crimes against humanity and ethnic cleansing, are occurring or are likely to occur.

### APPLICATION

1. The Standard and attendant Guiding Principles apply to any situation of stress in order to determine whether it could benefit from the R2P as endorsed in the 2005 WSOD. The application of this Standard aims at increasing transparency and accountability of deliberations on the application of R2P to a given situation and promotes consistency in State action.

2. The assessment of available information aims to determine the likelihood of future conduct. This determination will build upon evidence of past events as relevant.

3. For fact-finding on present and past events, the standard of reasonable suspicion should be applied, which is met when a reliable body of evidence indicates the occurrence of a particular incident or event. Relevant facts cannot be established solely on the basis of reports in mass or social media and must be corroborated.

4. Following national and international practice, a real risk has been established if, based on the facts available, there are substantial grounds to believe that grave human rights violations against personalized individuals or groups are possible in concrete scenarios.

### PRINCIPLE 1:

**Determination of relevant human rights violations**

1. The objective of the determination of relevant human rights violations is not the identification of separated legal categories of mass atrocity crimes on the one hand and other human rights violations on the other hand, but a common consciousness of the risks involved in any massive violation of human rights.

2. The following human rights violations have been of particular relevance in past cases of mass atrocities: Killings, torture, mutilation, rape and sexual violence,
abduction, forced population movement, expropriation, destruction of property, looting, lack of freedom of speech/press/assembly/religion, destruction of subsistence food supply, denial of water or medical attention, man-made famine, redirection of aid supplies, discrimination in access to work and resources, political marginalization, restricted movement, discrimination in education, and lack of access to justice and redress.

**PRINCIPLE 2:**

**Determination of the level of gravity or seriousness of potential violations**

1. The persecution of large parts of the population based on group identity applied by the perpetrators is the main element of the exceptional situations in which application of the R2P may be relevant.

2. The significance of human rights violations will be assessed in light of the number of potential victims of violence or level of irreparable harm that may be caused to potential victims taking into account the following risk-factors: Identification of the victims based on identity criteria linked to race, color, descent, religion, ethnic, or national origin, gender, sexual orientation or other ground and their association with a specific political opinion or group; public hate speech, incitement to violence, or humiliation of a group publicly or in the media; exclusionary ideologies that purport to justify discrimination; a past history of violence against perceived groups; a climate of impunity in which these events unfold.

3. The following circumstances can increase the risk-level for potential victims: Armed conflict, which may disproportionately affect a specific group or a large part of the population; existence of and support to militias that could carry out attacks against potential victims; and elections.

**PRINCIPLE 3:**

**Application of the R2P**

1. The R2P requires States to take concrete measures to mitigate the real risk of mass atrocities, based on existing legal obligations. The R2P encourages a concept of consecutive, measurable steps by national and international actors, based upon existing resources and strategies, but does not prescribe particular measures.

2. The nature and timeline of the steps depends on the gravity and urgency of the situation. Such measures could include: Public acknowledgement and condemnation of human rights violations; clear and public orders to military, police or security forces to respect international human rights and humanitarian law; immediate enforcement of accountability for the most relevant violations; ensuring humanitarian assistance and protection for victims of violence; in cooperation with relevant stakeholders, including potential victims, creating an action plan with timelines for mitigating the most urgent risk factors.

3. Action by the international community is subsidiary to action by the national government, i.e. to support and complement rather than substitute.

**PRINCIPLE 4:**

**Determination as to whether a State is “manifestly failing” to meet its R2P**

1. In cases where the national authorities are manifestly failing to meet their responsibility to protect, the responsibility moves to the international community.

2. The determination of whether a State is “manifestly failing,” should be based on the information regarding relevant human rights violations, the implementation of measurable steps by the State to mitigate risk factors, and their impact on the real risk that exceptional grave violations of human rights could occur in the future. Based on the outline of consecutive measures to mitigate the real risk of exceptionally grave human rights violations, the compliance of national governments and the international community can be established. Manifest failure occurs when foreseeable consequences have not been addressed and an unacceptably high level prevails or increases.
In a rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through “timely and decisive action,” not on following arbitrary, sequential or graduated policy ladders that price procedure over substance and process over results.

INTRODUCTION

This meeting is the first - and foundational – for the project, situated within a two-year research undertaking supported by a grant from the Australian Government. The project seeks to conceptualize and operationalize a critical subset of the R2P doctrine by exploring the creation of evidentiary guidelines to determine when the international community must act pursuant to its obligations under R2P. Specifically, what is an appropriate evidentiary standard - articulated specifically for the R2P context - that prevents hasty action, while ensuring that the preventative component of R2P is realized?

In the Secretary General’s (“SG”) 2009 report, he suggests a three-pillared approach to R2P’s implementation. The first pillar consists of a state’s responsibility to protect its own population from serious crimes. The second pillar is the commitment of the international community, including states, regional and sub-regional organizations, civil society and the private sector, to assist states in meeting those obligations. The third pillar is the responsibility of member states to respond collectively in a timely and decisive manner when a state is manifestly failing to provide such protection. Under the third pillar a wider range of measures, peaceful or coercive, can be invoked by the international community if two conditions are met: (a) “should peaceful means be inadequate” and (b) “national authorities are manifestly failing to protect their populations.” The SG repeatedly states that the diverse circumstances in which rapidly unfolding mass atrocities occur leaves no room for rigid sequencing of the three pillars or for tightly defined “triggers.” According to the SG, the more robust the response, the higher the standard for authorization.

Our discussion will center on the specific question of evidentiary standards that can guide the deliberations of individuals within the UN, regional and sub-regional organizations, states, and civil society when faced with a situation of unfolding mass atrocities. Our inquiry proceeds by examining evidentiary standards drawn from various areas of domestic and international law, which seek to regulate conduct that R2P seeks to capture. To guide our deliberations the program will unfold in a series of discussion sections.

Generally, the program will proceed as follows in Room 1008, the Dean’s Conference Room.

9.15am
W elcoming Remarks by Dean Matthew Diller and Professor Sheri P. Rosenberg

9.30am
The Concept and Challenges of Developing Evidentiary Standards for the Responsibility to Protect – comments by Edward Luck, UN Special Advisor on the Responsibility to Protect; Hon. Gareth Evans AO QC, Chancellor of the Australian National University.

10.15am
Urge to turn to Criminal Law

Because R2P uses criminal categories to define the acts with which it is concerned, the practice has been to turn to international criminal law to determine whether a situation of mass atrocities falls within the remit of R2P. This examination will involve a discussion of the substantive content and contours of the four enumerated crimes, as well as the evidentiary standards prosecutors and judges use in the multiple stages of criminal proceedings. Areas to be discussed include:

- The international criminal court’s use of increasing evidentiary thresholds at each stage of an international criminal proceeding (e.g., to determine when to begin an investigation, issue an arrest warrant, confirm an indictment, or convict).
- A comparison of the nature and purpose of criminal justice or criminal punishment with the nature and purpose of both civil compensatory liability and state responsibility.
- The balancing of interests that takes place in developing elements of a crime like “objective knowledge” or burdens of proof like “proof beyond a reasonable doubt” in the context of R2P.
- The doctrine of ‘complementarity’ and its relationship to R2P.
11.30am
The Duty of Care, and the Duty to Protect in Human Rights Law

While criminal law defines the category or substance of R2P, the duty to protect in international human rights law more accurately captures the object, purpose, and scope of the obligations articulated in R2P. Resembling national tort law theories, international human rights law recognizes positive duties upon states to take measures to prevent harm caused by private actors to individuals within their jurisdiction. This perspective focuses us on what to do for the threatened or actual victim, rather than what to do with the violator. This examination will involve a discussion of the ‘duty to protect’ in human rights law and the ‘duty of care’ in common law national systems.

- What are some of the theories and policies underlying the concept of ‘duty of care’ from domestic tort law, in particular the ‘failure to act’?

- The elaboration of the ‘constructive knowledge’ and ‘due diligence’ standards within international human rights law

- How would the application of these concepts balance the preventive demands of R2P with the need to avoid hasty action?

1.00pm–2.25pm
Lunch (will be served in Cardozo Law School)

2.30pm
State-to-State Obligations: Duty to Prevent, Duty to Cooperate and Transboundary Harm

Because R2P seeks to engage the obligations of a state to protect populations outside its territory, we will examine the issue of obligations in respect of third states or transboundary harms, and the concept of ‘due diligence’ that seeks to set the standard of conduct required to fulfill these obligations. We will also flesh out the idea that in the R2P inquiry we are looking at a general state practice rather than toward individual liability. The concept of legally enforceable obligations to address atrocities committed outside the territorial borders of a State has seen renewed examination in the jurisprudence of regional human rights bodies and in the International Court of Justice – specifically, we will discuss the ‘duty to prevent’ that was examined in the ICJ’s 2007 Bosnia v Serbia Judgment. As invoked by the ICJ in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, States are under a special duty to cooperate to end these violations.

We will flesh out the application of these principles in the context of R2P, and address the role these concepts play in early action for R2P.

- As these differing concepts of prevention have been elaborated (e.g., for genocide in the ICJ judgment, and for transboundary harm in the case of the ILC’s Draft Articles on the Prevention of Transboundary Harm), when does the obligation arise, and what standard of proof is required to show this?

- Do Articles 40-41 of the ILC’s Draft Articles on State Responsibility apply to all R2P acts? What is the relationship between the ‘duty to cooperate’ and R2P, and what is the utility of its use herein?

- How satisfactory is the standard of proof for genocide prevention set out in the 2007 ICJ Bosnia v Serbia Judgment?

3.00pm
The Elephant in the Room: Military Intervention, Coercive & Consent

Although R2P has never been focused or framed in terms of military intervention alone, it is the aspect of the concept that has and continues to generate the most heat (if not light). The law and politics surrounding the use of force to address mass atrocities has led to much discussion and debate, and has been central to the popular perception of R2P at this time. We will discuss whether these evidentiary standards should aim to cover the use of force in the context of R2P and, if so, whether it will demand an entirely different set of considerations and legal obligations – and what such standards should therefore be.

- Should the evidentiary standards address only (in terms of ‘pillar three’) the application of the R2P framework, or must it deal specifically with the issue of military intervention given its importance to so many actors?

- How do we address the perception that these standards will be all about authorizing military intervention, when
that is just the final component of a multi-prong approach within R2P?

- Are the standards as presented in the ICISS report sufficient to cover this issue?

- How do we distinguish between coercive military intervention and intervention by consent?

4.15pm

**Conflict Prevention: View from the ground**
The ultimate determinant of the effectiveness and utility of these standards will be their effect on the ground. Throughout the many stages of an unfolding conflict or situation where R2P acts may be occurring, it is the facts on the grounds that support a claim that ‘now’ R2P must be in play. We will discuss the role of evidentiary standards in different intervention points of conflict, and how different standards will help or hinder the effectiveness of addressing atrocity prevention. This part of the conversation will be framed against a case study involving Guinea concerning actions in 2009-10.

- Can you imagine the utility of such standards? In what way could they be used from an on-the-ground situation?

- What value is R2P at all in real conflict prevention situations?

- When can you say, in plain English, that “we know enough – action must be taken by the international community”?

5.30pm

**Sliding Scale; Law versus Politics**
In moving towards conceptualizing the evidentiary standards of this Project, we will discuss whether more intrusive forms of international action should require higher evidentiary standards, producing a graduated series of standards; given the multiplicity of R2P enumerated acts, modes of implementation and actors to be involved, should the aim be to produce separate standards along these parameters or a simple unified application? Secondly, should the standards aim to become, in due time, legally enforceable rules over the behavior of relevant actors, or should they aim to remain as persuasive indicators for policymakers that shape the boundaries of what may be essentially policy decisions?

- Should there even be a standard for pillar one?

- The 2005 World Summit Outcome Document, in its use of the language ‘manifestly fail’, appears to suggest a form of ‘complementarity’ in the application of R2P. How should this affect the creation of standards of proof?

**RECEPTION**
Following the conclusion of the day’s discussions, please join us for a reception (food and drinks). Details of location will be provided forthwith.
SUMMARY NOVEMBER 17, 2010
CARDOZO R2P EVIDENTIARY
STANDARDS EXPERT MEETING
This paper summarizes the primary findings and concerns raised at the meeting of experts as interpreted by the convener Sheri P. Rosenberg and the meeting rapporteurs Daniel Stewart and Sam Permutt. Participants neither reviewed nor approved this summary. The meeting was held under the Chatham House Rule and thus this paper sets forth the basic points that emerged from the meeting without any attribution whatsoever.

The discussion centered around the issue of evidentiary standards that can guide the deliberations of individuals within the UN, regional and sub-regional organizations, states, and civil society when faced with a situation of unfolding mass atrocities. The meeting was divided into discussion modules. Each module began with a brief presentation by an expert in that particular area of inquiry. As the modules were interrelated, the conversation flowed seamlessly among ten main topics. A copy of the Agenda is annexed.

**TOPIC I:**
THE CONCEPT AND CHALLENGES OF DEVELOPING EVIDENTIARY STANDARDS FOR THE RESPONSIBILITY TO PROTECT: DEVELOPING LEGAL NORM, POLITICAL NORM, OR BOTH?

There was relatively sharp disagreement over whether R2P is—or should develop as—a primarily legal or political concept, and over the consequences that flow from each characterization. On one side of the debate, some argued that R2P is quintessentially a political concept, not a legal concept, and the framework for determining its application is political too. As a concept it is intended to build international consensus and seeks to avoid any categorization that will thwart this goal and lead to division. The implication of this line of reasoning is that pursuing R2P as a legal norm will divide rather than unite the community of interests. Following this point, one participant raised questions such as:

- Whether we would want a political body engaged in assessing evidence, testing against standards and then a judicial body doing the same for a different purpose? This could lead to inconsistency and ambiguity;
- Example: What would happen if military intervention was authorized on grounds of genocide and then the ICJ determines that there was no genocide in relation to the authorizing body
- What if the evidentiary basis used to legitimate the R2P falters?

On the other side of the debate, some suggested that legal categories have been used, even within the UN system as a defense to the charge of selectivity. Steering clear of the R2P’s potential legal effect underplays the significance of legal arguments’ political impact in the UN system. Moreover, the R2P has a space outside the UN where legal arguments have even more leeway. Finally, legal language can, and has, persuaded policy makers. [See below Topic III].

The question is whether the standards should aim to become, in due time, legally enforceable rules governing the behavior of relevant actors, or should they aim to remain as persuasive indicators for policymakers that shape the boundaries of what may be essentially policy decisions? If they do become legally enforceable rules, what sort of legal rules would they become?

A participant questioned whether the “standards” this project is developing are intended to be legal standards. The response was a categorical no. The project leaders clarified that they are agnostic on this question. Rather, they are looking to hear from scholars and stakeholders. Since most agree that R2P itself is not a legal concept, the standards for its invocation are not likely to be legal. As one participant noted, “saying it is well-established law does not get you there politically.”

**TOPIC II:**
VALUE OF EVIDENTIARY STANDARDS OR GUIDELINES

Most agreed that, whether R2P is primarily a political or legal concept, the creation of clear evidentiary standards can help to allay concerns among critics of the R2P by contributing to the consistency of its application.

Most agreed that guidelines were a step in the right direction. One participant, however, suggested that defining evidentiary standards is like “chasing a will of the wisp” since the R2P as a political concept will not necessarily adhere to evidentiary standards. Moreover, there is a tension between legal standards as an advocacy
tool and legal standards as a total time-buying distraction for inaction.

As one participant pointed out, the legitimacy function of the effort to protect populations under the R2P Framework depends on its being perceived as impartial, consistent, and making a difference on the ground. It is certainly possible to uphold standards in exemplary ways while not making a difference on the ground. One participant suggested that the R2P has yet (as of November 17, 2010) to pass either test. Many participants agreed that developing clear evidentiary standards or guidelines can help allay concern among critics of the R2P about selectiveness and double standards in its application by contributing to standardization and the transparency of an articulated standard of application.

Another reason to develop evidentiary guidelines is to help distinguish whether there is value added in bringing an R2P perspective to a given case.

It was recognized, of course, that the standard cannot solve real world political imbalances. The R2P cannot change the political balance of power. And it is not only R2P that suffers the misfortune of such a reality. All international human rights norms have been challenged with selectivity and double standards.

TOPIC III: THE CONTENT OF R2P IS DESCRIBED IN LEGAL CATEGORIES: CONSEQUENCES AND IMPLICATIONS

In a continuation of the discussion over whether R2P should be seen as a legal concept, some suggested that states intended to cleave to legal categories—by defining the content of R2P using legal categories (ethnic cleansing can be an act of crimes against humanity or genocide). In response, one participant stated that Member States intended to narrow the categories of scenarios that would trigger the R2P by using legal categories; they did not intend to cleave to legal standards.

Member States utilized legal categories to define the content of R2P primarily as a way to limit the scope of the principle. Under the ICISS Report the scope of R2P was broader and could encompass, for example, natural disasters. While legal categories are intended to limit the scope of the R2P, legal standards applied to determine the application of the R2P framework should not be allowed to stymie the application of the principle. For example, during the genocide in Rwanda states dithered over whether to engage to stop the atrocities, claiming that they could not determine whether “genocide” was in fact being committed at the time. Genocide, they claimed, is a legal term and requires a very strict legal determination. In this way, policy makers were able to use a legal standard as a shield for inaction rather than a sword of action. Regardless of the intention of the Member States, the reality is that legal categories lead to legal analyses. And law is accustomed to deriving standards against which to analyze information and draw conclusion. Hence the development of standards would be aided by examining evidentiary standards drawn from various areas of domestic and international law, which seek to regulate the conduct that the R2P seeks to capture.

With this in mind the participants generally agreed that tort law, rather than criminal law, is the appropriate analogue to R2P, emphasizing a duty of care and prevention rather than punishment. Prevention encompasses the prevention of outbreak, prevention of continuation, prevention of escalation and prevention of recurrence.

TOPIC IV: URGE TO TURN TO CRIMINAL LAW

One participant noted that we can get commitments to act on genocide that we cannot get for crimes against humanity. States are willing to do things in response to evidence of genocide that they will not do in the face of evidence of crimes against humanity. This participant argued that this is true, in part, because there is not a “crimes against humanity” convention. Genocide is an argument stopper. It has an accepted non-contested definition.

It was further suggested that we can use criminal law to advance the R2P, but we have to live with the consequences and finesse around them. Talking about crimes and criminal law gives you some traction. There are, however, some conceptual difficulties linking up criminal law and the R2P.

- First, tribunals identify acts perpetuated by individuals, not crimes committed by states. Paragraphs 138–139 deal with State responsibility. Efforts by the International Law Commission to recognize the concept of State crimes did not take hold;
• We have a legal problem marrying up State responsibility with individual responsibility;

• One problem with the jurisprudence coming out of the ad hoc international tribunals is that it divorces individual responsibility from State action and made perpetrators of serious international crimes mere serial killers possessed of genocidal ideals rather than actors in a broader State action.

Some participants suggested that another problem with transposing international criminal law standards to the R2P context is that criminal law does not deal with things that have not yet happened. Criminal law is about assessing whether a crime was committed.

Having said this, many participants agreed that there are some basic principles that can be drawn from the different evidentiary standards at play in the Rome Statute. There are four standards starting with the reasonable basis test when the prosecutor decides whether situations merit investigation (lowest) to the beyond a reasonable doubt standard for conviction, and those in between.

Four core burdens within the Rome Statute:
• To undertake an investigation, the Prosecutor must merely have a “reasonable basis” to proceed—a standard set against specific tests within the Statute. In a preliminary investigation the Prosecutor focuses on the gravity requirement, which is the most central requirement for elevating atrocity crimes to R2P crimes. In a December 7, 2011 report the ICC set forth the criteria for gravity. These include: scale, nature, manner of commission, impact of crime committed on victims, existence of aggravating circumstances.

• The Court will issue an arrest warrant for an individual if there are “reasonable grounds to believe” that the person has committed a crime within the jurisdiction of the Court.

• If the Court is required to confirm the charges or an indictment against an individual, the Prosecutor must provide “sufficient evidence to establish sufficient grounds to believe” that the person committed the crime charged.

• Finally, a finding of guilt must be “beyond a reasonable doubt.”

Despite the clear need to recognize its limitations, it is certainly useful to consider standards from international criminal law in constructing the R2P standards for two reasons: first, international criminal law categories describe the content of R2P; and second, international criminal law, as it has evolved, injects itself and acts in concert with other forms of political, humanitarian, and diplomatic mechanisms to address imminent or on-going mass atrocities.

Nonetheless, several participants suggested that civil (as opposed to criminal) law should be used. The private law context is actually more helpful when trying to assess potential risk, which is what the R2P ideally is attempting to do. For example, injunction language uses a balance of harms test, balancing risk of harm and inconvenience when assessing whether to issue an injunction. We use this language in the human rights law context, particularly in recent cases dealing with refoulement and extraterritorial application of norms. The ECtHR and the HRC talk about real risk of irreparable harm, serious violation, and substantial grounds for believing there is a real risk.

One participant suggested that we must make some distinction in analysis when looking at evidentiary standards in terms of the preventive category of work and the reactive category of work.

The three categories, discussed earlier, the prevention of outbreak, the prevention of continuation and escalation, and the prevention of recurrence—is an extremely pragmatic breakout, according to several participants. Moreover, once atrocities begin the criminal law context is important in persuading policymakers that in examining tribunal jurisprudence, these factors will constitute atrocity crimes of a dimension you do not want to see continue. For example, stakeholders will look to tribunal jurisprudence to see what level of criminal activity would trigger use of force. Guidance from tribunals enables legal discussions that may trigger political action. For example:

• Destroying part of a group means destroying a substantial part of the group

• Crimes against humanity uses a substantiality test with considerable detail

• For ethnic cleansing, there is a gravity test in tribunals’ jurisprudence
• War crimes also uses substantiality

Gravity can be examined in terms of applicability to the R2P whereas broad jurisdiction over war crimes is indicative when they are committed on a large scale. The criteria for establishing gravity could have qualitative dimensions as well as criteria that the offices of prosecutors have established. See, Bemba decision.

Another participant suggested that some general references to criminal law standards can be made—perhaps to the reasonable basis standard, the lowest used by the prosecutor to determine whether to open an investigation into a situation. The reasonable basis standard is potentially useful because it is applied in a broader context, namely state action or inaction, and designed for a different purpose than the other tests which focus on individual liability.

The threshold should be some sensible or reasonable justification. For example, the Commission on Inquiry for Darfur developed similar standards of proof—a reliable body of material consistent with other verified circumstances that a person may reasonably be suspected of committing crimes.

• Low threshold
• Basic information showing reasonable observer that allegations justify outside intervention

There are other standards that one may examine from within the international criminal law context.

• Responsibility always resides at the national level (like Pillar 1 of R2P)
• For forum determination, which actor will proceed, the idea is that there is an international authority; legitimization function recognized. This is presumed in the Rome Statute context.
• There is a burden on the prosecutor of the ICC to demonstrate a reason to intervene—failure or inaction of the state or inability or unwillingness to carry out the investigation or prosecution.
• Balance of probabilities burden applied. Is that something useful to examine in terms of what triggers international intervention? Contestation between state and international authority.

• Noncompliance procedure in relation to cooperation—if a state does not cooperate then the matter can be referred to the international community.

TOPIC V:
DUTY OF CARE AND THE DUTY TO PROTECT IN NATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW

While criminal law defines the categories or substance of the R2P, most participants generally agreed that the duty to protect articulated in international human rights law reflects the object, purpose, and scope of the obligations articulated in the R2P. Resembling domestic tort law theories in place in many countries, international human rights law recognizes positive duties upon states to take measures to prevent harm caused by private actors to individuals within their jurisdiction. This prevention perspective focuses us on what to do for the threatened or actual victim, rather than what to do with the violator.

DOMESTIC LAW

A participant discussed generally the duty to protect concept in the US context. He cautioned that the transplantation of private concepts to this project may introduce dangerous confusions and that there was a need to be cognizant of issues that include:

• Shift from emphasis on private actors to public actors;
• US focused regime to international legal regime;
• The difference between intentional wrongdoing and negligence.

In the continental system, private actors have a broad duty to protect or rescue whereas at common law, there are few rules proscribing duty to rescue. In the US, the duty to rescue among private actors is quite limited. Generally speaking, in the US there is no duty to control the conduct of a third person to prevent harm to another unless there is a special relationship

In the US, the public duty does not apply to uniquely municipal activities. The US is but one of the legal families in the world measuring standard of care to ascertain breach of duty.
• In common law jurisdictions, the distinction between intentional tort and negligence is very important.

• Intent has a two pronged definition in the US: purpose or substantial certainty of outcome.

• Some legal families in Europe contour “intent” more narrowly to solely mean purpose.

• If negligence is adopted as part of the scope of the duty to protect, then how should a breach of the duty of care be measured? For medical malpractice, the profession determines the standard; for products liability, outside experts determine the standard. Who would we look to in order to define the standard of care in the R2P context?

What is the duty to rescue as articulated elsewhere?

• Quebec—There is a duty of care to all and a duty to rescue so long as that does not require you to put your own life at risk.

It was suggested that if we make the focus of our discussion of paragraphs 138 – 139, the intentional tort construct applies quite well to examining a State’s responsibility not to commit the four atrocity crimes described in paragraph 138. If we are looking to see how to evaluate whether the state was manifestly failing, we’d inquire as to whether we find intentional commission of these crimes by a state; or, if a non-state or sub-state actor commits the crime, then we’d look for intent on the part of that group to commit these crimes. But the negligence standard of paragraph 139 comes into play as well, since if there’s a failure on the part of the state to do its duty to protect its own people this could trigger a response by the international community. In that case the international community would ask first if there was an intent not to protect, intent to commit genocide, or if the state was unable or unwilling to act which could be based more on a negligence type standard than an intentional tort standard. Thus, both negligence and intentional tort analysis can have relevance in the 139 paradigm.

A participant queried whether the duty lasts for the duration of the State’s rebuilding efforts after the intervention; in other words does the State’s duty go beyond the intervention? What can we take from national law on torts to answer that question, which more broadly is one about what is the content of the duty? We are familiar with the idea that professional communities define their own standards of care. Can we in any way find a handhold to discuss reasonable performance when we are talking about a municipality at any point in time?

It is relevant that the duty to rescue someone whose life is in danger is an asymmetrical obligation that does not apply equally. If a doctor sees someone dying, the doctor has a stronger obligation to rescue since the doctor is able to do more. The ICJ has said in the Bosnian Genocide case that the responsibility/ duty to prevent genocide is assessed in terms of what you can do; not a unilateral, general obligation but rather one relating to matters like proximity and ability—it is not an obligation for everyone to respond in the same way.

INTERNATIONAL HUMAN RIGHTS LAW

The participants turned to a discussion of expectations placed upon states by international human rights law and the R2P norm. There are three basic obligations imposed on states by international human rights law—to respect, to protect and to fulfill. R2P may be articulated as an obligation to prevent, which is articulated in international human rights law under the rubric of the duty to protect. International human rights law and regional bodies make clear that the obligation to prevent extends not only to states but also to private actors involved in the commission of violations.

The duty to prevent private individuals from committing human rights violations has been most articulated in regard to bodily integrity rights. In particular this obligation has been found with regard to the right to life and the prevention of torture. The best articulation of this duty, in the context of the obligation to protect the right to life, is found in a series of Articles 7 & 8 cases from the ECtHR, beginning with Osman v. UK which held that the responsibility to protect the right to life extends not only to the deterrence of offenses through law enforcement or punishment, but may give rise to a positive obligation upon authorities to take operative measures to protect someone who’s life is at risk.

These operative measures provide generally that the government has a responsibility to take all measures, which reasonably judged would prevent the anticipated harm, in a situation where, the government knew or should have known of a real and immediate risk to a particular group. The responsibility to act applies when there is a real and immediate risk and real and available
measures that the State can take that are likely to have a meaningful impact. But to whom does the State owe the duty? And in what context is the duty triggered? The duty extends when the state actor is in a position of control or has a specific relationship with the individual.

A number of other cases were brought up as potentially relevant. One of these was the RTS – Bankovic case, in which relatives of those killed in the bombing by NATO of a Belgrade tower, argued that those NATO states engaged in this operation owed a duty of care to citizens in Belgrade since they controlled the airspace over Belgrade. In that case the court rejected the idea that there could be effective control over an area in which one would conduct paramilitary activities and acknowledged that the political reality of a given situation is relevant in determining duties owed by states. Some participants argued that Bankovic is not particularly helpful to this project because the decision in Bankovic dealt with jurisdiction, an issue which Does not arise in the context of the R2P principle.

The Transdniastria Case, may be more useful to our project. In that case a separatist party, supported by Russia, occupied a small part of Moldova. The ECtHR determined that Moldova lacked effective control over the area, but was still responsible for acts within that territory. This represents the beginnings of responsibility in third-party states. In a separate case addressing the issue of state obligations, McCann v. UK, the key question is what knowledge did the state have? In this case three active IRA members were killed in an anti-terrorist operation carried out by the British Army. While these actual killings were not held to be violations, the court examined what knowledge the British Army had of causalities when planning the operations. It held the government responsible for not intervening earlier to prevent the terrorist attack. If states have knowledge of threats at an earlier point, they bear responsibility under HR law for not intervening at an earlier stage to prevent the loss of life.

ECOSOC is more progressive in looking at the application of extraterritoriality responsibility.

- State parties should prevent their own entities from violating those rights being developed by the Special Rapporteur on HR and business, this creates state responsibility when businesses act.

While there is a developing body of law concerning the obligation to prevent particular human rights violations in ones territory and in a third-party space over which a state holds some control, some participants pointed out, that practically speaking, the ECtHR seems to establish a high evidentiary standard in the Osman and other related cases. They query over whether a state is ever really going to have the specific level of information about the kinds of human rights violations necessary to meet the level of “know or should have known”? This raises a challenge for this project.

Another participant questioned the merit of asking whether the ECtHR jurisprudence should apply to a bombing run through Belgrade in terms of effective control? If we are in an R2P context, to what extent should the ECHR or the ICCPR be factored into a government’s decision to apply resources to pursue an R2P objective overseas? Should we have human rights standards in mind for uses of military force overseas? Where do we start thinking about that?

In response, some suggested that if a state intervenes in an R2P situation where there is conflict, there might be international human rights rules to govern any state actor. Which ones take precedence and at which stage of the conflict? Perhaps, the standard changes as the conflict progresses. For example:

- Should there have been a more robust response by European Community and the EU to the situation in Kyrgyzstan, given that they are also parties to the ECHR and their soldiers will be held accountable for actions while they are there and must comply with HR standards? Should the EU members have thought about their signature to the ECHR? Their soldiers will have to comply with their HR standards abroad. So yes, it will be a factor in how states conduct their operations.

- Would states have an obligation under human rights law to intervene if R2P did not exist? That is unclear and regional standards would be a factor here.
TOPIC VI: TRANS-BOUNDARY HARMs AND THE DUTY TO COOPERATE

Because R2P seeks to engage the obligation of a state to protect populations both within and outside its territory, the conveners examined the issue of existing obligations regarding third states and trans-boundary harms, along with the concept of due diligence that seeks to set the standard of conduct required to fulfill these obligations. The concept of legally enforceable obligations to address atrocities committed outside the territorial borders of a state has seen renewed examination in the jurisprudence of the regional human rights bodies and the International Court of Justice. The International Law Commission’s Draft Articles on State Responsibility provide a “duty to cooperate” to bring an end to certain atrocities.

The participants revisited the ICJ’s 2007 Genocide Case decision and looked specifically at how it plays into the issue of state responsibility; control; evidentiary standard and duty to cooperate. This was a significant case in that it took us away from criminal law in a case of mass atrocities, addresses inter boundary responsibility issues in the human rights context and accomplished a lot—while illustrating the difficulties that arise when discussing state responsibility for mass atrocities.

- In this case due diligence obligations under the genocide convention were clearly decided for the first time.
  - The court articulates a readily flexible standard. Factors that the Court discusses include the geographical distance, strength of the political links, and all other kinds of links between authorities.
  - After this case, all of a sudden, we can look at situations and assess the obligations of countries that do have influence on the situation happening.

- The Court states that the duty to prevent genocide is not in the realm of criminal law but in the realm of state responsibility. In this case, the court applies two different standards depending on whether it is discussing prevention or the attribution/commission of genocide.
  - For attributing genocide, the standard used is one of absolute certainty. The same standard is used for complicity—a state is only complicit if it knew for certain genocide was committed. This places the bar high for deciding that genocide has been committed.
  - In the realm of prevention, the Court is more lenient and articulates standard that it would be sufficient the third-party state knew or should have known that there is a serious risk that genocide will be committed—at least it solves part of the problem of the legal definition—so long as there are strict standards, we must get into legal definition. Article 40 of the articles on state responsibility and jus cogens.

Just as on due diligence, the standard developed by the courts is relatively flexible and takes a few things into account. The Court talks about the capacity to enforce effectively, the geographical distance, strength of the political links, and all other kinds of links between authorities. After the ICJ decision in the 2007 Genocide case, the notion of influence was developed. In this decision, for the first time, the Court provides guidance on how to look at situations and assess countries that have influence on a situation at the time it is happening. In sum, when it comes to prevention, the standard is different than the standard for commission. As long as there are firm, strict standards, clearly there is a need for standard legal definitions. Moving away from strict standards and looking at the risk of genocide, helps us for our framework.

The participants were split on the applicability of the Genocide judgment to the other three crimes subsumed under the R2P. Some presumed that the judgment is transferable on issues of prevention and control/ complicity but others thought this was less clear. There are trouble spots and interpretative difficulties.

- The problem of control takes us backwards—if the court is quite forward looking in terms of an obligation to prevent, than it is conservative in other areas.
  - There was a discussion of the criteria by which to attribute the behavior of private actors to a state with the debate between overall control and reasonable control.
    - After the Tadic decision, it appears that the Courts are focused on overall control. If an individual has reasonable control over a group and the group can’t function without your support, then you are responsible.
    - In the Genocide case, there needs to be a decision behind every level of action of independent groups. This is a difficult standard to meet. The state probably is not apprised or aware of the reason behind every level of action; it does not even do this for its own employees.
Parallel with the Congo/Uganda case. Uganda invaded a large part of DRC, but only occupied a smaller area (in terms of classic occupation). In other places, it let local groups control the administration. So the court decided that Uganda did not control the territory administered by local groups and was therefore not responsible for human rights violations there. There was a disconnect in the way court addresses modern warfare/non-state actors. The court did not adapt itself to this current reality, which is troublesome on the prevention side.

• Article 41 of the Articles on State Responsibility

  » When there is a violation of a *jus cogens* norm, states have obligations not to contribute to that violation or assist in its maintenance, and to cooperate to put an end to that violence. But in the body of the 2007 Genocide court decision, the notion of the responsibility of all states is dropped and replaced by the notion that only those countries that are parties to the Geneva Convention are responsible. So no explanation for what the duty to cooperate entails is provided.

• The first place to look with respect to R2P is state cooperation in the UN. In the General Assembly, there have been questions of who has ownership over deciding R2P issues. Some want the secretariat to have it, but others claim that these issues belong to the General Assembly. Two different questions arise:

  » Does the General Assembly have the duty to make decisions related to R2P?
  » Does it have the right to make decisions related to R2P?

• What is the role of state parties to cooperate to ensure compliance with international conventions? It is difficult to articulate how collective responsibility would work outside the framework of UN—the General Assembly and potentially, the Security Council?

  » One argument that could be made is that Regional organizations are more integrated and have strong legal basis for integrated action. Can argue responsibility of members of assembly state parties.

Are some states, by allowing al-Bashir to travel freely, violating their obligations under this framework? What is the role of collective state parties to address this type of violation? Could this type of action be prosecuted before the ICJ?

The collective assembly of states serves as a trustee of the Rome Statute and has assumed obligations in relation to a recalcitrant state. A few years ago, before the Bashir issue came up, the collective assembly of states adopted a series of recommendations about the fact that state parties need to assist the court in these types of situations. State parties should use membership within other organizations to take measures, generate political support and consider other tools to facilitate cooperation, using more punitive measures as a last resort. States may make recommendations that national authorities institute measures—failing those measures, the noncompliant state may be referred to ICC.

• In this context, there is a concrete obligation of the noncompliant State to take action with respect to a particular request or judicial order.

• If the State fails to take action, R2P is triggered. Could this type of framework, where States failing to act pursuant to ICC orders (i.e. the need to arrest a foreign official based on an ICC arrest warrant when he visits the ICC member State) are held accountable, be useful to R2P? Does it apply in an R2P context?

On the question of the application of the Genocide case to the R2P, care should be taken about blurring the distinction between complicity and the duty to prevent—By blurring it, we are making it harder for states to accept the obligation. Some participants were strongly opposed to saying to certain states for example, “if you do not arrest Bashir, when he lands on your territory, you are violating the Rome Statute and becoming an accomplice to violations of international humanitarian law in Darfur.” The explanation by the ICJ in the *Genocide* case of the distinction between duty to prevent and complicity made sense. You are an accomplice if you *know or have knowledge*. A state cannot be an accomplice without knowledge; it must have awareness or should be aware that acts of genocide are about to be committed. Not waiting for certainty, you are expected to act when you are aware. But to prevent genocide you do not have to know with absolute certainty that Genocide is occurring and, from an R2P standpoint, in many cases action may be necessary before the point of
complete knowledge. Is it helpful to promoting R2P to say we are not going to blame you for lack of action in such a circumstance?

Most agreed that the Genocide decision is significant with respect to the prevention analysis. And it is significant for the R2P in general (this is a positive development). On state responsibility for genocide, however, some suggested that the Court leaned too far over to a criminal law analysis of evidentiary standard, resulting in a determination of no genocidal culpability on the part of Belgrade. Some wanted to see the court rely more on an inference of intent and how that expressed itself over time, that culmination being Srebrenica. Instead, of going in that direction, the court chose to rely on ICTY jurisprudence. The ICJ is not well equipped and lacked the means to make these determinations. It looked at decisions of the ICTY. Danger when a non-criminal law body, such as the ICJ, looks at a case like criminal law body, such as the ICTY.

Look at Articles 41 and 42 of the draft articles along with Article 16. There must be a line drawn between traditional complicity, which is a basis for state responsibility and responsibility under the R2P. The court plays a little fast and loose with respect to whether knowledge or intent should be the standard. If we go through the articles carefully, it suggests that knowledge is not enough for complicity. You must facilitate assistance with purpose. The court did not wrestle with that in the opinion. For the R2P, it is necessary to set up a dual level of responsibility. What we are talking about is not a question of complicity—it is a separate legal duty with second-order importance in international law below the primary duty to avoid engaging in conflict.

Linking pillars 1, 2, and 3 creates a kind of vagueness—turning to the setup of the due diligence standard; it would be most effective in focusing on states where the atrocities are occurring. The language of 139 suggests some form of complementarity kicking in. With respect to a duty to prevent, you need a certain level of risk being assessed. You can put a lot of normal work the UN does into the first and second pillars. So due diligence gets to more of what kind of reaction do you have? It does not seem so useful before that. Any of the work the UN does on a daily basis tends to happens under the first pillar; not really where first factor comes in; clearly, due diligence happens with regard to what kind of reaction occurs; not entirely useful beforehand.

We are still dealing with an ex post facto analysis by the ICJ. There is no time to infer intent while a crime is happening. Only in retrospect can one infer intent; an individual or state can only be guilty of failure to prevent genocide if there is genocide. A different type of analysis needs to take place in the prevention and operationalization stages.

**TOPIC VII: LOCATING THE R2P STANDARD ON THE PREVENTION SPECTRUM: HOW DO WE DETERMINE RISK?**

Throughout the many stages of an unfolding conflict or situation where R2P acts may be occurring, it is the facts on the ground that support a claim that “now” R2P must be in play. This raises questions about the role of evidentiary standards in different intervention points of conflict, and how different standards will help or hinder the effectiveness of addressing atrocity prevention.

R2P situations may not be open to abstract legal determinations. We need to narrow down obligations and to know when evidentiary standards kick in—when do we reach the level of conducting a risk assessment? From the practical side, there is an abstract duty to prevent genocide in the conventions. The reality is that part of the reason that there is the move into Pillar One is that long-term prevention issues are not really open to empirical analysis. In many of the short-term prevention situations where violence is imminent or ongoing, we do not have a lot of experience.

What we could draw on is the discussion regarding the obligation to protect under international human rights treaties. All of these treaties refrain from defining an abstract duty to prevent under the convention. As the IACtHR has said, while duties are defined in the abstract, there must be a way to apply abstract normative provisions to concrete factual scenarios.

It was suggested that we utilize much of the underlying theory of the duty to protect, as articulated by the ECtHR jurisprudence, using three steps to find out whether there is a certain level at which you can establish a breach:

- Identify the main rights protected under R2P;
- Based on exceptional character of R2P and the concrete identification of risks (which can never be decided in the abstract), which of these duties of states correlating
to these rights needs to be responded to in a particular circumstance? Under R2P (as opposed to general human rights norms) this might be narrowed down to a limited set of actions based on the particular risk. This is what the Darfur committee of experts tried to do, linking to the obligation to prevent and narrowing down to a duty to prevent. Then, arrive at the level of evidence you’d need for the international community to do something about the identified risk. Get away from defining in the abstract;

- Assess the actions that a state may take to realize these obligations. In all other cases, you must balance the interest of the state with what kind of measure they are going to take. Only if a country is not acting at all would a violation be established immediately.

» You can use this process as an early warning or risk assessment tool. We know about the 10 or 15 situations in which these 3 steps would apply. If we applied these steps, we would be prepared early on, and by linking to obligation, we can give the R2P or the process impartiality and escape the assumption that we are selective. Ideally, this is a process for the Secretariat but others could engage in this work or encourage the Secretariat. If this came out of the Secretary General’s Reports to the Security Council, it would allow for different political debates in that context.

This three-step approach was positively received, although with some expressing reservations and challenges. One participant noted that there is an ongoing discussion about non-state actors, but if you look at the ten to twelve situations viewed as being most at risk for atrocity crimes, the situations diverge into at least two different types.

- In one case, you have situations like Nigeria, observing eruptions of substantial violence in which the state could have taken different measures to protect the population from violence and has not—these are the steps that next time, the state needs to take and we can analyze behavior based on that.

- Then, you have situations like Kyrgyzstan, in which there were warning signs in advance of the violence, but the level and scale were unpredicted and unprecedented in such a short period of time. In this situation, the three-part analysis does not work and as per the project’s objective, we need standards in advance.

R2P is doing something that is badly needed—thinking systematically about how to address a crisis situation. The secretariat has dealt with countries before where the country has no background to deal with this type of crisis; no one knows how to process the situation. R2P tries to define a continuum of steps, without having one single prescribed formula, that is dependent on the situation, the obligations at stake, and the actions needed to address the risks.

Some participants raised a concern with regard to the application of R2P to non-state actors. In particular, a question concerning the ongoing systematic violations being committed by the Lord’s Resistance Army (LRA) in Uganda was raised. Essentially, the persistent question is what distinguishes the ongoing systematic violations routinely perpetrated by the LRA, where we do not apply R2P, from other situations where we do apply R2P?

In response, some participants suggested that there is no real problem with categorizing the crimes of the LRA as an R2P situation. There is however, a conceptual problem with ascribing R2P acts to non-state actors. In this regard, the question was what is the value-added of the R2P framework to actions of non-state actors? Some participants pointed out that one of the major innovations of the SG’s 2009 report was to impose upon non-state actors and armed groups the same obligations as states under R2P. This was a big change from 2005; a change that was very well received since it fit with the philosophy of R2P. States are not always at the center of the problem and may be a big part of the solution. There may even be situations that warrant preventative deployment (Chapter VII coercive action) under Pillar 2 if it is undertaken to assist a State military to fight rebels committing atrocities, and with the consent of the State involved. Others suggested that the LRA and the broader question of crimes committed by a non-state actor is not a huge challenge for the R2P so long as we see the state manifestly failing to protect civilians. If we look at it in an R2P framework, we could gain a level of systemization.

On the same subject of non-state actors, some participants cautioned, relying on discussions with Latin American human rights experts, that the minute you apply R2P to non-State actors, there is an implicit political risk when one shifts the to non-state actors.
• Query whether this three-party analysis argues for a more sophisticated integration of human rights violations and analysis of those violations that may not take you down the R2P pathway? Preferable to watch situations unfold, strategize for the potential escalation and try to fulfill the duty to protect the civilian population along a human rights treaty standards pathway, rather than trying to fit these situations into an atrocity crimes framework along a contentious pathway of analysis of customary international law and implementation.

And what are the practical consequences of applying a crimes perspective versus, or in conjunction with, a human rights perspective?

We need more comprehensive human rights analysis. We are too abstract and broad at the moment in defining what constitutes risk. All of this is in a context of a very limited number of countries where we assume there is a particular risk of genocide because of past experience. It may never come to the level of the R2P because we are successful with the level of prevention we are doing. What the R2P adds is that if you define this continuum, you have a framework for other work you are doing.

• In Burundi you do not hear the need to prevent mass violence. Work is being done via institutions. But there is a fear of mass violence. So R2P adds something beyond the institution building since it looks specifically at atrocity prevention in a way that conflict prevention or resolution may not.

One participant suggested that we might make this process much simpler. Are we saying that the extent of a state’s responsibility is commensurate with the reality of the risk in question? The level of preventive responsibility will vary according to the reality of the risk. Then, we must quantify the reality of the risk. What we need to do is focus on preparing a watch list of those cases which are situations of R2P concern, and that the touchstone are atrocity crimes occurring now, likely to occur within a certain amount of time or imminent if preventive measures are not taken. As to the rest of the cases, which involve long-term risk reduction, get on with the task of applying necessary policy instruments. But do not rush to describe them as R2P cases.

A proponent of the three-step process agreed with regard to the starting point of discrete situations, but that does not tell you what stages, on what basis and how to narrow down questions of what the international community should do. Based on a European constitutional theory, a state-based on the principle of sovereignty has options and only if the options are narrowed down, can we actually say a state is internationally obliged to do this—trying to define options and obligations by linking to human rights and de-linking from political motivation, selective application.

It was suggested that the three-part approach is similar to the approach of the OSAPG and the rest of the UN on how to deal with situations, not only in responding after the fact but terms of prevention. One example would be the violence in June in Kyrgyzstan, and no action forthcoming. How do you prevent recurrence? UN work being done with a view to preventing mass atrocities, but not under the R2P label. Rather, there are eight factors we look at—early warning indicators. We take steps; make recommendations that states comply with the treaty or domestic law obligations consistent with a step-by-step approach—this is what most UN teams do anyway.

» Standard that invokes a level of responsibility—sufficient information indicating that crimes would or could occur.

» A standard invoking objective and subjective criteria would be good to give a certain level of discretion to the OSAPG, so it could call for a meeting of UN chiefs with no complaints about criteria used or amount of info used.

R2P can concretize what the state is being asked to do; how the ICC statute applies is made in terms of concrete obligations. The challenge for R2P is that the unwilling/unable test is not an exclusively contextual framework. This is something that is grappled with at the ICC. Collaborative or multifaceted approach. Complementarity can embrace a cooperative approach approaching a notion of shared responsibility, as often articulated in the R2P context.

What are the measures needed to be taken to address problems associated with violations of human rights norms in an outbreak type situation? The three-part framework is not a fast enough mechanism to use. We need more robust forms of preventive diplomacy. Can we have any certainty? Because if XYZ happens, we think something will happen? We need enough reason to be concerned. This is the best we’ll get.
Some made recommendations that could guide the evaluation of any developing standard. We need to take into account the substantive, temporal and quantitative dimensions.

Substantive dimension: the situation must involve one of the so-called crimes, genocide, war crimes, and crimes against humanity, with ethnic cleansing subsumed under the others.

Temporal dimension: for some for a situation to be characterized as R2P situation atrocities must either be visibly occurring now, or reasonably likely to occur if prevention action is not taken. *The key question here is how far in advance R2P moves in as an appropriately used concept.

Quantitative dimension: On how large a scale does the unfolding situation have to be before it justifies as an R2P situation? ICISSS report and refers to large scale crimes.

**TOPIC VIII: CONFLICT PREVENTION**

The discussion turned to an on-the-ground perspective on whether and/or how evidentiary standards would work. In other words, what value, if at any, does R2P add on the ground in conflict prevention situations

Three sets of questions framed this issue:

- Can you imagine the utility of such standards and in what ways may they be used on the ground?
  - Having listened to the discussion, the essential challenge for this project is to find ways in which the law can be used to advance R2P while recognizing that it is quintessentially a political concept and not a legal one. This is not a unique challenge. The creation of evidentiary standards can help in three ways:
    - First, evidentiary standards can help to deal with the concern among critiques of R2P about selectiveness and double standards in intervention and application of R2P in consistency of application.
    - Secondly, the creation of these standards may be a necessary step in the operationalization of R2P.
  - Finally, to help in actually making this concept work on the ground by developing clear thresholds and triggers which could increase the finding of R2P crimes.
- If there is a more concrete legal standard, then it may clarify when the UN is expected to exercise its role or when neighboring countries may have an obligation to undertake actions. Having said that, what evidentiary standards can and cannot do to find R2P crimes:
  - Has the crime been observed and reported?
  - Do the observed crimes fall within a legal definition?
  - Does the international community uniformly act according to duties? Creation of standards allows for second question, but will not automatically lead to adequate response from international community as there is no automaticity in making assessment and getting action.
  - What is the degree to which legal approaches would be useful for prevention—here the lawyers can assist for example in the ways that legal standards have deterrent effects.
- Final point—there exists a more practical concern in that UN member states have reluctance about an overly legalistic approach which they argue would impede action.
- What value is added by R2P in real conflict prevention situations?
  - This depends on what is meant by real conflict prevention situations—scholars disagree whether R2P merely refers to operational or direct prevention, or structural/root cause prevention.
  - Some favor a more focused approach; keep R2P narrowly focused and only apply the term to the use of direct, short-term efforts. If one accepts a narrow definition and restriction, then R2P will function as political tool, and once fully conceptualized, will make clear what actions neighboring countries may take when crimes occur.
  - Others favor a broader interpretation of R2P, that it should apply in cases where early signs of instability are present even if the threat of violence is not imminent—long term structural development.
Everything depends on one’s interpretation of prevention—narrowly focused or broad view.

As a final thought, the question of when you can say you know enough, such that action must be taken by the international community, overlooks the main challenge of operationalization and is not very relevant. The main problem is seldom the lack of information or definition—rather, the main problem is the unwillingness of the international community to act on its responsibilities. The international community does not operate on international standards alone. This may be a situation where the law is used as a shield rather than sword, to escape rather than fulfill obligations. The actual problem is not lack of information, but how you convince the international community to act on that information.

Perhaps a more useful question is when does the international community take action? Then, you could begin to analyze factors that make intervention more likely—strategic interest, acceptance, factors specific to operation, costs, dangers, likelihood of success and factors related to the international context. We have a sense of what some of the signs are and, when we see enough of them, we should be deemed to have sufficient information to act.

TOPIC IX: MILITARY INTERVENTION—ELEPHANT IN THE ROOM

Although R2P is not focused or framed in terms of military intervention alone, the law and politics surrounding the use of force to address mass atrocities has led to much debate and is central to the popular perception of R2P. Military intervention is, indeed, the elephant in room, and raises the question of whether we should demand different and graduated standards for the application of different measures under R2P.

How do we address the perception that any standard will be perceived as authorizing military intervention? In terms of standards, is there a need for a sliding-scale type standard for military intervention, or is the standard manifest failure to protect (one participant suggested that is it like the US Supreme Court opinion regarding pornography, you know it when you see it) enough? Does manifest failure to protect imply certain standards? Are they separate standards, and how do you respond if military intervention is anywhere within the standard?

The discussant on this subject believes there is not much value pushing forward with something beyond a reasonable doubt standard. He expressed the view that the 2005 Outcome Document is watered down by demanding that parties take collective action through proper channels on a UN Charter Chapter VII basis. There is a deep tension in this formulation between “timely” and “decisive” action and a commitment to working through UN Chapter VII channels. Historically, the use of force works as a deterrent before things explode; to prevent or rollback violence before things get out of control. But the UN Security Council will rarely generate that kind of timely and effective response, including lowest common denominator pressure that Security Council deliberations push on remedies. Rather, the Security Council tends towards slow incremental escalation of measures. All of this said, he makes clear the Security Council process has its virtues which you may want to work through in certain circumstances, but he remains deeply skeptical and feels that timeliness and effectiveness is not likely to be one of the Council’s strengths.

Others responded that we should resist the temptation to amend paragraph 139. The elephant in the room should be put in a cage. The most reassuring thing about the use of the doctrine is that it is in the control of the five permanent members (P5), and we can’t control how they will use their veto. This is reassuring for the P5, but states in the south were nervous about the authorization for use of force. The original plan was to convince states not to use the veto in cases where atrocity crimes were occurring or at risk. We have to recognize that there is a limit to how far we can go in developing legalistic guidelines for this. This is critical at the ICC—at the threshold level, elaborate guidelines have been developed for the exercise of discretion, which will be a political determination. There is an elaborate framework, but if the Prosecutor does not want to deal with a particular country situation, he will not deal with it. Far from responding with cynicism, we must acknowledge political factors. We can push the framework forward, but must know when to stop.

Whether specific use of evidentiary standards will guide specific consequences requires examining two main categories of situations:
• A mass atrocity crisis so obvious and severe that evidentiary standards are not likely to be very important;

• Situations which are so ambiguous or slow rolling that there are other barriers to military intervention or intervention and they are so politically laden that he does not see evidentiary standards as contributing to timely and decisive action but rather, serving as an additional barrier.

Others believe that if there is an occasion where the standard was met and countries do not engage, then they are manifestly failing in their responsibilities. In addition, while the Security Council reserved for itself the right to determine a threat to peace and security, this was strongly contested by governments outside the council. In 2005, the General Assembly accepted the legitimacy of the Security Council in taking on this role. This speaks to a need to give some standard, for continuing a discussion where the council can establish itself on standards rather than whims.

Thinking realistically, if there is a desire to develop evidentiary standards we might look to experience regarding the use of force doctrine as a matter of international law. Customary international law has developed over time but has not progressed much further than “reasonable basis to believe that action is necessary.” More specific standards are impossible to articulate, and any use of force is so context-dependent that contemplating the reasonableness of the use of force will depend on the nature and the immediacy of the threat or the type of force anticipated with regime change at one end of the spectrum or small, discrete use of force to protect, for example, humanitarian convoys at the other end. Use of force and reasonableness in these cases tends to be so fact specific that it is difficult to draw clear threshold lines.

Perhaps, we should not think about drawing evidentiary lines, but should look at the way in which rules and principles fit together into a coherent whole. We should not only think about thresholds, but also the burdens of evidentiary persuasion and presumptions. For example, one reason why it is difficult to arrive at common understanding of factual circumstances on the ground is that we are often dealing with closed systems that are trying to prevent information from coming to the surface. One analogue in the American system: when one party deliberately obscures information, withholds witnesses or destroys evidence, certain inferences would be drawn against that party. Rather than thinking about which evidentiary standards to use, maybe we could draw upon evidentiary presumptions. For certain states in crisis that refuse to allow in inspectors or fact finding missions or who interfere with their work, these states should be on notice that certain inferences will be drawn against them.

Is there not a halfway house between meticulously detailed evidentiary standards and all-purpose reasonableness analysis? Can we not borrow certain guidelines on use of force, seriousness of harm, and proportionality from other contexts?

Countries from the South do not see the veto power held by the P5 as a safety mechanism but rather as a potential threat. They argue that the power to use force should belong to the General Assembly and not the Security Council.

TOPIC X:
SLIDING SCALE, LAW V. POLITICS, GRADUATED STANDARDS & RELATIONSHIP OF THREE PILLARS

Evidentiary standards aren’t laws; evidentiary standards are tied to aspirational standards. From dozens of field sessions, rarely has anyone said they are against a robust response. The issue for these people is two-fold:

• Structural dynamics of the UN system. The Security Council is perceived as faltering on deployment, and is not perceived as a reliable source for deliberative engagement around these issues. Why would Member States want to give the council more tools?

• But what is the alternative? Some self-righteous deployment by the EU or the US. But these have less legitimacy than the UN. The UN is still seen as having more legitimacy than the P5 acting alone or without UN Authorization.

• In the absence of a clear aspirational standard, is to invoke a bunch of “white folks” to come in and fix a problem they can’t solve?

• We’ve overplayed the resistance of smaller countries to this concept, since we are not willing to do the necessary work in terms of creating an aspirational context to think through options for intervention that make it more palatable.
It seems that the next stage is developing the corresponding measures and tools. Civil society groups working at the local and national level haven’t found a way to integrate into the work around R2P, but we should find a way for them to be able to take action. The idea of evidentiary standards is interesting—we’ve talked about how governments or the international community could provide the criteria, but said nothing about the perspective of conflict survivors. In 1999, survivors wondered why there was no intervention in certain countries such as the Congo while there was intervention in other countries. Why were Kosovars being saved while others were not? The intervention word is taboo in many countries, especially in Africa. Regional economic bodies are still embryonic and still need the help of the UN to develop capacity. They wanted help on their terms. The African Union wanted to front the troops and receive logistical assistance. Those relationships must be explored and examined closely. How do regional bodies relate to the UN?

As long as we cannot address fears over the use of force, we will not turn the corner from military intervention when we are discussing the R2P. The proposed catalogue of criteria developed in the ICISS report to determine when military intervention for humanitarian purposes may be used was a very useful proposal/step to take in 2005, but today, it is no longer useful. States are concerned that they might reach the R2P threshold and if criteria is established for the use of military intervention, then all hope is lost for them. Disagreeing with the point made earlier, one participant suggested that it is in the interest of small states to have the veto; they have no interest in addressing it at the P5 level either. We are not being very clear or honest when we talk about military intervention. UN peacekeeping missions do Chapter 6 and 7 work. In practical terms, there are certain realities and dependencies on the ground. We need to break Pillar 3 out of isolation and talk about it as similar to the others, as a list of options at a particular risk level. Let’s define it as a type of response to a particular risk level.

Evidentiary standards by definition tend to be linear and linearity has own logic. A linear principle may push you into a place much quicker than you want to go. At what point have you satisfied the provisions of this stage so that you move on to the next one? Peacekeeping missions see people pushing through stages more rapidly than safely. Perhaps a more flexible framework, offering collections of different strategies dependent on need and context and involving communication with people we are concerned with. This is not an argument against evidentiary standards. They are indispensible.

But the participants agreed that standards coupled with a plan and strategy is what matters. For example, regarding Kyrgyzstan, what is troubling is that, in looking at incidents warranting action/redress, when these incidents happened before, there was no international response. What prevented a response from happening? A very substantial portion was in deference to Russia, but not one of the relevant stakeholders figured out what needed to be done. It is not just about identifying what’s on the list, but what being on the list means.

What R2P’s “value added” means you have to have a plan, but what happens when that plan fails? Strategy is the weakest link. If principles serve as justification they might provide greater assistance. Looking at Darfur, would the Security Council have been better served in 2004-2005 by having standards firmly in place? Darfur ended up being something which was thrust into the judicial sphere in 2005, starting with the work around the commission of inquiry. Absent standards for military intervention, the Council resorted to a peacekeeping operation which took a long time to implement and has been criticized for a lack of effectiveness. Darfur is an interesting example to consider in terms of the question “would standards have helped?” Would the situation have been better handled had something a little more concrete existed? Would it have made a difference to have evidentiary standards? In a way, we already have them in the terms “genocide” and “crimes against humanity.” Aren’t we just trying to define when we can use those words—ironclad proof or serious risk that it will happen. One example was the 2004 request of SC by Colin Powell invoking article 8 of the Genocide Convention on Darfur. Is this the Genocide Convention? It has to be the Genocide Convention since that’s the only way to operationalize obligation. Not Genocide Convention, but crimes against humanity, which ostensibly should be just as serious. We know that’s not true—no convention, no obligations. All we are trying to do here is clarify how we are going to use words.

**CONCLUSION**

There is a notion of limiting our consideration of standards to what is palatable with a focus on the importance of being strategic to advance the R2P. This
involves taking into consideration the north-south distinction and the appeal to regional actors to take the lead on responses to the R2P situations. The concern is pinning down exactly what the R2P is. Turning to legal standards will establish clarity but also create limits. We have to fight against sacrificing efficacy for palatability. It is not the lack of information; it is the lack of political will that prevents action. Would the development of standards influence R2P’s utility as a political tool? Or would such standards tie up the international community’s response in esoteric debate over whether standards are being met?

One basic question is who is the audience for the evidentiary standards? When we look at the R2P’s utility recognized in a political reality, then the answer has to be—who we want to gain buy in from on this—Brazil, China, South Africa. If by having clear evidentiary standards, you can get China not to block action, then you can get the US to recognize genocide in Sri Lanka as well as Srebrenica.

The development of a standard won’t change the fact that there will always be a debate about whether the framework applies. This standard would be an incremental step forward. Right now, there is no way of articulating what kind of standard applies. Ascertaining the standard entails a question that needs to be asked, a very simple question - Is there a substantial and reasonable basis to believe that there is a real risk of a mass atrocity crime occurring? There is a case for framing the question in a better way and developing it through meticulous assessment of past cases. There has to be some meat attached to the bones or else you do not move away from the selectivity problem of “I call it when I see it.” The standard cannot be too specific, but we need to give these words some meaning.

**POINTS OF AGREEMENT**

- The creation of clear evidentiary standards can help allay concern among critics of R2P about selectiveness and double standards in intervention and the application of R2P by contributing to the consistency of application.
- Given the tendency of the international community to use law as a shield rather than sword to escape obligations, an overly legalistic approach would impede swift responses in crisis situations.
- There is a need to avoid unduly watering down R2P.

**POINTS OF DISAGREEMENT**

- Whether R2P is primarily a legal or political concept, and what impact this characterization will have in ascertaining State obligations and responsibilities?
  - How do you resolve the tension between reference to legal standards as an advocacy tool and a total distraction?

- While everyone agreed that countries from the Non-Aligned Movement feel concerned about R2P and the prospect of military intervention under Pillar 3, there is some disagreement as to whether these countries will embrace R2P for purposes of ensuring swifter preventive action, despite the remaining possibility of intervention?

**POINTS FOR FURTHER DISCUSSION**

- Whether the appropriate legal frame of reference is provided by tort law or criminal law, and if so, how to transpose concepts from criminal or tort law to operationalize the project at hand?
  - What kinds of situations lend themselves to an R2P framework?
    - What is the added value of bringing in an R2P perspective in each case?
    - How to address the problem of non-state actors?
- The utility of political bodies engaging in application of strict evidentiary standards.
- How stringent should the standard be and/or what level of knowledge should be required before the responsibilities of the international community and other relevant actors trigger?
  - If the threshold is too high, then the possibility for preventive action is curtailed and if the threshold is too low, decreased chances of political buy-in/risk of over-intervention.

- Whether implementation of R2P should come from the UN Security Council, UN General Assembly, or outside the UN framework by way of regional organizations?
  - While the Security Council process has its virtues in certain circumstances, the Security Council tends towards slow, incremental escalation of measures rather than timeliness and effectiveness.
• What is the role of the veto power of the P5 in allaying concerns from Non-Aligned countries or impeding timely action?

• What insight may be gleaned from the ICJ’s decision in the Genocide case on issues of state responsibility and control, evidentiary standards, and the duty to cooperate?

POSSIBLE STANDARD FORMULATIONS AND CONSIDERATIONS
Prevention of outbreak, continuation and escalation and recurrence does not lend itself to precise calibration.

It all comes down to what is reasonable under particular circumstances. **Standard: whether there is a substantial and reasonable basis to believe that there is a substantial risk of mass atrocity crimes occurring.**

In determining what is appropriate and reasonable, there are some calibration issues staring us starkly in the face. Characterization issues arise in defining:

• What kind of situations are the R2P situations?

• What degree of gravity of the risk in question must there be in order to trigger different kinds of responses, especially the use of force?

• Framing questions: What kinds of situations lend themselves to the R2P framework?

• Substantive—step away from strict legal terms, and look instead to acts that can be characterized by what we understand as atrocity crimes.

• Temporal—occurring or reasonably likely to occur. How far in advance does the R2P need to cut in.

• Quantitative—On how large a scale does the unfolding situation have to be before it justifies description as R2P? The greater the risk, the greater the responsibility.
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EVIDENTIARY STANDARDS
FOR THE RESPONSIBILITY TO PROTECT
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GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT (GCR2P)
Launched in 2008 and co-chaired by Gareth Evans and Mohamed Sahnoun, GCR2P serves as an informational clearinghouse for governments, international institutions, and NGOs leading the fight against mass atrocities. GCR2P conducts, coordinates, and publishes research on refining and applying the RtoP concept.

ASIA-PACIFIC CENTRE FOR RTOPI
Launched in 2008 by Assistant Secretary-General of the UN, Edward Luck and former Foreign Minister of Canada, Lloyd Axworthy, the Centre conducts research, policy work and outreach within the Asia-Pacific Region. Based at the University of Queensland in Australia, the Centre's mission is to further the acceptance of RtoP and to support the building of capacity to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

KOFI ANNAN INTERNATIONAL PEACEKEEPING TRAINING CENTRE (KAIPTC)
KAIPTC is an internationally preferred Centre of Excellence for research and training for conflict prevention, management and resolution, Founded in 2000 by UN Secretary General Kofi Annan, KAIPTC's mission is to develop and deliver internationally recognized training and related programs to equip personnel with the skills needed to meet Africa's present and future complex peace and security challenges.

CAMBODIA INSTITUTE FOR COOPERATION AND PEACE (CICP)
CICP is an independent, non-partisan research institute based in Phnom Penh, Cambodia. Founded in 1994, CICP promotes domestic and regional dialogue between government officials, international organizations, academia, and the private sector on issues of peace, democracy, security, conflict resolution and development.

CARDOZO LAW SCHOOL
Since its founding, the Benjamin N. Cardozo School of Law has embodied a legal pedagogy based on rigorous academic inquiry and active social participation. Central to Cardozo's approach is the idea that lawyers are uniquely situated to advance the public good and are charged with the responsibility to help maintain and shape a society that upholds the rights of all. The Program in Holocaust and Human Rights Studies at Cardozo is one of the first law school-based Holocaust and human rights studies programs in the nation. Now in its fourth year, the Program focuses on teaching, research, and illuminating the past while looking to prevent such genocides in the future.
The Authors
Sheri P. Rosenberg is the Director of the Program in Holocaust and Human Rights Studies, and the Director of the Human Rights and Genocide Clinic at the Benjamin N. Cardozo School of Law where she has taught since 2004 as Clinical Assistant Professor of Law.

Daniel J. Stewart is the International Human Rights Clinical Teaching Fellow at the Benjamin N. Cardozo School of Law. He is a graduate of Harvard College and Columbia Law School.

More information on the project can be found at our website, http://www.r2pproject.org/.
EXECUTIVE SUMMARY

The Responsibility to Protect (RtoP) norm was intended as a practical and normative response to recent failings to prevent and react to genocide and mass atrocities. Reconceptualizing state sovereignty to focus primarily on the duties a state owes to protect its citizens from certain acts of atrocity, specifically genocide, ethnic cleansing, crimes against humanity and war crimes - RtoP reflects international society’s intention to assume responsibility for the protection of populations from a prescribed set of mass atrocities. It represents a collective pledge that, as members of international society, states will support each other to achieve this prevention and protection, and act appropriately when a state fails to look after its own populations in this regard. Yet absent universally accepted criteria determining when states should act pursuant to their RtoP obligations, legal and policy debates concerning this very issue have delayed responses in the wake of mass atrocities, and detracted from the primary goal of RtoP: the protection of human life.

As part of a multi-staged project undertaken by the Human Rights Program at Benjamin N. Cardozo School of Law, this concept paper aims to enable relevant stakeholders to focus on the practical implementation of measures to prevent mass atrocity through implementation of the RtoP norm in an early warning stage. The project seeks to achieve this aim through the creation of widely-accepted evidentiary guidelines or standards to focus attention on the determination of when states should act pursuant to their RtoP obligations, enabling relevant stakeholders to focus on the appropriate action(s) to be taken in situations of stress instead of focusing on whether a situation falls within the RtoP framework. The standards are intended to be utilized by a range of actors that are called upon to make assessments regarding the applicability of RtoP and will encourage these actors to evaluate information on abuses against an articulated standard of proof.

THE STANDARDS WILL:

- Promote the full continuum of RtoP actions;
- Target the application of limited resources;
- Legitimize decisions of when to act under the RtoP framework.

It is important to emphasize that this project does not suggest legally binding tests against which to gauge the appropriateness of action. Rather, these standards are intended to enable greater transparency and accountability in deliberations, while resulting in more consistent state action. In assessing the most appropriate standards, the project rejects a blind urge to look to criminal law, and instead explores multiple areas of law to highlight potential overlap in normative, political and legal concerns between each area and RtoP. Suitable institutional mechanisms to use these standards to help assess the evidence as to the threat or presence of RtoP acts will be introduced as a potential element of the project going forward.

The output of this project will be the creation and wide dissemination of the evidentiary standards to assess when the RtoP framework is applicable to situations.
INTRODUCTION

This past decade has witnessed a dramatic evolution in the nature and intensity of national, regional and international discussions over responses to the prevention of and reaction to genocide and mass atrocity that must be implemented in order to reduce (if not eliminate) their occurrence.

At the core of this transformed discussion over the prevention and reaction to mass atrocities is the concept of the ‘Responsibility to Protect’ (RtoP), an international norm that states must protect their populations against genocide, war crimes, crimes against humanity and ethnic cleansing (the four “RtoP acts”). In turn, RtoP involves a collective pledge that, as members of the international community, states will support each other to achieve this prevention and protection, and will collectively take timely and decisive action when a state fails to look after its own populations in this regard.

As with any concept dealing with international peace and security, especially those dealing with the protection of individuals, RtoP has been and continues to be the subject of debate on its content, its legality, its morality, and its efficacy. This concept paper, which is part of a multi-staged project undertaken by the Human Rights Program at Benjamin N. Cardozo School of Law, aims to advance the ability of states, regional organizations and international institutions to focus on the practical implementation of measures to prevent mass atrocity through RtoP at stage when such prevention has a reasonable prospect of success. The project seeks to achieve this aim by conceptualizing and operationalizing a narrow but critical subset of the RtoP doctrine by exploring the creation of evidentiary guidelines or standards to assist relevant actors with the determination of when states should act pursuant to their RtoP obligations. Thus, less time is spent on whether states should act, and rather on how states should act to prevent or react to mass atrocity. In line with the original construction of the concept and that adopted by all United Nations Member States in 2005, these obligations range from long-term prevention through capacity building and international assistance; to a range of peaceful measures carried out by regional organizations and the international community; to more coercive measures contemplated only in extreme cases; to long-term commitments to rebuild and assist populations with recovery and reconciliation. A component of this project may include a proposed institutional structure of how this evidentiary assessment should proceed through international, regional and national bodies.

The Secretary-General and others have unambiguously stated that prevention is the single most important dimension of the responsibility to protect. Nonetheless, frequent debates over when a state must act pursuant to the emergent obligations embodied within the responsibility to protect have often slowed the application of appropriate responses to prevent, react and rebuild, and permitted legal and policy debates to lose focus on the real concern over protecting human lives. This project will present an approach that seeks to place clear boundaries on discussions over when the RtoP doctrine applies in different situations. The project will explore the full range of sources that suggest the most appropriate form for the guidelines given the focus on mass atrocity prevention that RtoP embodies.

It remains unclear what if any practical consequences flow from invoking the language of RtoP at this time. This is particularly the case because RtoP may require an obligation to do something, but it does not dictate the precise means by which international society should implement RtoP in a given situation. Relevant stakeholders, however, have been working to strengthen the understanding and the appropriate application of the concept, and this project will contribute by aiding in the accurate assessment of when to apply the RtoP framework. The goals of the project are to:

- **Promote the full continuum of RtoP actions**: While it is universally agreed that the best form of protection is prevention, the lack of common standards of assessment at early stages of unfolding situations is one explanation for the continued focus and association of RtoP exclusively with military intervention. Common standards that span the full range of beneficial protection endeavors will help to ensure prevention is promoted forcefully where it is really needed.

- **Targeted application of limited resources**: Given the constraints on time and resources that all stakeholders can direct to address mass violations of human rights, a common standard of assessment of which states and situations will benefit from robust international assistance in addressing the potential for mass atrocities will ensure the most effective allocation of those limited resources.
• **Legitimizing Effect:** There are valid concerns expressed by stakeholders across the political and geographic spectrum over the potential for selective applications of RtoP. On the other hand, there are legitimate concerns that necessary measures to prevent and react to mass atrocity are not undertaken due to political calculations, calculations that may leave innocent victims without protection. A common standard of assessment, while inevitably open to interpretation by all parties, will at the very least begin to require parties to explain their reasoning from a common starting point. Actions that are taken will hopefully be seen as more legitimate if successfully applying the standards; decisions not to act will also be seen as more legitimate.

The creation and adoption of uniform evidentiary guidelines will ultimately lead to greater consistency in outcomes of state action within the RtoP framework. Like all standards guiding international relations it will be open to interpretation by a wide array of actors, but its flexibility will be bound by the common values shared by states and their populations: to prevent mass atrocities.

The project pursues academic rigor, while at the same time consulting with relevant policy makers and other relevant actors in order to ground the articulated standard in real world policy and practice. This paper sets forth the parameters that guide the development and construction of a standard and serves as a guide for discussion for the application of the final articulated standards within existing institutional structures. A number of options as to all aspects of the construction of these standards or guidelines will be set out, and through feedback and discussion, the project will proceed to the drafting of appropriate standards that do not exist in a vacuum, but speak directly to those standing at the frontline of responses to the threat and reality of genocide and mass atrocity.

1 THE RESPONSIBILITY TO PROTECT AND THE NEED FOR EVIDENTIARY STANDARDS

1.1 HISTORY OF THE DOCTRINE OF RTOP

The creation and elaboration of the doctrine of RtoP stands as a practical and normative response to recent failings to prevent and react to genocide and mass atrocities. RtoP’s origins lie in the evolving conception of state sovereignty that focuses more on the *duties* a state owes to protect its citizens than the *rights* accruing from such sovereignty. This “sovereignty as responsibility” framework underpinned the elaboration of RtoP by the Canadian Government-created International Commission on Intervention and State Sovereignty (ICISS) in 2001. ICISS set out the doctrine of RtoP as encompassing state responsibilities to prevent, react and rebuild in order to protect populations against genocide and mass atrocity.

Discussion over the doctrine formed part of the United Nations’ (UN) High-Level Panel on Threats, Challenges and Change report entitled *A More Secure World: Our Shared Responsibility* and its wider focus on UN reform. Former UN Secretary-General Kofi Annan endorsed this principle in his report *In Larger Freedom: Towards Development, Security and Human Rights for All*, in which securing international peace and security was fundamentally linked to collective endeavors to protect human security. The release of these reports in anticipation of the UN General Assembly’s 2005 World Summit promoted discussion of RtoP within this forum, and the amassed heads of state and government included paragraphs 138 and 139 on the responsibility to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing in its Outcome Document, subsequently adopted by the General Assembly in Resolution 60/1.

These two paragraphs set out states’ acknowledgment of their individual responsibility to protect their populations from the four listed RtoP ‘acts’. Member States pledged to assist other states, as appropriate, in fulfilling this responsibility. Member States additionally pledged to utilize the collective mechanisms of Chapters VI and VIII of the UN Charter in a timely and decisive manner to help protect all populations, and pledged “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” As befits the product of a multilateral compromise on political imperatives, these two paragraphs are open to interpretation. The UN Security Council made its first express reference to the concept of RtoP in Resolution 1674 in 2006, whereby it reaffirmed the commitments set out in paragraphs 138 and 139 of the 2005 World Summit Outcome Document (“Outcome Document”)
The concept began its institutionalization within the UN with the 2007 appointment of Dr. Edward Luck as the first Special Advisor to the Secretary-General on the Responsibility to Protect, a position that complements the 2004 creation of the UN Office of the Special Advisor on the Prevention of Genocide. Secretary-General Ban began the process of implementing RtoP within the UN with the release of a report in January 2009. This report set out the Secretary-General’s ‘three pillar’ approach to advancing the agenda included in the pledges made by Member States: Pillar One focused on ‘the protection responsibilities of the State’; Pillar Two focused on ‘international assistance and capacity building’; and Pillar Three focused on ‘the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection.’ Again, the point is stressed that RtoP provides justification to act, but it does not prescribe the precise actions to be taken in any given situation. In the July 2009 General Assembly debate on the implementation of RtoP and the accompanying Resolution, Member States expressed continued and overwhelming support for RtoP. The Secretary-General continued his work on the UN implementation of RtoP with the release in July 2010 of his report on early warning and assessment in the context of RtoP. In the General Assembly discussion that followed, wide support for RtoP was again maintained. The third General Assembly discussion on RtoP, focused on regional organizations, will take place on July 12, 2011.

The implementation, elaboration and institutionalization of the doctrine of RtoP has not been limited to the Secretariat of the UN, but has become a core component of the work of regional, sub-regional and national governmental organizations. Much of this institutionalization and discussion at the United Nations was preceded by the adoption of the ‘principle of non-indifference’ within Africa, most notably set out in Article 4(h) of the Constitutive Act of the African Union drafted in 2000. RtoP is increasingly framing debates on national security, human rights policy and collective efforts to ensure peace and security. Additionally, non-governmental organizations, civil society and academic institutions from across all regions of the globe are contributing to the examination of the contours of the doctrine; to mechanisms to ensure its efficacy in implementation; and in debating the best measures to ensure RtoP successfully contributes to actual – and not merely rhetorical – improvements in the prevention of genocide and mass atrocity.

Most recently, the decision by the Security Council to undertake coercive measures under their Chapter VII powers against Libya has brought RtoP firmly into global headlines and policy discussions. The terminology has been used (at least in regard to reminding Libya of its responsibility to protect) in the preamble to Security Council Resolutions under Chapter VII for Libya and additionally in addressing the disputed election in Côte d’Ivoire. These situations, and the debates surrounding the appropriateness of using the RtoP framework to explain or justify different actions, provide further strong grounds for the goals of this project.

1.2 THE APPLICATION OF RTO P TO SITUATIONS: 2001-2011

We can never know the exact role played by words or actions taken in the name of RtoP, but in the decade since the concept was first presented, situations of widely different origin, intensity and circumstance have and have not been said to fall within the ‘RtoP framework’.

While there have been responses to mass atrocity over the last decade, the application of the RtoP framework has not been uniform. The principle of RtoP remains open to differing interpretations, and in the absence of universally accepted criteria to determine when an RtoP ‘act’ is likely to occur or is stated to be occurring, such differing interpretations are to be expected. However, to permit more energy to be expended on the more fundamental question concerning the appropriate action to be taken for any set of facts, convincing all actors to utilize a common standard of proof will hopefully reduce the confusion over RtoP situations that has marked the first decade of RtoP’s existence.

The language of the RtoP framework has been applied in a variety of situations, and at different stages of unfolding situations. The responses to post-election violence in Kenya in 2007-08 involved regional actors taking the lead role in addressing the crisis, and avoided any use of external military intervention. The successful management of the situation in Guinea, in the years following mass atrocity, did not get the attention its successful prevention and reaction to RtoP acts deserved. Rebuilding exercises after atrocities, such as in Macedonia and Burundi, have not been widely seen and discussed as RtoP situations, despite the application of long-term peace-building measures in both countries that focused on the underlying causes of mass atrocity.
Debates over the application of the responsibility to protect have been most prominent in situations where conflict and the loss of life have already commenced, and the main issue has been the legality, morality and prudence of coercive forms of intervention, particularly military action. Strong debates have occurred over whether RtoP was at issue in such situations as Iraq, Gaza, Georgia, Somalia, Sri Lanka, the Democratic Republic of Congo, Cote d’Ivoire, and Libya.

This inconsistent application of the RtoP framework has frequently failed to apply at those times when effective preventive measures could have been undertaken. Additionally, RtoP debates have too frequently focused on the role of the Security Council to the exclusion of other key actors.

1.3 THE EVIDENTIARY STANDARDS PROJECT

1.3.1 The aims of the project

The goals of the project, in addition to its key aims set out in the Introduction above, are straightforward: First, to increase the likelihood that all relevant stakeholders focus on a discussion of the appropriate action to be taken in any situation of stress. This project will help reduce the depth and duration of debate that is centered on whether a situation falls within the RtoP framework. Second, to add a level of transparency and accountability to the deliberations over the application of RtoP to a given situation. Ultimately, this will result in greater consistency in outcomes of state action. Third, to produce a set of widely-accepted evidentiary standards or guidelines that will be disseminated to stakeholders across the globe.

It is important to disaggregate the different elements encompassed in the analysis of a situation through a potential RtoP lens, and therefore isolate what this project in particular is focused on.

- The first element is the type of gross violations of human rights that have been included within the scope of RtoP. The decision was taken at the 2005 World Summit to limit the scope of RtoP to four acts: genocide, war crimes, crimes against humanity and ethnic cleansing. Each of these acts derives substantive content from legal and policy-based sources.

- The second element focuses on the realization that RtoP will be rendered meaningless if it can only be applied when legal determinations of criminal or civil responsibility can be proven conclusively. Instead, it is imperative to understand that RtoP must be called into action at a specific level of gravity or seriousness of potential violations in order to work to prevent such atrocities.

- The third element concerns the standard of proof that is applied to determine when that level of seriousness or gravity set out in the second element has been reached, and therefore when the RtoP framework is applicable. The standard of proof could range from as low as ‘potentially applicable’ to ‘definitively proven’. This third element concerns the standard of proof required for all potential forms of state or collective action, whether coercive or otherwise.

This project, while appreciating the holistic and interconnected nature of the three elements set out above, is focused on the third element. Such a standard of proof is intended to reduce the technical haggling that occurs over whether situations are within the RtoP framework by encouraging (if not requiring) all stakeholders to evaluate information on abuses against an articulated standard of proof.

Despite the use of the terminology of ‘evidentiary standards’ or guidelines, it is important to emphasize that this paper does not suggest that the product of this project is to be implemented as legally binding tests against which to gauge the appropriateness of action.

The enquiry involving RtoP will often, perhaps always, have elements of both forward-looking and backward-looking investigations, assessing whether sufficient acts have occurred to fall within RtoP and whether future atrocities are potentially to occur. Therefore, the examination in Part 3 will examine areas with both prospective and retrospective assessments.

1.3.2 Practical utilization

The standards are intended to be utilized by a range of actors that are all called upon to make assessments as to the applicability of the RtoP framework. These standards will have utility for each of these actors. These standards can assist common and coordinated state approaches to implementing the practical steps embodied in RtoP. It is important to recognize the potential for distinct evidentiary standards for, on the one hand, the state upon whose territory the acts may be occurring and, on the other, bystander states whose responsibility is less immediate.
Regional organizations will equally draw on these standards when implementing their collective mechanisms to prevent and respond to mass atrocity.

For those civil society organizations with presence on the ground or attempting to draw attention to mass atrocity, the evidentiary standards will provide a common threshold against which claims for action can be more readily assessed. The standards will seek to remove the more overt politicking that can accompany claims over the necessity of states or inter-governmental organizations exercising their responsibility to protect.

The Secretary-General recently merged the Office of the Special-Advisor for the Prevention of Genocide with that of the Special-Advisor on the Responsibility to Protect. As part of this restructuring, this new Joint Office is to be provided with a convening function to alert the Secretary-General and then the UN Security Council directly over the threat of RtoP acts or their occurrence. The evidentiary standards could support the work in this convening function as well.

1.3.3 Methodology of examining various sources of standards

In examining the language that has been utilized in debates over the applicability of the RtoP framework, the frequency of concepts emanating from criminal law that have appeared to frame the debate is striking. As will be examined in the proceeding section, this urge to turn to criminal law is both dangerous and entirely understandable.

It is far from clear that the normative rationale for international (or national) criminal responsibility of an individual is analogous to that embodied in the concept of the “responsibility to protect”. In seeking to determine the most appropriate and fair set of standards for RtoP, this project will examine a series of source areas, highlighting the potential overlap in normative, political and legal concerns between each area and that of RtoP. In this way, the final set of proposed standards will find their foundations from the most relevant sources and hence be more likely to garner widespread acceptance and support.

There are of course standards or guidelines of proof or evidence from a variety of fields of enquiry, including science, history, political science and law. However, the scope of RtoP is bound by the four categories of crimes defined in international law and set out in the 2005 Outcome Document; thus, when approaching RtoP, stakeholders are necessarily searching for its practical meaning within the bounds of international law. For these reasons this project draws on legal areas for the source of its inspiration on the appropriate standards. This does not however mean that the standards are legally binding (or intended to be so), or that they should be utilized by legal departments to the exclusion of political officials. Instead, the steady evolution of RtoP within the General Assembly and across stakeholders has been to implement its moral concerns with practical mechanisms—it is for this reason that examining sources of law makes the most sense.

2 EVIDENTIARY STANDARDS FROM ACROSS THE SPECTRUM

For a more detailed examination of each of these areas of law, please see the attached Appendix I. The following will present the major contours of each standard and its potential applicability to our project.

2.1 THE URGE TO TURN TO CRIMINAL LAW IN RTOP

2.1.1 The Imperfect Fit of International Criminal Law Evidentiary Standards

The use of international criminal law terminology within the 2005 Outcome Document has both comforted and confused all those dealing with RtoP. The result of both compromise and principle, three of the RtoP acts set out – genocide, war crimes and crimes against humanity – find detailed elaboration within international criminal law. Ethnic cleansing is one possible form of crime against humanity, and may be a component of both genocide and war crimes. The use of acts that fall within the purview of international criminal law did mark off the application of RtoP to both a somewhat more narrow set of events than was set out in the original ICIS report, and suggested a common standard against which the constitutive acts of RtoP could be measured.

This compromise, however, has resulted in much confusion. First, it should be self-evident that RtoP cannot be held to apply only at the stage at which guilt under international criminal law for an individual culprit could be found. Such a standard would ensure the immediate demise of the normative concerns embedded within RtoP, most of all its ability to proactively attempt to prevent imminent or on-going forms of mass atrocity. Second, the level of “seriousness” or scale embodied within each of the acts is not automatically clear when examining the definition of
the crimes from within either customary international law or, more narrowly, the Rome Statute of the International Criminal Court. An individual act that can be characterized as a war crime may not in fact require the application of the RtoP doctrine, despite the importance of prosecuting any culpable individuals.

As a consequence of the use of criminal law language, stakeholders have primarily turned to the standard of proof associated with individual criminal guilt to assess whether or not RtoP should be invoked – that is, the standard of “beyond a reasonable doubt”. It is prima facie clear that this is a very high hurdle to pass in order to see the RtoP doctrine applicable. The normative goals of each system differ so markedly so as to render this standard of evidence inappropriate.

International criminal law is ultimately focused on assessing the individual culpability of those alleged to have committed the most heinous of crimes. This assessment of responsibility will occur after the incidents within which such crimes may have occurred. The potential consequences of a prosecution for an international crime (or domestic crime in fact) are the loss of liberty for the individual, and the social stigma attached to a finding of criminal guilt. Moreover, the goals of criminal sanction – whether retributive, rehabilitative, deterrence-based or another goal – do not align completely with RtoP's focus on prevention. While certain leaders, governmental or otherwise, may play very important roles in the commission and the ability to end mass atrocities (or prevent them from occurring in the first place), RtoP is still focused on the protection of potential victim populations, and their threat from large-scale acts of violence. There is little concern with allocating responsibility in terms of restitution or criminal sanction, but instead concern with ensuring the right actors take the most effective action to stop mass atrocity as soon as possible.

Despite the divergence of goals and concerns between these two areas, stakeholders have either felt compelled to use the prosecutor’s standard of proof or have hid behind this standard – as either a potential violating state or an entity fearful of triggering its own perceived international legal or moral obligation to act. The implicit use of this prosecutor’s standard of proof, if continued, will severely impair the ability of the RtoP doctrine to effectively work at an appropriately early stage of threats to human security, and will permit stakeholders to inadequately act to protect as opposed to merely retroactively respond to mass atrocities.

2.1.2 The Standards from within International Criminal Law

Despite the clear need to limit the use of standards from international criminal law in applying the RtoP framework, there are good reasons to examine the standards from within this discipline as part of constructing the RtoP evidentiary standards:

- The fact that the four RtoP acts listed in the 2005 Outcome Document are international criminal law violations means that it is impossible to entirely remove RtoP from international criminal law;
- The use of international criminal law goes beyond the finding of individual criminal liability. It has the potential to act in concert with other forms of political, economic, humanitarian and diplomatic mechanisms to address imminent or on-going acts of mass atrocity through persuasion or deterrence;
- International criminal law has already adopted standards of proof that increase in their stringency in correlation with the intrusiveness of the proceedings at issue; as the focus of an enquiry moves from the application of the standards of a preliminary examination, through the issue of admissibility, to the issuance of an arrest warrant, to the issuance of an indictment, and finally to the outcome of the trial on guilt, the standards of evidence required get more demanding.

In this concept paper, we will limit this examination to the standards associated with the Rome Statute and the International Criminal Court (ICC).

The ICC’s standards start with no standard at all for the ICC to undertake a preliminary examination into a situation. To undertake an investigation, the Prosecutor must merely have a “reasonable basis” to proceed – a standard set against specific tests of course within the Statute. The Court will issue an arrest warrant for an individual if there are “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” If the Court is required to confirm the charges or an indictment against an individual, the Prosecutor must provide “sufficient evidence to establish substantial
grounds to believe that the person committed the crime charged.” Finally, a finding of guilt must be made with a finding that is “beyond a reasonable doubt”.

2.2 THE NATURE AND APPLICABILITY OF ALTERNATIVE EVIDENTIARY STANDARDS

2.2.1 How to assess their relevance and applicability to RtoP

In assessing the relevance and usefulness of borrowing from areas of the law to create evidentiary standards for the RtoP framework, the most important consideration is the underlying reasons, including the balancing of interests at stake, for the adoption of a certain standard within each area.

2.2.2 Preliminary Judicial Measures: International and Domestic

Courts are often asked to impose coercive measures prior to their examination of the substantive merits of a dispute. Fearful that prior to hearing the arguments of both parties actions may be taken that might exacerbate the dispute, the application of preliminary measures is similar to attempts within the RtoP framework to prevent RtoP acts or to prevent any escalation of atrocities. These standards combine prospective and retrospective enquiries.

The International Court of Justice has generally applied the standard that, if prejudicial action is “likely” to occur prior to the Court’s determination, provisional measures will be applied. Within US national law, preliminary injunctions in civil law cases also use a standard of irreparable prejudice being “likely” to occur; however, for an application of the more intrusive restraining order—which leads to an individual being required to stay away from another person—the proof of showing actual or potential imminent violence must be proven by a “preponderance of the evidence”.

2.2.3 The Duty to Care and Rescue

National legal systems sometimes permit individuals to bring their governments to court for the government’s failure to protect them from the actions of harmful private actors. Common law legal systems such as the US or UK require a “special relationship” to exist between the individual and the government before liability can attach; at this stage, the standard of proof applied is most often by a “preponderance of the evidence”. In civil law countries, this duty of care is more widely applicable, and civil law judges will apply their own sense of conviction over whether a fact has been sufficiently proven.

Requiring private citizens to rescue their fellow citizens is a long-debated aspect of law, with some states even imposing criminal sanctions for failures to undertake this duty to rescue. The rationale for such a duty is analogous to the demands on bystander states to intervene and prevent or react to mass atrocity in other states. When imposed a non-criminal sanction, the standard of proof is generally that of by a “preponderance of the evidence”; when the state has decided that a failure to rescue deserves greater moral—and hence criminal—sanction, the high standard of proof associated with criminal law will apply.

2.3.4 The Duty to Protect under Human Rights Law

The core concerns of RtoP are of course animated by the longer history of human rights. There are however specific threads within the human rights framework that play a more forceful role within any discussion of RtoP. States are under a duty to protect those within their jurisdiction from violations of their rights by other private actors. This duty requires states to act with due diligence to prevent such violations; courts have required that the risk of such violations be “real and immediate” to be actionable. Additionally, courts and commissions—such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and People’s Rights—will require that evidence to proof this risk is “clearly proven” or established “beyond a reasonable doubt”, both high standards of proof.

2.3.5 The Duty to Prevent or React to Gross Violations of Human Rights by Other Actors, and the Duty to Cooperate to Respond to Gross Violations

This section deals with the duties on states to respond to violations by other states—bystander responsibility for mass atrocities, which is one of the more innovative areas of international law and relations. The question of which violations (and their level of seriousness) require bystander states to undertake certain forms of action has been the subject of examination across several disciplines—see Appendix I for more details.

The most relevant source on the question on the standard of proof applied to this responsibility came in the International Court of Justice’s Genocide Judgment. The Court found that if a state was aware or should have been aware of a “serious risk” that genocide could occur in
another state, a state will be held responsible for its failure to undertake preventive measures if that state has sufficient influence over the state in whose territory the violations may occur (see Appendix I for more details in this case). The Court utilized the same high standard of proof (“fully conclusive”) in this area as the question of the commission of genocide directly.

2.3.6 Torture and Non-Refoulement Obligations

When an individual claims that their return to a particular country will lead to his or her being tortured, courts or commissions are required not to expel this individual if they are persuaded that this will or may occur. This prospective enquiry is very similar to the question facing bodies looking to decide when to act to prevent or react to potential mass atrocities. These tests have two components:

- The level of risk that must be shown that torture will occur in the future;
- The standard of proof that must be met to satisfy the fact-finder that this level of risk has been met.

International bodies have generally required that individuals show that there are “substantial grounds to believe” a certain level of risk will occur. The level of risk of torture that must be demonstrated ranges from a “real risk” in the European Court of Human Rights to a “reasonable possibility” of occurrence in the US Supreme Court.

2.3.7 International Environmental Law: Transboundary Harm

International environmental law does not appear to directly apply to the concerns of mass atrocity prevention embodied within the RtoP framework. What unites these areas is a focus on prevention, given the realization that certain harms cannot be made whole by reparations alone. States are required to act with due diligence to undertake all reasonable measures to prevent the risk of “significant” transboundary harm occurring. While states have generally been limited to preventing “significant” harm, there is little indication from within international law of the standard of proof that should be required to hold a state accountable for a failure to undertake adequate prevention measures.

2.3.8 Serious Human Rights and Humanitarian Law Violations Directly Committed by States

Fact-finders often turn to heightened standards of proof when international law assesses gross violations of human rights or international humanitarian law by state actors. Tribunals examining these questions are faced with allegations over situations that have already occurred, and usually have already come to a conclusion. The role of individual criminal responsibility has already been addressed in Section 3.1 above; this section instead introduces state responsibility for those violations included within RtoP.

Human rights bodies have applied the very high standard of proof associated with criminal conviction to such serious allegations—“beyond a reasonable doubt”. The International Court of Justice has been less consistent; in the Genocide Case (Bosnia v. Serbia), the Court applied a very high standard, requiring a “high level of certainty” and they needed to be “fully convinced”. In the Armed Activities Case (Democratic Republic of Congo v. Uganda), the Court did not make clear what standard of proof they were applying.

2.3.9 The Use of Force: Ex Ante & Ex Post Evaluations

The use of force is legal within international law in very limited circumstances. The legality of actions is often debated, but is not frequently subject to examination by judicial examination. The International Court of Justice has examined asserted defenses of ‘self-defense’ within international law after states have used force. The Court has been unclear on what the appropriate standard of proof is for such questions, reflecting the mixed common law and civil law backgrounds of the judges—civil law judges do not feel that it is appropriate to set out a standard of proof when judges are the triers of fact.

The application of standards of evidence to the use of force before it is undertaken—a component of this project of course—has been discussed widely and yet never accepted or applied by states or international organizations.

2.3.10 International Organizations and Responsibility

A final potential area from which to glean insight for this project comes from the consistently evolving area of the international legal responsibility of international
organizations. The question of whether and when international organizations can be held responsible for actions or omissions under international law is complex and controversial. Indeed, the ILC’s Draft Articles on the Responsibility of International Organizations, provisionally adopted on first reading in 2009, have received a multitude of comment and critique, although they have been referred to by several courts already.

This work includes examining such interesting areas as the responsibility of states even when international or regional organizations are involved with addressing a situation. Tribunals that have addressed this issue have used the standard of proof that accompanies the underlying allegation at issue (i.e. “beyond a reasonable doubt” if addressing human rights violations). There are no clear rules on standards of evidence to apply directly to international organizations at this time.

3 OPTIONS FOR THE STANDARDS

3.1 FACTORS TO CONSIDER IN CONSTRUCTING THE STANDARDS
A detailed set of considerations will come into play in constructing the standards. The concept paper lays out the areas which will animate these discussions:

- Should there be a single set of guidelines for any stage of an unfolding situation? The question of whether different standards of proof should be applied at different stages of events will lead to the construction of either one or several standards.

- Should there be different standards of proof depending on the intrusive or coercive nature of the measures proposed? As the proposed form of RtoP response ranges from working to assist states towards requiring Chapter VII action by the Security Council, should the standard correspondingly become more stringent?

- Should there be different standards for different actors? The roles and responsibilities of various civil society organizations, bystander states, regional organizations and international organizations may differ. Potentially, the evidentiary standards of proof may differ with these roles as well.

- What is the right mix of a prospective and retrospective focus of the guidelines? Any standard of proof could encapsulate examination of past practices as well as gauging the risk of future conduct that ought to be prevented. How should the standards get this balance right?

- How strict should the standards be? At the heart of this project is an attempt to find a workable and moral balance between, on the one hand, respecting states’ obligations and abilities to protect their own populations and, on the other, ensuring engagement with evolving situations that fall within the RtoP framework. How best can the standards strike this balance?

3.2 CONTENT OF THE STANDARDS: SELECT OPTIONS
To spark thoughts this paper sets out some potential options in one area, that of determining the standard of proof appropriate for the determination of when states should take “timely and decisive action” to protect its population from one or more of the four RtoP acts. This exercise is set out in detail in Appendix II.

- The most stringent standard could require proof “beyond a reasonable doubt” that one or more of the RtoP acts has occurred.

- If we were to focus entirely on the future occurrence of events as the core component triggering the application of the RtoP framework, the standard could require “substantial evidence of a real risk that one of the RtoP acts may occur”.

- A combination of forward—and backward—looking elements, as well as one that applies a less stringent requirement of evidence, could require “clear and convincing evidence either (i) that one of the RtoP acts has occurred; or (ii) that it is likely that one or more the RtoP acts will occur absent collective action”.

Of course these examples blend a range of potential options that will be discussed and deliberated within the regional fora and in our discussions with a range of actors from all relevant disciplines and regions of the world. It is through this consultation process that the matrix of appropriate, relevant and potentially effective standards of proof for the
assessment of RtoP situations will emerge, and to ensure that preventive action is taken without being overly hasty to be untenable and to challenge the core basis of territorial integrity that supports each state’s primary obligation to protect the populations within their own territory.

4 ARCHITECTURE FOR EVIDENTIARY ASSESSMENT

The primary focus of this project is the creation of the evidentiary guidelines to set out the standards of proof within the RtoP framework. However, the project is exploring the potential to set out mechanisms for how stakeholders could accurately assess evidence as set against the constructed standards. Appendix III sets out in more detail the role of international and regional fact-finding mechanisms or commissions of inquiry.

The considerations that will need to be taken into account include the following:

• The bodies that can authorize a fact-finding mission or commission of inquiry: Many institutions possess the mandate to authorize such endeavors for potential or existing RtoP acts—the Secretary-General; the Security Council; the Human Rights Council; the Peace and Security Council of the African Union. Should all relevant bodies play a role in every situation, or is there a way (and a rationale) for determining in advance which body should act?

• Triggering a mission: The powers that permit these bodies to create commissions of inquiry are uniformly triggered by procedural requirements, giving them wide discretion to determine when to act. Should there and can there be a method to have the evidentiary guidelines utilized to trigger a fact-finding mission?

• The timing of the mission: There are many uses of fact-finding missions, laying the ground work for a variety of follow-up actions. At different stages of an unfolding situation, where RtoP acts may be occurring or may potentially occur, the role of a mission will be very different. How early should these missions be created? How late do they become useless in the context of RtoP?

• The mandate of a fact-finding mission: Closely connected to the question of timing is the question of the nature of the mandate of a mission that is linked to the RtoP framework. How might a mandate be created so that it actively supports the preventive and reactive components of the RtoP framework? Should these mandates be explicitly tied to RtoP?

• The methodology and composition of a fact-finding mission: The composition of fact-finding commissions have naturally been adjusted to the nature of the enquiry at issue. It is often the case that they are staffed with lawyers. Although rarely set out explicitly, the fact-finding missions have increasingly seen the connection of their work to international criminal procedures. Indeed, there has been direct reference by the Pre-Trial Chamber of the International Criminal Court to the work of specific commissions. However, should the assessment methods of a mission that has a RtoP component be analogous to that of a pre-trial investigation? What sources of information will allow the mission to provide an accurate assessment of the evidence as to the application (or otherwise) of the RtoP framework?

At this stage of the project, the examination of how the evidentiary guidelines could be united with methods of evidentiary assessment is at a preliminary stage.
APPENDIX I:
LEGAL SOURCES OF STANDARDS

1. THE STANDARDS FROM WITHIN INTERNATIONAL CRIMINAL LAW

1.1 Situation
The three mechanisms upon which a situation can be brought to the attention of the ICC for a preliminary examination – referral from the Security Council; referral by a State Party or referral through a declaration of a non-party State; the Prosecutor acting on his own initiative – are not in fact subject to a standard of evidence as set out by the Rome Statute. The potential rallying cry that the conducting of a preliminary investigation by the ICC may have on a situation is therefore not subject to any evidentiary burden at all, though all of the mechanisms are of course subject to bureaucratic and political hurdles.

1.2 Investigation
As set out in Article 53 of the Rome Statute, the Prosecutor will undertake an investigation unless there is "no reasonable basis to proceed under the Statute." The three elements of the 'reasonable basis' are jurisdiction, admissibility and the interests of justice. Decisions of the ICC have begun to give content to the requirements of a "reasonable basis" in the context of jurisdiction and admissibility. The Pre-Trial Chamber approved the investigation into post-election violence in Kenya, but required the Prosecutor to provide additional information and clarification on the question of the Court’s jurisdiction.

The two elements of admissibility are complementarity and gravity of the case. These aspects have also been examined by the ICC; while the substantive content of these two factors has begun to be addressed by the Prosecutor’s Office (and is already partially elaborated upon in the Statute itself) and in the decisions of the ICC, the standard of evidence utilized to determine the correctness of this evaluation (the essence of this project) has not been made clear – but it may be implicit from the decisions of the ICC. Nonetheless, early drafts of paragraphs 138-139 of the WSOD utilized the language of ‘unable or unwilling’ instead of ‘manifestly failing’, and therefore the strong connection between ICC complementarity and ‘manifestly failing’ is clear.

Finally, Article 53 requires that an investigation should not continue if there are "substantial reasons to believe that an investigation would not serve the interests of justice.” With “substantial reasons to believe” at a heightened level to “reasonable basis”, it is clear that choosing not to undertake an investigation for the ‘interests of justice’ is seen as requiring a greater rationale than undertaking an investigation that passes the jurisdiction and admissibility requirements.

1.3 Arrest Warrant
Once an investigation has been initiated, Article 58 sets out the evidentiary standard required for the issuance of an arrest warrant. The Pre-Trial Chamber is guided by whether it is satisfied that “[there] are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” The evidentiary standard was met in the application against President Omar Hassan Ahmad al-Bashir of Sudan, and the content of this standard can be implied by the evidence presented to the Chamber. However, the successful appeal by the Prosecutor to the ICC Appeals Chamber over the decision of the Pre-Trial Chamber not to issue the warrant against President al-Bashir on the charge of genocide suggests the strictness of this standard. The Pre-Trial Chamber’s holding, that as genocidal intent was not the only reasonable inference available no charge of genocide should be included within the arrest warrant, was rejected by the Appeals Chamber as beyond the requirements of a ‘reasonable basis’ under Article 58. The Appeals Chamber however did not expand on the proper interpretation of the ‘reasonable basis’ standard, referring the matter back to the Pre-Trial Chamber for future interpretations of the standard.

1.4 Indictment/Confirmation of Charges
The Prosecutor at the ICC is tasked with providing the Pre-Trial Chamber "with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.” The decisions in the Lubanga and Bemba cases have begun to spell out what "sufficient evidence” will require, including that the evidence must be ‘concrete and tangible’, and sufficient to demonstrate a clear line of reasoning underpinning its specific allegations. The Chamber has warned that, at this stage of the proceedings, “it may be impractical to insist on a high degree of specificity.” “Substantial grounds to believe” has been tackled by the Chamber through the application of dictionary definitions, supplemented by reference to relevant case-law, including that of the European Court of Human Rights. Substantial was shown to mean significant, solid, material or strong.
It is important to be reminded however, as seen in the Abu Garda Pre-Trial Chamber decision on the confirmation of charges, that the concerns of this confirmation process have already narrowed in on one or more particular individuals at this stage. The Chamber’s decision concerning Mr. Abu Garda focused on the “scant and unreliable” evidence connecting him to the alleged crimes, and not to their commission at all.

1.5 Prosecution:
The most stringent standard utilized is that of “beyond reasonable doubt” as required of the Trial Chamber under Article 66. The ICC has yet to reach the stage of assessing the guilt of an individual utilizing this standard.

2. THE NATURE AND APPLICABILITY OF ALTERNATIVE EVIDENTIARY STANDARDS

2.1 How to assess their relevance and applicability to RtoP
There are a variety of considerations in determining the applicability of evidentiary standards from one area of law onto the political and normative framework of RtoP: The relationship between state and individual responsibility; the ex ante or ex post nature of the judgment; whether it is private or public law at issue; whether domestic or international in origin. There is a presumption that the stringency of a standard of proof has been chosen to reflect the nature of the consequences that will result if the standard is met.

Despite this understanding, it is quite apparent that while the substantive legal areas that could potentially support RtoP are relatively well-developed, and developing all the time, the standard of proof or evidence that has been set down for each area at issue is often far more uncertain and obscure. These alternative standards will at least begin to animate our thinking about the standards applicable to the RtoP framework.

2.2 Preliminary Judicial Measures:

International and Domestic
Courts are often asked to impose coercive measures prior to their examination of the substantive merits of a dispute. Fearful that prior to hearing the arguments of both parties actions may be taken that might exacerbate the dispute, the application of preliminary measures is similar to attempts within the RtoP framework to prevent RtoP acts or to prevent any escalation of atrocities.

2.2.1 International
Termed provisional measures under Article 41 of the Statute of the International Court of Justice (ICJ), the ICJ has been regularly called upon to protect parties from potential harm to their rights before the Court has had the opportunity to decide on the case before it. The substantive standard required under the Court’s jurisprudence for the application of provisional measures has focused on, first, the potential for “irreparable prejudice”, and second, that urgency is present in the need for such provisional measures.

With respect to the requirement of urgency, the Court has often utilized the standard that prejudicial action is “likely” to be taken prior to the Court delivering a final decision. However, in the context of serious allegations of mass atrocity in the case of Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), the Court implemented provisional measures on finding that “there is a serious risk that the rights at issue in this case … may suffer irreparable prejudice”. This wording suggests a different standard than “likely” in assessments of the Court.

2.2.2 National
The concept paper will draw on predominantly US law in the examples of national law standards that can be utilized, but it is quite clear that comparative standards across national jurisdictions are not uniform.

US courts may issue preliminary injunctions in civil cases in order to prevent irreparable harm to either party and maintain the status quo prior to the determination of the case. The US Supreme Court has recently required that the party seeking the injunction must demonstrate that this potentially irreparable injury is “likely to occur”, and is not a mere “possibility”.

Courts may issue civil protection orders (CPO) (often referred to as ‘restraining orders’) in order to give relief to past and potential victims of violence, primarily domestic violence. The application for a CPO requires a relationship requirement (to determine the level of protection needed) and an act requirement to state which potential harms are at issue. The party seeking the order has the burden of proving actual or imminent domestic violence most frequently by a “preponderance of the evidence” standard, to show that the facts alleged in the petition occurred and that the behavior is likely to continue.
The CPO, like the application of the RtoP framework, is both retrospective and prospective, whereas other preliminary injunctions attempt only to predict and prevent future harms. It is clear that the language and understanding of standards of proof to prevent future harms will be distinct from retrospective determinations of whether something did in fact happen. Perhaps most pointedly, the higher standard of proof required for the CPO over the preliminary injunction corresponds to the greater intrusion on privacy that the CPO represents. More intrusive and coercive forms of action for RtoP should also perhaps be associated with stricter standards of proof.

2.3 The Duty to Care and Rescue

In some instances it is possible to hold public authorities responsible for their failure to protect an individual from harms committed by a private actor. This responsibility is in the form of civil actions to seek monetary damages. In addition, seeking to require citizens to act as ‘good Samaritans’, certain (predominantly civil law) countries impose a “duty to rescue” upon individuals, and in certain circumstances, a failure to undertake this duty to help others will lead to criminal sanctions against the timid Samaritan. These duties of care and rescue share common moral foundations with RtoP’s claims upon national governments to protect their own citizens and on third-states to ensure protection of citizens anywhere in the world. Of course, this sub-section presents many conceptual difficulties in applying domestic, private law actions to the international, public law actions embodied by RtoP; however, the conceptual and normative commonalities are not unimportant, and are therefore worth exploring.

2.3.1 Public duties of care

Domestic tort law in some states provides the opportunity for individuals to sue the state for failing to protect them from third party harm in certain instances. In the US, the general ‘public duty rule’ means that while the government owes a general duty to all citizens, the limitations of resources and the impossibility of ensuring protection at all times means that no duty is owed to any one individual in particular, and therefore the government cannot be brought to court for a failure to protect. The exception to this rule centers on the state adopting a ‘special relationship’ to the individual, essentially involving an affirmative and direct assumption of protection by the state in a particular instance, and the individual’s reliance on this affirmative undertaking that then did not materialize. These suits will involve the four elements of a tortious action: a duty to act because of the special relationship; a breach of this duty by the public authorities through their omission; the omission was the cause-in-fact of the injury; and actual damage to the individual bringing the suit. The standard of proof needed to prove a ‘special relationship’ existed, as well as the standard needed to prove the elements of the lawsuit, is by a “preponderance of the evidence”.

In contrast, civil law countries in general have a general duty of reasonable care placed upon municipalities, and such a duty is actionable. Of course proving what conduct is reasonable of a municipal entity will often itself be subject to heavy qualification. When such acts or omissions are actionable, the civil law judge will rely on his or her conviction over whether a fact has been sufficiently proven, and no clear standard of evidence is present.

2.3.2 Duty to rescue

States have long debated whether they should require individuals to seek to rescue those in danger. The common law family of states has generally placed no general duty upon individuals to help others in need. Utilizing the US as emblematic of this set of standards, two general exceptions to this rule apply. First, if an individual volunteers to help, or is herself responsible for the danger itself, then one is required to intervene in some form. Second, if a ‘special relationship’ exists either between the failed rescuer and the victim or the failed rescuer and the aggressor. A complicated set of factors are utilized to determine when this exceptional duty to rescue does exist. In these potential tort actions, the standard of proof applied by the court for each element is generally that of a “preponderance of the evidence”.

Many civil law states have made the “duty to rescue” an individual in peril a criminally enforceable requirement. These criminal statutes examine the dangers placed upon the rescuer, and the level of harm placed upon the ‘victim’ requiring the rescuing. There is also a wide gamut of required actions to be undertaken in order to fulfill this duty of rescue or assistance. As set out above, civil law jurisdictions have generally avoided providing detailed indications of the standard of proof required in different actions; instead, they rely on the conviction of the civil law judge that applies the (in this instance criminal) code to a particular action. It can be generally stated that those courts enforcing a criminal penalty concerning the duty to rescue must be persuaded that the evidence, by the
“balance of probabilities”, suggests that each of the required elements has been proven.

2.4 The Duty to Protect under Human Rights Law
The core concerns of RtoP are of course animated in the longer history of human rights. There are however specific threads within the human rights framework that play a more forceful role within any discussion of RtoP.

2.4.1 The Duty to Protect
The obligations upon state actors encompassed within any human right have been broken down into obligations to respect rights by not committing direct violations against individuals; to protect individuals from violations of their rights by third party non-state actors; and to fulfill rights when the state must step in and provide the content of the right.

Under the duty to protect, eloquently presented by the Inter-American Court of Human Rights (IACtHR) in the Velasquez Rodriguez case against Honduras, and by the European Court of Human Rights (ECtHR) in the Osman case against the United Kingdom, states may be held liable for their failure to take adequate measures to prevent violations, or for their lack of appropriate responses when violations have occurred, by non-state actors. Of course states are faced with operational difficulties, resource constraints, and the need to respect a variety of other human rights that limit their general coercive powers, and hence the “duty to protect” is applicable only in certain circumstances. The IACtHR required reasonable steps to be taken, and a lack of due diligence on the part of the state will determine their liability, in this case for a state tolerating a pattern of forced disappearances. States’ obligation is one of conduct (states are not expected to always achieve perfect prevention in order to have fulfilled their obligations), and acting with “due diligence” means utilizing all appropriate means at their disposal to minimize the risk of significant harm. This umbrella concept of “due diligence” could potentially mirror the nature of the conduct that third states should (minimally) seek to fulfill under pillars two and three of the Secretary-General’s RtoP framework.

For the ECtHR, the authorities must have “[known] or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk”, in this case the risks associated with a dangerous teacher who had threatened a student, and ultimately murdered the father of this student.

These standards of behavior having been set down, Courts have indicated differing standards of proof in the area of the duty to protect. The IACtHR in Velasquez Rodriguez stated it was “convinced” and that the facts were “clearly proven”; this corresponded to the Court’s stating that such serious charges required a standard of proof “capable of establishing the truth of the allegations in a convincing manner.” The ECtHR in Osman stated that the lack of reasonable preemptive steps “must be established to [the Court’s] satisfaction”.

The “duty to protect” is just one element of a state’s obligations to assist in the prevention of possible human rights violations occurring beyond its direct actions or omissions. It is self-evident that the rationale for protection of human rights and of the impetus for the doctrine of RtoP is similar if not identical; the duty to protect concerns a state’s obligations to help even when they are not the direct actor causing the violations, and therefore mirrors the role the international community is meant to play under RtoP.

It is important to note therefore the general standard of proof applied by human rights tribunals in finding a state responsible for those violations that would reach the seriousness of the RtoP acts has usually been proof “beyond a reasonable doubt”, as seen for example in the ECtHR’s decision of UK v Ireland (1978) concerning torture or inhuman or degrading treatment or punishment.

2.5 Torture and Non-Refoulement Obligations
A clear legal prohibition against torture exists, and is set out in a variety of international conventions. One aspect of this absolute ban has been the obligation placed upon states not to expel or return an individual to another state if there is a danger that the individual will be tortured in this other state. The prospective nature of the evidentiary standard applied by bodies deciding whether to impose a non-refoulement obligation on an individual correlates strongly with the decision stakeholders must make over whether or not to intervene to prevent future atrocity crimes.

The Convention Against Torture requires that no one shall be expelled if there are "substantial grounds for
believing that he would be in danger of being subjected to torture.” The Committee monitoring this Convention has noted that this standard entails a “foreseeable, real and personal risk”. The risk must be assessed on grounds surpassing “mere theory or suspicion” or “a mere possibility”; the risk need not be “highly probable” or “highly likely to occur” however. The Committee will look to a variety of criteria to assess the personal risk to an individual (including specific history involving the individual; the situation in the country in general; etc), and the facts to prove this case must be “sufficiently substantiated and reliable”.

The European Court of Human Rights has also interpreted its Convention’s prohibition against torture under Article 3 to include a non-refoulement obligation. The standard of proof utilized by the Court is to impose the obligation if there are “substantial grounds [to believe] that an individual would face a real risk of being subjected to treatment contrary to Article 3.” (Emphasis added) Of course, the Court itself (must prominently in the concurring opinion of Judge Zupancic in the case of Saadi v. Italy (2008)) has acknowledged that this prognosis or probabilistic exercise is not the usual retrospective domain of assigning legal responsibility.

Domestic courts have actively interpreted and implemented their obligations under the Refugee Convention to ensure asylum for those with a ‘well-founded fear of persecution’ on the grounds of race, religion, nationality, political opinion or membership in a social group. The US Supreme Court has required an individual to show that this fear is based on a “reasonable possibility” of occurrence; moreover, the US State Department has explained that the “substantial grounds to believe” standard from the Torture Convention should mean the risk is “more likely than not” to come to fruition. The UK House of Lords requires the risk to have a “reasonable chance” or a “serious possibility” of coming to fruition.

These predictions are intended to protect individuals from serious harms, which while not reaching the level of the RtoP acts at all times, may certainly form elements of such acts.

2.6 International Environmental Law: Transboundary Harm

It is a clearly established obligation of international law that states are required to take adequate steps to control and regulate the effect of their actions upon the physical environment of other states. International conventions dealing with specific areas of the environment have emphasized that the nature of environmental problems are such that reparations and restitution will often be inadequate to compensate for irreversible damages. Therefore, a norm of harm prevention is ever present in examining the obligations states have to protect the environment; this core conception of harm prevention is a central component of RtoP. In an analogous fashion, the harms included within RtoP acts cannot be made whole by reparations or (the often impossible) restitution, and thus the standards utilized for transboundary harm may assist in the construction this Project is working on.

One example of this obligation can be found in the International Law Commission’s 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. The Draft suggests that the “state of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.” First, the risk to be prevented must be of “significant” transboundary harm; the determination of this standard involves the combination of the probability of an event occurring and the level of harm that would occur in such a situation. Second, as with the discussion on the duty to protect in human rights law, states’ obligation is one of conduct, not result, and they must act with “due diligence”.

The standard of proof utilized to assess this prevention obligation in the context of environmental law and transboundary harm has not been readily examined by tribunals or courts, with the ICJ’s opinions in international environmental law so far focused on specific treaties and not general standards. However, it can be inferred that the Court has not treated this area of concern as one for which a heightened standard of proof is appropriate, as it has not invoked the need for a strict standard given the “exceptional gravity” of the issue at hand (as had been the case with questions involving the use of force or genocide, as discussed below).

A further relevant concept from within international environmental law is that of the ‘precautionary principle’. This principle stands as a reaction to the very high standard of proof previously required in environmental cases, one that did not appreciate the reality of scientific uncertainty, and therefore limited the ability of states to require prevention of environmental damage. The principle
stands to require or permit preventive action even in the face of scientific uncertainty in the foreseeability of harm and the likelihood of its gravity. In essence, the utilization and application of this principle works to lower the standard of proof required before preventive action must be undertaken.

2.7 Serious Human Rights and Humanitarian Law
Violations Directly Committed by States

This sub-section examines the standards applied when international law assesses gross violations of human rights or international humanitarian law by state actors. Tribunals examining these questions are faced with allegations over situations that have already occurred, and usually have already come to a conclusion. In addition, the role of individual criminal responsibility has already been addressed in Section 3.1 above; this section instead introduces state responsibility for those violations included within RtoP.

It has already been noted that the ECtHR has applied the standard of “beyond a reasonable doubt” in addressing allegations of violations all of its range of human rights. This standard as to the proof of the facts of alleged violations has been applied for both allegations committed within the territory of a signatory of the ECHR or for violations committed outside the territory of the state charged with the violation.

Some of the most difficult questions in addressing these areas concern states’ obligations outside their territorial borders, and their responsibilities for conduct not directly carried out by the state itself. These questions are at the very heart of the responsibility to protect, as states examine the issues surrounding any decision to intervene into other states in order to protect populations from potential or existing mass atrocity.

The question of control over territory outside the sovereign borders of a state can be seen in the ECTHR’s cases (such as Loizidou and Bankovic) and in the ICJ’s case-law, for example in the Israeli Wall case. The second element is one of attribution of conduct undertaken by a non-state actor or a third-state so as to lead to a state itself being held responsible for the allegedly illegal international conduct. This is an area set out in detail under the ILC’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as well as jurisprudence from the ICJ (for example Bosnia-Herzegovina v. Serbia, USA v. Nicaragua), the ECtHR (for example Ilascu), and the International Criminal Tribunal for the Former Yugoslavia in the Appeal Chambers’ Judgment in the case of Tadic.

These tests of attribution and control have implicitly been answered using the same standards of proof associated with the serious allegations of state misconduct at issue.

Unlike the ECtHR, the ICJ has been less consistent when addressing allegations of serious violations of human rights and humanitarian law. In the Genocide Case involving allegations against Serbia, the Court recognized that “charges of exceptional gravity must be proved by evidence that is fully conclusive” and the Court must be “fully convinced that allegations… [of genocide] have been clearly established”; the Court demanded that the standard to be met be one of a “high level of certainty”. In the Armed Activities case involving Uganda and the Democratic Republic of Congo, the standard of proof appeared to vary quite considerably across the Judgment, with the Court utilizing the terms “sufficient”, “conclusive”, “persuasive” and “convincing” in assessing evidence and in turn declaring whether they were or were not satisfied that a particular factual allegation had been met; this variety of terminology would be more than adequate if set against a clear standard of proof, but it instead appears that these terms were themselves applied to determine whether a facts were satisfactorily proven in the eyes of the Court.

2.8 The Duty to Prevent or React to Gross Violations of Human Rights by Other Actors, and the Duty to Cooperate to Respond to Gross Violations

One of the most evolving areas of international law concerns the rights and duties states have to protect populations outside of their territorial control or outside their direct governmental authority; this is of course the very essence of the RtoP norm. We have set out the first element of that duty as embodied within international human rights law in Section 3.2.4: the duty to protect individuals from the actions of private actors. In addition, we have examined obligations placed upon states not to contribute by their actions to harming other states, in this paper within the context of international environmental law and transboundary harm.

Within human rights law, the Committee on Economic, Social and Cultural Rights has examined the obligations
A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

included within the Covenant with respect to “international assistance and cooperation”, obligations that flow from the undertakings of Articles 55-56 of the UN Charter itself and additionally advanced by specific General Assembly resolutions on economic development. However, the Committee has not begun to indicate what standard of proof would apply in the situation, for example, whereby one state sought to demand the implementation of this concept against a set of duty-holders.

Turning to identifiably serious breaches of international law, the ILC’s Draft Articles on State Responsibility under Articles 40-41 focused on “serious breaches of obligations under pre-emptory norms of general international law”—and all states’ duty to cooperate to end these violations. The breach must be of a pre-emptory norm of international law (frequently referred to as a *jus cogens* violation), and it must be serious. “Serious” is defined as a “gross or systematic failure by the responsible State”; it is self-evident that the question of whether RtoP acts are occurring and whether a state is “manifestly failing” to protect their populations will have great commonalities to this examination. Article 41 sets out the consequences that will flow from a finding of a serious breach of a pre-emptory norm of international law: States are under a duty to cooperate to bring such breaches to an end, and must not recognize any such act as lawful or render aid or assistance to the responsible state or states. Of course the standard of proof that will be applied to determine finding under these Articles will depend on the context in which they are invoked: i.e. use by an organ of the United Nations will have different standards than by an international judicial tribunal or an arbitral body.

One specific aspect of this wider international duty concerns the Convention on the Prevention and Punishment of the Crime of Genocide, and its recent examination by the ICJ. The Court’s groundbreaking decision in the *Genocide Case* of 2007 examined the requirements placed upon a state, under the Convention, to prevent genocide. The Court set out that this obligation of conduct was fulfilled through “due diligence” by states. Standards to assess whether this duty has been fulfilled focused on the ability of the state to “influence” the state or non-state actor that has in fact committed genocide (and of course the obligation to prevent begins before the genocide has definitively occurred). The Court indicated that the obligation to prevent applies when the state “was aware or should normally have been aware, of the serious danger that acts of genocide would be committed.” Certainty over whether genocide was or may occur was therefore not required, but instead the focus in terms of prevention was on a “serious risk” of genocide occurring. The Court applied the same standard of proof for all parts of their Judgment – that the evidence must be “fully conclusive” and they must be “fully convinced”.

Finally, while the Court explicitly limited the scope of its decision to the application of the 1948 Convention, it is additionally arguable that such duties are customary international law obligations incumbent upon all states, and include a duty to prevent all of the RtoP acts.

### 2.9 The Use of Force: Ex Ante & Ex Post Evaluations

The use of force under international law is valid, in the age of the United Nations Charter, in only very limited circumstances. Its potential validity can be placed into two categories: the inherent right of self-defense (either individual or collective), or as authorized by the UN Security Council as provided for by Chapter VII of the Charter, including to protect populations at risk from RtoP acts. This section does not address the legal, political or normative issues involved in the question of the use of force outside of these two avenues.

To work backwards, tribunals have been asked to assess the question over the validity of a claim of self-defense on several occasions, but there have not been (at this time) judicial findings on the validity of Security Council authorized uses of force. The ICJ examined the alleged illegal use of mines in the *Corfu Channel* case, decided in 1949 – although the case did not center on the assertion of self-defense by Albania. Here the Court declared its need for allegations to be proven by “conclusive evidence” and a “degree of certainty”. The Court’s assertion of a standard of proof in this case was unfortunately missing in their more recent cases over *Military and Paramilitary Activities* (Nicaragua v. United States of America) and *Oil Platforms* (Iran v. United States of America); both “sufficiency” and “conclusiveness” were invoked, but any choice or clarification of this standard has so far been lacking.

From an *ex ante* perspective, it would be useful to set out the standards of proof required to support a claim for self-defense under the customary international law rule embodied in Article 51 of the UN Charter, or for the use of force as authorized by the Security Council. While there is a voluminous amount of material on the requirements
that must be shown for such undertakings, in neither case has there been any robust indication of whether any standard of proof is in fact needed at all, or to whom this proof would be submitted and/or examined. The same problems that surround this issue are present in all coercive measures of prevention and reaction that may be taken under the RtoP framework.

2.10 International Organizations and Responsibility
A final potential area from which to glean insight for this project comes from the consistently evolving area of the international legal responsibility of international organizations. The question of whether and when international organizations can be held responsible for actions or omissions under international law is complex and controversial. Indeed, the ILC’s Draft Articles on the Responsibility of International Organizations, provisionally adopted on first reading in 2009, have received a multitude of comment and critique, although they have been referred to by certain national courts and the ECtHR in turn.

Despite the title of the ILC’s work, and in turn the title of this sub-section, it is as important to examine the question of holding states responsible for actions taken in conjunction with or in the context of international organization activity, provisionally set out in Articles 57 to 62 of the Draft. With respect to RtoP, given the framing of paragraph 139 to involve the Security Council as the primary actor to address RtoP acts in the face of manifest failure, this topic would be potentially applicable in situations whereby the UN or a regional organization fails to act appropriately in the face of RtoP acts, or in situations whereby a state incurs responsibility for actions taken or omissions through international organizations. Yet the question of whether and what obligations are placed on different international organizations in the area of RtoP is a separate topic outside the scope of this concept paper.

There has been an increasing volume of case-law concerning the attempts to hold states responsible for actions conducted under the auspices of international organizations. These cases have utilized the standards of proof that is associated with the primary rule of conduct at issue, i.e. if concerning core human rights at the ECtHR, that Court applied the “beyond a reasonable doubt” standard. There has not yet been a separate examination or analysis on the standard of proof for the assessment that might be utilized to determine whether a state is failing its international obligations in the context of an act of an international organization, or for the responsibility of an international organization independently for its acts. Whether this standard of assessment should necessarily be identical to that associated with the responsibility of a state will remain an open question at this time.

APPENDIX II:
OPTIONS FOR THE STANDARDS

1. OPTIONS FOR THE STANDARDS

1.1 Why present options for the standards?
The concept paper has laid out the goals of the project, and the historical events that have motivated its undertaking in Parts 1 and 2. In Part 3, the areas of law from which the standards can find support and insight were set out. At this stage of the project, it is important to seek to ensure that the standards could function as practical and realistic boundaries in assessing the role of RtoP; it is to this end that the project has undertaken and will continue with a wide-ranging consultation process, with stakeholders from a variety of relevant fields and from all regions across the globe.

This concept paper is therefore a preliminary step in the construction of the standards, and a number of open questions and options remain. By presenting a range of available formulations for the nature of the standards, we hope to spark discussion and seek insight. The concept paper will set the stage for the regional fora in Africa, Asia, and Europe, and our meetings with a significant number of Permanent Missions to the United Nations in New York City.

1.2 The five entry points for standards
The unanimous adoption of the 2005 Outcome Document containing the commitment to RtoP, and the widespread participation by Member States in the General Assembly meetings focused on the Secretary-General’s reports on RtoP, suggest that the standards should seek to engage with the three pillar framework presented in 2009 by the Secretary-General. However, RtoP as conceptualized in the ICISS report provided its own very important tripartite methodology: that protection required prevention, reaction and rebuilding. Therefore, the standards are not directly wedded to the three pillars, but are intended to work very closely with them.
The starting points for potential standards therefore appear to fall into five categories:

I. The protection responsibilities of each state towards its population with respect to RtoP acts.

II. The role of international assistance and capacity-building may require a standard of proof to determine either when such assistance is necessary or when such assistance should be sought by a state.

III. The role of peaceful and pacific measures under UN Charter Chapters VI and VIII.

IV. In the advent that peaceful means may be inadequate, and if national authorities are “manifestly failing” to protect their populations, “timely and decisive” responses not including military intervention are available, through the Security Council.

V. If the requirements for point (IV) have been met, but focused on the unique nature of military intervention as a potential component of RtoP responses.

It is against these starting points that the potential production of the standards can now be framed.

1.3 Starting points and standards: Options

Although there may be five potential entry points into which standards of proof or assessment for RtoP could be applied, this does not mean that such an endeavor is prudent or even necessary for each one of those corresponding set of activities. The potential groupings of entry points that should have standards of proof appear to be as follows:

- **Standards for each of (I)-(V):** It may be fruitful to set out standards for each of the corresponding entry points from above.

- **Standards for (II)-(IV):** Category (V) has been defined as focusing on the unique nature of the use of force within the RtoP framework. Given the specific rules within international law on the use of force, as well as evident unwillingness at this time to adopt those guidelines on military force under RtoP that had been set out in 2001 within the ICISS report, it may be prudent to not attempt to assign standards of proof for this category.

- **Standards for (III)-(IV):** In addition to the concerns presented above on categories (I) and (V), the nature of category (II) is such that its more voluntary nature may appear to some to not permit of the use of standards of proof. On the other hand, given the need to target limited resources to those states and situations that truly require forceful early prevention against mass atrocity, a standard of proof could be very useful in assessing where international assistance and capacity-building should be best utilized.

1.4 Pillar Three and a Sliding Scale: Options

It is of course self-evident, and reiterated explicitly in the Secretary-General’s 2009 report on Implementing the responsibility to protect, that the threshold of RtoP acts required to utilize Chapter VI measures under Pillar Three will be lower than that for enforcement action under Chapter VII. However, it does not necessarily follow that the standard of proof should also be higher for more intrusive forms of intervention.

Examining Categories (III)-(V) as one whole unit of Pillar Three activities, two potential approaches seem possible:

- First, one single standard could be set out that would determine when Pillar Three concerns were at play. In turn, it would be within the hands of the relevant stakeholders to then determine the appropriate time for differing forms of more or less intrusive action.

- Second, corresponding to the three categories, and even within each category, there could be a sliding scale of higher standards of proof required for more intrusive interventions. This would suggest that a stakeholder would have a greater burden to prove the existence of verifiable information given the stricter standard of proof, if more stringent forms of intervention were sought within RtoP.
1.5 Standards and Different Actors: Options
The “responsibility to protect” is a concept that is slowly becoming part of the lexicon of a variety of actors dealing with the prevention of and reaction to mass atrocities. These various actors include:

- National governments from within the region—and those outside the region—from which the situation has arisen;
- Regional organizations;
- Various organs of international organizations, including the Security Council and General Assembly;
- The staff of the respective international organization itself, including those located both inside and outside of the site of the situation at issue;
- Civil society organizations, including those dealing specifically with RtoP, those located outside of the situation, and those on-the-ground during a specific situation.

Given the very different role and access to information that these different actors may have, it may be prudent to suggest different standards for these actors. For example, the standard of proof required for a regional organization when the situation is occurring within that region may be lower than that for a state located at some distance, and in turn may lack the same understanding or information on a situation. Alternatively, maintaining uniform standards may be easier and more appropriate.

1.6 Content of the Standards: Select Options
Given the number of potential options over which standards to set out, and to whom they should be directed, it would be premature in the concept paper to provide a comprehensive set of standards for discussion. To spark thoughts however this paper sets out some potential options in one area, that of determining the standard of proof appropriate for the determination of whether a state is “manifestly failing” to protect its population from one or more of the four RtoP acts. This enquiry corresponds to Category (IV) from the typology set out above, and is therefore a very significant decision by the international community. With all of the following guidelines, it is within the limited scope of this project to seek a common standard of proof for the assessment of the current or future presence of one of the four RtoP acts, but it is of course an equally important—if not more politically charged—undertaking to set out standards on what factors would be used to examine the four RtoP acts (this would correspond to the second level of enquiry set out in Section 2.3.1 above). The following are illustrative and not exhaustive of the potential standards:

- Utilizing the standard from international criminal law prosecutions and that of the European Court of Human Rights in addressing state responsibility, the invocation of a need for a timely and decisive response could be proved “beyond a reasonable doubt” that one or more of the RtoP acts has occurred”. This standard is both stringent and entirely retrospective, and would therefore be the most protective of the principle that a state has the primary responsibility to protect its own population.

- Maintaining the focus on retrospective standards of proof, but appreciating that the nature of the enquiry at this juncture would make such a stringent standard of proof unworkable and potentially severely curtail the application of appropriate responses to prevent mass atrocity, the invocation of a need for a timely and decisive response could be proved if “on the balance of probabilities one or more of the RtoP acts has occurred”.

- A third alternative would focus entirely on the future risk aspect of the prevention component of RtoP, and would therefore examine those standards that are prospective. The invocation of a timely and decisive response would be proved if there is “substantial evidence of a real risk that one of the RtoP acts may occur”.

- The third alternative utilizes a mix of the strictness of the evidence needed for assessment and the potential future risk of harm, which is common to all prevention standards of proof set out in Part 3. It is possible therefore to require a lower threshold of evidence but a higher risk requirement, for example permitting the invocation of a timely and decisive response if there is “clear evidence of a significant risk that one of the RtoP acts may occur”.

- A final illustrative example would be to acknowledge the need to combine prospective and retrospective standards. RtoP under Pillar Three must be both preventive but
also reactive, as the import of urging collective action must balance the urgent imperatives of population protection against the legal and normative value of sovereign equality and territorial control. Therefore, the invocation of a need for a timely and decisive response could be proved if there is "clear and convincing evidence either (i) that one of the RtoP acts has occurred; or (ii) that it is likely that one or more the RtoP acts will occur absent collective action".
APPENDIX III: OPTIONS FOR THE STANDARDS

1. UN MECHANISMS FOR FACT FINDING AND INVESTIGATION

1.1 Secretary General:

Despite its infrequent use, Art. 99 of the UN Charter empowers the Secretary-General of the U.N. to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.1 Under the Security Council’s Provisional Rules of Procedure, the Secretary-General shall immediately bring to the attention of all representatives on the Security Council all communications from States, organs of the U.N., or the Secretary-General concerning any matter for the consideration of the Security Council in accordance with the provisions of the Charter.2 Additionally, the Provisional Rules also permit the Secretary-General, or his deputy acting on his behalf, to make either oral or written statements to the Security Council concerning any question under consideration by it.3

Finally, while the 1991 Declaration on Fact-Finding by the U.N. in the Field of the Maintenance of International Peace and Security contends that fact-finding missions may be undertaken by the Security Council, the General Assembly and the Secretary-General in the context of their respective responsibilities for the maintenance of international peace and security in accordance with the Charter, particular attention is paid to the activities of the Secretary-General.4 The Declaration provides that the Secretary-General should monitor the state of international peace and security regularly and systematically in order to provide early warning of disputes or situations which might threaten international peace and security;5 may bring relevant information to the attention of the Security Council and, where appropriate, of the General Assembly;6 and on his own initiative or at the request of the States concerned, consider undertaking a fact-finding mission when a dispute or a situation exists.7 Additionally, paragraph 15 of the Declaration provides that Security Council and the General Assembly should, in deciding to whom to entrust the conduct of a fact-finding mission, give preference to the Secretary-General, who may, designate a special representative or a group of experts reporting to him.8

1.1.1 International Commissions of Inquiry (ICOI) Initiated by the Secretary-General

1.1.2 Timor Leste

Following the outbreak of violence in Timor-Leste on April 28-29, 2006, the Government of Timor-Leste addressed a letter to the UN Secretary General, “wish[ing] to invite the U.N. to establish an independent Special Inquiry Commission . . . mandated to review the incidents of 28 and 29 April, 23, 24 and 25 May and other related events or issues that contributed to the crisis.”9 This letter was transmitted to the Secretary-General Kofi Annan, who responded favorably to the invitation and requested the OHCHR to establish such a commission.10 This decision was communicated to the Security Council on June 13, 2006, pursuant to Rule 39 of the Security Council’s Provisional Rules of Procedure.11 On June 20, 2006, the Security Council passed Resolution 1690 (2006), “welcoming the initiative of the Secretary-General to ask the High Commissioner for Human Rights (HCHR) to establish an independent special commission of inquiry and request[ing] the Secretary-General to keep the Council informed on the subject matter.”12 On June 27, 2006, the Secretary-General wrote to the President of Timor-Leste, Xanana Gusmão, informing him that he had requested the OHCHR to establish an Independent Special Commission of Inquiry.13 The Secretary-General appointed three commissioners who would convene in Timor-Leste for a maximum total of five weeks over a maximum of two visits - Mr. Paulo Sérgio Pinheiro (Brazil, Chairperson), Ms. Zelda Holtzman (South Africa) and Mr. Ralph Zacklin (United Kingdom of Great Britain and Northern Ireland) – and would supported by a secretariat based in Dili and headed by an Executive Director, Mr. Luc Côté (Canada).14 In Resolution 1704 (2006),15 the Security Council welcomed the establishment and initiation of the tasks of the Independent Special Commission of Inquiry for Timor-Leste, and received its report in October, 2006.16

1.1.3 Gaza

During the course of the recent conflict in the Gaza Strip and southern Israel, a number of incidents occurred between December 27, 2008 and January 19, 2009, in which U.N. personnel, premises and operations were affected. In his capacity as the Chief Administrative Officer of the Organization, Secretary-General Ban drafted a letter to Vitaly Churkin, President of the Security Council, dated May 4, 2009, and determined to establish a U.N. Headquarters Board of Inquiry to review and investigate nine of these incidents to establish
“a clear record of the facts of these serious incidents and their causes and of where, if anywhere, bearing in mind the complexities of the overall situation, responsibility for them might lie.”17 The Board of Inquiry was led by Mr. Ian Martin (UK) and included, as its other members, Mr. Larry Johnson (US), Mr. Sinha Basnayake (Sri Lanka) and Lieutenant Colonel Patrick Eichenberger (Switzerland). Secretary-General Ban, rejected the report’s call for a full and impartial investigation into the war, and refused to publish the complete 184-page report, releasing only the Secretariat’s own summary of the report.18

1.1.4 Guinea
In response to widespread appeals from Member States, regional organizations and the Security Council,19 and following an exploratory mission,20 Secretary-General Ban informed the members of the Security Council of his decision to establish an international commission of inquiry to investigate the violent events that took place in Conakry on September 28, 2009.21 On October 27, 2009, the Secretary-General approved the terms of reference of the Commission, as prepared by OHCHR: “The Commission of Inquiry shall investigate the facts and circumstances of the events of 28 September 2009 and related events in their immediate aftermath”. To that end, the Commission shall (a) establish the facts; (b) qualify the crimes; (c) determine responsibilities and, where possible, identify those responsible; and (d) make recommendations, including, in particular, on accountability measures. In order for the Commission to be able to conduct its inquiry, the terms of reference specify that in the conduct of its inquiry it shall enjoy the full cooperation of the Government of Guinea. The Government shall comply with requests of the Commission for assistance in collecting the required information and testimony and shall guarantee freedom of movement throughout the territory and freedom of access to all sources of information necessary for the fulfillment of its mandate”.22 The Report concluded that Guinea had violated several provisions of the international human rights conventions it has ratified, and that the crimes perpetrated on September 28, 2009 and in the immediate aftermath can be described as crimes against humanity.23 The Secretary-General transmitted the final Report of the Committee of Inquiry to the Government of Guinea, the Security Council, the African Union and ECOWAS on December 19, 2009.24

1.1.5 The Assassination of Benazir Bhutto
In May 2008, the Government of Pakistan requested the UN Secretary-General to establish an international commission of inquiry investigating the December 27, 2007 assassination of former Prime Minister Mohtarma Benazir Bhutto.25 Following extensive discussions with the Pakistani authorities, as well as members of the Security Council, on February 2, 2009, the Secretary General, in a letter to the President of the Security Council, informed the Security Council of his decision to establish a three-person international commission in connection with the assassination of Ms. Bhutto.26 On February 3, 2009, the President of the Security Council Yuki Takasu brought the request to the attention of members of the Security Council, who took note, with appreciation, and firm the intention of the Secretary-General to submit the report.27 The Commission was composed of the Permanent Representative of Chile, Ambassador Heraldo Muñoz, as the head of the Commission; Marzuki Darusman of Indonesia; and Peter Fitzgerald of Ireland. In accordance with the agreed Terms of Reference, the Commission’s mandate was to inquire into the facts and circumstances of the assassination of former Prime Minister Bhutto and would not extend to carrying out a criminal investigation.28 The report was completed on April 16, 2010.

1.2 Security Council
Art. 34 of the UN Charter empowers the Security Council to investigate any dispute, or any situation that is likely to endanger international peace and security.29 The Security Council has established a wide-variety of Commissions to handle a variety of tasks related to the maintenance of international peace and security. Commissions have been created with different structures and a wide variety of mandates including investigation, mediation, or administering compensation.30

1.2.1 ICOIs Initiated by the Security Council
1.2.2 Burundi
Following the October 1993 coup attempt that resulted in the assassination of President Melchior Ndadaye and widespread massacres and other acts of violence throughout the country, the International Commission of Inquiry concerning Burundi was established on August 28, 1995 pursuant to Security Council Resolution 1012.31
Resolution 1012 contained the following mandate: “The Security Council requests the Secretary-General to establish, as a matter of urgency, a commission of inquiry, with the following mandate: To establish the facts relating to the assassination of the President of Burundi on October 21, 1993; to establish the facts relating to the massacres and other related serious acts of violence which followed; to recommend measures of a legal, political and administrative nature, as appropriate, after consultation with the Government of Burundi, and measures with regard to the bringing to justice of persons responsible for those acts, to prevent any repetition of deeds similar to those investigated by the commission and, in general, to eradicate impunity and promote national reconciliation in Burundi.” In accordance with Resolution 1012, the Secretary-General appointed an International Commission of Inquiry for Burundi, on September 20, 1993, consisting of the following jurists: Edilbert Azzafindralambo (Madagascar), Chairman Abdelali El Moumni (Morocco) Mehmet G. Ney (Turkey) Luis Herrera Marcano (Venezuela) Michel Maurice (Canada).

Prior to the International Commission of Inquiry Concerning Burundi, several previous U.N. missions had been conducted into the events of October 1993. Two occurred under the auspices of the Secretary-General; the first occurring in March 1994, when the Secretary-General, in response to a request from the Government of Burundi44 and in compliance with a Note from the President of the Security Council45, designated Ambassadors Martin Huslid and Simeon Aké for a preparatory fact-finding mission. The second responded to a formal request by the Government of Burundi that the U.N. set up a judiciary commission of inquiry. On June 26, 1995, the Secretary-General sent Mr. Pedro Nikken to Burundi to look into the manner in which such a Commission should be established. The report submitted by Mr. Nikken contained recommendations regarding the creation of the Commission and its mandate. Finally, on February 6, 1995, following informal consultations, U.N. Security Council sent a mission to Burundi. This Mission was led by Ibrahim A. Gambari (Nigeria) and its terms of reference were established pursuant to a Note by the President of the Security Council.

1.2.3 Darfur
The International Commission of Inquiry for Darfur was established on September 18, 2004 by the United Nations Security Council, pursuant to Resolution 1564 requesting that the Secretary-General ‘rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable’.

In October 2004, the Secretary-General appointed Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott as members of the Commission. In order to discharge its mandate, the Commission endeavored to fulfill four tasks: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether or not acts of genocide have occurred; (3) to identify the perpetrators of violations of international humanitarian law and human rights law in Darfur; and (4) to suggest means of ensuring that those responsible for such violations are held accountable. While the Commission considered all events relevant to the current conflict in Darfur, it focused in particular on incidents that occurred between February 2003 and mid-January 2005.

1.3 Human Rights Council (HRC)
The HRC was created by the UN General Assembly on March 15, 2006 through the adoption of GA Resolution 60/251, with the main purpose of replacing the Human Rights Commission with a new subsidiary body of the General Assembly. Resolution 60/251 provided that the HRC “shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner and . . . should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon . . . shall contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.”

On June 18, 2007, the Council adopted its “Institution-building package.” Among the new elements contemplated in the Institution Building Package was the Universal Periodic Review mechanism to assess the human rights situations in all 192 UN Member States and a review, rationalization, and in some cases, establishment of new mandates, within the UN Special Procedures rubric. Finally, pursuant to paragraph 10 of General Assembly Resolution 60/251 and in accordance with Rule 6 of the HRC Rules of Procedure,
as annexed to HRC Res. 5/1, the HRC "shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council."46 It appears that through these special sessions, called at the initiative of HRC Member States with the support of one-third of the membership of the HRC, and by referencing the aforementioned provisions of General Assembly Res. 60/251, the U.N. HRC is able to establish commissions of inquiry.

1.3.1 Universal Periodic Review
The Universal Periodic Review (UPR) is a state-driven process under the auspices of the HRC, created by General Assembly through Resolution 60/251 and mandated to "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States."47 On June 18, 2007, members of the new HRC agreed to its institution-building package, providing a road map for the future work of the HRC, including more explicit mechanisms for the UPR.48 This process involves a review of the human rights records of all 192 U.N. Member States once every four years and provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations.49 The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a "national report"; 2) information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other U.N. entities; 3) information from other stakeholders including NGOs and national human rights institutions.50 Reviews take place through an interactive three-hour discussion between the State under review and other U.N. Member States during a meeting of the UPR Working Group.51 During this discussion, Observer States may participate in the review, including in the interactive dialogue and other relevant stakeholders may attend the review in the Working Group.52

1.3.2 Special Procedures
"Special procedures" is the name given to the extra-conventional mechanisms established by the former U.N. Commission on Human Rights and continued by the HRC to monitor human rights violations in specific countries or examine global human rights issues.53 In THE U.N. SPECIAL PROCEDURES IN THE FIELD OF HUMAN RIGHTS, Ingrid Nifosi traces the legal foundations of special procedures to Art. 62, paragraph 24 and Art. 6855 of the U.N. Charter, and to ECOSOC Resolution 1235.56 Special procedures can entail either individual (called "Special Rapporteurs", "Special Representatives" or "Independent Experts") who are leading experts in a particular area of human rights, or working groups usually composed of five members, or legal experts who monitor and investigate specific human rights concerns. Various activities can be undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation, and engaging in promotional activities. The special mechanisms are categorized according to thematic mandates and country mandates. (See, Appendix I for list of country specific and thematic mandates)

1.3.3 ICOIs Initiated by the HRC
1.3.3.1 Lebanon
By a letter dated August 7, 2006, addressed to the President of the HRC, the Permanent Representative of Tunisia to the U.N. Office at Geneva, on behalf of the Group of Arab States ("Arab League") and the Organization of the Islamic Conference, requested that a special session of the Council be convened immediately "to consider and take action on the gross human rights violations, by Israel in Lebanon, including the Qana massacre, the countrywide targeting of innocent civilians and the destruction of vital civilian infrastructure."57 The letter, received by the President on August 7, 2006, was accompanied by signatures in support of the request from 16 States members of the HRC. As more than the one-third of the membership supported the request, the President, following consultations with interested parties, decided to convene a special session of the HRC on August 11, 2006.58

At this special session, the HRC adopted Resolution S-2/1 entitled "The grave situation of human rights in Lebanon caused by Israeli military operations." Recalling General Assembly Resolution 60/251 in which the General Assembly decided that the HRC (a) should address situations of violations of human rights, including gross and systemic violations, and make recommendations thereon; and (b) shall respond promptly to human rights emergencies,59 the Council decided to "establish urgently and immediately dispatch a high-level Commission of Inquiry comprising of eminent experts on human rights law and international humanitarian law, and including
the possibility of inviting the relevant U.N. special procedures to be nominated to the Commission.”60 Pursuant to paragraph 7 of Resolution S-2/1, the Commission was mandated to: “(a) investigate the systematic targeting and killings of civilians by Israel in Lebanon; (b) examine the types of weapons used by Israel and their conformity with international law; and (c) assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.”61 On September 1, 2006, the President of the HRC, Luis Alfonso de Alba, announced the nomination of João Clemente Baena Soares (Brazil), Mohamed Chande Othman (United Republic of Tanzania) and Stelios Perrakis (Greece) as members of the Commission of Inquiry. The members were appointed on the basis of their expertise in international humanitarian law and human rights law. On September 22, 2006, the Commission of Inquiry provided a progress report on its activities to the President of the HRC. The text of the report was released on November 23, 2006.62

1.3.3.2 Gaza

On April 3, 2009, the President of the HRC established the U.N. Fact Finding Mission on the Gaza Conflict with the mandate “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.” The appointment of the Mission followed a January 6, 2009 letter to the UN Office at Geneva (UNOG), addressed to the President of the HRC, from the Permanent Representatives of Egypt, Pakistan and Cuba in their representative capacities, to request the convening of a Special Session of the HRC on January 9, 2009 to address “the Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression of the occupied Gaza Strip.”63 The request was supported by the following 33 States members of the HRC.64 As more than one third of the membership of the HRC supported the above-mentioned request, the President of the HRC convened informative consultations on the matter on January 7, 2009 and determined to convene a Special Session of the HRC on January 9, 2009.65 On January 12, 2009, the HRC adopted Resolution S-9/1 on “The Grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip.”66 The President appointed Justice Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to head the Mission. The Mission interpreted the mandate as requiring it to place the civilian population of the region at the centre of its concerns regarding the violations of international law.

1.3.3.3 Libya

On 23 February 2011, the Permanent Mission of Hungary to the UNOG, on behalf of the EU, requested the convening of a special session of the HRC on 25 February 2011 to address the situation of human rights in the Libyan Arab Jamahiriya.67 The above-mentioned request was supported by 23 States Members of the HRC and as more than one third of the membership of the HRC supported the abovementioned request, the President of the HRC convened informative consultations on the matter on February 23, 2011 and decided to convene a special session of the HRC on February 25, 2011.68 On March 15, 2011, the President of the HRC announced the composition of the members of the commission of inquiry: Mr. Cherif Bassiouni (chair), Ms. Asma Khader and Mr. Philippe Kirsch. The Commission released its findings on June 1, 2011.71

1.3.3.4 Cote d’Ivoire

On December 21, 2010, the Permanent Mission of Nigeria to the UNOG (on behalf of the Group of African States) and the Permanent Mission of the United States of America to the UNOG requested the convening of a special session of the HRC on December 23, 2010 to address the situation
of human rights in Côte d’Ivoire since the elections on November 28, 2010. The above-mentioned request was supported by 31 States members of the HRC and as more than one third of the membership of the HRC supported the aforementioned request, the President of the HRC convened informative consultations on the matter on December 22, 2010 and decided to convene a special session of the HRC on December 23, 2010. At the conclusion of the 14th Special Session, the HRC adopted Resolution S-14/1, inviting the UN HCHR to submit a report on the abuses and violations of human rights in Côte d’Ivoire in relation to the conclusion of the 2010 presidential election. The report covered the period up to January 31, 2011 and was released on February 25, 2011, recommending the establishment of a credible and representative international commission of inquiry.

On March 25, 2011, the HRC resolved to dispatch an independent, international Commission of Inquiry at the conclusion of its sixteenth regular session, to be appointed by the President of the HRC and whose mandate is "to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d’Ivoire following the presidential election of 28 November 2010, in order to identify those responsible for such acts and bring them to justice". The HRC appointed three high-level experts as members of the Commission of Inquiry to investigate the allegations of serious abuses and violations of human rights, as mandated by the HRC: Vitit Muntabhorn, Suliman Baldo, and Reine Alapini Ganso with Mr. Muntabhorn serving as Chair of the Commission.

2. REGIONAL MECHANISMS FOR FACT-FINDING AND INVESTIGATION

2.1 The African Union

Under Art. 6, paragraph 1 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the Peace and Security Council shall perform functions in the following areas: promotion of peace, security and stability in Africa; early warning and preventive diplomacy and peace-making, including the use of good offices, mediation, conciliation and enquiry. Pursuant to Art. 8, paragraph 5 of the Peace and Security Council may establish such subsidiary bodies as it deems necessary for the performance of its functions. Such subsidiary bodies may include ad hoc committees for mediation, conciliation or enquiry, consisting of an individual State or group of States.

2.2 Ad Hoc Committees Established Under the AU

2.2.1 African Union Ad Hoc Committee on Côte d’Ivoire

At its 259th Meeting held on January 28, 2011 in Addis Ababa, the Peace and Security Council of the African Union (PSC-AU), adopted a decision on the situation in Côte d’Ivoire, and determined to establish, under the authority of the AU, a High-Level Panel for the resolution of the crisis in Côte d’Ivoire in conditions which would preserve democracy and peace. The Council determined that the Panel, whose composition would be finalized, following appropriate consultations would be supported by a team of experts and work in close cooperation with AU partners, particularly the UN. The Panel was mandated to "evaluate the situation and formulate, on the basis of the relevant decisions of the AU and ECOWAS, an overall political solution." The mandate of the Panel was limited to one month, at which time its conclusions would be endorsed by Council, and would be binding on all the Ivorian parties with which these conclusions have been negotiated. The Panel comprised President Mohammed Ould Abdel Aziz of Mauritania (Chairman), President Jacob Zuma of South Africa, Blaise Compaore of Burkina Faso, Jakaya Kikwete of Tanzania, and Idriss Deby Itno of Chad. On March 11, 2011 at its 265th Meeting at the level of Heads of State and Government, the PSC endorsed "the recommendations of the High-Level Panel as contained in its report, as well as the proposals made for an overall political solution to the crisis in Côte d’Ivoire, and requested the Chairperson of the Commission to appoint a High Representative for the implementation of the overall political solution, as endorsed by Council."
engage AU’s partners, in particular the League of Arab States, the Organization of the Islamic Conference, the European Union and the U.N., to facilitate coordination of efforts and seek their support for the early resolution of the crisis. On March 19, 2011, the Ad Hoc Committee requested the AU Commission to convene, in Addis Ababa on March 25, a meeting bringing together high representatives of the League of Arab States, the OIC, the EU and the U.N. (Secretariat and the five permanent members), as well as other partners and stakeholders, in order to agree on: (a) ways and means for an early resolution of the crisis, on the basis of the elements outlined in paragraph 5 of the present communiqué, as well as operative paragraph 2 of UN Security Council Resolution 1973(2011) and (b) a mechanism for continued consultations and concrete joint actions to be taken.

3. OTHER ORGANIZATIONS ENGAGED IN FACT-FINDING INQUIRIES

3.1 The International Humanitarian Fact-finding Commission (IHFFC)

The IHFFC was established as an independent and impartial body in order to investigate alleged violations of international humanitarian law. Unlike a court, the Commission restricts itself to establishing and clarifying the facts: it does not deliver a verdict. The Commission notifies the relevant parties and makes recommendations for improving compliance with international humanitarian law and its application. Its 15 members are elected by the now 71 States which have recognized its obligatory competence. The legal basis for the Commission’s existence is Art. 90 of the First Additional Protocol to the Geneva Conventions (adopted 1977). The fact-finding commission’s remit includes both international conflicts and conflicts within one country. Only a State having acknowledged by declaration the commission’s competency (on either a blanket or an ad-hoc basis) and filed a declaration with the Swiss Federal Council, which acts as the Depositary of the Geneva Conventions and the annexed protocols, can unilaterally request an inquiry (either ad hoc or on a blanket basis), and only against another State having made the same declaration. The commission cannot initiate investigations, however, until the parties to the conflict have given their consent.

From 2002-2008, the Commission offered its services in four concrete cases:

- In the course of its promotional visit to the Ivory Coast in February 2004, to the Minister of Foreign Affairs and the Head of the Cabinet of the Prime Minister to take up a role proposed in the Linas-Marcoussis Accords. The Ivory Coast has not however had recourse to the services of the Commission.

- With regard to allegations appearing in the media of serious human rights violations by members of the “X” State armed forces of persons detained by such State in Iraq. In May 2004, the Commission offered its good offices to the “X” State, suggesting that it could undertake a monitoring role in respect of the internal inquiries into these allegations. After further contacts, the Ministry of Foreign Affairs of “X” finally declined the Commission’s offer.

- When the Secretary-General of the U.N. was assembling the membership of the Commission to inquire into allegations of human rights abuses in Darfur the Commission suggested the names of a number of Commission members. The suggestion was not taken up.

- In the context of the hostilities which took place in summer 2006 in the Middle East and the alleged violations of international humanitarian law by parties to the conflict, the Commission offered its services to these parties in August 2006. Until now, it has not received a response to its letters. That enterprise received encouragement from the U.N. High Commissioner for Human Rights, Louise Arbour.

In 2008, the IHFFC adopted a new proactive approach, by which the IHFFC itself, in particular the President, the Vice-Presidents and the Secretariat, observe ongoing armed conflicts and assess the possibilities and needs of fact-finding. In relation to some of these conflicts, fact-finding was indeed undertaken. In 2009, in the case of four conflicts, it took exploratory steps with relevant actors for that purpose; however, the policy of the Commission is to keep those contacts confidential and in some cases, express assurances were given to that effect.
3.1.1 IHFFC Fact Finding Missions - Conference on the Fact-Finding Mission sent to the Philippines by Geneva Call to verify the allegations of the Philippine Government concerning the use of land mines by the Moro Islamic Liberation Front (MILF) 

On October 26, 2010, the Geneva Centre for Security Policy (GCSP) organized a public conference designed to present the fact-finding mission that was sent to the Philippines upon the request of the Philippine Government for the purpose of verifying whether the Philippine rebel movement called the Moro Islamic Liberation Front (MILF) – which has been conducting a secessionist war against the Philippine state since 1970 – had resorted to the use of anti-personnel mines in 2008 despite the commitment which it made to the Geneva association “Geneva Call” in 2002, that it would never employ this type of weapon. Organized by Geneva Call with the agreement of the Philippine Government and the MILF, the Mission visited the Philippines from 16 to 26 November 2009. The Mission included Mr. Eric David, professor emeritus of the Free University of Brussels and member of the International Humanitarian Fact-Finding Commission. At the Conference, Prof. David reported on the legal context of the Mission, i.e., the original nature of the commitment entered into by the MILF with Geneva Call, the stipulations of public international law applicable to the matter at hand, and the desire of the Mission to strictly observe methodology inspired by legal practice, that is to say, to respect the rules of objectivity, independence, impartiality, to abide by the criterion of “proof beyond a reasonable doubt”, and to hear the witnesses while taking care to reassure them of the fact that their identities would not be divulged.95

3.2 International Labor Organization (ILO) on Burma (1996)

On June 20, 1996, in a letter addressed to the Director-General of the ILO, 25 workers’ delegates to the 83rd Session of the ILO (June 1996) presented a complaint96 under Art. 26 of the Constitution of the ILO97 against the Government of Myanmar for non-observance of the Convention concerning Forced or Compulsory Labour (ILO No. 29) which it ratified on 4 March 1955 and which came into force for Myanmar on March 4, 1956.98

At its 268th Session (March 1997), the Governing Body reviewed another report of its Officers which noted that:

“No discussion on the merits of the complaint is admissible at the present stage. It would indeed be inconsistent with the judicial nature of the procedure provided for in Art. 26 and the following Articles of the Constitution that there should be any discussion in the Governing Body on the merits of a complaint until the Governing Body has before it the contentions of the government against which the complaint is filed, together with an objective evaluation of these contentions by an impartial body. Nor would such discussion be appropriate while a proposal to refer the complaint to a Commission of Inquiry is pending before the Governing Body or while the complaint is sub judice before a Commission of Inquiry. If there is to be a Commission of Inquiry -- which it is for the Governing Body to decide under Art. 26, paragraph 4, of the Constitution -- it is when the Commission of Inquiry has reported on the merits of the complaint that the Governing Body may be called upon to take action in the matter.”100

At its 267th Session in November 1996, the Governing Body reviewed a report by its Officers concerning the subject of the complaint.99 The report recalled the dates of ratification and entering into force of the Forced Labour Convention, 1930 for Myanmar. It also pointed out that the 25 complainants were, on the date of filing the complaint, Workers’ delegates of their countries to the 83rd Session of the International Labour Conference; accordingly, they had the right to file a complaint under Art. 26, paragraph 4, of the Constitution, if they were not satisfied that the Government of Myanmar was securing the effective observance of the Forced Labour Convention. In addition, the report indicated that:

“Contradictions exist between the facts presented in the allegations and those set out in the observations of the Government of Myanmar. It would, however, not be appropriate to enter into a discussion of the substance if it is envisaged to set up a Commission of Inquiry under Art. 26, paragraph 4, of the Constitution in order to make an objective assessment of the situation. As was pointed out in the report of the Officers of the Governing Body at the latter’s 267th Session, it would be incompatible with the judicial nature of the procedure thus instituted to open up such a discussion before the Commission of Inquiry submits its conclusions.”101
In light of the foregoing, the Governing Body decided that the whole matter should be referred, without further discussion, to a Commission of Inquiry set up in accordance with Art. 26 of the Constitution. The Governing Body added that the Commission was to establish its own procedure in accordance with the provisions of the Constitution. At the same session, the Governing Body decided that the Commission be composed as proposed by the Director-General.
AGENDA FOR JULY 11 -12 2011: THE RESPONSIBILITY TO PROTECT (R2P)

Benjamin N. Cardozo Law School, Human Rights Centre; University of Oxford, Institute for Ethics, Law and Armed Conflict (ELAC); Kofi Annan International Peacekeeping and Training Centre (KAIPTC)

Monday July 11th, 2011

9am: Welcoming Remarks from KAIPTC

9.15am: Introduction to the “Responsibility to Protect” and the Evidentiary Guidelines Project

The conveners expressed thanks to KAIPTC, ELAC and Lucy Crittenden, and to everyone at the Benjamin N. Cardozo School of Law; and in reminding the participants of Chatham House rules, expressed his hopes for open conversation and discussion. He provided some brief background information to the Cardozo Evidentiary Standards Project, describing meetings in New York and Europe (and soon Asia) involving a mixture of civil society, government and academic figures. These hoped-for standards would only have relevance and resonance if they were based in a real-world understanding of practical concerns, debates and limitations.

The conveners gave a brief Power Point Presentation on 10 years in the life of R2P, and its current content. He described the origins of R2P as emerging from the actions, inactions, successes and failures of 1990s and a conception of humanitarian intervention leading to reexamination of:

• how to respond to mass atrocities;
• who should respond, and
• the underlying theory, as articulated by Francis Deng in another capacity – turning away from sovereignty as a pure shield and re conceptualizing sovereignty as including government responsibility to protect civilians from gross violations of human rights.

The direct construction of the concept grew from the Canadian-supported ICISS Report of 2001 setting forth the three-piller “Prevent, React and Rebuild” framework to four years of political working through regional and national governments and IGOs; to a High Level Panel on threats set up by then-Secretary General Kofi Annan and his report “In Larger Freedom” to the 2005 World Summit.
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The official language of R2P was set forth in the World Summit Outcome Document released in 2005. Paragraphs 138-140 reflect the compromises necessary to ensure acceptance by every state, but each government pledged responsibility to protect from four delimited “R2P Acts” (distinguishing acts from crimes).

Paragraph 138:
Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

Paragraph 130:
The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

The acceptance of R2P at the UN was made evident through UN Security Council Resolution 1674 (2006) and the establishment of the UN Special Advisor’s Office in 2007. The Secretary General’s report in 2009 and
General Assembly meetings were crucial to elaborate, operationalize and understand what was entailed by R2P. The 3 Pillar approach set forth in the 2009 report included:

- Pillar 1: responsibilities each state has to protect populations from these actions;
- Pillar 2: international assistance and capacity building;
- Pillar 3: timely and decisive response by the intl community.

The presenter described two different categories of contestation surrounding R2P, most evidently when one of the so-called R2P acts occurred and/or whether the language of R2P was used:

- First, whether or not certain factual examples fall within what Member States accepted in 2005 – “acts occurring or threat of acts occurring” and whether repeated invocation of R2P does some disservice to the moral strength of the norm; and
- Second, whether natural disasters fit within the prescribed definition of R2P. For example, invocations of R2P regarding Burma were contested by that state and other states within the region.

Most recently, R2P has been invoked in situations such as Libya (directly utilizing the R2P terminology in preambles to Security Council Resolutions authorizing coercive action, although the Resolutions invoked Libya’s responsibility and not that of the regional or international community) and Cote d’Ivoire.

The presenter turned to the Evidentiary Guidelines Project, explaining some of the rationale behind the project. As far back as 1994, much of the debate on R2P has focused on whether or not a situation falls within the scope of the norm - reflecting the concern that certain terms, once used, compel certain actions. This has hampered discussions on how best to respond to mass atrocities, while impacting the time/effort necessary to build long-term structures for consistent and coherent responses.

The underlying goals of the Evidentiary Standards Project are:

- Promoting the full continuum of R2P actions to get away from an exclusive focus on Pillar 3 and military intervention
- The targeted application of limited resources. An assumption underlying the demarcation of four specific “R2P” acts (as opposed to a more open-ended framework) is that there is something pressingly important about the very threat of these particular acts that suggests they should entail specific responses. One goal of the project is to direct resources to combat the acts identified as of particular gravity by R2P, thus allowing for the targeted application of limited resources.
- Reducing selectivity in application of R2P. There should be something important about identifying an R2P situation, and that responses would be perceived as less-biased if such determinations were made according to a clear sets of standards.

The desired output of the project is the creation of widely accepted evidentiary standards or guidelines focused on the appropriate standard of proof to determine when the R2P framework is applicable - avoiding the two polar possibilities of actions which are either:

- too protective of sovereign prerogatives, leading to the creation of a meaningless standard and ad hoc, political responses; or
- too facilitative of hasty/premature international responses which may prove more destructive than inaction.

The project was not intended to develop legally binding or legalistic standards, but did involve grounding the evidentiary standards in sources emanating from law (as law deals with findings of fact and testing these findings against ex ante standards of proof). Some examples might be:

- beyond a reasonable doubt that acts have occurred;
- substantial evidence of real risk that acts will occur; and
- clear and convincing evidence that acts may occur.

There should be a level of flexibility to the appropriate level of scrutiny. It is not the goal of the project to proscribe action. Rather, there is a need for an innate flexibility to any standard, and a need to create a sense of greater uniformity of action.

The presenter then raised the issue of methods and mechanisms for assessing the practical utilization of evidentiary standards, indicating a level of government
support for the project, while conveying the sense that governments are concerned as to how they would carry out assessment. Who would assess evidence; what evidence would be assessed? The discussion moved to current standards for assessment of situations at risk of R2P acts on the African Continent, and the participants were asked whether, in their organizations or their thinking, when examining situations of mass atrocity, they utilized the label of R2P, and how they made the determination to use, or not use, the label?

9:45
Current Standards of Assessment of Situations at Risk of R2P Acts in the African Continent: Examining long-term early warning, medium-term prevention, and finally direct prevention:

1. How do stakeholders within Africa currently assess when risks of R2P acts occurring (or threats to occur) require certain forms of action?
2. Given the potential overlap of atrocity and conflict prevention, what value does assessment within the R2P framework (i.e. attention on the four acts and violations) bring?

In making such determinations with respect to certain developing situations, on participant replied, the first thing his organization examined was the polarization of countries along certain lines – specifically political, ethnic and regional lines – such that in the event of violence, it would be possible or credible to suppose that the government would lack incentive to protect a particular group, or would not be willing to intervene because these groups would not be perceived as supporting the government. In these instances of polarization, The participant emphasized the need to intervene at some point to protect civilians, in view of the fact that the governing authority or the state (which is supposed to protect civilians), in fact might not protect civilians.

Another participant inquired who determines what situations are R2P situations and if so, then who determines to act? Do states accept the R2P principle as is? Despite references to R2P in the AU, he suggested that more debate is necessary in Africa. Alluding to previous statements, he noted that the difficulty for the region lay in perceiving situations from government perspectives. Citing Libya as an example, he noted that the uprising might be perceived, not as individuals fighting genuinely for their rights, but as a rebellion in which Colonel Gaffadi has a duty to ensure the stability of his government. If outside influences are involved in financing the insurgents, he asked, then how should the international community determine whether the individuals fighting for their rights are also fighting for the interests of the state? The participant expressed the need for further questioning and more answers before talking about how such determinations can be made.

The conveners asked the participants, how did each of them consider the meaning of R2P? Did R2P add anything to the discussion on the prevention of mass atrocities?

One participant perceived preventive diplomacy as the most important step. In Guinea in January 2007, 150 people were massacred in the city of Conakry. Immediately, a decision was made to come to Guinea. ECOWAS relied on its collective security mechanism to justify its presence. Alluding to certain conditions which must be met before ECOWAS can become involved (e.g., humanitarian crises or imminent crisis), Ambassador Fadiga recalled that the Guinean Head of State was informed that if ECOWAS did not take steps to resolve the local situation, other international organizations would intervene. At one point, an AU official invoked the right of the AU to get involved in Guinea, although it ultimately did not get involved. ECOWAS was invited in, and a number of diplomats and emissaries went to Guinea to stabilize the situation. An International Contact Group was set up, remaining engaged with the situation through the transition period into the installation of the national Parliament. This process ultimately brought the Guinean government to organize democratic elections and install a new head of state. Had such a situation continued in Guinea, then R2P would have been applied. When the military government toppled, President Jean Ping of the AU said that governments should remember, “You are party to conventions in West Africa and to the AU, which can send military personnel to establish order and stability in government.” Intervention by the international community was avoided by the participation of ECOWAS and the Friends of Guinea.

Another participant stated that he believed multi-track elements were involved in terms of “who determines” R2P scenarios. Discussing the concept of R2P, he expressed no doubts; his real question, however, was WHEN does R2P
get invoked? Citing Cote d’Ivoire and the selective support for Alassane Ouattara versus Laurent Gbagbo as an example, he wondered, how does the international community justify whose perception determines the invocation of R2P? How does one justify its selectivity? Is it about people, or interests? In examining Cote d’Ivoire and Guinea, he wondered whether certain predetermined indicators were at play in Cote d’Ivoire permitting an invocation of R2P. Regarding Guinea, he asked how the international community decided whether to assist – is it about other countries with interests in that country or the collective agenda of the international community? He said it would be helpful to have predetermined indicators to avoid the prospect of interests driving R2P determinations.

A different participant responded to these questions by citing the absence of rules and regulations which explicitly stated whether or not a situation called for R2P. He encouraged conceptualizing R2P as a framework where:

1. where determinations are made by the actors themselves;
2. permitting room for lawyers to debate on certain issues;
3. allowing for more contextual interpretation and
4. providing for the will of certain nations with the capacity to implement (something which leads to the related issue of implementation without the means to finance or deploy, which is not of interest at this point).

The participant continued his intervention stating that laws at every level are subject to interests and subjectivity, and determinations of necessity make this a subjective matter. R2P must be very comprehensive, deep, and flexible enough to allow for an examination of various options before committing to a course of action. As Secretary of Defense Robert Gates stated with regard to Libya, a no-fly zone is not a walk in park and those with the capability to deploy have the capability to impose their will. It is better not to trust people, and to remain cognizant that things, situations change. That is why a framework is necessary, he stressed, stating that protection of civilians and protection of human lives, must be the measure of all things.

Another participant followed up on these remarks, asking on what basis (following its first intervention in Guinea) ECOWAS justified its involvement. Did it have to offer some rationale for early involvement or was it indirectly utilizing some kind of standard?

A convention between ECOWAS and its member countries, stipulating that whenever there is a crisis in a country, ECOWAS has right to involve itself/ must involve itself in that country was cited in response.

One participant referred to the AU Constitutive Act, specifically the Security Mechanism which sets out an elaborate series of institutions and mechanisms involved in taking action in the event of a crisis and determining what is required to take action. Alluding to the examples of Cote d’Ivoire and Guinea), the participant explained that provisions in the ECOWAS Security Mechanism give Member States responsibility for peace and security within their own boundaries, but there is a point where ECOWAS as an institution can intervene, provided certain conditions are met. ECOWAS has 6 area specific conditions for application of the mechanism, which may be applied:

- in the event of aggression or conflict in any Member State or threat thereof;
- in cases of conflict between two or several Member States;
- in cases of internal conflict
  » that threaten to trigger a humanitarian disaster or
  » that poses a serious threat to the peace and security in the sub-region;
- in the event of serious and massive violations of human rights and the rule of law;
- in the event of an (attempted) overthrow of a democratically elected government; or
- in any other situation as may be decided by the Mediation and Security Council.

This Mechanism has been strengthened over time. Going back to the example of Guinea, election issues in 1993 were recalled, when ECOWAS wanted to send a fact-finding mission to ascertain what action was needed. In that instance, the former President of Guinea refused to allow a mission to take place until much later. A stronger Security Mechanism was developed in 1999 without much mention of R2P. The mechanism adopted a global consensus on mass atrocity prevention, but problems
exist with the current global structure on mass atrocity prevention. The international community has pledged to assist states in exercising their responsibility and, based on recent events, it seems that “international community” is the new euphemism for “small group of nations in the western world”. This creates a problem. Article 139 of the WSOD, relies on the Security Council to determine timely action but most states lack representation in the Security Council. Those countries represented on the Security Council have huge amounts of power to act or to not act, and until there is a more widespread consensus on indicating factors, there are likely to be further problems since regional organizations are not given sufficient time to deal with local issues.

The next participant to speak agreed that, in some ways, regional organizations have worked better than expected. Fortunately, through the AU, regional organizations have been given the autonomy to address issues and defuse situations themselves, and have established collaborative agreements with Heads of States to respect sovereignty but discuss internal concerns. The important concept, he contended, is collective responsibility. The support for regional organizations enables the monitoring of elections, neutralizing conflict early which is key because the earlier, the better in conflict and atrocity prevention.

The two questions on the agenda for this section were viewed as interrelated by one participant because, in terms of determining when R2P comes into effect, they rely on whether or not there have been previous indicators. In terms of assessing conflict prevention, the international community needs to look at things which might customarily fall beneath their notice, such as situations in which states are not in a position to control/maintain certain levels of stability (when this can only be done by institutions within the country). She urged that R2P Pillar I prevention kick in when things are happening, but not yet at a critical stage; regional or international involvement can come in when crisis escalates (but should still try to engage the government in question).

Another participant believed that there is a tendency for problems to arise when governments use the power of the state to remain in power. Political elites desire power. She used Laurent Gbagbo as an example – asking him whether Cote d’Ivoire was a case for R2P was useless, since he used state power to maintain his position and was the wrong party to ask whether to intervene. She emphasized that stakeholders must not just be politicians and there is a need for engagement with other actors and institutions. She suggested relying on civil society, the people themselves and the history of a country to provide information. In examining the African Peer Review Mechanism and the history of a country to determine the likelihood of future occurrence. Turning back to Kenya as an example, she reminded the participants that Daniel Arap Moi used state power to incite ethnic violence. Regionally and internationally, she emphasized that the frequency with which certain situations happened in the past will best illustrate how to deal with them when they do happen again.

In discussing regional organizations, the participant continued by noting that East/ Central and South Africa lacked an ECOWAS model and that the most likely recourse in the case of mass atrocity situations in these regions would be assistance in terms of discussion rather than military intervention against abusive rulers. There is no military force that can be used in East Africa – there are weak regional mechanisms and no stick against abusive rulers. These factors made the AU more significant in East African conflicts. In these situations, there is a greater need for the international community to provide warnings and respond to threats. The key is in preventing, and making sure that citizens are empowered and able to bring about regime change, such that the state must take into account their wishes.

In West Africa, the barometer for determining R2P was viewed as being quite high, to a point where response was delayed until the situation became untenable, resulting in humanitarian crises. It was no secret that the state would collapse in Guinea, lives could have been saved ten years earlier. Civil society organizations in West Africa had spoken out extensively about Guinea; ECOWAS had engaged several times with the leadership. The participant wondered why ECOWAS didn’t make a difference and pointed to a double standard - in situations such as Libya, the international community responded quickly. To have an effective norm of R2P, there was a need for a standardized measure, respected by all; and in the ECOWAS sub-region, the need for more assertive preventive diplomacy. R2P must be invoked much earlier. And in discussing early warnings, R2P and preventive diplomacy, the processes
that must be worked through but why is nothing being done in the case of North Korea?

Another participant stated that the crux of R2P is timely intervention - actions must be taken in haste or it will be too late to prevent mass killing. The key challenges were not instruments or indicators, he emphasized. The key factors were international consensus, early response, international will and the capacity to act. Citing the cases of Libya and Cote d’Ivoire, he noted that early responders were criticized for hasty action, but emphasized that the best way to negotiate is to have something with which to negotiate. If the aim of R2P is the protection of civilians, then structures must be put in place for civilians to be protected. These structures are frequently absent, and there is a need to implement systems and structures that cannot be derailed.

11am

The Role for Assessment by States, Sub-Regional Organizations, Regional Organizations, International Organizations and Non-Governmental Organizations

After a short break, the conveners responded to a number of issues that had been raised during the previous discussion. As to the question regarding Crimes against Humanity, it was explained that in 2005, a political compromise was reached to limit the number of potential crimes falling within the R2P ambit. Three of the acts (genocide, war crimes and crimes against humanity) were clearly-defined international crimes, leading perhaps to a focus on a strict level of evidence customarily required by criminal law. In the decade since the original formulation of R2P, the transformation of international criminal law has rendered it impossible not to focus on the international legal definitions of these acts. On the other hand, this compromise was not achieved solely for the purpose of focusing on criminal law, but rather, was a way of focusing the energies of R2P. The conveners noted that one of the problems with prevention and the focus on criminal law is that they can’t be examined with the same level of scrutiny. To do so would obviate the preventive aspect of R2P by resulting in undue delay. Yet while R2P does not merit the same standard of proof as individual criminal prosecution, there is obviously some overlap in dealing with instances of grave violations to human dignity.

The convener addressed the perception of R2P as the Outside Coming In, attributing it in part to an association between R2P and coercive intervention and the legacy of humanitarian intervention. He wondered whether the level of scrutiny needed to be at quite a high level for military intervention, such that it required a determination that there was a very high level of threat, but then how did that impact the possibilities for early involvement by military forces.

The conveners expressed some concern at the possibility for even greater perception of bias should regional actors take action. He wondered whether there should be different standards for regional actors, or whether states should be concerned that one’s neighbors might not be one’s closest friends? Finally, he noted that each of the above-mentioned institutions in the agenda has a role to play in responding to threats of mass atrocity. But how does each type of institution undertake assessment? When does the international community need to play a role in assessment? When does external assessment become interference or intervention, as opposed to “engagement”? A participant inquired as to “how early is too early” and in fact, at the risk of sounding too philosophical, inquired whether prevention can ever be too early? She emphasized the real risk in focusing on prevention at the time when signs of imminent crisis have emerged, particularly in the African situation where resources are limited. The participant expressed a wish to focus on long-term preventive strategies such as development, growth and stability, rather than conflict prevention. In that respect, she stressed the importance of giving equal space within the R2P framework to other initiatives of human security – democratization, ensuring development and enabling political participation – and bringing all these things together into a coherent framework; ensuring prevention through political education, skilled observers and strong political conditions in countries. She wondered how supra-organizations should raise the bar to ensure that these conditions are in place. She emphasized the need to avoid overestimating resources, and to be wise in utilizing resources, since there is an interrelationship between all these things.

One of the conveners responded to this point by stating that the ELAC project was examining the tools of
A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

prevention, using a more broadly integrated framework to examine very early and late-stage prevention. She noted two challenges relating to preventing conflict versus preventing atrocity, which arise the further back in time one went:

1. It is very difficult to measure the effectiveness of early stage prevention. If the overarching concern is limited resources, how should international actors choose among the variety of things at that early-prevention level and where should the focus lie? How do international actors know what is effective?

2. Atrocity prevention and conflict prevention overlap, but they are not exactly the same thing. One might witness the commission of atrocities outside situations of armed conflict; alternatively, one might witness crimes in the context of armed conflict which do not fall within the ambit of R2P. Is it helpful from a policy perspective to try to distinguish between atrocity prevention and conflict prevention? And because they overlap, should they entail similar kinds of standards?

A participant expressed concern that if definitions could not be established, then to what situations should international actors react. He insisted on a need for better understanding of the level of development of the states involved. In most parts of Africa, he stated, conflict and atrocity were synonymous (atrocities occur in the context of armed conflict). How should these overlapping frameworks be managed? He stressed the importance of “how early is too early,” in terms of structural conflict prevention, particularly since a critical issue for Africans is the issue of corruption (i.e., need to look at the risk factors that might lead to these crimes). If R2P does not address the issues that lead to genocide, then genocide will not be prevented. In discussing stability in Libya, should international actors have used the R2P framework to rubber-stamp Colonel Gaddafi and foster stability in Libya, albeit stability achieved at the price of oppression?

From another participant’s point of view, it is unclear whether conflict prevention and avoidance of mass atrocities entail different responses – they often occur in the same instance; it was difficult to distinguish between the two and ultimately, failure to manage conflict resulted in atrocities. It was viewed as better to err on giving a bigger role to regional organizations because the AU and regional organizations have achieved a lot of relative success in diffusing situations. There is also a likelihood of future conflict, as Africa was at a cooking point with many potential conflicts.

Another participant wondered if an examination of early warning mechanisms in the West African and AU systems (and how these regional entities collect date) from the Early Warning people, might shed light on determining “how early is too early”. In the West African and AU systems, when an event occurs, the early warning systems didn’t inquire as to whether it was too early to report an event. When an event touched on human security/ state stability issues, that event must be reported. Whether the reporting systems move forward and say, “An issue has been reported to a Situation Room; therefore, States need to act” – what the reporting systems disclose to governments - is something to which many in civil society are not privy. It is difficult to ask governments to react to that. In such a sense, whether a situation is premature or not, the idea of the states driving the agenda is important. Ghana was cited as an example of a fairly stable country with a long-simmering chieftaincy conflict in the North Country. Although the state appeared capable of addressing the situation, and it was not perceived as a general threat to the security of the state (such that it would necessitate ECOWAS or AU involvement), the participant wondered what/ whether anything could be activated within the ECOWAS Conflict Prevention framework to address these kinds of simmering tensions (citing Ghana’s North Country; Nigeria; Senegal)? How long should a conflict drag on before external intervention.

The approach by the ECOWAS Early Warning Directorate was established in line with the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. It comprises the Observation and Monitoring Centre at the ECOWAS Commission, and four Zonal Bureaus on the ground. It worked through a network of field monitors in member states, whose primary responsibilities were to gather on-the-ground information, which was then forwarded to the Heads of the Zonal Bureau for quality control and initial analysis, before transmission to the Observation and Monitoring Centre. The field data was then further verified and analyzed at the Observation and Monitoring Centre and forwarded to the policy makers at the ECOWAS Commission, usually for the President of the Commission to do with it whatever he saw fit.
The data was based on predetermined indicators (previously 94; now 6, still a work in progress covering the whole range of human security issues). While the Directorate was provided by the Security Mechanism, the indicators were derived from an additional Protocol to the Mechanism which tried to investigate/interrogate the root causes of conflict within the ECOWAS region – unconstitutional change of government, role of women in governance, and the issues of elections, etc.

One participant alluded to attempts to get the Early Warning Directorate to disseminate its information and conclusions to a wider audience, (AU, UN or other partners) throughout the conflict cycle (pre, during, and post-conflict) and attempts to allow for a more harmonized method of dealing with Early Warning issues in different Member States, so that they can more effectively deal with issues while linking with the sub-regional network.

She noted that someone had mentioned an important issue - conflicts within Ghana, Senegal and Nigeria. Each state bears the primary responsibility for peace and security within its borders. There were certain conditions under which ECOWAS would intervene, but absent those conditions or an invitation by a Member State to intervene in a localized conflict, then it would be assumed that that Member State had the issue in hand.

She cited the examples of the Niger Delta in Nigeria where the country derives 80% of its resources, and Northern Ghana, noting that the question is whether the state is able to deal with that conflict. Within the ECOWAS the Early Warning Directorate, has attempted to work with the three Member States – maybe responses to Early Warning issues have not been particularly effective, so they look to someone in the Member State and try to make recommendations to authorities for a more harmonized form of early warning so that they might more effectively deal with issues while linking in with the sub-regional network.

One of the conveners followed up on these remarks, inquiring whether or not standardization would lead to automatic action. Even with Early Warning information gathered, assessed and reported, discretion was still left with the head of the Early Warning Directorate, and there seemed to be a gap in response. He wondered whether there was a response that was less than military intervention but more than leaving it on a shelf a kind of response associated with intervention. He set forth a scenario in which a situation in a country, having passed some sort of test, some response would occur - not necessarily intervention, but something triggering political negotiations or some sort of automatic formalized debate/commission which doesn’t necessarily lead into more problematic questions of military intervention. Could standardization help to create a duty of conduct? (i.e., trigger some kind of discussion and response, even if not very invasive)?

There is a possibility for engagement throughout the conflict. In West Africa, supranationality guided intervention, and in Member States, there had always been a conflict between supranationality and sovereignty. When Member States pretend they have the capacity to address certain issues (when they don’t and should invite ECOWAS), quiet diplomacy can be useful, utilizing the Council of the Wise, and maintaining a level of engagement as the only ways to break the impasse because even if at that state, ECOWAS cannot intervene militarily, they can at least pursue enforcement. To even have effective peacekeeping or military intervention requires the presence and support of Member States to do so. She emphasized the key issue of having the capacity to engage Member States and to allow somebody to negotiate or mediate a local conflict.

One participant suggested that raising the issue of R2P always involved raising the issue of armed intervention to prevent mass atrocities. In looking at R2P as a way of preventing the suffering to individuals in conflict there is a certain point at which discussion becomes moot, innocent lives over sovereignty and actions of the international community. The crucial issue in stopping conflict and human suffering is the question of whether to intervene militarily or the non-use of force. Conflict amounts to atrocities and that conflict does not obey international law. He noted ECOMOG’s intervention in Liberia, and again emphasized the primacy of human lives.

Another participant agreed that R2P boiled down to military issues, but suggested that the idea was not only to present military solutions (which was why some states hesitate at the international community’s leap towards intervention). He further agreed that in situations of genocide, war crimes and R2P crimes, consideration needed to be given to the use of force to prevent atrocities. But besides that, he emphasized R2P’s character as
“narrow but deep”. R2P concerned the prevention of specific “R2P acts”, but he suggested moving beyond this and talking about the factors that lead to the four R2P acts. He suggested a need to focus more on assessment and conflict prevention, as touched upon in the Secretary General’s report on Early Warning and Assessment.

Is preventing atrocities being dichotomized with preventing conflict? If so, this is a false dichotomy, and one which can be personally upsetting.

Examining the on-the-ground reality in West Africa and Ghana - Northern Ghana in particular – leads to a rather controversial question: “[T]hat where there is the need for R2P, what are the treaties that will make the government [expedite] the process of normalizing the situation or what would be the trigger for an external intervention, be it at a preventive diplomacy level or enforcement level?” She pointed to the case of Northern Ghana (in which protracted conflict centered around elections), and noted that when the conflict was confined to only one part of country and the government failed to interfere in any significant way, that conflict would go on as long as possible. She insisted that R2P be viewed beyond “destabilizing factors within government triggering intervention”. She alluded to Ghana again, emphasizing that with regard to Northern Ghana, one could not just look at destabilizing factors within a government (i.e., that might bring about state failure); one needs also consider the impact of certain social factors such as youth from Northern Ghana moving into Accra, bringing conflict to the capital. In that case, the President made efforts to calm the situation. She also cited the example of the Casamance in Senegal, where conflict had raged for almost 30 years. Since the conflict was perceived as localized, the government of Senegal could devote itself to government business without addressing the problem. Again, she said, it was the same issue of “for how long should unrest or conflict drag out before external intervention?”

In responding to the question on “when does external assessment become interference”, the ECOWAS Protocol on Conflict Prevention was referenced, in which sovereignty was quite clearly defined. She wondered whether ECOWAS would recognize its right to start interrogating or bringing individual governments to answer to the sub-regional body on low-intensity, unresolved conflict. Returning to Northern Ghana, she pointed to conflicts in Bawku and Dagbon which were virtually synonymous with elections. These simmering conflicts call for a review of the level at which R2P has to be brought into so-called national conflicts, with which governments can allegedly deal.

Another participant turned to questions of standardization. How many standardization questions should there be (i.e., every situation is different but violence tends to occur in certain situations, such as in conjunction with elections)? If there is a need to monitor different situations according to different standards, then the international community needs some sort of outside monitor to ensure that negative information about a state’s conduct go through to supranational authorities, rather than being suppressed by Member State representatives or by Member State governments. He cited the African Peer Review Mechanism as a helpful tool, which helps to identify particular risk factors and to focus analysis on particular things, but reiterated the need for ensuring that negative comments against a state go through rather than risk repression by national representatives. He wondered if perhaps, the answer lay in the African Union taking on some kind of external role. In discussing the role of the Peace and Security Council at the regional/Continental level, he doubted whether the mechanisms were used extensively. Getting back to standardization, he emphasized a need for acceptance of a level of proof for all participating nations by all participating nations, and widespread sources of information.

One participant expressed a bit of concern at the previous comments on the specter of military intervention, and uncertainty as to how to marry these comments with those made by other participants. He suggested that there needs to be consensus from the region on the criteria that will be used to determine whether intervention is warranted. Standardization should be collective agreement (i.e., “we do not agree on Libya that this is the type of strategy to be carried out, but if we agree that if x and y exist, then that is the time for intervention”). Even with standardization, even getting agreement on standards is a level of prevention, reminding states of their responsibilities is also part of prevention. In the case of Côte d’Ivoire, it was easier for ECOWAS to intervene on the basis of those protocols. He wondered what difference R2P would bring?

Another participant countered that ECOWAS communiqués do not protect civilians and that election monitoring wasn’t R2P and that R2P spoke of intervention. He noted
Article 7, Section 1(e) of the Protocol Relating to the Establishment of the Peace and Security Council, noting the right of the Council to recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the African Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments; (ethnic cleansing was left out). The Protocol contemplated situations where such acts were occurring or about to occur (i.e., a situation such as Rwanda), and indicating factors that trigger acknowledgement of such acts. The participant did not believe that intervention was an issue of a communiqué or a speech, but something which must be prepared with force. R2P is a part of conflict prevention. Look at the structural factors and immediacy, he advised - R2P is what is implemented. At an imminent stage, who should intervene and who can be most effective depends on who has the capacity He noted the level of intensity and immediacy with which France prepared to act militarily in Cote d’Ivoire following Resolution 1973, This speed and response capability was essential. At the end of the day, the human rights of Africans need to be provided for (by whoever can do it).

There is value in talking about “too early to act”, but waiting to negotiate to talk to madmen will not save lives. In terms of factors and indicators, there are things that are obvious. The AU Protocol talks about “grave circumstances”, which does not mean that a situation will inevitably culminate in genocide, but suggests that it is evident a situation is headed that way. The participant stressed the need for Africans to avoid arguing about “which” human right: “human rights must be taken holistically – having food does not mean, Be happy; don’t worry about the democratic process.” It is a contradiction. Africa has the AU Constitutive Act, which states that the AU can intervene to protect human rights, but when the issue of R2P arises, Africans ask why France and the US intervene. There are times when we cannot act ourselves, but someone else can. Someone else has the capacity to act. If France had not acted in Cote d’Ivoire, then what would have happened? Laurent Gbagbo wanted a government of national unity – but Laurent Gbagbo lost the election. Violence has broken out. Action must be taken. We cannot take action. Someone else must. People cannot be resurrected. Their deaths become the foundation for further hostilities, the seeds of future vengeance. Elections symbolize power, vengeance, and sustenance. There is time for talking, and then there is time to ask if we are talking about anything. Some people act with impunity. They should be dealt with.”

The issue of whether the international community itself is divided on the meaning of the R2P concept was seen as troubling. The framing in the African Charter is quite specific, but may draw on perhaps a growing notion of security. Similarly, the notion of R2P may be conceived narrowly or broadly. There is space for a wider concept of R2P, a wider concept of security and that the international community cannot ignore other elements that come into play. There could well be space for understanding how ECOWAS came to develop a consensus around such a robust mechanism. Was it the nature of particular individuals or the gravity of history/ experience in a volatile region, whereas other areas adopted a rather more lackadaisical approach?

12.15pm-1.30pm
Lunch Break

1.30pm
Examination of Case Studies: Evidentiary Assessment in Recent Years: A number of situations in the past years have involved the perceived risk of R2P acts; pointedly in the last calendar year. In examining select case studies, how were the potential threats assessed and the corresponding decisions determined? What standards (if any) were applied in making these decisions? What difference would clear standards have made?

One of the conveners noted that one of the rationales behind the creation of R2P was the failure to respond to threats in Rwanda in 1994. Was the failure to act in Rwanda a case of absent political will, or would standards/triggers/ a greater methodology to identify triggers have made a difference?

In recounting the events in Rwanda, a participant contended that: “nothing in Rwanda happened as a result of R2P [Note: the R2P principle did not exist in 1994]. Rwanda happened with peacekeepers in place. While the crash of President Juvenal Habyarimana’s plane in 1994 precipitated the genocide, according to many reports by General Dallaire, people knew what was going to happen in Rwanda. The risk of genocide was there (recurrence of large-scale violence with little to no response; widespread availability of arms). Even during the commission of atrocities, there was no strong reaction. It was only in May,
one month later, that the UN Security Council referred to the events taking place in Rwanda as “genocide”. At the time of the commencement of the atrocities, the UN attempted to repatriate its Belgian soldiers rather than prevent the killings. Despite the combustibility of the situation, things were known, and there was no reaction, before or during, and only after the crisis was action taken.

Since the genocide, Rwanda has attempted many tools of reconciliation by reducing sentences, instituting community service, abolishing the death penalty, and by asking those who committed genocide to admit what they have done. This, the participant described, was Rwandan justice. Is it justice for the perpetrator, he asked. Rather, it was a political strategy to rehabilitate a country trying not to fail its children.

Forgetting while living with your enemy is not easy, but in Rwanda, they think about the future, they think about their children. How can you protect your own people against bad governments? What is the way to react? This notion of involvement and how to protect, this notion of engagement and how to find a preventative mechanism – he did not know what to say about protection. In Rwanda, the genocide is over, but Rwanda is trying to put into place the tools to avoid recidivism or another conflict which will bring in its wake renewed atrocities. There is a role for R2P. Instead of processing so many cases, focus energy on the Democratic Republic of Congo as sample, just to show that it is possible to protect.”

In response another participant expressed that he felt that the international community should have believed or known that a situation would unfold in Rwanda. There was a pattern of recurring, endemic violence in Rwanda, dating back to 1959 and emerging again in 1961, 1980, 1990 – there was plenty of evidence of recurrent violence. In light of this history of recurrence, the international community should have taken the appropriate steps to protect civilians. If a situation arises in a country, where the need to protect civilians is evident and there has been a history of violence in that country, this situation must be taken seriously. Another factor is easy access to arms. If atrocities are the result of planning, then the international community must view the ready availability or importation of arms as evidence, as an indication or determinant that something will happen. Yet another factor to consider is the hate campaign that was conducted on the radio and in the media. Priests and public figures, individuals who should have remained neutral, expressed sentiments couched in ethnic language. Additionally, the international community must examine situations of ongoing conflict - armed struggles or guerilla rebellions. These kinds of situations provide clues to potential threats of butchery. In Rwanda, the UN had a limited mandate. When atrocities began, the UN pulled its troops, leaving only 270 Ghanaians. These were insufficient numbers.

There were a lot of unknowns behind the Rwandan genocide, including how many people were saved by so few troops on the ground, and how many could have been saved in the presence of sufficient troop numbers.

One of the conveners interjected to express one of the initial concerns of the project - that questions of evidence demand questions of substance. What indicators give rise to predictions? There is some debate as to whether it is possible to predict atrocities. Having standards or guidelines of action along these lines is not entirely controversial, since the kind of things the international community needs to look for is pretty clear, but the question of whether the last decade of responses has been successful is unclear.

A participant remarked that in Rwanda, there was a failure to listen to the perspective of those on the ground (often the best informed about a situation), but there was also an unwillingness to act on the information that they did have. That is why it is necessary to listen to feedback from Early Warning Systems and be prepared to react to that information. From the time a situation looks as if it might spin out of control, the Peace and Security Council should issue rapid mandates to deploy. Success stories, where timely decisions were made, include Operation Artemis in the Democratic Republic of Congo, which featured a flexible and robust mandate to sort out the conflict, and effective French action in addressing the conflict (caveating that the follow-up had been less successful.) There is a need for post-conflict involvement and reconstruction - because when the fighting stops, it’s not enough to say there is no underlying tension. Rapid deployment, force capability, a robust mandate – all these things are needed to stabilize a situation. Once the situation has been stabilized, remove the military, but first ensure the situation has been stabilized. And in the case of Nairobi and Darfur, he recommended ensuring that during the negotiations of
Another participant raised some issues to bear in mind during the discussion, among them the difficulty in making decisions and mobilizing support once atrocities have begun. He reminded the participants that those were decisions countries made in view of their own foreign policies and wondered whether it was possible to create a kind of ideal platform, ensuring regional organizations would determine whether an R2P situation existed (as opposed to the UN, which can be very slow and may lead to too late a response) and involve civil society groups in the assessment.

One of the conveners asked whether, in the case of Guinea and Cote d’Ivoire, could/ would a standard for the R2P suggest that the international community would step in at an earlier point? He noted that the permanent missions near Cote d’Ivoire seemed to know that situation in Cote d’Ivoire would happen, well in advance of the international community, and wondered whether 1) an early preventive response would have been robust enough in Cote d’Ivoire; 2) whether it would have been able to shape some of the response, or 3) if this earlier standard is politically unfeasible? Likewise in Guinea, to the extent that people engaged in risk-assessment, he asked, what would have occurred had there been a standard applying the R2P in the event of a real risk of one of these crimes occurring?

It was suggested by a participant that had ECOWAS assessed the situation earlier, the killings in 2007-2008 could have been avoided, but that decisions taken rapidly after the events occurred helped to overcome difficulties. As soon as events occurred, ECOWAS arrived and held a discussion with the government and relevant stakeholders. Still, there are problems, into which ECOWAS is looking. It is an ongoing process. One stage at which the international community might consider paying close attention or contemplate preventive action is during parliamentary elections which may be more difficult than presidential elections. The international community must stand very firm in order for parties to get along during elections.

ECOWAS’s responses to the Guinean situation during that time period reflected a focus on “after the fact” as an aspect of prevention. In response to the question of standards, responses seem more political by nature, the expression of opinion rather than backbone, and the key lay in reducing the scope for discretion. While much has been achieved within the existing ECOWAS Framework, and some of the criteria identified in the Mechanism has been genuinely helpful, the Framework still leaves room for discretion (i.e., what constitutes “humanitarian disaster” has not been fully defined). Work is still required in that area, and this might also be a contributing factor to the politicization of response. There is a need to widen the hook where ECOWAS could intervene.

In terms of responses, another challenge was uniformity of assessment. One of the positive things about ECOWAS is its openness to the involvement of civil society through WANEP, its civil society network, which (in conjunction with Member States) provided data and analysis. Whether ECOWAS decides to do something to respond to a particular conflict can raise a number of issues, and it helps to have some kind of parallel non-state actor. That was one the concerns about the approach suggested by the Global Center, whose May meeting she attended. There, a consensus was said to be building around Member States as focal points, and she noted the difficulties in trying to monitor what states are doing. She noted some of the other suggestions raised at the meeting - individuals; committees of different Member State stakeholders; civil society; relevant stakeholders and in terms of a standard for civil society, the focus seemed to be on raising alarm. She pointed out the risk of “crying wolf”, if alarm was raised in every situation, and wondered what level of risk needed to be reached for civil society to intervene?

In 2008, civil society actors generally did not have an idea of what the R2P was all about, and what they as an African NGO tried to do was generate knowledge about norm itself by putting together a training tool-kit to educate civil society actors. Prior to that, the NGO tried to develop a resource spot for conflict prevention, based on the ECOWAS Framework and the language of R2P and utilized to train civil society actors in conflict prevention. Some months ago, a study on civil society revealed that it was quite difficult for civil society to engage in situations once the state gets involved. In Cote d’Ivoire, there was a situation in which pro-Ouattara civil society workers were also anti-France and anti-French intervention. It was difficult to convey a message of support for intervention and these difficulties polarized civil society itself. This was a challenge for civil society generally and some groups have tried to do two things - get civil society to increase
its R2P knowledge and to see how they could come together to get governments to implement what they have signed on to.

A participant asked who the international community looks to for decision-making knowledge, and wondered with what certainty civil society organizations were heeded. Using the Libyan example, he noted when many of them were making decisions in the week after, he wondered how decisions were made. These decisions were not made because a Special Representative or the Secretary General determined an adequate presentation of evidence. Events in Libya were portrayed differently, depending on the State. What sources were used to say whether a certain level had been reached, or whether certain actions are appropriate.

The issue of uniformity was raised. Citing earlier comments about ECOWAS on conflict prevention, a participant noted that while ECOWAS might be open to civil society, a similar situation did not exist within the AU system or for East/ South Africa. How should a uniform standard be created? In Ghana, he noted the presence of a legitimate infrastructure for peace, but wondered how functional were counterparts in other countries? Were other countries willing to develop new strategies and accept civil society participation at the national level? Again, he remained skeptical.

Another participant wondered if the ECOWAS model was meant to serve as a model for the African region. The state should start as the unit out of which any viable model could succeed. She believed that the fragmentation of ideas, differences of opinion, rivalry over who should dominate within the infrastructure were obstacles to be worked through, but she also believed that a strong and professional technocratic capability would be a useful starting point. In many instances, political leaders (especially in Africa) failed to look beyond their terms of office. What engendered continuity, she believed, was strong institutional capacity. The African political makeup evidenced a distinction between those in civil service and those in politics: those from political backgrounds had superficial observable motives and interests, and would remain silent to advance their careers, while those from civil service backgrounds were motivated by the desire to strengthen institutions. She believed that civil society had a very strong role to play in promoting concepts to bureaucracy. Education becomes important to ensuring the long-term sustainability of institutions, which will hopefully lead to institutionalization of concepts.

She raised the issue of different regional dynamics within Africa. Noting that South Africa dominated its neighbors in the region and would be the only nation capable of responding, there was a kind of discretion that made the region less likely to support objective standardization. She emphasized the need for flexibility in any standard, particularly if one country would have to undertake or finance intervention. She also noted that questions which were not so immediate might influence the kinds of calculations made, and yes, political dynamics had quite an input on those choices.

One participant raised the issue of who constitutes civil society, and noted that one of the ways in which civil society contributes to forcing states to live up to their human rights obligations is by working with national human rights organizations (if they exist in a particular country). If these organizations are strong enough, then they should be able to serve as focal points. National human rights organizations are based on principles (often backed by treaty law) which require them to work with civil society, and while they may have national mandates, they have locally-mandated responsibilities. National human rights organizations can serve as a bridge between civil society and states who are otherwise afraid that civil society will be comprised of random entities who are unwilling to deal with issues or serve as fronts for potential rivals. Whether they are regional, national or international organizations, Ms. Simbiri-Jaoko urged a recognition that power is located not only in the state, and that the people (and bodies that represent their interests) must also be acknowledged.

2.45pm

A Model for Future Standards of Evidence? Should there be a single set of guidelines for any stage of an unfolding situation? Should there be different standards of proof depending on the intrusive or coercive nature of measures proposed? Should there be different standards for different actors? What is the right mix of prospective and retrospective focus in the guidelines? How strict should these standards be? How do the participants propose that future decisions can be standardized? Can we envision a formalized acceptance of these standards? Can there be a unified approach to the institutional assessment of evidence, for instance establishing
commissions of inquiry or other formalized discussions? Who would the best actors be for this type of approach? Should this project attempt to suggest mechanisms for HOW stakeholders could accurately assess evidence on R2P as set against the standards to be formulated?

A participant wondered who set the standards or guidelines. He asked, what responsibility does the international community have in examining situations, and then, should the international community put all responsibilities at the doorsteps of ECOWAS, what they did or did not do. As a caveat, he noted that these questions do not take responsibility away from the state and that there were limits to what regional organizations, the international community and, more holistically, civil society could do. He wondered who would set the standards and who would police the standards to ensure that they were enforced. He acknowledged the need for common standards, but remarked that standards could not and should not be linked to a number of people killed. He pointed out instances where individuals died and no action was taken; and other instances where some action took place. Rather, he wondered, how do we treat situations on a case-by-case basis? Everyone knows what human rights violations looked like, and thus the standards should be context-sensitive, concerning the nature of the acts, and that the key question should be whether human rights were being violated.

The conveners acknowledged the comments, noting that for this project and looking at these examples, the project attempts to tie together the concerns regarding acting on a case-by-case basis. He asked, if it means something to call a situation an R2P situation, then what standard of proof must be brought to the table. Indicators are a sort of substantive standard. Risk presents itself at what stage? Once the facts are present, the cases become relatively simple, but in focusing on R2P at an early level, there is some utility in having a uniform standard of proof.

Another participant wondered what should be done in a situation where the context is a religious conflict featuring group-on-group violence (rather than state-committed atrocities against its own people). What should be done when the state has made efforts to address challenges, but is unable to meet them? He harked back again to the long-simmering chieftaincy conflict in Northern Ghana.

One participant responded that, irrespective of standards, the international community needed to consider differences – looking into what constitutes atrocity in what particular state? That led to a kind of level-of-development tension. What kind of standard is being discussed? There is a need to unpack what is meant by “international community.”

The greatest dilemma was seen as contextual, but at the same time, there is a lack of trust or consensus among the different countries of the world on taking preventative action, because the question of who takes action is so limited to an elite handful. Is it possible to create a broad global standard which would then be localized, i.e. think globally, act locally; or would it be easier to work top-down towards a common goal in wider international conflict – i.e. towards Security Council reform?

A participant noted that ECOWAS and the AU had criteria for collecting evidence and examining early warning data, determining what needed to be reported and what didn’t, what needed attention, and categorizing the data in terms of the required level of attention.

Another participant emphasized the problem that lay in absenting regional organizations from the equation. Member States bore the primary, overarching responsibility for internal peace and security, but the Member State doesn’t always have the capacity to ensure internal peace. The international community should engage with Member States to ensure capacity.

Situations which may be of importance to ECOWAS can be a question of the ECOWAS mandate. ECOWAS may not respond to a community conflict since it does not fall within its mandate. ECOWAS perceives the big national issues.

One participant cautioned against the gauntlet of institutionalized relativism while justifying a case-by-case approach, as though participants could speak of an
African standard. This trap was particularly dangerous for Africa, with its limited resources, implying that some standards are OK for some people means no longer dealing with universal rights and responsibilities.

In looking at ethical standards and monitoring criteria or assessment strategies, the tipping point in a conflict could be something entirely unrelated to politics. It is tough to pin down any one standard.

One of the conveners noted that when talking about responses, depending on the situation, certain practices worked well while others seem absurd. One of the reasons for a move from a more broad-ended idea to the more clearly identified four core acts was to remove discretion premised upon perceived political purposes, and adopt more universal terms. This goes back to an underlying assumption that there is something special about calling a situation R2P. The UN Special Advisor on the Responsibility to Protect, Ed Luck, has prioritized response over terminology (i.e., he doesn't care if you call it R2P so long as you respond). Does calling a situation R2P or otherwise accelerate/ decelerate responses? The convener harkened to the actions of the Security Council and the International Criminal Court in the Libyan case and Resolution 1975; the more diluted form with regard to Cote d’Ivoire reflecting the ex-post realities of Libya – still this idea that creating a forced formalized discussion if not responsive framework would allow something approaching universality.

Another one of the conveners stated that part of the challenge is that the idea of using a looser standard than in the way originally assessed in ICISS report is akin to what the Security Council uses liberally – what constitutes a threat to human peace and security? Have there been creative uses? The Security Council has been using the issue of a threat to peace and security creatively to perceive humanitarian crises, allowing for a wider range of actions. Perhaps it is better to have a more general standard; on the other hand, questions of credibility and the epistemic capacity of the body making such judgments remain. Here, when thinking about protection, at the end of the day if this is why the institution that applies it matters, then we must reconcile ourselves to accepting the fact that those bodies make errors in doing things preventively. In Libya, with Resolution 1970, no situation of armed conflict existed, no war crimes existed. Crimes against humanity yes, but war crimes, no. Perhaps these are limitations to applying standards but nonetheless, allowing for total discretion is worrisome because of legitimacy and selectivity problems. If the objective is to build support, questions about legitimacy and broadness must be considered. How should standards be framed around those four crimes? At a base level, why wouldn’t we want a low standard, but a low standard may not preferable in light of coercive response. It is better to act preventively based on clear and convincing evidence that acts may occur for non-coercive response, but because war of any kind has destructive consequences, It is preferable to have a more strict standard. Thus, standards may need to vary depending on the coerciveness of the tool. A looser standard is preferable. Should this be a global standard? One that varies according to coerciveness of tool? If using force, there should be a stronger burden of proof but even there, the Security Council must have a basis for the evidence to authorize a no-fly zone. In examining the history of sanctions, they have proved to have a more harmful than positive impact on civilian populations. In raising the issue of “robust military force”, there should be a higher standard. Simply put, perhaps a more relaxed standard is fine for non-coercive measures but a stricter standards is preferable for coercive measures, in particular military intervention.

A participant noted that any resulting standard would be a configuration of factors, some of which would come into play to determine the course of action – arms, incitement, defections, - and would involve identifying which of these factors strongly points to a high risk of civilian casualties. He suggested that some factors – the easy availability of arms – may take on greater prominence and bump things up to intervention stage. He noted that this configuration of factors, in which some factors are not as prominent as others, may even shift during the response period. He emphasized that it was a question of anticipation, what the international community anticipates is going to happen but cannot pin their hands/ fingers on. If the community waits, the situation will deteriorate – that kind of perspective, that belief that something will happen plus certain prevailing factors suggest the need for intervention.

Another participant advised that the use of a standard more stringent than “reasonable doubt” would result in no action, as those charged with acting would be unlikely to connect evidence sufficient to reach it. She would rather adopt a lesser standard – substantial and
clear, dealing with “likelihood” – and likened it to using a standard to obtain a conviction but it was mostly probability that these things are happening or would happen. In different situations, R2P is very closely related to prevention. If it is not a case of military intervention, then other interventions will happen. Other interventions will call into question – what exists that could make certain regimes act differently. She noted that it was easier to make decisions based on past history and past performance, but genocide was very tricky, unless it was a situation similar to the Rwandan genocide, in which the presence of two fairly distinct groups of communities made it easier to perceive events. The intent requirement is too demanding. In Kenya, genocide was a loose idea where it was unclear which tribe was killing which tribe, what was the position of the state in such a situation where the state apparatus was coming from many tribes. Those killed are simply vulnerable. It was a different question, and she advised that in countries with many tribes, genocide was the last thing that should be looked for. Using Crimes against Humanity was an easier standard for finding massive violations. If a very heavy standard is used, reaction will be difficult, particularly if the state is not a source of information for how the international community should act. She would not advise a very stringent standard, but would suggest extrapolating a process from history, from the people involved, examining the regime and its reactions in the past. Some of these regimes are known. These things can help determine action. She also suggested that countries in Africa are more likely to listen to the West than other African countries.

One participant advised adopting a middle of the road kind of standard and looking for state involvement to suggest military intervention. In the case of so-called “small fires”, the international community should apply preventive diplomacy. Should the situation deteriorate further, it should utilize observers, then forces. He raised the issue of the African Standby Force, and suggested that steps need to be taken to make this a reality.

Another participant noted that ECOWAS used trend analysis that combines quantitative and qualitative analysis to perceive dangerous signals. Sometimes though, the issue is just a smokescreen. Sometimes there were larger issues with timing. She discussed some of the difficulties with stakeholders fighting government trend analysis - states revising reports of what is happening in their country. To take binding decisions, the Mediation and Security Council must show trend analyses and proof to members of Mediation and Security Council to demonstrate signals, upon which Member States may become more willing to listen and to take steps to avert crisis.

The issue of accountability was emphasized; there must be some way of ensuring accountability is built into the system. There cannot just be standards. It is important to know that the necessary information for decision-making is exactly put before decision-makers.

One participant wondered how states should be held accountable, and at what point should other actors, like civil society, become part of the decision-making, or should these decisions be left to the heads of state as to whether to do something about the situation or not.

The convener then concluded the day’s discussion by listing some Points of Agreement.

- He noted that they were still trying to construct this down, and discussed potential sources of accountability to legitimate and reduce discretion.

- In terms of bigger assumptions, this notion that R2P situations must be labeled as such and located within the framework of R2P changes the dialogue; hence, the desire to have common universal standards that will be applied. The discussion of standards that are available in a particular region versus only one standard, released by the Special Representative, was very positive and highlighted all of the key points.

- Finally, the discussion hasn’t really touched in great detail on legal sources, but that there were commonalities between questions underpinning certain areas of the law, looking at continually changing situations at an early enough stage where prevention has realistic probability of success.
SEPTEMBER 19-20 2011

ASIA CONVENING:
THE RESPONSIBILITY TO PROTECT (R2P)-EVIDENTIALY GUIDELINES PROJECT

Benjamin N. Cardozo Law School, Human Rights Centre; Asia-Pacific Centre for Responsibility to Protect; Cambodia Institute for Cooperation and Peace (CICP)
CONFERENCE MINUTES

This paper represents the meeting, which took place among relevant stakeholders, including policy makers, NGO’s, civil society, scholars, and journalists, to discuss the concept paper laying out the parameters of a potential common standard for the application of R2P. The minutes were compiled by the meeting Rapporteur Sam Permutt. Participants neither reviewed nor approved this summary. The meeting was held under Chatham House Rule and therefore, this paper sets forth the basic points that emerged from the meeting without any attribution whatsoever.

INTRODUCTION TO THE MEETING

A representative from Cambodia suggested that the country has suffered mass atrocity at the hands of the Khmer Rouge, which the ECCC is working to bring to justice. The challenge to R2P is how one reconciles it with state sovereignty. Cambodians, who have seen civil war, international isolation, and strife, would like to learn more about R2P before they support it as it is a new concept for the country.

THE CONVENER'S LAY OUT A THUMBNAIL SKETCH OF R2P AND THE PROJECT AS FOLLOWS

In 2000, Kofi Annan put forward a question to the General Assembly: how are we to respond to situations like we have seen in Rwanda and Srebrenica if sovereignty is an absolute bar to action? In this question, he was alluding to two concerns: 1) UN paralysis in the face of mass atrocity; international society’s failure to live up to greatest calling—to protect populations. As R2P is evolving, it is affecting conceptions of sovereignty—moving from non-interference to a view that states owe responsibility to their populations; and 2) the challenge to the UN itself, which is a neutral arbiter of peace and security. But instead, there was an intervention initiated by NATO in Kosovo and generally regional defense organizations have been filling in where the UN has failed.

Led by the Canadian government, the UN investigated the question, producing a report called The Responsibility to Protect. Thereafter, the UN member states in 2005 unanimously agreed to a modified version of the Responsibility to Protect in the World Summit Outcome Document of the General Assembly. The R2P does not prescribe what actions are to be taken in any given situation. The Responsibility to Protect principle or framework is not linear, it is not sequential; it does not dictate what international society is supposed to do. Rather, in a situation where atrocities are occurring or at risk it is applied to obligate the international community to act to protect population, but it is up to the international community to determine what measures will be taken to fulfill that obligation. It is in the last ten years, R2P has become conflated with military intervention for humanitarian purposes. This is unfortunate. The principle is most effective when it encompasses engagement with international society prior to a need for military intervention. Its greatest strength lies in mid-to long-term prevention apparatuses to protect populations. The ICISS R2P report stressed that R2P must encompass the responsibilities to prevent, react, and rebuild. This is crucial because, the international community frequently engages at the reaction point, not paying sufficient attention to the prevention and rebuilding pieces. Reaction doesn’t necessarily result in fulfilling the obligation to rebuild, running the risk of a return to the atrocities that resulted in engagement in the first place. This is why social scientists agree that a prior genocide can result in a later genocide.

The 2005 World Outcome Document, resulted in conversations over R2P and leads to acceptance; here, states agree that they have a responsibility to prevent and respond to four specific acts. On some level, the doctrine means that you are governments are forfeiting a certain amount of sovereignty. In a 2009 report, the SG set out a framework implementing R2P: international society has to engage with states to help them fulfill their obligations and, should they fail to do so, there should be a timely and decisive response. It is not the case that “timely and decisive response” means military humanitarian intervention. Rather, it includes diplomacy under chapters 6 and 8 of the UN Charter with military intervention as a last resort.

R2P has developed fairly rapidly. In 2006, the Security Council reaffirmed R2P. Since then there have been several Security Council resolutions referencing R2P. Apart from implementation in UN system, a key question regarding the development of R2P is whether it is a legal norm or political norm. Most would agree at this point that it hasn’t developed into a legal norm, though on the other hand some suggest there is is somewhat, of a pattern of practice such that there is a sense of legal obligation around R2P. Others would argue that R2P is there is not a legal norm, nor should those in favor of developing it push for it to become one. Rather, it is likely
that R2P’s ability to prevent mass atrocity crimes will be better served if it is a political norm.

Regional organizations might be in fact the gatekeepers of R2P, in that international society’s response will be significantly influenced by the reactions of regional organizations, in which atrocities are occurring. Regional organizations are playing a greater and greater role in the development and implementation of the norm. Likewise, civil society (sub regional organizations, NGOs, academia) are instrumental in development of R2P.

**UNDERSTANDING WHY THE R2P NORM WAS INITIATED, WHAT IS IT IN RESPONSE TO, AND HOW IT HAS DEVELOPED**

There was general agreement that it is better to have a predictable framework and some agreed that right now R2P is, and should be, an emerging political and legal regime. And while there may be obstacles, it is a good time to codify and develop guidelines or criteria for the application of the regime. For example, one participant stated that it is important for Cambodia to have a sensitization about it especially among its top leaders and civil society, so that we know what R2P is, exactly. In other words guidelines on R2P are necessary in Cambodia.

From there the conversation continued and participants discussed the challenges of the principle of non-interference, military intervention, context, the relationship between R2P and the ICC, and the methodology for developing the standards. For example, a participant suggested that we only have intervention and mass atrocity, no focus on prevention. There is no such exercise to implement prevention. Maybe it would therefore be better to look at the practice concerning whether there should be a standard framework.

One participant pointed out that the background to all this is that there are fears of interventionist policies where humanitarian intervention is justified based on an alleged need to enter a country to protect populations. The other angle is that contextually, it is important to deal with the principle of non-interference in state affairs: unspoken fact that is raised all the time by Asian countries. Muted voices in ASEAN don’t quite understand the balancing act between non-interference and R2P. They are fearful of R2P. If there are fears that R2P will be used as a justification for military action it is important to ensure that R2P respects national sovereignty. It is only where nation-state is unwilling or unable to fulfill its obligation to its population that a discussion of intervention enters the picture R2P does not apply in regard to human rights as a whole, it is limited to the four acts. R2P is a very high threshold. For R2P to be invoked, there has to be a very serious matter, ultimately where international peace and security is involved.

Cambodia is curious about role of the UN in implementing R2P. Military intervention might not be initiated by UN but by a superpower. How do you strategize around the UN’s role: a participant expressed concern that the UN is a pretext, it is starting from the point of a superpower, and superpowers might use humanitarian concerns as a pretext for intervention actually based on something else, such as a desire to gain control of oil or natural resources. Cambodia experienced genocide, but nobody took it into consideration. Cambodia is still very confused about the concept. Following up on prior response, another respondent suggested that ten years after the introduction of the concept, for the Asian region, individual ASEAN countries do not understand what R2P is, and do not even know the concept is limited to the four crimes. R2P is not a first priority for most countries in the region. ASEAN has incorporated some aspects of the concept, but there is no common position on R2P and there is no serious discussion. If you want to introduce R2P, there is none here yet. As for intervention: the UN and US and some other countries to protect pops from atrocity, both intervention is very crucial to protect people and to abolish human rights violations especially by dictators throughout the world. In terms of Afghanistan and Iraq, the US started interventions on its own. Leaders should be responsible for the human rights violations they commit. In the UN Security Council, countries side with their allies. I think it is very important to have intervention to protect people and warn dictators that atrocities against their people will not be tolerated.

We know that R2P is an important issue with a lot of potential to shape future world order. We are determined to tackle the issue because of its importance. At the last meeting, CICP had a big debate: much work was done to address aspects of R2P. Today, we want a detailed perspective: how do we prove, or prevent, R2P acts? Now, before entering technical legal reasoning, the 1st question is whether R2P is a legal norm or a political principle. We have to answer that because if it is in the province of political calculation, there is no need to draft standards of
proof. Although R2P is in its fledgling period, from our perspective, legal assessments are still important but at this stage we don’t have enough practice to evaluate standards of proof. From the concept paper, we get examples from other international law fields and municipal fields, but to what extent R2P borrows from this is unclear. We need in depth discussions about how to incorporate R2P norms; we are quite flexible about whether it is a legal or political norm.

In response to this last point, the conveners pointed out that we are looking to develop not a legal standard but a common framework so that we can think about how to respond to atrocity situations. It is about a common set of guidelines to reduce the level of discussion over whether R2P applies and get us more quickly into what series of acts of engagement we should undertake. The standard is about reducing the amount of time haggling over whether R2P is applicable. Legal terminology arises because the content of R2P is legal—so that people are going to wrangle over legal terms—but up until now it hasn’t been articulated. We want to be speaking the same language—a common standard of assessment irrespective of disparate conclusions. We are not looking for a strict test, but rhetorically we want to come from same place.

A participant examined the R2P standards from the perspective of women’s rights:

1. We should look at trying to advance R2P, it should be linked with other existing international norms, for example: this is human rights within the context of armed conflict situation. At end of day, what is important is that lives are at stake, we may debate endlessly about how norms are conceptualized, but it is always about the people who are seeking justice, who have undergone conflict, who need protection.

2. Aside from linking R2P to normative international standards, it has to be linked to regional norms, what has been shown to us thus far as the development of concept is not deep in Asian context. The only thing that comes out is Sri Lanka and Myanmar. Domestically, also, what is in the country’s constitution is relevant. What are the currents of other international norms—humanitarian law, human rights in conflict situation? As a defender of women’s rights I try to internalize UN Resolutions 1325 and 1830 (sexual violence).

3. Whenever we talk about R2P, it is still not really in the consciousness of the people or the grass-roots. What is happening in civil society or academia, they are representing people on the ground. This means there has to be a dialogue with the people themselves. Also, I taught this subject last summer, a co-professor based in Japan claims that it is an emerging principle, not a norm. What is the difference?

There was a suggestion that if we want to develop a common framework, we must find some sort of common mandate. In ASEAN, they do not know about R2P, but they have taken action related to R2P. Cambodia, Burma, East Timor—ASEAN has dealt with it not through R2P but through a similar type of experience. Their attitude is positive; they are fearful of military intervention but are willing to accept it especially since they signed a political document at the UN. There is political support among leaders—particularly if there is a normative framework.

Further a respondent pointed out that:

1. ASEAN has been engaged in R2P without knowing it. In 1998, the Indonesian minister forced humanitarian acceptance;

2. ASEAN procedure: you have to find an entry point. Here, that point is interesting; effort has to be made in revealing cooperation. I see the entry point as amending, reviewing the Treaty of Amity and Cooperation (where there are principles about use of force, etc); and

3. A country like Indonesia can push this because it was the first country to air its dirty laundry. ASEAN will hopefully follow suit. Cambodia opened up Pandora’s Box; Brunei opened ASEAN principles. The issue here is how we articulate it. ASEAN is important: if we want R2P as a political norm, senior officials need to take notice of it. ASEAN officials are “evil doers”—you can talk until you die here, but you will not get through. You have to know how to penetrate. Burma is a good example: it is no fool—it is engaged in diplomacy. ASEAN has mandate to deal with peace and security. For example, ASEAN might do everything at same time. How do you convince ASEAN flag until they feel comfortable? Bottom line: produce atmosphere conducive to acceptance among ASEAN officials—especially for Indonesia to set the ball rolling, looking to treaty of enmity and adding language.
Another participant noted that R2P was raised in 2001, supported by Cambodian government. This is not from my understanding a humanitarian intervention and there is a fear that big countries will intervene and interfere using the guise of R2P. There are 2 kinds of concept since 2005: consensus among the international community that showed a will to use the concept for civilian protection. It means that sovereignty of states requires that a State takes care of its population and implements R2P. Also, with regards to the preventative measures in the R2P framework—there is very clear discretion in paras 138/139, these are case-by-case principles. The most important concept is how we understand the implementation.

From the civil society perspective, R2P is a young norm and already very controversial and I think there seems to be a contest as to what this norm is all about. There seems to be some perception especially among civil society that it is being hijacked by a particular community—i.e. by the West or those would like to use norm as an entry point for military intervention and to a certain extent for regime change. Because of that prevalent perception, those of us who see R2P as a potential tool to forward human rights and values that we feel are embedded here, we have to engage in coalition building, we need to overwhelm the other prevalent discourse. To reiterate: R2P should and must be a tool that we can use in conjunction with other norms like IHL to expand and consolidate human rights and humanitarian assistance. If ASEAN was doing R2P without knowing what it was doing, there have been a lot of R2P instances, not only among and between states but among civil society, we have people to people R2P: solidarity among people.

This is a particular component of R2P that needs developing. I would dare say that among cultures there are expressions of R2P: i.e. love thy neighbor. These are some of the notes we can tap into to neutralize the other prevalent practice of R2P that has been riding some of us in civil society. In body of practice of the norm, I have noticed that it has been the reaction part that has a lot of examples while the prevention part is a bit lacking, and perhaps we need to explore the fact that reaction does not have to be limited to military action. That is why some believe R2P cannot be reconciled. Can there not be other political reactions that are not military reactions? In the Libya case, why didn’t we give more space to the AU’s mediation efforts before NATO jumped in? So the political meaning of reaction has always been, or perceived to be, hijacked by military intervention.

The conveners responded that there has been prevention work, but given the nature of news cycles and our interest in big planes over relatively boring prevention, it doesn’t get the same attention. In Kenya, for example, in 2007-08, during the post-election period, there was high level diplomacy, and it happened swiftly. It is not clear whether R2P was the motivating principle; Kofi Annan might have suggested that he was motivated by swift, high level diplomacy before things got out of control. This doesn’t get the same kind of attention, unfortunately, because the story doesn’t sell. How do you jazz prevention up? Likewise, in Guinea, there was a rapid response that managed to bring the situation to a conclusion. Also, as Cyclone Nargis in Burma, ASEAN community was motivated to convince Burma to allow in aid. But they are not as exciting—thus the lack of attention. But, it is happening and this work needs to be highlighted—it is our jobs to bring attention somehow. Notice that there has been movement among governments to develop genuine early-warning, but those systems need to be further developed.

Once a year, we meet to discuss R2P. Terminology, etc, but how do we send the message to the people on the ground? When we talk about human rights we are not talking about groups like this one. All of us at this table know about mass atrocity here and understand that education=prevention. How do we relate this to the people who have less than a $1 a day and try to survive? R2P is about humanity as a whole. We need to make sure that atrocity in Cambodia will not happen again. Hopefully from this discussion, experts can help us bring it to local communities. Education at grass-roots level is key. The local people, especially those in the field, need to hear about the expert work.

R2P has been very familiar since 2004, but the concept itself is linked with other principles. As a lecturer, my students are confused trying to engage in R2P. However, in reality, in recent situations, for example the agreements between Malaysia and Australia over refugees there is a question of whether it is a new interpretation of other international principles. R2P should not undermine international law or treaties. Before we discuss evidentiary guidelines, it must be clear to us what we mean in practice when we are talking about R2P.
ASEAN principle of non-interference is not an ASEAN principle but rather a UN norm. Also, there is a lot of international law around human rights violations. R2P is a conduit for that law. It is so important for governments and people to have guidelines so that in democratic societies, sovereignty is known to include responsibility.

This is a very important topic to discuss. Is R2P a violation of state sovereignty? It is really about the second category. First and foremost, it is the duty of states to safeguard their own citizens, but also when there is conflict, states owe duties to civilians. We need to recognize the extent to which R2P is very successful. The international community and individual governments are getting better at protecting civilians, even though we are not remotely perfect, there have been recent improvements. It is important for governments to recognize that the early steps of R2P are about how states protect their own civilians. This requires education about their responsibility and pro-actively taking steps domestically or during conflict, to protect their own citizens. Success would mean that governments know people are watching how they are reacting.

RELATIONSHIP BETWEEN R2P AND ICC
There is no direct linkage between the ICC and R2P. R2P is about punishment. The Security Council can ask the ICC to punish or investigate a leader who has committed R2P acts. Also, the status of the ICC can give a basic understanding to R2P about how to exercise punishment. The difference between the ICC and R2P is that the ICC is a criminal court. It is about criminal responsibility at the international level of individuals—not states, not companies, but people like us. It is about bad crime taken up to international level on only 4 grounds, which are not necessarily the same as R2P. The ICC has 4 grounds to tackle: 1) genocide, 2) war crimes, 3) crimes against humanity, 4) crime of aggression (not R2P). In terms of the substance and action, there is a difference. What about complementarity? The ICC was set up by a binding international agreement in 1998, so the founding instrument is different than R2P. When you come to R2P, the founding instrument is not a treaty, but an outcome document. It is a resolution, not binding, but highly persuasive as an indication of principles and norms. And in paras 138/139, you hear a certain exposition about what R2P is all about. What is the actor from the R2P perspective? The actor is the state, not the individual (unlike the ICC) and it is measured in its relationship between the state and the international community. Triangular relationship between people-state-international community. Secondarily, what is the action? It is in part the relationship with international community in terms of community being able to offer assistance in regard to those R2P acts. What is the consequence of R2P? Unlike with the ICC, where the individual may be found guilty and compensation awarded, R2P means international responsibility, in terms of pressure, Security Council pressure, sanctions, freezing assets, etc. It is more of an international setting.

SPECIFICATIONS OF THE CARDOZO STANDARDS PROJECT
Looking at developing evidentiary guidelines to assist relevant stakeholders—i.e. civil society, regional organizations, sub-regional organizations, and international organizations. Cardozo started this project with academic research, looking at other areas of international and municipal law that are relevant to standardization. One example: in looking at Rwanda, we questioned what kind of evidentiary standards of burdens of proof international society was using to determine if it was genocide, etc. They were using proof beyond a reasonable doubt. There is a distinction between international criminal law and state responsibility. Nonetheless, people were using international criminal law standards, which are retrospective. The high level of intent required and the nature and function of criminal law is retrospective, yet we want something that can be used to spur prospective action. So there needs to be a different standard. It makes sense to draw from international and municipal law and look at justifications for various standards and what is most applicable.

The project’s goals: 1) promote the full continuum of R2P actions, 2) ensure targeted application of limited resources (there are situations that go on all the time that may or may not fall within R2P framework; sets of guidelines might help target application); 3) reduce selectivity in application, thereby giving transparency in the process.

Project’s output: 1) create widely accepted evidentiary standards or guidelines. We need to avoid a low standard that may lead to hasty action and a high standard such that no action is ever taken—so where in the middle can we meet?
Examples of standards: 1) beyond a reasonable doubt that acts have occurred, 2) substantial evidence of a real risk that acts will occur, 3) clear and convincing evidence that acts may occur. The distinctions are significant in terms of whether it is retroactive or prospective standard. Once you are looking backwards, the prevention aspect of R2P has failed.

Can there be one general standard or do there need to be different standards based upon the levels of engagement or interference under consideration? What is the scope/time frame the project is looking at? Atrocities don’t happen overnight; they are products of years, conflicts, etc. Are we taking into account social inequities? How far back do we go?

If you look at the UN, there is a question of who is going to take care of the standard? Moreover, if you look at the standards, can you give an example of what substantial evidence is present for genocide? Is it a number of people? What kind of standard we choose requires examples in terms of how it would apply. What are we looking for?

One participant suggested that he would be very mistrustful of legal terms. The title of the document, “evidentiary” makes people shudder. What are the constituent elements of R2P? Also, we have to be very careful about implying that we are looking at the situation as criminal action and needing to prove criminality immediately, because that is not how the global community acts—nor is the intention of the UN Charter. The political response is guided by certain precepts—i.e. threats to international peace and security. If you take a particularly dangerous R2P situation, where you want to use Chapter VII powers, then there is a threat to peace and security, then you have legal back-up and policy prescription. If it is a threat to Peace and Security, you have to take graduated measures. But other than that, do you want to have criteria for other types of situations? It is not a criminal test because we are not going to court; we are talking about action by the global community. So, if we are using a graduated approach, we have to be careful about using criminal standards. So, from that angle, operationally what you see, in particular the past 2 years, what does the international community do? It interacts with the Human Rights Council and Security Council—there is a certain flow. R2P, as invoked operationally, appears first in the preamble to the resolution on Libya, “recalling that Libya as responsibility to protect its population, which provides for a justification for action.

If you want to act at the very beginning of a fact pattern, you want to look to indications a certain flow leading to the possibility (you cannot wait until you can prove genocide). Risk? Real risk? And then, if you go to the ICC, it is easy working through the stages. In sum, there is a graduated approach.

Pushing a political norm, we cannot escape the context of a legal norm. Having said that, I don’t agree with “evidentiary” in the title because it is scary for non-legal people. However, I want to put forward the threshold point: how many bodies do we count? How many women should have been raped in order for us to act? I think it would be difficult to put it in terms of numbers; most situations have different contexts. I do not agree that we should only look at mid-level intervention because that loses context. We should try to look at factors as to how we identify what could happen.

At this point two suggestions were made: 1) R2P should be integrated into Asian Intergovernmental Committee on Human Rights, bringing norms from above to the ground. 2) sensitized in Cambodia, it is not a problem with the people on the ground. Education and sensitization, in simple language, is not a problem. We do not want Pol Pot for a second time. Cambodia is going to be rich in the future, oil resources can be beneficial or harmful. R2P can protect people from exploitation.

As a victim of the Khmer Rouge, I support having a standard for R2P, apart from what we already have in international legal instruments, i.e. UN Chapter VII. In Khmer Rouge Cambodia, at the beginning when Vietnamese troops came to us, people thought it was international humanitarian intervention. But, after few years, when troops began to come, it was invasion. It was a question of what is international intervention and what is invasion. The question has been discussed among intellectuals, when the US invaded Iraq and Afghanistan, whether it was to protect people from terrorists; it was unclear. Was it an “invasion,” or an “intervention”? Having a standard consisting of more comprehensive indications can clarify what is “intervention” and what should be identified as “invasion” to avoid, for example, a powerful state using the guise of R2P to invade a poor country. This is an important reason for a standard, but the standard should not be developed in a few years. More consultation is required so that the standard is able to be applied properly. There was a very quick intervention
in Libya, but not in Cambodia. Thus, a firm standard would help a weak country. Also, is there any specific UN body to take care of R2P? We can bring the mechanism to the Asian region or to Africa, but at the moment we have seen that there is no improvement at the UN. So, we have to look at the UN first.

We keep focusing on whether we need specific rules, but maybe we don't need a rigid standard. Take Darfur, at the time, the US had a commission of inquiry examining whether the crimes there qualified as genocide. If Darfur teaches us anything, it is that, if we have a very rigid standard, once atrocities begin, lawyers take a long time to compare facts to law. At the end of the day, once we gathered evidence in Darfur and Chad, the discussion moved to what should be done. There was then no imperative to action. At the beginning of R2P, so far as it has been applied, we already have somewhat of a check on unilateral action. Kenya, Libya: R2P was used as a mechanism to act and then considered by the UN or regional bodies. That is normally a good check against unilateral action. The GA weighing in, NATO, ASEAN—this is a powerful check. The point is that we have to move debate forward to whether a majority of nations feel that there is a specific threat to respond to. We don't want to spend too much time applying facts to law.

Here you mention evidentiary standards with an "s" plural, we need one or two standards—not more. So, do we need unique or several or diverse standards? If we have many standards, we do nothing. It is very risky. Also, my impression is that we are looking at judiciary perspective not political actors. States are not judges. They ignore international instruments if they want. We see in our experience in history, so I think how can you adopt divergence in this thinking.

How much weight is being given to the voices and appeals of the victims and the potential victims in determining standards? It appears that the international community is creating this process and I still need to hear how much weight is given to people who feel that they are going to be victimized.

In situations that have occurred in this region, was the response by governments, or think tanks, or academics? Was there a risk assessment? What sort of guidelines do these institutions use to determine whether these are human rights violations or rise to something far worse?

Is there a lens used to see whether there will be future violence What are the lessons used in genocide prevention? Do we think about atrocity prevention when analyzing atrocities in this region?

Insofar as women empowered to act in the Philippines, there has been a lot of consultation with women’s civil society networks. We have developed the Philippine National Action Plan on 1325 and 1820 in coordination between government actors and civil society organizations—the first in Asia to develop a mechanism where the government is committed within its own domestic framework to act on issues of women being affected by armed conflict situations. The Plan has a specific provision that says it would monitor, engage with grass-roots organizations and communities, on the diagnosis on what is happening on ground—with women who have been already organized. But, a baseline has not been established. In order to answer, how far the Philippines has gone in implementing or internalizing the norm on protection of women under banner of peace and security: it has grounded itself insofar as discourse is going, but not in practice. We need baseline data. In areas of gender training, peacekeepers and those in the security sector, it needs to be strengthened; there has been training, but connection to indigenous women and grass-roots communities needs to be strengthened. We have yet to put it all together.

People to People is not necessarily the same as R2P has been identified within the UN structure. Even in the UN structure, which is linked with the Outcome Document, we want a reflection of how people feel in situations. The UN is sadly not an inter-people’s organization. What has happened in recent times is that there is a situation whereby R2P sets up a team of people who go out and consult with grass-roots. Intermediary mechanisms come in to fill in a certain gap. The issue is to consult with people and more and that facts have taken place that lend themselves to certain actions. Secondly, these mechanisms are triggered because of allegations of grave violations coming from a variety of sources. So, that is a criterion used for initiating human rights accountability through various sources in the UN. That is an entry point for mechanisms to come in and help clarify situations. Finally, in 2005 Outcome Document (para 2), if there is a very egregious situation lending itself to enforcement, “manifest failure on part of state,” you prove or at least indicate “manifest.” This word, although not clear, has to
be very evident, very marked—this is an implied criterion, which may lead to Chapter VII actions.

There has been an article linking R2P to Southern Thailand. Last year there was evidence of 90 people killed and some people referred to R2P. This was wrong, because you need to look at the intent of State (intent is very important). Also, in Thailand, there were several factors, including religious/ethnic conflict, but also there were mafia factors—the Buddhist community had also been attacked by the other side. Finally, a lot of civilians have died. What has the Thai government done? We have a commission on peace, resolution which is attached to the national security council composed of the economic and military sectors. This wasn’t published. The work isn’t superb, but the Thai government did try to deal with the situation.

There has and will always be different ethnic groups in Asia, but we’ve never looked at it through the lens of R2P—but through economic development. What we are witnessing today, we are looking at a moment of civil liberties in the region. People have greater freedom to voice their differences resulting in a clash between Muslims and Buddhists. Governments are mindful of isolated incidents, through the lens of how to create united society, rather than through the lens of R2P. In the field of national security in Malaysia, the number one threat is how to bind a multiracial society and provide security for everyone. The Malaysian idea of uniting disparate groups to achieve one society is a step in the right direction.

In Cambodia, ECCC has taken initiative on educating people on the Khmer Rouge. Education=respect. Somehow we can integrate R2P into society by teaching the atrocities of the Khmer Rouge. Secondly, from dealing with mass atrocity in Cambodian society, there is a universal law that we must respect justice, but from this perspective, should we address issue of political stability or bring justice for crimes that were committed in Cambodia? In case #2 at ECCC, a witness just died, and justice hasn’t been delivered to people of Cambodia. The healing of the Cambodian people—should we worry about national reconciliation or should we worry about justice? Justice must be delivered.

In the Philippines, manifest state failure did not occur, or at least no one will admit that there was a massacre at Mindanao. No sane dictator would massacre journalists; no democratic government would do this. Perhaps there were hints about what would happen, but there was nothing that came from national institutions to suggest that it is the will of the State. So, even though people try to link the massacre at Mindanao to R2P, it can’t be linked. As far as the international norm integrating into national planning priorities, my current assessment of R2P is that people have governance commitments, rights-based approaches, and to come up with new evidentiary guidelines as to how we are failing as a State, that is clearly not a priority.

I agree that there yes, there might not have been a manifest intent from the top of the government to massacre people or tolerate such, but this is the tricky part. From my perspective, I would assert that there was manifest intent of the previous government in the Philippines to protect and create conditions for that massacre to happen. If not for the particular support of that administration and creating systems and processes, the massacre would not have happened. Linking that to R2P, it might be very simplistic, but R2P is responsibility to prevent. I would use R2P from that lens. I don’t know how, but I’ll look at it from the perspective of human rights.

Southern Thailand faces many serious human rights violations. The local system works to some extent: for the past 7 years there were tens of thousands of incidents of violence. To date there have been 143 convictions in local courts—big disjuncture between allegations and convictions. We do recognize that it is a serious question. Does the international community take it up? At some level, yes, like a disappearance case considered by the UN. So there is scrutiny, and pressure for accountability through UN mechanisms. To what extent can it be said that Southern Thailand fits into R2P? In preferred methodology, where you are objective, the international community at its highest has said these incidents have not risen to R2P acts. The whole point is that we need a variety of entry points.
QUESTION: USING THE WORD EVIDENCE MIGHT IMPLY LAW, BUT WE’VE PUT THE R2P INTO LEGAL CATEGORIES—THERE IS NO WAY AROUND IT; YOU ARE GOING TO BE MEASURING SITUATIONS AGAINST LEGAL STANDARDS, BECAUSE IT WAS FRAMED THAT WAY IN 2005. CHANGING LANGUAGE IS FINE, ESPECIALLY IF IT WILL BE MORE PALATABLE. BUT, WE NEED A PROCESS WHEREBY WE DECIDE HOW THE INTERNATIONAL SOCIETY RESPONDS. WHAT PROCESSES WOULD WE USE THEN?

We need to look at it through a political lens, because that is what the UN is about. Through certain words about criminal responsibility, we are obviating the fact that this is a political process. We have to be careful about a misconception that what we are selling it as closely related to ICC. You put off the type of interaction we want by using legal terms. We want some criteria—if you push R2P to the max, there are legal standards. The value added to R2P is that it activates global community through a certain justification in color of politics and law.

Are we going to use R2P to push Libya and endanger our own (Filipino) people there? The policy questions have to be approached realistically; in developing questions we don’t want to be hypocritical. The hard reality is that very often positions are made according to State’s own interests. In Outcome Document, the words like “crimes against humanity,” inattention is paid to what is a war crime, etc? What is a crime against humanity is a traditional situation of mass atrocity. We don’t necessarily have to borrow those legal words; they are already covered.

At what point in your perspective does an external assessment become interference as opposed to “engagement”?

The Commission of Inquiry was requested by government in Thailand—but that wouldn’t happen in Libya. R2P justifies very nearly Chapter VII actions.

CASE STUDIES

Someone might want to talk about summer 2009 in Sri Lanka, how potential threats were assessed, how decisions were made about what kind of engagement would be applied or not be applied, and what standard was applied (if any) and what could have made a difference? We might have a few representatives from foreign service institutes or ministries, but did people follow closely the events that unfolded in Sri Lanka? I imagine that the Chinese foreign ministry might offer something.

R2P only applies to four acts, so it wasn’t applicable to Sri Lanka. From our perspective, Sri Lanka did not apply. One of the things the gathered at a workshop on R2P in Manila is that R2P was only applied in Libya, not Sri Lanka, under R2P pillars I and II. The conflict in Sri Lanka was not framed through the lens of R2P because it was framed as a fight against terrorism. The challenge is thus when R2P applies and/or “protection of civilians.” Also, a student from Sri Lanka was passionate about saying that R2P was never applied in Sri Lanka, because she was there during the conflict in 2009.

One of the responses for saying that Sri Lanka was not an R2P situation is the question of Why. At what point was there an analysis of whether those R2P acts occurred or about to occur? If we look at the events at the time, it was clear that state forces were advancing on LTTE, and civilians were in the way. Was there an assessment then? Or, was there a retrospective assessment? I think the investigations in Sri Lanka have drawn out that war crimes did occur. To resolutely state that Sri Lanka was not an R2P situation means that we have to ask the question, was the framework applied?

SL was not a R2P situation, because there was no idea about how to view it as an R2P situation. Maybe there were war crimes, but not all war crimes fit within the R2P rubric. When the situation was developing, you have to make decisions on a case-by-case basis; otherwise there is a very hard situation of domestic interference.

WHAT ROLE DOES THE MEDIA PLAY IN BRINGING ATTENTION TO A POTENTIAL R2P SITUATION BE AS IT IS UNFOLDING?

Given 24/7 news, the world has changed and the media gets blamed for everything. I don’t want to talk about the LTTE situation. I interviewed the Prime Minister of Sri Lanka and didn’t like him. If you want to talk about role of the media, I am aware of the fact that the media has created some sort of sentiment. There is a feeling as to certain elements, to certain events that catch your imagination. Certain elements, in the case of Libya, have a lot to do with media. Earlier, when you asked about extent of external assessment on, global media is the prime mover informing general perception of issue, but
when it reaches the tipping point (the international consensus depends on al-Jazeera, CNN, BBC). CCP will have a major role in global news. The media creates a deep impression on viewers, those on national TV permeate into national consciousness. When I write an editorial, those global networks have influence. I massage my views around those 3-4 outlets. So, when you talk about media, it is very general. In the future, you have to closely look at those journalists who report on TV. For example, when the Japanese nuclear power plant went awry, Anderson Cooper came in without knowing anything and the Japanese mechanism had to fight against what CNN was reporting. I was in NY during Hurricane Irene, everyone wanted to be Anderson Cooper. Media is the culprit. If you have TV exposure on Somalia on a failed state, the R2P issue will come out. If you have some sort of sustainability, one day 2 seconds, tomorrow 3 seconds. Every day, a few seconds, minutes, will become a pattern. It is that kind of influence that becomes important. As you know, in the international politic, you respond to CNN before you know the facts. There is no science as to how something serves as a tipping point, but if you look at how China responded to Darfur/Congo before the Olympics, China is very good in responding to international media. And because I read Chinese media, I appreciate it. For example: Xinhua Agency is #1 news agency; Reuters, AFP are too expensive. R2P must be viewed in this kind of whole picture.

In seminars on international law, in 2009, I didn’t mention R2P questions, but that doesn’t mean my logical thinking was wrong. As far as I know we need some sort of unilateral offender for R2P to be relevant. But in the case of Sri Lanka, as our Chinese colleagues already mentioned, it was a civil war question over 20 years, so that means there is of course a government military force and a separatist group. However, there is no unilateral offender or unilateral victim, so in that case I thought that the massive violation of war crimes, esp Article 2 of 1977 Geneva Convention, not R2P.

In the last couple of years, are there any situations that have lent themselves to application of the R2P framework globally? Not necessarily in Asia-Pacific…

Regarding North Korea, in the past 2 years, there is a bit of a conceptualization mis-confusion. War crimes—killing of a prisoner of war, for example—have several entry points in terms of responsibility. If you mean individual responsibility, which is very much at the heart of R2P, there are other levels of responsibility. A war crime happening in a country doesn’t necessarily invoke state responsibility, whereas R2P invokes state responsibility. Soldier-soldier killing doesn’t necessarily trigger R2P. It is not so that any war crimes leads to R2P. In this context, R2P is linked to state, which may be linked to individual. These are 2 tracks that can, but not always, converges. The study should be looking at state responsibility, rather than individual criminal responsibility with all the apparatuses of proof. If you start from there, which situations on the globe involve state responsibility? There are certain situations: North Korea is quite evident even though UN doesn’t take it up. Libya…arguably Myanmar, although it hasn’t gone up to the top.

War crimes, at a certain point, might rise to the level of state responsibility. The ex post investigations of SL, which I was involved in, show that the system created widespread and significant levels of atrocities. No disagreement on that, but you had indications that it was clear that at the top of the state officials were responsible. What I mean is that a war crime at the local level doesn’t necessarily involve state responsibility.

R2P situations seem to focus on only the systemic massacres or the government-inspired atrocities, but how about when a government makes the people poorer and poorer. So does that fall within R2P situation? What do we think about that?

In R2P definition, every State has responsibility to protect its people. In that case, failed states might be candidates for R2P. What states fit within such criteria…in Somalia, a failed state, it might be a very close candidate for R2P. As you know, Syria is another. As a colleague said, we don’t dismiss journalism. What I said is a legal point of view, not a political point of view. I would look at it from an area of state responsibility, a breach of international obligation. Now that entry point is more useful to me that an evidentiary one. The entry point is that there is an accumulation of allegations; on the basis of R2P, global action should take place. It is really about an action on the part of the state in terms of “doing” or “failure.” Again, you can open it up, to the threat to p+s…when you deal with state responsibility, you are not talking about criminal responsibility, you are talking about an
international wrongful act. This is slightly looser than an international crime—even though they can be linked.

In regard to R2P, it is quite obvious that there is content, in terms of guiding global actors, but it has its own content coming from an Outcome Document and Security Council resolutions. Finally, what I was just saying is that the contextualization of our actions is the state being responsible, not the individual. They are 2 different things. When you are dealing with a state, you are dealing with various other entry points.

What could be those criteria? You talk about “manifestly” failing, that is hugely ambiguous. Something underlying this project is that leaving it to ad hoc might be detrimental populations; there needs to be some standardization.

Our discussion can focus on R2P prevention, so that we can widen scope of discussion. One of the standards we can use is applying IHR standards, like using pre-existing standards rather than our own, because we can’t design our own R2P standards. NGOs are not very objective in terms of assessing a country’s human rights, so I would rather than use UN standards, which is a recognized institution and it is linked to R2P. The Human Rights Council, the ICJ, the ASEAN Committee on Human Rights—we’d rather use these institutions and standards rather than developing our own because it might not be very objective.

What criteria can we use? It requires multiple considerations: a) a country’s susceptibility to mass atrocity, b) the reports of NGOs, c) victims’ narrative. These varying perspectives are necessary because if we come only from the language of “allegations,” we will focus only on the legal aspect. We have the political and legal language. Also, I would like to raise the point that even if we say that R2P is only applicable to four crimes, those crimes have their own details. Crimes against humanity, for example, can be disaggregated into rape and sexual abuse. So, it is not saying that R2P is creating new ideas. R2P should be linked with existing norms that have already been accepted by international community.

Lastly, I would like to respond to a previous speaker, we have to find some semblance that we can change things. The whole thing about R2P, for me, is about preventing crimes and not looking at it afterwards and saying “whoops, maybe it is or is not an R2P situation.” On the one hand, we have to be passionate about what we are saying; on the other, we have to balance it against things we’ve seen. The third leg is that at the end of the day the aim is for people not to be killed—not just counting the bodies, but that each human life counts.

R2P, and a state’s commitment to its own population, is not a legally binding norm. If we look at a situation, there are many mechanisms to address state responsibility under international law, and that is not covered by R2P. The obligation for North Korea is only to follow treaties and customary international law. Also, if some country was in an R2P situation, not only does that country have a responsibility to protect, international society has its own responsibility to assist. It is not so easy to make a judgment—it has impacts on all of international society.

The question about what situations I think approximate an R2P situation, I am not so sure but we shouldn’t close ourselves to this possibility. First, in terms of Burma: we need to investigate whether there is a threshold that has been breached, whether war crimes have been perpetrated. This involves determining whether rape is a state policy, if this is indeed the case, that to me that reaches a war crime, so that in particular is a situation that we as a region can look into. But I wouldn’t set aside the issue of whether civil society is objective. Civil society is noisy and can be annoying to governments, that is our nature and our role. Sometimes it is not seen as objective and so be it if this leads to policymakers getting attention or policymakers seeing the input of civil society. But, civil society can be objective and I think it will be helpful if both civil society and States try to achieve a mode of engagement or partnership in preventing conflict.

From what I know, Myanmar considers the Karen people stateless, and stateless people don’t invoke state responsibility. From a policy perspective, if the North Korean government is going to go crazy and use nukes, it is not an R2P situation—it is more than that. If we invoke state responsibility, don’t we risk (a nationalistic) backlash? Civil society can be one-track minded, but government has many things to deal with.

Regarding the stateless issue in Burma, in both human rights law and R2P, states are required to protect "populations," not just "citizens" on its territories. The fact that a government has rendered a population stateless doesn’t mean that the population is not entitled to state protection.
I think that any state that commits systematic corruption and exploitation of natural resources must be considered to have state responsibility or for R2P to apply—as a sign that the systematic making of people poorer and poorer is a violation of state responsibility to the people. Land-grabbing by a few families is making people landless throughout South East Asia. 30-50,000 women and children are exported every year to work as housemaids every year. Such governments, such countries, must be under R2P. In Malaysia, we have 50,000 Cambodians working as housemaids, and they suffer a lot from rape and they are physically and mentally tortured—forced to use drugs—and we know that they are being raped like dogs. These people must be protected; R2P must be used against any state that is making people landless and poorer. And then, if they keep doing such bad things against people, the ICC should get involved. We need to give them a red sign and call to action.

One of the things we often hear in consultations about R2P is that the language of responsibility calls in so many responsibilities—good governance, protection, human rights. Those are enduring obligations of states. In the policy area of R2P, we sometimes use the language of R2P to cover all these categories but when we talk about R2P, the agreement is those 4 crimes. Although there are massive human insecurities elsewhere that are states’ responsibilities, we are looking at a distinct subset of human insecurity where the specific norm of R2P is applicable. While there should be a push toward better governance and regional mechanisms on human trafficking, that is a policy area distinct from R2P acts. How do we determine what an R2P situation is and what it isn’t? In terms of Cote d’Ivoire, the international community used the R2P language in a resolution. Why was R2P referenced in Resolution 1975?

We are not addressing that question directly, but are looking at what are early warning signals that can be incorporated into other assessments of other countries in the future. In Cote D’Ivoire, there were signals that gave a clear hint that something was going to happen. There is another related issue: the African Union reacted to Cote D’Ivoire and the outcome of the election has been debated for a long time. That is why in the Security Council Resolution 1975 mentioned R2P. Those words give a rationale for other countries to assist.

If we were to distill that into a hypothetical situation: one criterion is the regional reaction along with opportunity (because they had heavy weapons and were getting them into place) and strong influence by a relatively resourced country? How would you distill the fact that France was very involved in Cote d’Ivoire? When we are talking about that situation, we are talking about military intervention, I mentioned engagement by France and AU because all peaceful means failed—we had to go to the last resort.

We mentioned paragraph 138 referencing incitement—in the case of marking houses of opposition supporters, this looked like incitement to violence. Maybe gathering of armaments, it looked like violence could happen. How do you think we take that into other situations that may be hitting civil society circles—i.e. people calling for R2P actions? Does it require the government to be storing arms? Engaging in propaganda? Inciting violence? How do we take these lessons from a specific to general criteria?

The context is very important, which means that there is a policy and political point, with a legal flavor. In terms of Libya, with the threat of mass atrocities, the way the resolution’s preamble was written, it was a political justification with legal implications. If you want to draw a certain thread, it has to do with a threat of mass atrocity supported by a lack of legitimacy on the part of the government—there is a certain governance angle. . In terms of triggering a policy decision which is justifiable on legal grounds as well, I would reduce it to situations leading to mass atrocities and/or serious risks thereof.

We don’t know all the details about situations on the ground, because in Libya, for example, the situation is quite complicated, so from our perspective, we look to the regional mechanisms for fact-finding analysis. We looked to the Arab League to pass a resolution, as well as for strong statements on the situation, so we have to look at the security of the people based on the perspective of the regional organization. That is why we came to our decision that Libya cannot fulfill its own R2P its own population.

From the perspective of a political science project, the first thing I told my students is that you have to classify your cases. The basic problem we are encountering is to identify the relevant cases in terms of manifest failure and all these things. First, we have to come up with a system of classification. For example, why was Kenya a successful case? Why was there prevention there after
Kofi Annan played a role? So we have to look at both internal and external contexts. With respect to internal conflict a key question is whether there is a legitimacy crisis? Ethnic tensions? Structural problems? There are also cases of hate speech being used as a way to having to deal with the problem internally. The external context is of course very important. In 1970s Cambodia, the external dimension of the problem has to do with the Cold War, where you have the King being ousted by the US Central Intelligence Agency and then the Vietnam War involving Cambodia. So the internal civil war in Cambodia cannot be divorced from the Cold War environment. How was the Vietnamese intervention seen by ASEAN? It was seen as an invasion. It is also important to look at how regional organizations and arrangements play a role in dealing with what is essentially an internal conflict and how that is perceived by the international community. Thus, we need to know the indicators of these different dimensions and in what way the international community weighed mechanisms for “intervention”? Did they focus on diplomacy or did they employ coercive measures, or military intervention? I’m also grappling with the whole concept of “manifest failure.” What are the indicators? These are the basic things we need to consider first before we talk about standards or guidelines.

When we talk about the role of regional organizations, that suggests a mechanism as to how we can figure out R2P indicators or guidelines. Regional organizations, I am hearing, are more reliable because they are closer to the ground. Is that what we are suggesting?

In my opinion, it is not right for us to determine standards for R2P, but through the discussions we identify multiple actors, and each actor has its own unique role and can contribute to, and fulfill, R2P. If we can start examining what role each actor plays, then we have a starting point to figure out how to go about fulfilling obligations.

So are you suggesting that there are different standards for different actors—with NGOs having one set and governments another? Yes. Civil society is an information resource. If you want civil society to be involved to help the government, then civil society needs to have one standard, yes.

One participant suggested not using evidentiary standard, but rather “Risk Indicators.” We want to focus on the preventive aspect; we’ve been talking about state and other actors’ responsibilities. It is very important to identify baseline data, internally and externally, and I would like to reiterate that the internal aspect should incorporate ground narrative—what do the people themselves feel? This is where civil society is critical. What is the media’s role? What is the news that actually comes out in various communities and districts? What are the instances of violence? Is the violence symbolic—as in a threat, or something that is already imminent. I would look at, as a woman’s advocate, instances in violence-prone areas. What is the contextual specificity of a particular conflict that is not necessarily present in other situations? What if we say that conflicts and wars happen, what is the uniqueness of a particular conflict? I would like to raise a concern that is been on the floor: the importance of civil society and the people on the ground I wouldn’t want that to be lost insofar as the building of the risk assessment indicators.

HOW DOES THE PROJECT COMPLIMENT, OR DRAW ON, THE EXISTING BODY OF EARLY WARNING INDICATORS?

I think that the best way is through a step-by-step approach, particularly important are Security Council guidelines, since it is the best organ to implement R2P. Why? Because I think it is very important that so many combinations of standards...There are 4 situations where R2P can be applied.
Secondarily, the situation is not only awkward, but you want to establish imminent danger, and qualitative and quantitative elements, significant and severe...

When we talk about standardization, we have to look at many factors. I would like to include historical background as mass atrocity doesn’t just happen overnight. Look at Cambodia. The other thing we have to take a look at is the descriptive aspect. Civil society is much more knowledgeable about that. We also have to include the media—it plays an important role in dissemination of information. Look at Tunisia, Egypt, the media plays a big role. In March 2011, we took care of Libya.

Convener comments: To what extent does this compliment early warning systems? We are not trying to reinvent the wheel, nor do we want to come up with new early warning indicators. Rather, we are trying to come up with standards that deal with forward-looking prevention and backward looking elements that we apply as criteria. In New York, we are working with the Special Adviser on Genocide Prevention, they talk about early warning, and we talk about this project. But we are not coming up with our own framework. As far as the inter-agency body in the US government, this administration is committed to that, and is committed to developing the R2P principle. The extent to which the US will take a lead, under the current administration is unclear. There is definitely going to be movement but whatever happens next is an open question. For the moment, there are a number of individuals in the government that are quite committed.

I think it is correct that we are looking for options to help policymakers and avoid using the word “evidentiary.” I have 2 or 3 ideas about soft entry points. Operational Guidelines for R2P? Operationalizing R2P? Guiding Principles for Operationalizing R2P. I am totally agreeable to a step-by-step approach; what you can do is to try to have possible indications or indicators for a possible trigger for 4-5 criteria. 1) Facts or situations, based on state action or inaction, 2) Or giving rise to serious violations and/or mass atrocities against the population, 3) or serious threats thereof, meaning potential 4) complimented by the call for protection measures from a variety of relevant actors [including regional organizations and civil society], and 5) possibly linked with a threat to international peace and/or security. To sell it to policymakers, you want to nurture an easy entry point.

If you want another adjective, I would use something like preliminary. Start with that, and basically it will humbly be some indications for some terminology that you are using. Those are in the resolutions. I am not drawing from nill, these words come from- the resolutions (gross violations, etc.). I am trying to pick up words that they’ve used. In paragraph 139 of R2P, you have “manifest failure,” but it is difficult, convoluted language—not easy for the non-English language. “Serious” and “preliminary” are easier to manipulate.

Speaking about commissions of inquiry, I suppose that it still draws the question of how many actors (i.e. civil society actors, media, UN) have to provide allegations of violations? It should be cumulative, from a variety of stakeholders.

QUESTION: WHAT IS THE DIFFERENCE BETWEEN FACTS OR SITUATIONS AND SERIOUS VIOLATIONS?

We need the empirical side, linked with the violent side as an entry point because we want to deal with potential threats and potential issues. Serious threats come from accumulation of all kinds. Initial trigger, in terms of indications, I think.

You make it seem so simple. Take Syria, or embodied in 138/139, and yet it could easily pass the test. The point of this project is to move away from the whim of political actors. The problem you seem to have is with “evidence”—we use evidence in all fields—it is not necessarily legalistic. If we want case-by-case or whim by whim, it is fine, but I doubt we’ll move toward ending mass atrocities. It is not a solution without boundaries. How do you test a situation like Sri Lanka without some sort of standard? This may leave us nowhere then.

I’m terribly open. There is no problem in terms of disagreeing—the premise is to be slightly broader than what seems to have occurred this morning. The goal is to interlink between facts, stakeholders, and consequences. The point is to interact with and encapsulate examples of what has happened in Syria, Ivory Coast, etc. These are just options. What has been offered is to bridge law and policy. These are just little stones bearing in mind principles, stakeholders, etc.

Again, the practical side is to never distrust the voice of the people. We don’t necessarily agree with UN documents. We are respectful of a variety of sources. It is very important to talk to people and to check UN
documents. We work with words, given a psychological, legal, and political context, to convey and give impact, and that is why you probably don’t get R2P in some reports, even though it could be an R2P situation. In fact, R2P appears in the preamble of the Libyan resolution, in the Ivory Coast resolution. Then, you get into the nitty-gritty, where there is not R2P but talk of no-fly zones.

**Conveners Intervention:** Challenge is to balance between words that are empty and those that have teeth. Guiding principles, for example, on internally displaced persons have taken an incredibly long time to take hold, if they have even made progress, because, in part, we chose such diplomatic words. We need words that provide more than empty communication. I agree completely that we should use terminology that is already accepted, but at the same time, some of that language is very purposefully meaningless. And that is the challenge we face.

As you may know, everything that involves the UN Security Council, the traditional players are involved. Maybe we need to get non-traditional actors to address the whole issue of—because the decisions made in Iraq/Afghanistan were made by President Bush, etc—we need a new variety of actors.

I would like to put forward a couple of things. Forgive me, but I don’t really agree with the language that was used—ie. “whim by whim.” When we try to assess risk situations, it is not out of whim, but there is genuine passion and the project of making sure the people are protected. I just want to voice my discomfort with the word of “whim.” That “whim” you perceive to be a “whim” is just really a specificity that you cannot universalize. Listen to those who have actually been in the conflict and devised their own ways of dealing with conflict. Lastly, on commissions of inquiry—the whole idea of that is to address injustices and determine what we can do. What is the point of this project if you don’t accept criticism?

When I look at your concept paper, one of my major concerns is the utilization of the terminology of “standards”. Why? Because I advocated a step-by-step approach, the Security Council is the best actor for implementing R2P. The Security Council is not a traditional organ, it is a political organ. My last concern is with your eventual standards, do you think that the double standards of the Security Council will be diminished?

**Conveners intervention:** One of the results of the guidelines is to help civil society (or the people) so that they can use the guidelines to engage in advocacy. It is a preventative standard; it is not here right now. As of now, you don’t have guidelines, legal or otherwise, so it is very much intended that the standards be used by people on the ground or people in society or other actors. To the extent that the Security Council will be no longer selective—no, but some sort of guidelines can or should justify decision-making. The goals are modest.

It is an empirical, inductive method. The study should start off by saying good things have happened since 2005, and then go into concrete things. If you start inductively, you have a certain justification that impose principles that might turn off Security Council.

**CLOSING REMARKS**

Thank you very much for your participation. I think the project has gotten so many inputs for consideration. We hope to read the draft from Cardozo and we will encourage everyone to give feedback. We hope to encourage you to discuss the draft.
SET OF QUESTIONS FOR R2P EVIDENTIARY STANDARDS MEETINGS

1. Is R2P a part of your national policy in addressing mass atrocity?

2. If not, to what extent does your national policy address mass atrocity?

3. If so, is R2P specifically a part of someone’s portfolio in your government?

4. If so, who? Name, contact information.

5. How is R2P different from conflict prevention?

6. How do you currently determine whether a situation falls within the framework of R2P? What factors do you look for? What sources do you look to?

7. If your government is not specifically engaging with the R2P framework, but does deal with developing mass atrocities, what factors do you look for to determine whether engagement (of any sort) is necessary under the circumstances?

8. What standard of proof do you utilize to assess these standards and the applicability of R2P to a situation?

9. Which situations since 2001 (or before) have you placed under R2P? Which do you think should or should not be placed there?

10. Do you see R2P in political terms? Legal terms?

11. Do you think a uniform set of evidentiary guidelines is possible? Useful? Is it too early without working out i) what R2P requires; ii) for who; iii) for what sort of actions?

12. Assuming that standards could be useful, starting points for stds?
   a. Standard for each of VI(a)-(d)
   b. No standard for (a), standards for (b)-(d)
   c. Standards just for (b)-(c).

13. Sliding scale within Pillar Three Interventions?

14. Different standards for different actors: UN Secretariat, Regional, National?

15. Within the conception of “manifest failure” – one std for whether bad acts occurring? Another for “complementarity” type decisions?
ENDNOTES

A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

1 Mid-term prevention, as envisaged herein, is akin to what has been called “early-late,” (pre-crisis) prevention which seeks to employ measures of operational prevention to halt escalation into violence. See, e.g., I. William Zartman, International Peace Institute, Preventing Identity Conflicts Leading to Genocide and Mass Killings 15 (2010).

2 U.N. Secretary-General, Implementing the Responsibility to Protect, ¶ 11(c), U.N. Doc. A/63/677 (January 12, 2009).

3 For critiques of several well known failures of the international community see e.g., Letter Dated 15 December 1999 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1999/1257 (December 16, 1999); U.N. Secretary-General, The Fall of Srebrenica, U.N. Doc. A/54/549 (November 15, 1999).


12 U.N. Secretary-General, supra note 2, ¶ 3.


14 E.g., the International Coalition for the Responsibility to Protect (ICRtoP), the Global Centre for the Responsibility to Protect (GCR2P) and the Stanley Foundation.


17 U.N. Secretary-General, supra note 2, ¶ 3.

18 U.N. Secretary-General, Early Warning, Assessment and the Responsibility to Protect, U.N. Doc. A/64/864 (July 14, 2010).


[27] The R2P is relevant at all times to a States responsibility to protect its population by preventing the crimes described by war crimes, crimes against humanity and the subsumed act of ethnic cleansing.

[28] The no-fly zone authorized by the Security Council for Libya was sui generis and the purported backlash by at least two of the P-5 likely practically guarantees that this type of military action will not be pursued through the Security for some time to come.

[29] Participants neither reviewed nor approved this Paper.


[41] Darfur, Sudan, The International Criminal Court, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc-002005/related%20cases/icc002052009/Pages/icc002052009.aspx (last visited Jan. 1, 2013) ("On 8 February 2010, Pre-Trial Chamber I refused to confirm the charges against Mr Abu Garda. On 23 April, 2010, Pre-Trial Chamber I issued a decision rejecting the Prosecutor’s application to appeal the decision declining to confirm the charges.").


A COMMON STANDARD FOR APPLYING THE RESPONSIBILITY TO PROTECT

1 Implementing the responsibility to protect, Report of the Secretary-General, A/63/677 para. 50, 12 January 2009.
2 Id.
3 Id.

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EVIDENTIARY STANDARDS FOR THE RESPONSIBILITY TO PROTECT
APPENDIX III: OPTIONS FOR THE STANDARDS

1 UN Charter, art. 99. See, Steven Schwebel, "The Origins and Development of Art. 99 of the Charter – the Powers of the Secretary-General of the United Nations" in JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF JUDGE STEPHEN M. SCHWEBEL (Cambridge: Cambridge University Press, 1994) at p. 243 (discussing Art. 99 as the "prime and unmistakable affirmation of the true character of the office of the Secretary-General"); constituting when blended with Art. 98, the legal basis for the Secretary-General’s political authority. . . It may be argued that Art. 99, furthermore, may be called into play as the authorizing clause of declarations, opinions, proposals and resolutions which the Secretary-General may wish to offer in connection with the work of the Security Council. . . Last, it may be assumed that the Secretary General will choose to exercise his powers under Art. 99 only upon the basis of full and impartial data concerning the matter in point. From this assumption, it follows that the Secretary-General has the right to make such inquiries and investigations as he may think necessary in order to determine whether or not to invoke his powers."

However, Art. 99 has been rarely invoked by Secretaries-General. The most notable instance of its invocation occurred on July 13, 1960, when Dag Hammarskjöld requested the Security Council by letter for an urgent meeting on the basis of Art. 99. See, Letter Dated Jul. 13, 1960 from the Secretary General Addressed to the President of the Security Council, UN Doc. S/4381 ("I wish to inform you that I have to bring to the attention of the Security Council a matter which, in my opinion, may threaten the maintenance of international peace and security. Thus, I request you to call an urgent meeting of the Security Council to hear a report of the Secretary-General on a demand for UN action in relation to the Republic of the Congo.") The Security Council subsequently passed Res. S/4387 (Jul. 14, 1960) and S/4405 (Jul. 22, 1960) on the basis of this initiative.


3 Id. at Rule 22.


5 Id. at para. 28.

6 Id. at para. 11.

7 Id. at para. 13.

8 Id. at para. 15.

9 Annex to the Letter dated 13 June 2006 from the Permanent Representative of Timor-Leste to the United Nations addressed to the Secretary-General (Letter dated 8 June 2006 from the Senior Minister for Foreign Affairs and Cooperation for East Timor, Jose Ramos-Horta to the UN Secretary-General), UN Doc. S/2006/391. The Senior Minister had previously requested the U.N. High Commissioner for Human Rights (OHCHR) to issue a standing invitation to all special procedures mandate holders of the HRC (HRC), and also specifically requested relevant mandates to undertake an investigation into the events of April 28-29, 2006. Given the gravity of the subsequent events in May, Mr. Ramos-Horta revoked this request.

10 Letter dated 17 October 2006 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2006/822, ("I have the honour to refer to Security Council resolution 1690 (2006), in which the Council welcomed my initiative to ask the UN HCHR to take the lead in establishing an independent special inquiry commission in response to the request made by the Government of Timor-Leste in its letter dated 8 June 2006 (S/2006/391), and requested me to keep the Council informed on this matter.") and Annexed Report of the Independent Special Commission of Inquiry for Timor-Leste (Oct. 2, 2006), paragraph 2 ("The Secretary-General responded favorably to the invitation. On 12 June 2006, he requested the United Nations High Commissioner for Human Rights to establish such a commission.")

11 See UN Security Council, Record of the 5457th Meeting, 13 June, 2006, UN Doc. S/PV.5457 at p. 2 ("The President: In accordance with the understanding reached in the Council’s prior consultations, I shall take it that the Security Council agrees to extend an invitation under rule 39 of its provisional rules of procedure to Mr. Ian Martin, Special Envoy of the Secretary-General for Timor-Leste."

Mr. Martin spoke on behalf of Secretary-General Kofi Annan, describing a letter received from the Senior Minister for Foreign Affairs and Cooperation, Jose Ramos-Horta, on behalf of the Government, inviting the UN to establish an independent special inquiry commission "to review the incidents on 28 and 29 April, and on 23-25 May, and other related events on issues which contributed to the crisis. In response to that, Mr. Martin conveyed the Secretary-General’s request to the OHCHR to take the lead in establishing such a commission, and announced his intention to keep the Council informed of his progress."

See also, Security Council, Rule 39 of the Provisional Rules of Procedure (1983), available at http://www.un.org/Docs/sc/scrules.htm ("The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence.")


13 See, Letter dated 17 October 2006 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2006/822 and Annexed Report of the Independent Special Commission of Inquiry for Timor-Leste (Oct. 2, 2006) at p. 8. ("To establish the facts and circumstances relevant to incidents on 28 and 29 April, 23, 24 and 25 May and related events or issues that contributed to the crisis, including issues related to the functioning of the security sector; (b) To clarify responsibility for the above-mentioned events; (c) To recommend measures to ensure accountability for crimes and serious violations of human rights allegedly committed during the aforementioned period, taking into account that the Government of Timor-Leste considers that the domestic justice system, which has the participation of international judges, prosecutors and defense lawyers, should be the primary avenue of accountability for these alleged crimes and violations; (d) To report its findings within three months of its establishment through the United Nations High Commissioner for Human Rights to the Secretary-General and the National Parliament of Timor-Leste.")


16 Letter dated 17 October 2006 from the Secretary General addressed to the President of the Security Council, UN Doc. 2/2006/822, enclosing the report of the Independent Special Commission of Inquiry for Timor-Leste.

17 Letter dated May 4, 2009, from the Secretary General addressed to the President of the Security Council, UN Doc. A/63/855 – S/2009/250. The Board noted that it was not within its terms of reference to address the wider aspects of the conflict in Gaza, its causes, or the situation affecting the civilian populations of Gaza and southern Israel in the period before "Operation Cast Lead" was launched. Its task was limited to considering the nine incidents identified in its terms of reference. See Summary by the Secretary-General of the report of the United Nations

39 See, Note by the President of the Security Council, UN Doc. S/1995/112 (Feb. 6, 1995) at para. 3 (“To hold a series of consultations with the Special Representative of the Secretary-General on the situation regarding political and security developments and his efforts in this regard and on additional ways in which the United Nations might further underpin his efforts.”) To hold talks with the President, the Prime Minister, the leadership of the security forces and the leaders of the opposition parties as well as United Nations agencies, members of the diplomatic corps, non-governmental organizations (NGOs) the Office of the Organization of African Unity (OAU) and other interested parties and convey to them the serious concerns of the Security Council over the recent political developments in Burundi; (c) To stress to all the parties the strong support of the Security Council for the Convention of government of 10 September 1994 and the Government constituted on the basis of it and for the process of national reconciliation, and the Council’s rejection of all attempts to undermine them or to destabilize the region; (d) To submit a report to the Council.”)


41 GA Res. 60/251 (Apr. 3, 2006).

42 Id. at paras 1-3, 5(f).


44 GA Res. 60/251 at para. 5(e). See also, HRC Res. 5/1 at para. 14.

45 Id. at para. 6. See also, HRC Res. 5/1 at paras. 54-57.

46 See, GA Res. 60/251, para. 10 (Mar. 15, 2009) (“Decides further that the HRC shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the HRC with the support of one third of the membership of the HRC.”) HRC Res. 5/1, A/ HRC/RES/5/1 (Jun. 18, 2007), Annex VII, Rules of Procedure at Rule 6 (“The HRC shall hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the HRC.”)

47 Id. at para. 5(e).


49 Id. at para.14.

50 Id. at para. 15.

51 Id. at para. 22.

52 Id. at para. 18


54 UN Charter, Art. 62, paragraph 2 (“The Economic and Social Council may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.”)

55 UN Charter, Art. 68 (“The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”)

56 Ingrid Nifosi, The UN Special Procedures in the Field of Human Rights (Antwerpen-Oxford, Intersentia, 2005), pp. 25-28 (contending that the two Arts. constitute the ‘remote constitutional basis’, the legal foundations, for the establishment of special procedures. “Indeed, special procedures are indirectly derived from Arts. 68 and 62.2 insofar as they are the tools the CHR created and availed itself of, specifically to comply with the new tasks the ECOSOC entrusted to it in Resolution 1235, in accordance with the two aforementioned Arts. Id. at 41-42)


59 GA Res. 60/251 (Mar. 15, 2006), paras. 3 (“decides also that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon” and para. 5(f) (“decides that the Council shall, inter alia, . . . contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies.”)


61 Id.


63 HRC, Letter dated 6 January 2009 from the Permanent Representative of Egypt to the United Nations Office at Geneva, as President of the Arab Group and Coordinator of the African Group, the Permanent Representative of Pakistan to UNOG, as Coordinator of the Organization of the Islamic Conference and the Permanent Representative of Cuba to UNOG, as President of the Non-Aligned Movement, addressed to the President of the HRC, UN Doc. A/HRC/S-9/1 (Jan. 8, 2009)


65 Id. at para. 4. Pursuant to paragraph 10 of G.A. Res. 60/251, and in accordance with rule 6 of the Rules of Procedure of the HRC as contained in the annex to HRC Res. 5/1, the HRC shall hold special sessions, when needed, at the request of a member of the HRC with the support of one third of the membership of the HRC. See, GA Res. 60/251, para. 10 (Mar. 15, 2009) (“Decides further that the HRC shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the HRC with the support of one third of the membership of the HRC.”) HRC Res. 5/1, A/HRC/RES/5/1 (Jun. 18, 2007), Annex VII, Rules of Procedure at Rule 6 (“The Human HRC shall hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the HRC.”)

66 See, HRC, Human Rights in Palestine and Other Occupied Arab Territories, Report of the U.N. Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48 (Sep. 24, 2009) para. 131. The other three appointed members were: Professor Christine Chinkin, Professor of International Law at the London School of Economics and Political Science, who was a member
of the high-level fact-finding mission to Beit Hanoun (2008); Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan and former Special Representative of the Secretary-General on the situation of human rights defenders, who was a member of the International Commission of Inquiry on Darfur (2004); and Colonel Desmond Travers, a former Officer in Ireland’s Defence Forces and member of the Board of Directors of the Institute for International Criminal Investigations. The Office of the U.N. High Commissioner for Human Rights (OHCHR) established a secretariat to support the Mission.


68 Id. at paras. 2-5. Pursuant to paragraph 10 of General Assembly resolution 60/251, and in accordance with Rule 6 of the Rules of Procedure of the HRC as contained in the annex to HRC Res. 5/1, the HRC “shall hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council”. Id. at para. 1.


70 Id. at para. 7.


73 Id at. para. 3-5.


76 HRC Res. 16/25, Situation of human rights in Côte d’Ivoire, UN Doc. A/HRC/RES/16/25 (Mar. 25, 2011), para. 10 (Decides to dispatch an independent, international commission of inquiry, to be appointed by the President of the HRC, taking into consideration the importance of ensuring the equal participation and full involvement of women, to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed in Côte d’Ivoire following the presidential election of 28 November 2010, in order to identify those responsible for such acts and to bring them to justice, and to present its findings to the Council at its seventeenth session, and calls upon all Ivorian parties to cooperate fully with the commission of inquiry)


79 Id. at art. 8, para. 5 (“Subsidiary Bodies and Sub-Committees”).

80 Communique of the 259th Meeting of the PSC, PSC/AHG/COMM (CCLIX) (Jan. 28, 2011) at para. 6 (“Decides, in light of the above, to put in place, under the authority of the African Union, a High-Level Panel for the resolution of the crisis, in conditions which preserve democracy and peace.”)

81 Id.

82 Id.

83 Id. The mandate of the Panel to formulate, on the basis of the relevant AU and ECOWAS decisions, a comprehensive political solution and to submit to the Ivorian parties proposals for a way out of the crisis, as well as to report thereafter on its work to a meeting of Council to be held, as soon as possible, at the level of Heads of State and Government was extended to March 2011. See, Communique of the 263rd Meeting of the PSC, PSC/ PR/COMMCCCLXII (Feb. 28, 2011) at para. 5.

84 Id. at para. 3.

85 Communique of the 265th Meeting of the PSC, PSC/AHG/ COMM.1(CCLXVI) (Mar. 10, 2011) at paras. 7-8

86 Communique of the 261st Meeting of the PSC, PSC/PR/COMM(CCLXI), (Fed. 23, 2011) at para. 6

87 The Committee eventually comprised Presidents Mohamed Ould Abdel Aziz, of the Islamic Republic of Mauritania; Denis Sassou Nguesso, of the Republic of Congo; Amadou Toumani Touré, of the Republic of Mali; and the Ministers representing Their Excellencies Youweri Museveni, Jacob Zuma, President of the Republic of South Africa, and President of the Republic of Uganda, as well as Dr. Jean Ping. See, Communique of the Meeting of the AU High Level Ad Hoc Committee on Libya, Mar. 19, 2011, para. 1.

88 Communique of the 265th Meeting of the PSC, PSC/PR/COMM 2 (CCLXVI), (Mar. 10, 2011) at para. 8 (“Decid[ing] to establish an AU ad-hoc High-Level Committee on Libya comprising five Heads of State and Government, as well as the Chairperson of the Commission; Council requests the Chairperson of the Commission to finalize the consultations undertaken in this respect and to announce the composition of the Committee as soon as possible.”)

89 Id.

90 Id. at para. 7(iii)

91 IHFFC, Statement of the President of the [IHFFC]Professor Michael Bothe before the Third Universal Meeting of National Committees on International Humanitarian Law, available at http://www.ihffc.org/Files/en/pdf/ihffc_statementga0101ext_en.pdf (“The procedure is confidential and the results will not be published by the Commission unless the parties agree. Naming and shaming is not the agenda of the Commission. By ascertaining the facts which are the object of controversy, it will facilitate a return to a situation where the rule of law governs. It is a confidence-building measure.”)

92 International Committee for the Red Cross [ICRC], Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (Jun. 8, 1977), at Art. 90 -- International Fact-Finding Commission, available at http://www.icrc.org/ihl/WebART/470-7501167OpenDocument. “(i) The Commission shall be competent to: (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol; (ii)
facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol. (d) In other situations, the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.


95 Report by Mr. Eric David, Member of the IHFFC, on the Conference on the Fact-Finding Mission sent to the Philippines by Geneva Call to verify the allegations of the Philippine Government concerning the use of land mines by the Moro Islamic Liberation Front, October 26, 2010 available at http://www.ihffc.org/files/en/pdf/geneva_call_en.pdf

96 The complaint stated, in particular, that: “Myanmar’s gross violations of the [Forced Labour Convention] have been criticized by the ILO’s supervisory bodies for 30 years. In 1995, and again in 1996, they have been the subject of special paragraphs in the reports of the Committee on the Application of Conventions and Recommendations, and this year, the Government has also been singled out by the Committee for its "continued failure to implement" the Convention. In addition, in November 1994, the Governing Body of the ILO adopted the report of the Committee it had established to examine the representation made by the International Confederation of Free Trade Unions [ICFTU] against the Government of Myanmar for its failure to ensure effective observance of the Forced Labour Convention. The Government has demonstrated its unwillingness to act upon the repeated calls addressed to it by the ILO’s supervisory bodies to abolish and cancel legislation which allows for the use of forced labor and to ensure that forced labor is eliminated in practice. In these circumstances, the Committee on Applications has again expressed deep concern at the systematic recourse to forced labor in Myanmar. Indeed, it is clear that the practice of forced labor is becoming more widespread and that the authorities in Myanmar are directly responsible for its increasing use, and actively involved in its exploitation.” See, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Geneva, 2 July 1998 [hereinafter, Myanmar Report], para. 1, available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm.

97 International Labour Organization (ILO) Constitution, 15 UNTS 40, available at http://www.ilo.org/ilolex/english/constq.htm. Article 26 of the Constitution of the International Labour Organization reads as follows: “(1) Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles; (2) The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24; (3) If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon; (4) The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference; (5) When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.”

98 Article 24 of the ILO states: “In the event of any representation being made to the ILO by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.”


100 At the same session, the Governing Body determined the following: “(a) that the Government of Myanmar should be requested by the Director-General to communicate its observations on the complaint so as to reach him not later than January 31, 1997 and (b) that in accordance with Art. 26, paragraph 5 [of the ILO Constitution], the Governing Body should invite the Government of Myanmar to send a representative to take part in the proceedings of the Governing Body concerning this matter at its future sessions. When so inviting the Government of Myanmar, the Director-General should inform it that the Governing Body intended to continue its discussion of this case at its 268th Session, which was to take place in Geneva in March 1997.” See, Art. 26, para. 5 of the ILO Constitution. (“When any matter arising out of Art. 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration... and adequate notice of the date on which the matter will be considered shall be given to the government in question.”) In a letter dated December 23, 1996, the Director-General informed the Government of Myanmar of the decisions mentioned above. By a letter dated February 5, 1997, the Permanent Mission of the Union of Myanmar in Geneva transmitted the observations of the Government of Myanmar on the complaint and the further supplementary evidence submitted. See, Myanmar Report at pp. 3-4.

101 Complaint concerning the non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), made by delegates to the 83rd (1996) Session of the Conference under article 26 of the Constitution of the ILO.

102 The ILO Constitution does not lay down rules of procedure to be followed by a Commission of Inquiry appointed under article 26. When the Governing Body decided in March 1997 to refer the complaint to a Commission of Inquiry, it also specified that the Commission was to determine its own procedure in accordance with the provisions of the Constitution and the practice followed by previous commissions of inquiry. Myanmar Report at p. 7, para. 12.

103 GB 268/14/8
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About the authors
Sheri P. Rosenberg at Cardozo Law is the director of Holocaust, Genocide and Human Rights Program and Professor Associate of Clinical Law