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**Sompong Sucharitkul Center for Advanced International Legal Studies  
Presents**

***International Law in a Multipolar World***

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**Room 2203, 536 Mission Street, San Francisco, CA 94105**

**Keynote Speaker:**

***Professor Dr. Michael van Walt van Praag***

Professor van Walt van Praag is a visiting Professor at the Institute for Advanced Study at the School of Historical Studies in Princeton, NJ; Executive President of Kreddha, an international non-governmental organization which he founded in 1999 for the prevention and resolution of violent intra-state conflicts; and an international lawyer specializing in intra-state conflict resolution. He previously served as advisor and consultant to numerous governmental and non-governmental organizations in peace talks in regions ranging from Chechnya to Papua New Guinea. Professor van Walt van Praag has held visiting teaching and research positions at Stanford, UCLA, Indiana, Jawaharlal Nehru University, and Golden Gate University School of Law.

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# THE MISSING PEACE: International Law of Intrastate Relations

Keynote Address

## The 23rd Annual Fulbright Symposium on International Legal Problems: International Law in a Multipolar World

Sompong Sucharitkul Center for Advanced International Legal Studies, Golden Gate University

San Francisco, April 12, 2013

Michael van Walt van Praag<sup>1\*</sup>

### Introduction

A few years ago, Professor Cherif Bassiouni, a leader in the field of international criminal law, spearheaded a collaborative research project on conflicts and justice worldwide.<sup>2</sup> The team of 41 researchers found that 313 conflicts had taken place between 1945 and 2008, which resulted in between 92 and 101 million people killed.<sup>3</sup> Twice as many as in the First and the Second World War put together.<sup>4</sup> Of course the figure has gone up since 2008, with the conflicts in Libya, in Syria, in Mali, and the ongoing ones in Afghanistan, Iraq and elsewhere. And it does not include people who died as a consequence of conflicts, which would bring the total number to between 184 and 202 million.<sup>5</sup>

This number is especially significant considering the enormous effort that has been made to prevent and resolve conflicts, or wars, starting in 1944, including the founding of the United Nations, with all its agencies and the International Court of

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<sup>1\*</sup> The author wishes to thank Miek Boltjes for her input and assistance in the preparation of this paper.

<sup>2</sup> *The Pursuit of International Criminal Justice: a World Study on Conflicts, Victimization, and Post-conflict Justice*, M. C. Bassiouni, ed. (Antwerp ; Portland [Or.]: Intersentia, 2010).

<sup>3</sup> The criteria used for evaluation of armed conflicts included in the Bassiouni study are those of the Uppsala Conflict Data program and the Heidelberg Institute for International Conflict Research and qualified by the terms of Article 8(2)(f) of the Statute of the International Criminal Court. *The Pursuit of International Criminal Justice: a World Study on Conflicts, Victimization, and Post-conflict Justice*, M. C. Bassiouni, ed (Antwerp ; Portland [Or.]: Intersentia, 2010), Vol. 1, p.75, 79.

<sup>4</sup> Bassiouni, "Wolfgang Friedmann Memorial Award Address." *Columbia Journal of Transnational Law* 51, no. 1 (November 12, 2012), p. 5.

<sup>5</sup> *The Pursuit of International Criminal Justice: a World Study on Conflicts, Victimization, and Post-conflict Justice*, M. C. Bassiouni, ed. (Antwerp ; Portland [Or.]: Intersentia, 2010), Vol. 1, p.6.

Justice and the development of a new body of international law. How might our failure to prevent or swiftly resolve these conflicts be explained?

A closer look reveals that the overwhelming majority of armed conflicts in the past decades have been, and continue to be, *intrastate* as opposed to conflicts *between* states.<sup>6</sup> Most of these conflicts relate to the power to govern a state or a portion of that state, and their underlying causes often involve the violation of human rights, including issues of linguistic, cultural or religious rights of certain groups of the population, the abuse of power by rulers and questions of political representation, land rights and uneven distribution of resources.<sup>7</sup>

One type of intrastate conflict is fought over who wields power in the central government of the state, often pitting an opposition party or rebel movement against an incumbent determined not to relinquish or share the instruments of power. Another type involves the government of a state on one side and a group within that state, be it a people, an indigenous people, a tribe, a minority or the population of a distinct region within the state (referred to hereinafter collectively as ‘population group’), on the other. Such conflicts are identity based and parties fight over the exercise of authority, for example in the political, economic, cultural or religious spheres. They fight over control over territory, environmental issues and security matters and, more broadly over autonomy and -- in some cases-- independence. Both types of conflict often also concern ownership or exploitation of natural resources and may involve powerful transnational corporations not just as stakeholders, but as actual parties to the conflict. It is this second type of conflict --that between a government and a population group—that is the focus of my remarks today, although some of the points I will make may be relevant to both types of intrastate conflict.

I am not telling you anything new of course, when I say that the current international legal system is not sufficiently equipped to address these types of conflicts. We know that, in particular, two important pillars of that system, which is

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<sup>6</sup> Francesc Vendrell assesses that 90% of all armed conflicts since WWII have been intrastate. ‘The role of Third Parties in the Negotiation and Implementation of Intrastate Agreements’ in *Implementing negotiated agreements : the real challenge to intrastate peace* (M. Boltjes ed., The Hague, T M C Asser Press 2007), p.193. This is supported by data generated by the Uppsala Conflict Data Program (See [www.pcr.uu.se/research/ucdp/datasets](http://www.pcr.uu.se/research/ucdp/datasets) ) and the Stockholm International Peace Research Foundation (SIPRI). Over the decade 2001–2010, only 2 of the total of 29 major armed conflicts have been interstate. *SIPRI Yearbook 2011: Armaments, Disarmaments and International Security* (Oxford, 2011) Appendix 2A. Similarly, from 1990 to 2002, of the 58 major conflicts recorded in 46 locations around the world, only three were interstate. 55 were intrastate. *SIPRI Yearbook 2003: Armaments, Disarmaments and International Security* (Oxford, 2003) p. 109. If all armed conflicts are included in the survey, a similar picture emerges.

<sup>7</sup> See for discussions of the sources of intrastate conflicts, Zartman, ‘Sources and Settlement of Ethnic Conflicts’, in , A. Wimmer, R. Goldstone, D. Horowitz, U. Joras, C. Schetter eds, *Facing Ethnic Conflicts, Towards New Realism* (Lanham, 2004) pp. 141 -145;

based on the core concept of the sovereignty of territorial states, are detrimental to the prevention and resolution of intrastate conflicts. Namely: 1) the exclusive right of states to participate as actors in the system and 2) the prohibition of interference in the internal affairs of those states.

Much has been done and achieved that makes these principles less uncompromising and therefore opens the way to addressing intrastate conflicts more effectively. The application of aspects of international humanitarian law to non-international armed conflicts and the expansion of Human Rights law and the growth of instruments for its application are examples. So are the growing body of minority rights standards and the emerging indigenous peoples rights law, which are of direct relevance to the kinds of intrastate conflicts we are concerned about here. And most recently, the adoption of the statute of the International Criminal Court and of the Responsibility to Protect (R2P) principle, all serve to expand international law into what was once considered the exclusive jurisdiction of sovereign states.

But we are not done yet. Effective prevention and resolution of intrastate conflicts requires operating from a different paradigm as we further modify and expand international law. A paradigm where not the state and its sovereignty, but the safety and wellbeing of individuals and population groups are central, and where states and their governments are not only viewed but also treated purely as instruments to serve this central purpose. Operating from this paradigm demands the empowerment of individuals and population groups. It also leads to attention for accountability of non-state actors, including corporate financial actors and transnational corporations, that contribute to the causes of violent conflicts or to their prolongation. It is my thoughts on the changes in international law and the nature of access to international mechanisms, including courts, that flow from this paradigm, that I want to share with you today.

In the political sphere, the shift away from unipolarity seems evident. But what will emerge in its place is not clear, and a meaningful discussion of multipolarity would require agreement on the meaning of this contested term and its many ramifications. Poles have primarily been defined by military, economic and strategic power and influence, but an argument can be made that other criteria, such as cultural - and some have suggested moral ones - count as well.<sup>8</sup> Similarly, the polarity discussion has largely focused on states, but as Richard Higgott and others have argued, poles do not need to be states and might well include centers and networks of power or influence of a different kind, such as corporate and financial

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<sup>8</sup> For a discussion of multipolarity see Herolf, 'Multipolar World at the End of the First decade of the 21<sup>st</sup> Century: How About Europe?' in *Central European Journal of Public Policy* Vol.5, NO. 1 (June 2011). See also Levy and Nevell, 'Multinationals in Global Governance,' in *Transformations in Global Governance: Implications for Multinationals and Other Stakeholders*, S. Vachani ed. (Cheltenham / Northampton, 2006) pp. 1460167.

ones.<sup>9</sup> I will not attempt here to provide an answer or a theory but will limit myself to suggest that multipolarity of any kind is likely to entail uncertainty if not instability.

In relation to states, if unipolarity encouraged the sole super power to act with less regard for international law, it is conceivable that in a multipolar world more states will be tempted to do so. Unless other poles have an interest and capability to prevent or censure such behaviour or international law is strengthened in ways that respond to the new realities that are emerging. Either way, international law, in my opinion, will not lose its importance provided it is able to make itself relevant to the aspirations that are most critical to the people in the world, their safety and wellbeing. In order to make itself relevant in this way, international law needs to shift from a focus of protecting the state, to the extent this no longer serves us, to protecting the people from the unfettered self interest of ruling elites of states, who are often what we really should talk about when we refer to 'states', power, decision-making, and even interstate relations.

At any rate, I believe that we are entering a period in which the importance of the role of international law and its preeminence should not be *allowed* to decline provided it can *retain* and, more importantly, *enhance* its relevance. At a basic level, one of the most important functions of international law is to be in the service of the maintenance of peace among human communities, however we define, structure and label them. In other words, international law exists for an important part to prevent the outbreak of violent conflict and to manage and resolve non-violent conflict. In order to do so effectively, it needs to be equipped to address the conflicts we experience in the world today.

I have chosen to speak about international law of intrastate relations and, in particular, about intrastate conflict prevention and resolution, because this is my area of specialization. I would like to take the opportunity I have been given of addressing a distinguished international gathering such as this one to share my thoughts on this topic in the hope of persuading you of the usefulness of the approach I am proposing or of provoking some discussion that may generate new ideas. Equally important to me, judging from the backgrounds of the distinguished speakers today and the topics of their presentations, I am eager to learn a great deal from all of you.

It occurred to me when reading and thinking about the meaning of a multipolar world, that it is tempting to think in Machiavellian terms of grand strategic moves of major competing players on the world's chess board. To think, therefore, only of the exercise of power and influence outside of the player's own boundaries and functional spheres. But the conflicts we experience today are relatively local, and

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<sup>9</sup> R. Higgot, 'Multi-polarity and trans-Atlantic relations: Normative aspirations and practical limits of EU foreign policy. *Garnet Working Paper* 76 (2010).

therefore risk being overlooked or dismissed in the grander scheme of things. Moreover, these conflict do not directly affect most of your lives or my life, nor those of most political decisionmakers, international officials, top corporate leaders and elites in a large part of the world. Some of us have of course had deeply personal experiences of such conflicts. Even so, our society and environment – certainly here—does not encourage a feeling of connectedness to, let alone co-responsibility for, the tremendous suffering and misery caused by war.

For this reason too, I felt it important to focus my remarks today on this topic. I am hoping that by doing so you will incorporate some of the issues I am addressing in your deliberations today and in your thoughts on solutions for today's emerging multipolar world tomorrow.

### **The changing face of the law**

When it comes to conflicts within states, international law has and continues to undergo change.

International Humanitarian Law, also called the Law of War or the Law of International Armed Conflict, has progressively expanded its field of application. The narrow concept of war was broadened with the 1949 Geneva Conventions' common Article 2 and again with the 1977 Additional Protocol I to the Geneva Conventions, which added wars of national liberation to its application.<sup>10</sup> And Additional Protocol II explicitly extends the application of essential aspects of humanitarian law well beyond the provisions of Article 3 common to the four Geneva Conventions.<sup>11</sup>

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<sup>10</sup> Article 2 common to the four Geneva Conventions signed at Geneva on August 12, 1949, 75 U.N.T.S. 31, 75 U.N.T.S. 85, 75 U.N.T.S. 135, 75 U.N.T.S. 287. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. (The four Geneva Conventions and Additional Protocols, as well as their Commentaries can be accessed at [ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp](http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp).

The protocol stipulates that the four Geneva Conventions are also applicable to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly relations and Co-operation among States in accordance with the Charter of the United Nations." Article 1(4). Less clear is when the rules of international armed conflict apply to an internationalized internal conflict.

<sup>11</sup> Article 3 common to the four Geneva Conventions provided for application of minimal standards of humane treatment for persons not taking part in hostilities in conflicts "not of an international character;" Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. See S. Vité, "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, 91 *Int'l Rev. of the Red Cross* 873, March 2009, p. 76-80.

Human rights law is of course one of the most basic ways in which international law ‘involves itself’ in the area of relations between the state and its citizens. It therefore represents a narrow exception to the exclusive domestic jurisdiction of states. Since the adoption of the Universal Declaration of Human Rights, this exceptional area has been broadened to include both individual and – to a minimal extent-- collective rights.<sup>12</sup> It has, moreover opened the way for individuals to be recognized as subjects of international law to a very limited degree, as holders of certain rights, and also for equally limited participation in international fora by non-governmental organizations (NGOs) representing some of their interests.

The international community has been very reluctant since the Second World War to recognize group identities and rights as well as to allow access by minorities and peoples to international organizations and mechanisms.<sup>13</sup> Instead, it has opted for improving *individual rights* of persons belonging to minority groups.

The 1992 Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities<sup>14</sup> established rudimentary standards for minority protection, based and building on the rights of individuals belonging to minorities provided for in Article 27 of the ICCPR.<sup>15</sup> As the rising number of conflicts in the territory of the former Soviet Union and the former Yugoslavia in the 1990’s revealed the critical importance of the management of relations between majority and minority population groups within states, this area of the law and diplomacy received increased attention. The Organization on Security and Cooperation in Europe (OSCE), in particular, worked on improving the standard setting and actively engaged in the prevention and resolution of conflicts involving minorities within states where this would endanger international peace.

The standards relating to national minorities adopted by the OSCE’s Conference on the Human Dimension in 1990<sup>16</sup> and subsequent sets of recommendations developed under the auspices of the OSCE High Commissioner on National Minorities on language and education rights of national minorities<sup>17</sup> and on their

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<sup>12</sup> For a critical appraisal of the UN’s framework for protecting “individual and group identities”, see Darren Zook, ‘Decolonizing Law: Identity Politics, Human Rights, and the United Nations,’ 19 *Harv. Hum Rts. J.* 95 2006.

<sup>13</sup> This, in contrast with the minority regimes in Europe between World Wars I and II.

<sup>14</sup> UNGA res. 47/135 of 18 December 1992

<sup>15</sup> International Covenant of Civil and Political Rights, 999 U.N.T.S. 171.

<sup>16</sup> Copenhagen Document of the Conference on the Human Dimension of the CSCE 1990, Part IV.

<sup>17</sup> The Hague Recommendations Regarding Education Rights of National Minorities (1996) and the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998), both published by OSCE High Commissioner on National Minorities, The Hague, 1996 and 1998, respectively.

effective participation in public life,<sup>18</sup> have all contributed to an understanding of the importance of recognizing the legitimate needs and interests of distinct population groups within states. The High Commissioner's mandate<sup>19</sup> and his intensive silent diplomacy to prevent the outbreak of violent conflicts involving minorities as well as the involvement of the OSCE in efforts to resolve the conflicts in Chechnya, South Ossetia, Abkhazia, Nagorno Karabakh and Transnistria, are further evidence of the recognition, at least within the OSCE area, of the importance of this issue to the maintenance of peace.

Within the UN framework, attention for the place and rights of minorities in states also increased and very limited access has been provided by the creation of the Forum on Minority Issues<sup>20</sup> and by the appointment of the Independent Expert on Minority Issues.<sup>21</sup>

A similar development has taken place with respect to the law regarding the rights of indigenous peoples and their relations with the states they live in. The adoption by the UN General Assembly, after decades of work in the various human rights bodies of the UN, of the Declaration on the Rights of Indigenous Peoples in 2007<sup>22</sup> was a milestone in the recognition of the distinct rights and place in international law of indigenous peoples. In contrast with the law relating to minorities, indigenous peoples are recognized as distinct groups that possess rights, and therefore have a certain collective international legal personality.<sup>23</sup>

The creation of the Permanent Forum for Indigenous Issues<sup>24</sup> and the appointment of the UN Special Rapporteur on the Situation of Human Rights and Fundamental

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<sup>18</sup> The Lund Recommendations on the Effective Participation of National Minorities in Public Life, September 1999, Published by the High Commissioner on National Minorities, the Hague, 1999.

<sup>19</sup> Helsinki Decision of the OSCE, 10 July 1992 establishing the position of High Commissioner on National Minorities, in *CSCE Document 1992; The Challenges of Change*, Helsinki Decisions, II.

<sup>20</sup> Established by the Human Rights Council res. 6/15 (28 September 2007). It meets for an annual two-day session and replaces the former Working Group on Minorities was established in 1995 pursuant to Economic and Social Council res. 1995/31 of 25 July 1995.

<sup>21</sup> Mandate established by the UN Commission on Human Rights res. 2005/79 on 21 April 2005.

<sup>22</sup> UNGA Res/61/295, 13 September 2007. Another instrument of importance in this respect is the ILO Convention 169, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989).

<sup>23</sup> W.T Worster, International Legal Personality of Non-State Actors, 42 *Brook. J. Int'l L.* 207 (2016), pp. 221-29.

<sup>24</sup> The UN Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council (ECOSOC), created in 2000, by ECOSOC Resolution 2000/22 with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.

Freedoms of Indigenous Peoples<sup>25</sup> have both created avenues for limited access of indigenous peoples' organizations and representative bodies to the UN system. Although these mechanisms do in practice serve to draw attention to potential conflicts involving indigenous peoples, neither of them is mandated to engage in conflict prevention or resolution.

A recent development that has pushed the boundaries of international law into the sphere of domestic jurisdiction, is the creation of the International Criminal Court (ICC).<sup>26</sup> The ICC's statute provides it with jurisdiction where genocide, war crimes and crimes against humanity, as well as the crime of aggression are committed.<sup>27</sup> The inclusion of these crimes under international law, especially the first three that are most relevant to the topic of this lecture, is of course not new, given the Genocide Convention and the precedents of the Nuremburg and Tokyo Tribunals and more recently the tribunals on Former Yugoslavia and Rwanda. Nevertheless, the creation, by treaty, of a permanent court with the competence to prosecute and try suspects, including government officials while in office, for crimes committed within their state is groundbreaking –despite the reaffirmation of the principle of non-intervention in the preamble. With respect to war crimes, the Rome Statute makes specific provisions for protracted intrastate armed conflicts.<sup>28</sup> It is important in this respect that the procedure for seizing the Court is not state focused only, since the prosecutor can investigate crimes *proprio motu* on the basis of information available to her or him, furnished by non-state parties and others.<sup>29</sup>

And the encroachment does not end there. One of the potentially most far reaching developments has been the unanimous adoption of the Responsibility to Protect (R2P) principle at the 2005 World Summit.<sup>30</sup> Its re-affirmation in subsequent UN

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<sup>25</sup> Currently referred to more simply as the Special Rapporteur on the rights of indigenous peoples. First appointed by the UN Commission on Human Rights in 2001,. The Special Rapporteur's mandate was renewed by the Commission in 2004 and again by the UN Human Rights Council in 2007, under UN Human Rights Council Resolution 6/12, 28 September 2007.

<sup>26</sup> Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S. 38544 (in force 1 July 2002) Referred to as 'Rome Statute'.

<sup>27</sup> Rome Statute Art. 5.

<sup>28</sup> Rome Statute Article 8.2(d) and (f) making sections of Article 8 applicable to conflicts that are "not of an international character." Article 8.2(f) describes such conflicts in more detail as those "that take place in the territory of a state when there is protracted armed conflict between government authorities and organized armed groups or between such groups."

<sup>29</sup> Rome Statute Art 13, 15.

<sup>30</sup> UN General Assembly (UNGA), "2005 World Summit Outcome," UNGA/60/1, October 24, 2005, paras. 138-40.

Security Council resolutions<sup>31</sup> and, following the release of the Secretary General's report on the matter<sup>32</sup>, by the General Assembly<sup>33</sup> since then, has arguably made this a norm that profoundly affects the seemingly unassailable principle of non-intervention in the domestic affairs of sovereign states. It holds the promise to prevent at least the more extreme and massive assaults by a state on the people within its boundaries as well as by non-state actors where the state is incapable or unwilling to protect its people.

The Responsibility to Protect principle, as reflected in the UN World Summit Outcome Document and relevant Security Council and General Assembly resolutions, consists of the following basic principles: (1) that each state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and therefore must prevent these crimes, a task which the international community should "encourage and help" states to fulfill;<sup>34</sup> and (2) that the international community has the responsibility to take timely action to protect populations from those crimes, and where necessary even to intervene militarily (under Chapter VII of the Charter) where the authorities of the state in question are "manifestly failing to protect" them.<sup>35</sup>

This formulation is more limited than that proposed by the International Commission on Intervention and State Sovereignty (ICISS),<sup>36</sup> on which the UN debates and decisions were based, but both affirm the principle that state sovereignty entails responsibility and that prevention is the most important dimension of this responsibility. The conclusions of the ICISS, however, that "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of nonintervention yields to the international responsibility to

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<sup>31</sup> UN Security Council (UNSC), S/RES/1674 (2006), April 28, 2006; UNSC, S/RES/1894 (2009), November 11, 2009.

<sup>32</sup> Ban Ki-moon, "Implementing the Responsibility to Protect," Report of the Secretary General A/63/677 (2009).

<sup>33</sup> UNGA, "The Responsibility to Protect," A/RES/63/308, October 7, 2009.

<sup>34</sup> UNGA, 'World Summit Outcome 2005,' Resolution A/Res/60/1 (October 24, 2005), para. 138.

<sup>35</sup> UNGA, 'World Summit Outcome 2005,' Resolution A/Res/60/1 (October 24, 2005), para. 139.

<sup>36</sup> International Commission on Intervention and State Sovereignty, (hereinafter, 'ICISS'), *The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa 2001).

protect”<sup>37</sup> was narrowed by the UN member states to apply only to those mass atrocity crimes enumerated in the UN R2P-related resolutions.<sup>38</sup>

This being as it may, and although the UN reaffirmed the principles of state sovereignty and non-intervention in its resolutions, it has at the same time asserted the conditionality of these principles on the state’s ability and willingness to protect.<sup>39</sup> And the International Court of Justice, for its part, has since confirmed that states have a positive legal obligation to take all measures reasonably available to them to prevent such crimes, at least in relation to genocide.<sup>40</sup>

Because the R2P norm rests and builds on existing international law, some scholars have suggested that in substance it provides little that is new. A mandate for the international community to intervene, even militarily, already existed under Chapter VII of the Charter,<sup>41</sup> and they question whether the R2P principle even affects the law on humanitarian intervention.<sup>42</sup> In my view, the *explicit* articulation of the responsibility of states to protect their own populations as “a defining

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<sup>37</sup> *Idem*, p. xi.

<sup>38</sup> These crimes are also those as defined in Articles 6-8 of the International Criminal Court Statute (Genocide, war crimes, and crimes against humanity including ethnic cleansing). This was also done by placing emphasis on international *assistance* to states to enable them to fulfill their responsibility to protect and *downplaying* the role of armed intervention. A. Bellamy, ‘The Responsibility to protect – Five years On,’ *24 Ethics and Intl Affairs* 2 (2010) p. 143-44.

<sup>39</sup> M. Payandeh, ‘With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Lawmaking,’ *35 Yale J. Int’l L.* 469 2010, p. 493. He disagrees with the approach, which he considers short sighted, on the grounds that the principle of non-intervention is not just owed to individual states but to the international community as a whole, p. 494. *See also* Fernando Tesón, who argues this approach is not new. F.R. Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (3d ed. 2005), p. 178.

<sup>40</sup> ICJ, *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)*, General list no. 91 (February 26. 2007), paras. 428-38.

<sup>41</sup> *See*, Cuyckens and De Man, ‘The Responsibility to Prevent: On the Assumed Legal Nature of Responsibility to Protect and its Relationship with Conflict Prevention,’ in *Responsibility to Protect: From Principle to Practice* (J. Hoffmann and A. Nollkaemper eds., Amsterdam: Pallas Publications, 2012) pp.112-114; F.R. Tesón, *supra* note 38. *See also* M. Payandeh, *supra* note 38, p. 495-96.

<sup>42</sup> *See* M. Payandeh, *supra* note 38, p. 493. Amnéus, ‘Has Humanitarian Intervention Become Part of International Law under the Responsibility to Protect Doctrine?’ in *Responsibility to Protect: From Principle to Practice* (J. Hoffmann and A. Nollkaemper eds., Amsterdam: Pallas Publications, 2012) pp.157-165; Welsh, ‘The Responsibility to Protect and Humanitarian Intervention’, in *Responsibility to Protect: From Principle to Practice* (J. Hoffmann and A. Nollkaemper eds., Amsterdam: Pallas Publications, 2012) pp.185-188.

attribute of sovereignty and statehood”<sup>43</sup> *is very significant*,<sup>44</sup> and the R2P principle arguably provides the Security Council the mandate to intervene in internal situations *on humanitarian grounds alone*, rather than having to show that a situation endangers international peace before it can act.<sup>45</sup> This is of considerable consequence. Having said that, of course the R2P norm is a new and still emerging norm, and its interpretation and exercise is still a subject of considerable debate.<sup>46</sup>

And finally, the current negotiations for the conclusion of the Arms Trade Treaty at the UN headquarters in New York<sup>47</sup> represent yet another step in restricting the actions of sovereign states in the interest of protecting people from abuse by their government authorities.

What we may be witnessing is a shift from the “persistence of the core idea, going all the way back to the Peace of Westphalia in 1648, that sovereignty means, above all else, control of a state’s territory, unfettered by external constraints,”<sup>48</sup> to the concept of the state as an instrument at the service of its people and its sovereignty as a responsibility to the people, and specifically a responsibility to protect them. But, as I said before, we are not there yet.

The founders of the UN were very preoccupied with preventing states from waging war against each other and took far-reaching steps to restrict their freedom to this end. But, as Gareth Evans points out, “notwithstanding all the genocidal horrors inflicted during the Second World War, they showed no particular interest in the question of what constraints might be imposed on how states dealt with their own

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<sup>43</sup> “The protection of populations is a defining attribute of sovereignty and statehood in the twenty-first century.” Ban Ki-moon, “Implementing the Responsibility to Protect,” Report of the Secretary General A/63/677 (2009), para. 14.

<sup>44</sup> Liebllich, ‘Consensual Intervention and the Responsibility to Protect; Responsibility to Protect’s Place within the Legal Framework of Consensual Intervention in Internal Armed Conflict’ in *Responsibility to Protect: From Principle to Practice* (J. Hoffmann and A. Nollkaemper eds. Amsterdam: Pallas Publications, 2012) pp. 139-150.

<sup>45</sup> M. Payandeh, *supra* note 38, p. 496.

<sup>46</sup> *See for a discussion*, A. Bellamy, ‘The Responsibility to protect – Five years On,’ 24 *Ethics and Intl Affairs* 2 (2010). Its invocation is also erratic and contested. Thus Russia’s 2008 invocation with respect to its military intervention in South Ossetia, Georgia and France’s call for its application to provide humanitarian assistance to the victims of Cyclone Nargis in Myanmar in 2008 were widely rejected. On the other hand, the doctrine’s application to Dafur (Sudan) since 2003 and Kenya (2007-08) is rarely challenged.

<sup>47</sup> UNGA A/CONF.217/2013/L.3, containing the final draft for adoption by the Final UN Conference on the Arms Trade Treaty, 27 March 2013.

<sup>48</sup> G. Evans, Gareth J. *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*. (Washington, D.C: Brookings Institution Press, 2008), p. 21

populations.”<sup>49</sup> This may be a little harshly stated given the adoption of the Universal Declaration of Human Rights at that time, but the point is otherwise well taken. And so the “incredibly tenacious belief”<sup>50</sup> in the principle that “nothing contained in the [UN] Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state,”<sup>51</sup> has prevailed since. Kofi Annan tried to break through the sovereignty-intervention debate by articulating a reconceptualization of sovereignty in terms of ‘individual sovereignty’ and of the state as an instrument at the service of its people,<sup>52</sup> a notion I am expanding on here because his articulation conspicuously leaves out groups, suggesting an assumption that all that is needed is protection of individuals.

The attention since the adoption of the UN Charter has been on individual rights and the need to protect the individual due to the political sensitivity of the issue of group rights. Yet this is something we cannot afford to continue to skirt, especially in view of the role group identity plays in intrastate conflicts. And let us not forget that the whole concept of genocide and ethnic cleansing, which are key crimes which the R2P and the ICC were created to address, are based precisely on the recognition of the importance of protecting the group. Indeed, the very concept of ‘genocide’ developed by Raphael Lemkin and which lies at the base of the law of genocide (codified in the Genocide Convention) “captured some of the momentous quality of actions that are aimed not just at destroying individuals but whole national, racial, ethnic, or religious groups –targeting, as Lemkin put it, the essential foundations of their life as such groups.”<sup>53</sup>

Having said that, the reference in the UN resolutions to the responsibility to protect “populations” of a state, in the plural,<sup>54</sup> and the UN Secretary General’s Special Adviser on the Prevention of Genocide’s characterization of genocide as an extreme

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<sup>49</sup> Idem.

<sup>50</sup> Idem.

<sup>51</sup> UN Charter Article 4(7).

<sup>52</sup> Kofi Annan, ‘Two Concepts of Sovereignty,’ *The Economist* 352 (September 18, 1999) pp.49-50.

<sup>53</sup> G. Evans, Gareth J. *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*. (Washington, D.C: Brookings Institution Press, 2008) p. 20. Note, that genocide as defined in the Genocide convention (which is only part of Lemkin’s concept of genocide, which included cultural genocide), i.e. the legal definition of genocide “is so narrow in scope that there are very few kinds of behavior, by either individuals or governments, that will be actually caught by it.” Evans p. 20, This was made very clear by the ICJ decision in Bosnia v, Serbia, where the Court found that Serbia had not itself committed genocide in Srebrenica –though it did have some culpability for failing to prevent it. Idem.

<sup>54</sup> “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.” Para 138

form of identity-based conflict,<sup>55</sup> may suggest some acknowledgement of the importance of population groups in addressing the causes of conflicts and therefore also in their prevention and resolution.

Since so many intrastate conflicts, and the atrocities and suffering they bring, take place between states and peoples or minorities or between population groups within states and are, at the core, identity based, we *must integrate* the protection of population groups into the changes taking place in international law. Not just where this manifests as mass atrocity crimes of genocide and ethnic cleansing, but all attacks on population groups –whether cultural, religious, ethnic, linguistic, racial, or other—because of who they are.<sup>56</sup> And by the same token, the responsibility of the state to protect individuals should not be limited to mass atrocity crimes either.

The concepts and principles *underlying* the R2P must therefore be considered universally applicable and not only tied to the somewhat exceptional situations of ‘mass atrocity crimes’ that warrant intervention under the R2P adopted by the UN.

## **Prevention**

There is consensus that prevention is of fundamental importance.<sup>57</sup> What this necessarily entails is addressing the root causes of conflicts before they turn violent, even before they manifest at all if possible. Not waiting until the storm of mass atrocities has gathered. What prevention also entails, is addressing the causes of conflict in peace processes, in the content of peace agreements and in the implementation of those agreements. And I wish here once again to draw attention, albeit briefly, to the importance of granting access for population groups to international conflict prevention and resolution mechanisms and, more broadly, to decision-making at the international level. So let me say a couple of things in this regard.

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<sup>55</sup> Deng, ‘Contextualising the Prevention of Genocide,’ in *Responsibility to Protect: From Principle to Practice* (J. Hoffmann and A. Nollkaemper eds., Amsterdam: Pallas Publications, 2012) p. 338.

<sup>56</sup> While firmly securing the objective of ending mass atrocity crimes, our task as lawyers, as politicians, as educators, as human beings, should not be limited to mass atrocity crimes, however they are defined. For however necessary it may seem today to distinguish between mass atrocities and other atrocities for purposes of the entrenchment of R2P in international law and practice, any distinction is arbitrary. It is impossible to tell victims of one atrocity that theirs is not big enough to warrant the same treatment and concern as another atrocity, causing the same suffering, because an insufficient number of people were killed; or because they were not killed in a short enough time span; or because other circumstances were not present that would warrant international concern.

<sup>57</sup> See ICISS report’s conclusion, p. xi “Prevention is the single most important dimension of the responsibility to protect.” Ban Ki-moon, “Implementing the Responsibility to Protect,” Report of the Secretary General A/63/677 (2009), para. 14.

Mediated intrastate peace efforts are increasingly focusing on **autonomy** and power sharing arrangements as a preferred solution to intrastate conflicts. With respect to the type of intrastate conflicts I am focusing on today, autonomy arrangements hold the promise to satisfy both the state and the population group or groups' needs and to address the causes of conflicts without the necessity to break up the state. These arrangements can be tailor fitted and be limited or broad, transitional solutions or meant to be permanent albeit flexible.<sup>58</sup>

I personally believe that well crafted autonomy arrangements that satisfy the most important needs of all parties have the potential to be excellent solutions to many intrastate conflicts. However, current practice shows that 1) the majority of intrastate peace agreements containing autonomy arrangements is not, or not well, implemented,<sup>59</sup> and 2) even when they are, the autonomy arrangement's fragility surfaces when the central or the autonomous authorities assert power beyond the delicate balance inherent in such asymmetric structures. Both scenarios lead to renewed tensions and, sometimes, armed conflict.

Some of the reasons for non-implementation of peace agreements have to do with post-armed conflict institutional fragility. Of particular relevance to our topic, however, is the lack of political will to implement by relevant players on both sides, sometimes occasioned by changes of government or leadership, but also because of vested interests in the continuation of the conflict or some part of it. Non-state armed groups may want to retain the capacity to defend themselves militarily against challenges to their authority, while governments and their leaders may be reluctant to devolve power as part of an agreement.<sup>60</sup>

One ingredient in the strategy for intrastate conflict prevention and for better implementation of intrastate peace agreements is making use of select UN and other fora and of international courts and tribunals to help peacefully resolve intrastate disputes.

There is today no ready way for non-state parties and states to bring a dispute between them before an international court or tribunal (let alone disputes between

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<sup>58</sup> See for discussions Y. P. Ghai, *Autonomy and ethnicity : negotiating competing claims in multi-ethnic states* (Cambridge, UK; New York, 2000). H. Hannum, *Autonomy, Sovereignty, and Self-Determination; The Accommodation of Conflicting Rights* (Philadelphia, 1992).

<sup>59</sup> M. Boltjes ed., *Implementing Negotiated Agreements; the Real Challenge to Intrastate Peace* (The Hague, 2007) p.1-2.

<sup>60</sup> Van Walt Van Praag and Boltjes, 'Peace agreement implementation; dilemmas and options for mediators', in *Managing Conflicts: Process Related Questions. A Handbook for AU Practitioners*, (S. Mason, M. Siegfried eds., African Union, 2013), Vol. II, pp. 82-85; See also, M. Boltjes, *supra* note 58, 8-16.

non-state parties).<sup>61</sup> Considering the bad record of intrastate peace agreement implementation, international and regional courts could contribute to conflict prevention in a major way if their jurisdiction extended to intrastate disputes, including those relating to the interpretation and implementation of peace agreements and autonomy arrangements.

I headed an initiative by Kreddha a number of years ago to address this issue. We turned in particular to the Permanent Court of Arbitration (PCA) in the Hague to propose that it accept jurisdiction for disputes between states and non-state parties regarding the implementation of peace agreements concluded by them.<sup>62</sup> As a result, today, parties to an intrastate peace agreement can include a clause in their agreement that enables each of them to refer disputes arising out of the implementation or non-implementation to the PCA. The first such case was successfully brought before the PCA by the non-state party to the 2004 North-South Sudan Comprehensive Peace Agreement with respect to the border demarcation in the Abyei region.<sup>63</sup> This has created a useful precedent and is thus a step in the right direction, but one that needs to be institutionalized and broadened to the International Court of Justice and regional courts. Jurisdiction should, moreover, extend to cases where corporations are parties to conflicts or potential conflicts, as is increasingly the case.

This is but one example. For conflict prevention to succeed parties to potential conflicts must have avenues for dialogue, possibly facilitated, and mechanisms for resolving disputes among them. They should be encouraged to meet and dialogue and co-decide issues of mutual importance in international fora, as well as to resolve their disputes using international mechanisms, where national ones do not provide

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<sup>61</sup> Boltjes, *supra* note 58, p. 46. See W. Miles, 'Adjudication of Intrastate Disputes: a Review of Possible Mechanisms' in Boltjes, *supra* note 58, pp. 211-228. Non-state parties have no standing in the International Court of Justice or regional courts. In some courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, individuals have standing to raise human rights issues only. The ICC is a criminal court and not a dispute resolution mechanism. Its criminal jurisdiction can, moreover, be invoked only against the commission of genocide, crimes against humanity and war crimes. Only The ECOWAS Court rules of procedure do allow non-state parties to file a claim.

<sup>62</sup> See Kreddha Expert Meeting on International Adjudication Mechanisms for Intrastate Peace Agreements, Report by Inga Frengly (Kreddha, The Hague 2006) unpublished, accessed on [www.kreddha.org](http://www.kreddha.org)

<sup>63</sup> Permanent Court of Arbitration (PCA) case no. 2008-07, The Government of Sudan v. The Sudan People's Liberation Movement/Army (Abyei Arbitration). The arbitration under auspices of the Permanent Court of Arbitration was successful and the tribunal's decision was accepted and implemented by both sides. The conflict that erupted later concerned other issues, not the border dispute settled by this arbitration. See for a detailed discussion W. J. Miles, D. Mallett, 'The Abyei Arbitration and the Use of Arbitration to Resolve Inter-state and Intra-state Conflicts', *Journal of International Dispute Settlement*, Vol. 1, No. 2 (2010), pp.313-340.

conducive means to do this. The exclusion of population groups and autonomous sub-state entities from such effective participation is a shortcoming of the international legal system.

### **Paradigm shift**

We can suggest more arguments, but what we really need to do is make a paradigm shift –or perhaps more accurately we need to complete the paradigm shift that we are in the process of undergoing—to a place where the state and its sovereignty –with all the rights and privileges and protections that entails—are no longer central. Instead, the safety and wellbeing of individuals and population groups are central, and states and their governments are not only viewed but also treated purely as instruments to serve this purpose.

The corollary of such a transformation must be that the safety and wellbeing of individuals and population groups must not be pursued in any way to the detriment of the safety and wellbeing of other individuals and groups within or outside the state.

The other consequence of such a shift is that the voices of the individuals and population groups must be given a meaningful place in decision-making at the international level. For if states have the exclusive power to decide, as they have had, most worthy initiatives that would spring from attempts to operate from the new paradigm would be stifled or watered down in efforts to retain the power of states befitting the traditional conception, and therefore effectively prevent the operationalization of the new paradigm. By the same logic, in the international judicial field the change must also be acted upon, and access provided to non-state parties, carefully, in ways that will help prevent and resolve intrastate conflicts.

I have not tackled the question of the place and role of transnational corporations in intrastate conflicts and intrastate relations, not for lack of importance. Indeed their importance is only accentuated by the realization that some of these non-state actors constitute actual poles, in other words important centers of power or influence, in the emerging multipolar world. Their lack of accountability under international law for their roles in conflicts should be of concern to us all. But it is a major topic to which I cannot do justice in this lecture and which I will leave for another occasion.<sup>64</sup> But here too, the non-interference principle and the exclusive rights of states –also with respect to corporations—is an impediment.

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<sup>64</sup> For the current state of the law on corporate responsibility in this area, see *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy”* (OHCHR, United Nations, New York and Geneva 2011).

As we have seen, the law has undergone considerable change since the Charter's adoption. But we also note that *as a matter of practice* the international community has intervened where the political will existed to do so. But often not before unacceptably large numbers of people had to suffer and die. Powerful states also intervene on their own or with allies, regardless of the rules of international law, in order to protect their own interests if they can get away with it. So the prohibition of intervention in a state's domestic affairs is not as starkly black and white in practice as its predominance in law suggests, and this results in ambiguities. My point here is that we need a clear and coherent body of international law that has population groups and individuals, and their relationship to the state in which they live at the heart of the system. Not states, state interests, and state sovereignty alone. The state structure and international system should facilitate peaceful relations among all population groups within states and across boundaries, not only among those that hold power. And democracy –though of critical importance—is not sufficient.

Anne-Marie Slaughter and William Burke-White also argue for a change in the international legal system, but do so on the basis of different but equally important arguments:

[t]he process of globalization and the emergence of new transnational threats have fundamentally changed the nature of governance and the necessary purposes of international law in the past few years. From cross-border pollution to terrorist training camps, from refugee flows to weapons proliferation, international problems have domestic roots that an interstate legal system is often powerless to address. To offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of states and harness national institutions in pursuit of global objectives.<sup>65</sup>

**In conclusion:** We noted how the creators of the UN Charter and the Universal Declaration of Human Rights reframed and re-conceptualized international law with the overriding purpose to end wars among states, precipitating the development of a whole new body of law leading up to what we have today. So too, we must take what we have, preserve the achievements to date, and reframe and re-conceptualize it, this time from the standpoint of the new paradigm in which individuals and population groups are central, so as to effectively respond to today's challenges, including that of intrastate conflicts, the 'scourge of war' the founders of the UN did not address.

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<sup>65</sup> Slaughter and Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law),' 47HarvIntLJ2, (2006) p. 328.

From this reconceptualization there can emerge the body of law I call international law of intrastate relations, consisting of all that already exists in international law that relates to this subject matter (some of which I have highlighted today) as well as new law, to be created with the participation of non-state actors. I visualize a whole new field of international law, of specialization, of law school courses and text books. A field that will advance and expand once the new paradigm has caught on.

What I am proposing is not that far fetched, considering the developments I sketched earlier and the considerable shifts that are taking place as we speak. Holders of state power will resist it and its consequences for some time, but let us not forget that international law is not only theirs to make: it is the result of the interplay of state treaty making and state practice, of decisions of international courts and, to a lesser degree, national courts and of scholarship: *opinio juris*. And we have our role to play in all these fields.

Surely, we do not need to wait for a new catalyst in the form of yet greater mass atrocities to address the underlying problems. The death and suffering intrastate conflicts throughout the world continues to inflict is sufficient incentive.

Thank you