

UN PEACEKEEPING, RESPONSIBILITY TO PROTECT AND HUMANITARIAN INTERVENTION

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ABSTRACT

The question of armed intervention on behalf of the international community, in the internal affairs of a state against the wishes of the government of that state, in order to prevent widespread death or suffering amongst the population, is not a new one. Indeed, Imperial Rome grappled with the same problems in Dalmatia and Judaea two thousand years ago, as the international community does in those same regions today. How effective are peacekeeping operations in preventing and stopping violence? Is there an alternative to UN and regional peacekeeping operations? The practice of UN peacekeeping is evolving in many instances into robust peacemaking actions with a positive responsibility to protect civilians within the field of operations. The “responsibility to protect” (R2P) (and “responsibility while protecting” - RWP) concept sets out a key principle to enable the international community to prevent atrocity crimes. Since its emergence, however, there have been intense discussions over how to put the principle into practice. Some aspects of the concept remain unclear, including how to undertake, as the last resort, the use of military force. These issues must be considered within the boundaries set by R2P which seek at all costs to avoid the use of force for other reasons than ceasing mass atrocity crimes. The use of force, therefore - including possible military action by the international community, given growing international reluctance to accept grave threats to peace and security, including mass crimes against defenseless populations - have to be thoroughly analyzed and comprehended. This article presents an analysis of the development of civilian peacekeeping, its relevance in the field of conflict resolution and its autonomy from multidimensional peacekeeping, championed by the UN.

Keywords: protection of civilians, peacekeeping, United Nations, international humanitarian law, international human rights law, responsibility to protect.

INTRODUCTION

The protection of civilians has in recent years become an important focus of international relations and international law, particularly in the context of United Nations (UN) peacekeeping operations. It is often at the heart of international debates on responding to major conflicts, as evidenced in the ongoing discourse on the situations in Syria, Mali and the Central African Republic.¹ Yet despite the international attention being focused on protection issues, the normative bases, content and responsibilities associated with practical implementation remain contested, with disparate usage of the protection lexicon in international law and across humanitarian, human rights and peacekeeping communities. The concept has come to encompass a wide range of rights and obligations under jus ad bellum, the UN Charter, international humanitarian law (IHL) and international human rights law (IHRL), as well as a spectrum of activities including the use of force for the physical defence of civilian populations, aspects of humanitarian action and human rights monitoring, reporting and advocacy. The fragmented conceptions and lack of strategic coherence has, at times, negatively impacted the practical implementation of protection mandates, with protection actors sometimes working at cross purposes.

After the massive failures of international governments to protect civilians from systematic violence throughout the 1990's, and with the brutal conditions created by modern day conflict, the international community has begun to recognize responsibility to better protect civilians from genocide, ethnic cleansing, war crimes and other crimes against humanity. In order to meet this responsibility, governments are increasingly looking to UN peacekeepers.

Peacekeeping mandates have steadily become more complex and difficult to achieve, but the ability of the UN system and the political will of member states to adequately staff and equip those

¹ Security Council Meeting Record S/PV.7019, 19 August 2013; Security Council Meeting Record S/PV.6985, 25 June 2013; Security Council Meeting Record S/PV.7098, 22 January 2014; Cross-Cutting Report 2013 No. 3: Protection of Civilians, Security Council Report, 20th December, 2013, pp. 11–12. Available at: www.securitycouncilreport.org/protection-of-civilians/.

missions have not evolved with expectations. Some progress is being made. The UN is making efforts to improve the quality of guidance and training that it delivers to peacekeepers, and to make deployments more efficient.

THE EVOLUTION OF UN PEACEKEEPING AND THE PROTECTION IMPERATIVE

UN peacekeeping is not what it used to be. The UN Security Council authorized early peacekeeping operations to fulfill the UN's role under Chapter VI of the UN Charter, the chapter dealing with "Pacific Settlement of Disputes." These missions were deployed with the consent of both parties to the conflict in order to monitor and enforce existing peace agreements. For example, the Security Council first mandated the United Nations Peacekeeping Force in Cyprus (UNFYCIP) in 1974² to supervise a ceasefire and monitor a buffer zone between the Cyprus National Guard and Turkish Cypriot forces. These peacekeepers represented a "thin blue line" between two groups who had agreed to their presence. The mandates were simple and the danger and political controversy surrounding the missions were very low.

UN peacekeeping operations were originally conceived as inter-positional military forces deployed to carry out observation and ceasefire monitoring.³ The end of the Cold War heralded a quantitative and qualitative shift, with many more peacekeeping missions deployed and the range of tasks significantly expanded. Where early peacekeeping missions had sought to freeze a conflict, the next generation of peace operations sought to address the root causes through peace-building activities, including electoral assistance, promotion of human rights, disarmament, demobilisation and reintegration of combatants, security sector reform, and other rule of law-related activities.⁴

² UNFYCIP was first deployed in 1964, but the mandate was expanded in 1974 to take into account the de-facto ceasefire agreement between Greek Cypriot and Turkish Cypriot forces.

³ For example, UN Emergency Force (UNEF I), 1956–1967; UN Observation Group in Lebanon (UNOGIL), 1958; UN Force in Cyprus (UNFICYP), 1964–present; UN Emergency Force II (UNEF II), 1974–1979; UN Disengagement Observer Force (UNDOF), 1974–present; and UN Interim Force in Lebanon (UNIFIL), 1978–present.

⁴ For example, UN Angola Verification Mission II (UNAVEM II), 1991–1995; UN Mission for the Referendum in Western Sahara (MINURSO), 1991–present; UN Observer Mission in El Salvador (ONUSAL), 1991–1995; UN

Due to growing international concern with the humanitarian situation in several countries, spurred by the ‘CNN effect’⁵, a number of UN missions were deployed into less permissive environments of ongoing internal conflict with a mandate to use force to ensure a safe and secure environment and to support the delivery of humanitarian assistance.⁶ There were several high-profile failures to protect civilians during the early to mid-1990s, including in Rwanda and the former Yugoslavia.⁷ It was not until 1999 that the first UN peacekeeping mission was specifically mandated to use force ‘to protect civilians’, a mandate that has been provided to almost all UN peacekeeping missions established since.⁸

Following the end of the Cold War in the 1990s, UN peacekeepers began to be deployed in new and more challenging places, such as Somalia in 1992 and Liberia in 1993. The nature of conflict was changing, and intra-state conflicts, often with multiple internal armed groups, usually meant that one or more of the armed actors did not consent to the involvement of peacekeepers. The potential for peacekeepers to become targets dramatically increased. Their neutrality was also increasingly compromised by calls from concerned governments and humanitarian actors for peacekeepers to engage in the protection of civilians, which often demands that peacekeepers take action that will put them at odds with armed groups involved in the conflict.

Over time, it became clear that UN forces designed to fulfill traditional peacekeeping roles were woefully underequipped, and both politically and operationally unprepared to take on the more robust peacekeeping demanded by complex protection mandates. Increasingly, UN peacekeeping

Transitional Authority in Cambodia (UNTAC), 1992–1993; UN Operation in Mozambique (ONUMOZ), 1992–1994; UN Assistance Mission in Rwanda (UNAMIR), 1993–1996.

⁵ The ‘CNN effect’ refers to the broadcasting of images of suffering populations, which caused democratic constituencies to put pressure on their governments to ‘do something’. See Robinson, Piers, *The CNN Effect: The Myth of News, Foreign Policy and Intervention*, Routledge, London and New York, 2002.

⁶ Examples include UN operations in Somalia (UNOSOM I and II), the former Yugoslavia (UNPROFOR) and Haiti (UNMIH).

⁷ See the Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, A/54/549, 15 November 1999, para. 49; and Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, S/1999/1257, 16 December 1999, paras. 50–52.

⁸ The only UN peacekeeping operation deployed since 1999 without a protection of civilians mandate was the UN Supervision Mission in Syria (UNSMIS), which was established to monitor a cessation of armed violence and to monitor and support the full implementation of the Joint Special Envoy’s six-point plan to end the conflict in Syria: see SC Res. 2043, 14 April 2012. Available at: www.un.org/en/peacekeeping/documents/six_point_proposal.pdf.

operations were being authorized under the more aggressive Chapter VII of the UN Charter which pertains to “Action with Respect to the Peace, Breaches of the Peace and Acts of Aggression.”

Expectations have steadily increased and UN peacekeeping operations have been entrusted with ever more complex and dangerous missions. Humanitarian and political actors have increased the pressure for more missions, more rapid deployment, and more difficult civilian protection tasks. In all, the total number of UN peacekeepers deployed has increased from roughly less than 20,000 at the beginning of 2000⁹ to over 93,000 today.¹⁰

ORIGIN, DEFINITION AND BASIC PRINCIPLES OF TRADITIONAL UN PEACEKEEPING MISSIONS

There is no definition of the peacekeeping operations on which everyone agrees, the scientists even argue about what can be considered the first peacekeeping mission. Some interpretations go so far in the past that the origin of this phenomenon is seen in demarcation commissions which were drawing many European borders during the 1920s, after the World War I. However, the UN officially lists the UNTSO as the first peacekeeping mission – the unarmed observers who were sent to Palestine in 1948 to observe the truce between Israel and its Arabic neighbours.¹¹ Speaking of the definition which would suit the traditional type of UN peacekeeping mission, typical of the Cold War era, the most comprehensive one was again given by Marrack Goulding: they are “...field operations established by the UN, with the consent of all the stakeholders, and with the aim to control and peacefully resolve the conflicts among them, under the command and control of the UN, paid by all the UN member states and for which they deploy military and other personnel at their free will, which act in a completely unbiased and independent manner and which

⁹ UN Monthly Summary of Military and Civilian Police Contributions to the United Nations Operations, 1995 to 2004. Available at http://www.un.org/Depts/dpko/dpko/contributors/Yearly_Summary.pdf.

¹⁰ UN Monthly Summary of Military and Civilian Police Contributions to the United Nations Operations, 2005 to 2009. Available at <http://www.un.org/Depts/dpko/dpko/contributors/Yearly06.pdf>.

¹¹ This was not the first attempt by the UN to resolve the conflict – the first was in the Balkans, i.e. the Special Commission established by the UN to verify the claims of Greece that Albania, Bulgaria and Yugoslavia were supporting the guerrilla in Northern Greece in 1947.

use minimal force”.¹² Such a definition is in fact the compilation of the basic principles of deployment of the “blue helmets”¹³, formulated by Dag Hammarskjöld, UN Secretary General from 1953 to 1961. The analysis of these principles can, with a certain level of generalization, explain the scope of action, powers and objective limitations of traditional UN peacekeeping missions.

OPERATIONS OF “CHAPTER SIX AND A HALF” OF THE UN CHARTER

The concept of collective security was initially designed in its operational form, as stipulated in the Chapters VI and VII of the UN Charter, and the word peacekeeping is not mentioned anywhere. Still, the ad hoc international military forces were established during the Cold War under the application of Chapter VI (“Peaceful conflict resolution”), although over the time the mandate of these forces became much wider than the mere UN actions provided for in the Chapter VI of the Charter. However, this mandate was still narrower in its content than the measures envisaged in the Chapter VII of the Charter (“Measures in case of threat to peace, violation of peace or in case of aggression”). This Chapter of the Charter gains its importance as the legal ground for the UN peacekeeping missions in the post-Cold War era. The title of this section comes from this “non-belonging” to either Chapter of the Charter.

Between 1948 and 1987, the Security Council initiated the total of 15 missions, mostly to prevent the escalation of the conflict that had already started. Half these missions were in the Middle East, in the region which had (and still has) obvious geo-strategic importance for the key permanent members of the Security Council. In spite of great importance that was given to the peacekeeping missions as the UN’s attempt to establish themselves as the pillar of a true system of collective security under difficult circumstances, their small number indicates that the limitations of the Cold War prevailed after all. These limitations include the fact that the UN was given the mandate to prevent inter-state conflicts, which were mostly the consequences of the Cold War “Alliance”.

¹² Ibid.

¹³ This name was given to the UN forces during the peacekeeping operation in the Suez Crisis because of the characteristic colour of their helmets, which differentiated them from the parties at war.

Limited mandates that were given to the peacekeeping operations by the Security Council or by the General Assembly did not give them the authority to eliminate direct causes of conflict, but the “blue helmets” were just to support creation of the conditions that would enable the parties in conflict to resolve it themselves. Lack of commitment of the key stakeholders at the international scene to reaching a sustainable solution turned out to be the key problem. Already after the problematic deployment of the UN in Congo in 1960 and 1961, it became obvious that the UN mandate needed to be more complex and the peacekeeping operations better organized in order to have the peacekeeping forces more directly involved in the conflict resolution process and in order for them to take an active role in rebuilding of society and elimination of all the consequences of conflict.

The mission in Congo deserves a few more words – it was the only exception between 1948 and 1989 in several respects. This was the only mission that attempted at resolving the internal conflict, which was devastating and it particularly endangered the civilians. Although at the beginning of their mandate the peacekeeping forces implemented the existing self-defence standards, later, because of the changed situation in the field (but also because of the tragic death of the UN Secretary General Hammarskjöld), the mandate of the “blue helmets” was extended and they were given greater powers to implement repressive actions which were closer to the Chapter VII of the Charter, i.e. to enforcing peace. Apart from providing activities typical of traditional operations, “...the UN mission... provided protection to the civilian population and used force in this direction, but it also ensured the flow of necessary food items. Here lie the roots of restoration of the humanitarian activities by the peacekeeping missions which would be undertaken after the Cold War...”¹⁴

EVOLUTION OF THE NEW MISSIONS, AUTHORIZATION AND PROBLEMS

After the Cold War ended there was, as it turned out, unfounded enthusiasm among the statesmen and scientists about “unblocking” of the Security Council, which, according to many, meant

¹⁴ Milisavljević, B., “Nove mirovne misije Organizacije ujedinjenih nacija”, Službeni glasnik, Beograd, 2007, p. 46.

possibility to significantly reduce the number of conflicts and to have the UN absolutely capable to control and pacify the remaining conflicts. The final goal was to end all the wars, thus ending the history. The painful wake-up came very quickly in the form of conflicts in Somalia, Rwanda and wars in former socialist Yugoslavia. These conflicts showed that the UN was still not up to the challenges of the new era. Wrong assumptions on the possibilities for escalation of the conflict, failure to be effective in the field, limitations stemming from (already) obsolete provisions on the peacekeeping missions, lack of proper understanding of the nature of the conflict, all led to the facts that the mission in Somalia failed, that the withdrawal from Rwanda resulted in atrocious genocide, and that the UN were humiliated in former Yugoslavia (remember the images of the UN representatives tied to the lampposts) and forced to let the NATO, i.e. the USA resolve the situation.

Facing a series of failures, the UN Secretary General at that time Boutros Boutros-Ghali concluded in 1994 that the UN “should not be alone in dealing with large and demanding operations of peace-enforcing, but that the Security Council should authorize the so called Coalitions of the willing or the regional organizations to get involved as well”.¹⁵ Such a solution, over the time labelled as the “system of authorization” practically meant that in situations in which the UN were unable to provide sufficient support to implementation of specific activities which required high level of equipment and operational capacity, they could seek support in implementing the mission from the states or from the regional organizations. “The support was required for different activities, starting from control of implementation of the sanctions, conduct or armed activities to authorizing the states to implement the peacekeeping mission’s mandate that was established by the Security Council”.¹⁶ Justification for the use of this system was found in liberation from the occupation (Kuwait case), reinstating the legitimate government (Haiti), as well as establishment of the internal peace and security (East Timor). Probably the best known case of authorization took place in Bosnia and Herzegovina, when the UN, practically in despair, gave the mandate to the NATO (as the regional organization) to secure military (air) support to the UN efforts. This case applied the so called “double key”, by which every decision on any type of the military operation had to

¹⁵ Malone, D. and Wermester, K., “Boom and Bust? The Changing Nature of Peacekeeping”, *International Peacekeeping*, Volume 7, Issue 4, Winter 2000, pp. 37 – 54.

¹⁶ Milisavljević, B., Note 16, p. 120.

be approved both by the NATO command and by the UN Headquarters. Such a situation without precedent frustrated the US officers (in the NATO uniform) to such an extent that they tried never to make a similar mistake again.

The system of authorization, with all its positive sides, revealed how big the limitations of the UN were in the wake of the new millennium. The end of the Cold War did not bring much desired strengthening of the UN's authority, quite the opposite. The impression was that the status quo which existed between the USA and the USSR during the Cold War gave much more manoeuvre space to the UN than it was the case afterwards. Aware of this, and facing an increasing number of conflicts and non-functioning states, Kofi Annan, Boutros Boutros-Ghali's successor at the position of the UN Secretary General, asked for "thinking anew" on the way in which the United Nations safeguarded the political and human rights and responded to the humanitarian crises that affected the world so significantly".¹⁷ Annan also commissioned the so called Brahimi Report, which was supposed to be the result of a comprehensive research of the past and current peacekeeping operations, including challenging their basic principles. The Report was supposed to propose a completely new way in which the UN bodies would better respond to the political and humanitarian crises. The Report was presented to the public at the UN Millennium Summit in 2000.

PROTECTION OF CIVILIANS

The many traumatic experiences of the 1990s — the genocide in Rwanda, crimes against humanity in the former Yugoslavia, and the systematic use of rape as a weapon of war in what is now the Democratic Republic of Congo — resulted in the push for UN peacekeepers to take on a much more active role in the protection of civilians. As U.S. Ambassador to the United Nations Susan Rice said, "We have just drawn down the curtain on the bloodiest century in human history. That is why the United States is determined to work...to ensure that the 21st century takes a far lesser

¹⁷ Annan, K, "Address of the Secretary-General to the UN General Assembly", 20 September 1999, GA/9596.

toll on civilians — on innocents who should be sheltered by the rule of law and the rules of war. I believe deeply that atrocities are not inevitable.”¹⁸

Today, mission mandates routinely include authorization for peacekeepers to take measures to protect civilians under imminent threat of violence. Some mandates even prioritize protection of civilians above all other objectives, such as the current mandate for the UN Mission in DR Congo (MONUC), Darfur (UNAMID), South Sudan (UNMISS), Liberia (UNMIL) and in Chad and the Central African Republic (MINURCAT). Yet in spite of the overarching international focus on civilian protection, there is no clear definition or doctrine to tell military peacekeepers what protection is or how to make a protection mandate work.

In the context of the violent conflict in Libya, in March 2011 the Security Council authorised member states to ‘take all necessary measures ... to protect civilians and civilian populated areas under threat of attack’.¹⁹ In this instance, the ‘protection of civilians’ language was used to authorise what was essentially a Responsibility to Protect intervention. This was because the mandate provided for Libya was concerned equally with the broader strategic basis for intervention (for which Libya had not provided its consent) as with the operational-level use of force. In comparison, the protection of civilians mandates in UN peacekeeping are usually focused on the operational-level use of force in the context of the host state’s consent to the deployment of the mission (whether genuine or coerced).

The protection of civilians is, first and foremost, the responsibility of states. In a conflict situation, however, protection roles and tasks are broadly dispersed among humanitarian and political actors, as well as domestic and international security forces. Everything from the safe positioning of refugee camps to the intervention of military peacekeepers to prevent an attack on a village is part of the broader effort to keep civilians safe in conflict affected areas.

¹⁸ U.S. Permanent Representative to the UN, Ambassador Susan E. Rice, Remarks on the UN Security Council and the Responsibility to Protect, at the International Peace Institute, Vienna, June 15, 2009.

¹⁹ SC Res. 1973, 17 March 2011, operative para. 4.

THE RESPONSIBILITY TO PROTECT

The Responsibility to Protect is a central part of the wider effort to keep civilians safe. After the genocide in Rwanda, and the failure of the international community to intervene to prevent an unfolding mass atrocity, individual diplomats and leaders of human rights and humanitarian organizations began to elaborate on the idea that there is a particular international duty to intervene in order to prevent, protect against, and rebuild communities in the wake of genocide, war crimes, ethnic cleansing or crimes against humanity.

As World War II came to a close, the Allied Powers established the International Military Tribunal at Nuremberg (1945) and the International Military Tribunal for the Far East (1946) to try Nazi and Japanese war criminals for crimes against peace, war crimes, and crimes against humanity. From these two milestones in international justice have come further manifestations of an emerging trend in international criminal law. In 1993 and 1994, the Security Council established two ad hoc tribunals – the International Criminal Tribunals for the former Yugoslavia and Rwanda. The international community regarded the Yugoslav and Rwandan conflicts as threats to international peace and security, and the tribunals, in turn, were regarded as a means of rendering justice and enhancing the peace by identifying those specific individuals responsible for war crimes.

Indeed the two ad hoc tribunals have greatly helped define a new era of international justice and the rule of law, but because these courts are ad hoc instances of international justice, there is little interest in regarding them as the ideal type for a global criminal justice system. The international judicial movement will fail to be meaningful if it continues to be centered on ad hoc means of reacting to new waves of atrocity crimes. Since the wheel is reinvented anew with each recognized atrocity situation, investigations become enormously costly, and the expense that the international community must bear in the creation and operation of these one-off tribunals tends to weaken the political will required to mandate them.

An important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with the setting-up of the two ad hoc Tribunals for the

prosecution of crimes committed, respectively, in the former Yugoslavia (ICTFY) and in Rwanda (ICTR). These Tribunals represent major progress towards the institution of a kind of permanent jurisdiction. But they have also provided clarification as regards the substance of what is becoming a sort of international criminal code, in the sense envisaged by the UN General Assembly in its Resolution 95 (I).²⁰

The various UN Security Council resolutions on the establishment of tribunals for the prosecution of individuals responsible for acts committed in the former Yugoslavia and in Rwanda contain provisions on acts punishable under international law. In particular, Articles 2, 3, 4 and 5 of the Statute of the International Tribunal for the former Yugoslavia enumerates the different crimes coming under the jurisdiction of the court.²¹ Article 2, on grave breaches of the 1949 Geneva Conventions, gives the Tribunal the power to prosecute persons “committing or ordering to commit” such grave breaches. Article 3 enlarges the scope to cover violations of the laws and customs of war. Article 4 reproduces Articles 2 and 3 of the 1948 Genocide Convention.

The Statute of the Rwanda Tribunal appears slightly different, but the global approach of its provisions does not reveal major differences.²²

This great corpus of principles and rules, this entire legal heritage has now been codified in an organic way in a single instrument, the Rome Statute of the International Criminal Court (ICC), adopted by a UN diplomatic conference on 17 July 1998.²³ Articles 5 to 8 of the Statute deal with

²⁰ D. Schindler/J. Toman, *The Laws of Armed Conflicts : A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff/Henry Dunant Institute, Dordrecht/Geneva, 3rd ed., 1988, p. 5.

²¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted 25 May 1993 by SC Resolution 827/1993 ; text in UN Doc. S/25704 (1993). See also E. David, “Le Tribunal international pénal pour l’ex-Yougoslavie”, *Revue belge de droit international*, 1992, p. 565 ; A. Pellet, “Le tribunal criminel international pour l’ex-Yougoslavie — Poudre aux yeux ou avancée décisive ?”, *Revue générale de droit international public*, 1994, p. 7 ; D. Shraga/R. Zacklin, “The International Criminal Tribunal for the Former Yugoslavia”, *European Journal of International Law*, 1994, p. 360 ; A. Cassese, “The International Criminal Tribunal for the Former Yugoslavia”, in *Studi Panzera*, Bari, 1995, I, p. 235

²² The Statute lists genocide and crimes against humanity in the first place and adds a reference to Art. 3 common to the Geneva Conventions and to 1977 Additional Protocol II. The peculiar context of the Rwanda conflict explains these differences.

²³ UN Doc. A/CONF. 183/9. Final Act : UN Doc. A/CONF. 183/10. See also F. Lattanzi (ed.), *The International Criminal Court : Comments on the Draft Statute*, Napoli, 1998

the definition of the crimes coming under the jurisdiction of the ICC. They are “the most serious crimes” and are “of concern to the international community as a whole” (Article 5). This is a comprehensive definition which covers, from a genuinely universal perspective, both “grave breaches” and “serious violations” of the Geneva Conventions and of the laws and customs of war in general. Such offences contravene the legal and ethical rules and principles of the international community.

The failure of the international community to respond in a timely and effective manner to the horrific genocides in Rwanda in 1994 and in Cambodia two decades earlier, as well as to the mass murder in Srebrenica in 1995—the latter two under the watch of UN peacekeepers—had raised disturbing questions both about political will and about UN capacity. This growing public and official uneasiness came to a head in divisive debates within the Security Council at the end of the century on what to do about mounting violence and possible ethnic cleansing in Kosovo. In 1998 and 1999, then UN Secretary-General Kofi Annan posed, in a series of eloquent speeches, the stark choice between standing by when mass atrocities were unfolding or intervening militarily even if Security Council authorization was blocked.²⁴ For many member states, however, this was seen as an unacceptable choice between two unpalatable options. In essence, they found the debate over humanitarian intervention to be ultimately unsatisfying and unproductive in terms of advancing UN policy or doctrine.²⁵

The experts at the Brookings Institution had been developing the concept of “sovereignty as responsibility”.²⁶ Sovereignty, they posited, imposed abiding obligations toward one’s people, as well as certain privileges internationally. By, meeting these obligations and respecting fundamental human rights, the state would have less reason to worry about coercive intervention from abroad. These conclusions reflected evolving notions of sovereignty that had long historical

²⁴ For a handy compilation of his key speeches, see *The Question of Intervention: Statements by the Secretary-General, United Nations, New York, December 1999*. It contains, among others, “Reflections on Intervention,” Ditchley Park, United Kingdom, June 26, 1998; and “Two Concepts of Sovereignty,” Address to the 54th Session of the UN General Assembly, September 20, 1999.

²⁵ In this regard, the debate in the General Assembly following Kofi Annan’s September 20, 1999 speech was telling. See UN documents A/54/PV.8 and A/54/PV.9, September 22, 1999.

²⁶ Francis M. Deng, “Sovereignty as Responsibility: Conflict Management in Africa”, The Brookings Institute, Washington, DC, 1996.

antecedents in both Western and non-Western political thought and doctrine.²⁷ In 1992, for example, the first UN secretary-general from Africa or the Arab world, Boutros Boutros-Ghali, commented that “respect for its [the state’s] fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.”²⁸ In 2000, five years before the Summit declaration, the Constitutive Act of the African Union (Article 4 (h)) asserted “the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity.”²⁹

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) formally elaborated this concept, which they named “the responsibility to protect.” The Commission raised important questions about sovereignty and the role of the state with regards to the protection of people within its borders. In its 2001 report, the ICISS asserted that “state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.” It further stated 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 non-intervention yields to the international responsibility to protect.”³⁰

In response to the indeterminate debate over humanitarian intervention and the Security Council’s split over how to address the crisis in Kosovo, the Canadian government decided to launch an independent International Commission on Intervention and State Sovereignty in 2000. As co-chairs Gareth Evans and Mohammed Sahnoun commented, “external military intervention for humanitarian protection purposes has been controversial both when it has happened—as in Somalia, Bosnia and Kosovo—and when it has failed to happen, as in Rwanda.”³¹ Over the course

²⁷ Some of these sources are cited in Edward C. Luck, “The Responsible Sovereign and the Responsibility to Protect,” in Joachim W. Müller and Karl P. Sauvant, eds., *Annual Review of United Nations Affairs*, Oxford University Press, Oxford, forthcoming 2008.

²⁸ Boutros Boutros-Ghali, *An Agenda for Peace*, A/47/277—S/2411, June 17, 1992, paragraph 17, page 5.

²⁹ http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

³⁰ ICISS, ‘Basic Principles,’ *The Responsibility to Protect; Report of the International Commission on Intervention and State Sovereignty*, 2001, p XI.

³¹ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001, page vii. An insider account of the work of the

of their deliberations, however, the geographically diverse blue-ribbon commissioners came to see protection from a much broader perspective than as simply a contest between state and individual sovereignty. Coining the phrase “Responsibility to Protect,” their conclusions addressed a responsibility to prevent, a responsibility to react, and a responsibility to rebuild, seeing a continuum of graduated policy instruments across this spectrum. Though concerned about proper authority and rules for the use of force, much of their report stressed the advantages of prevention and of encouraging states to meet their core protection responsibilities. Some of the commission’s key recommendations were picked up by Kofi Annan’s High-level Panel on Threats, Challenges and Change (2004) and his subsequent “In Larger Freedom” report (2005). These, in turn, provided material for consideration by the September 2005 Summit that adopted this historic R2P language.

All 192 UN member states endorsed the Responsibility to Protect (R2P) norm in the 2005 World Summit outcome document, which asserted both the right and the responsibility of the international community to intervene, with or without the consent of the host government, in cases where genocide, war crimes, ethnic cleansing, and/or crimes against humanity can be reasonably expected or are being committed. This intervention is defined in terms of both peaceful and forceful forms:

“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

Commission and the ideas that shaped it can found in Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Brookings Institution Press, Washington, DC, September 2008.

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.”³²

However, while the Member States of the United Nations (UN) unanimously endorsed the ‘responsibility to protect’ principle in October 2005, the P5 have yet to operationalize it. Adopting an agreement which removes the use of the veto in cases of genocide and mass atrocities would be one step to implementing the R2P agenda.

The UN Charter grants the P5 veto power in three main areas related to Security Council decision-making, Charter amendments, and the appointment of the Secretary-General.³³ Peculiarly, nowhere does the Charter oblige the P5 to provide an explanation for any vetoes they may cast. The rationale for the P5 veto power was to ensure that the UN Security Council did not suffer the same fate as its predecessor the League of Nations. In essence, the veto power was granted to the P5 as reassurance that their interests would not be ignored and in the hope that it would ensure their participation in the new organization. This was reflected in both the Dumbarton Oaks and San Francisco meetings to establish the UN where the great powers made it clear to the smaller powers that their choice was to accept an organization with great power privilege or no organization at all.³⁴ Expressed in more positive terms, the veto power was designed ‘to transform a wartime alliance into a big-power oligarchy to secure the hard won peace that would follow.’³⁵

³² Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields. Follow-up to the outcome of the Millennium Summit, A/RES/60/1, 2005, Paragraph 139.

³³ Article 27(3) states that Security Council decisions on matters that are not procedural ‘shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.’ Initially at least, there was some debate over what exactly constituted a ‘concurring vote’. See Courtney B. Smith, *Politics and Process at the United Nations* (Boulder, CO: Lynne Rienner, 2006), p.214. The P5 also have the right to veto amendments of the Charter as set out in Articles 108 and 109. In addition, under Article 97 they can exercise a veto over the appointment of the UN Secretary-General.

³⁴ Nico Krisch, ‘The Great Powers and the Security Council’ in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (eds.), *The United Nations Security Council and War* (Oxford: Oxford University Press, 2008), p.136.

³⁵ *Ibid*, p63.

The bulk of the debate has since focused on the international responsibility to intervene militarily to protect civilians as a measure of last resort.

Certain aspects of the commitment to protect by non-military means reflect international law proper, in particular the obligation to prevent genocide, the enforcement of international humanitarian law, and the duty to co-operate for the promotion and respect of human rights.³⁶ Firstly, it is established that it is the international community, through the United Nations, that assumes responsibility for helping to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility is to be exercised through the use of appropriate diplomatic, humanitarian and other peaceful means (in accordance with Chapters VI and VIII of the Charter). These ‘non-forceful’ measures shall, according to the formulation, be channelled through the UN, but should also for natural reasons be possible to undertake individually by states when such measures are not in violation of international law.³⁷

Secondly, when considering military enforcement measures as a means of carrying out the responsibility to protect, the states express that they are prepared to carry out this responsibility through the Security Council, not that there is a an obligation to do so. It is notable that this part of the principle is not formulated with obligatory language in the form of a duty, but by simply stating a preparedness to act collectively in a timely and decisive manner. Thus the states are in the position of indicating that they may use force to protect, but that this shall be achieved collectively through Security Council authorisation under certain circumstances and on a case-by-case basis. The Outcome Document confirms a legal right on the part of the Council to protect by military means, but not a legal obligation to protect in all cases alike. Paragraph 139 furthermore establishes a moral and political responsibility for the Security Council to consider the protection of populations by military means when certain circumstances prevail.

³⁶ See Articles I and VIII of the Genocide Convention (1948) Article 1 of the four Geneva Conventions (1949) on humanitarian law, and Articles 55-56 of the UN Charter together with principle four in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970); GA Res. 2625 (XXV), 1970.

³⁷ The prohibition on genocide, for example, is an *erga omnes* obligation that all states have a legal interest in protecting and upholding, and the Genocide Convention also imposes legal obligations individually on states to prevent and punish genocide. These obligations, however, do not explicitly include the right to use military force without Security Council authorisation.

The military aspect of the principle to protect in the Outcome Document is connected to several criteria in order for such a forceful measure to be considered. Firstly, the forceful action must be made “in accordance with the UN Charter, including Chapter VII”. This phrase can apparently be read in different ways. One way, which the majority of states would submit to, is that enforcement action must be in accordance with Chapter VII. Hence only Security Council authorised military action to protect was accepted by states.

There was no state that officially made explicit statements in support of unauthorised humanitarian intervention, and even the strongest proponents in the EU and Africa stated that the use of force to protect was a measure only of last resort and exceptional circumstances. The view expressed by Russia in declaring that the UN was already capable of responding to crises under current situations supported the interpretation that the Security Council already has the power and legal right to carry out its external responsibility to protect.³⁸

The other alternative interpretation, which some commentators propose, is that military action may also be taken separately from the Security Council, as long as it is done in accordance with the UN Charter. This interpretation, however, is based upon reinterpretations of the UN Charter with regard to unauthorised humanitarian interventions, which have not yet been accepted by the majority of states.

A second criterion for military action, is that the Security Council is to consider the responsibility to protect on a case-by-case basis. This clearly shows that member states have agreed to limit responsibility to that of a permissive right rather than a duty to be carried out in all cases alike. The decision to take military action will be based upon a political assessment by the Council in the individual case. This element reflects and takes into account the political reality and existing power structures in the Council and the world order.

³⁸ Responsibility to Protect - Civil Society (Publ.), State-by-State Positions on the Responsibility to Protect, 11 August 2005. Available at “[http:// www.responsibilitytoprotect.org/index.php/civil_society_statements/294](http://www.responsibilitytoprotect.org/index.php/civil_society_statements/294)”, (2005-10-11).

Thirdly, the decision to protect people by military means is a question of last resort. The criterion stating that “should peaceful means be inadequate” can be interpreted in different ways. Some commentators interpret the phrase as being a requirement that peaceful means must have been exhausted. Another more convincing interpretation is that peaceful means must be considered to have had no impact on, or were unable to change, the security situation. Thus it could be argued that it should be given the same interpretation as that of the same phrase in Article 42 of the UN Charter. There it means that not all forms of peaceful means must have been employed and failed, but that the Security Council believes that such means would be inadequate to address the security situation in question.

In 2009, UN Secretary-General Ban Ki-moon presented R2P as a three-pillar approach: primary responsibility of the home country, responsibility of the international community to support the government of the country, and responsibility of the international community to take action if the government manifestly fails in protecting its population. R2P can be interpreted as an important attempt to reduce the political character of interventions and to grant them more legitimacy. Although R2P proponents frequently advocate that “humanitarian interventions are dead” (especially due to the negative connotations of the expression), they also admit, when confronted, that R2P third pillar, when used, may ultimately result in a humanitarian intervention.

The Libyan case has provoked some international debate not about the rightfulness of intervention as such or the moral legitimacy of the norm, these remain rather unchallenged, but about the implementation of R2P. In the case of Libya there was no blue print for action, clearly demonstrating the unfinished nature of the norm. Considering the time pressure under which UN Security Council Resolution 1973 authorizing “all necessary means” was passed international actors had little time to coordinate their positions. In other words, the reaction of international organizations (IOs) to Libya is authentic and indicative of how and what the system can produce if undergoing a hard test.

None of the BRICS voted against Resolution 1973 (Brazil, China, India, Russia and Germany abstained). Despite their decision to abstain, the result was seen at the time as a subtle signal of

general support for humanitarian intervention in Libya. Yet this support among emerging powers quickly turned into rejection when it became clear that NATO was using its mandate to protect civilians as a mandate for regime change, thus clearly misinterpreting the spirit of the resolution.³⁹ In addition, NATO disobeyed the arms embargo by supplying Libyan rebels with arms and de fact acting as the rebels' air force in the conflict. The bombing in Libya stopped not as soon as the rebels took control of Tripoli, but only when Muammar Gaddafi was killed.

Faced with the situation in Libya, the initial assumption was that to protect civilians from attacks by the Gaddafi regime would primarily involve defensive use of force in line with the mandate, which stipulated the enforcement of a no-fly zone, defence of Benghazi by denying Gaddafi's forces the right of free movement on the ground, and enforcement of the arms embargo by deploying naval vessels outside the Libyan coast. The hope was that Gaddafi would eventually be compelled to enter into a political settlement.

However, this was before the realization that the regime was fighting its own people, which Gaddafi and his peers seemed compelled to destroy to secure its own survival. In this situation, direct protection of the population by way of airpower was at best insufficient, while indirect protection was only possible through defeating the regime militarily through offensive use of airpower, the only military instrument available to the intervening force.

The U.S. Government has embraced R2P in principle, but not always in practice. In the 2008 report published by the Genocide Prevention Taskforce (co-Chaired by former Secretary of State Madeleine K. Albright and former Secretary of Defense William S. Cohen), the authors "acknowledge[d] that the United States' record in responding to threats of genocide has been mixed. Over the span of time, our top officials have been unable to summon the political will to act in a sustained and consistent manner or take the timely steps needed to prevent genocide and mass atrocities from occurring."⁴⁰

³⁹ Gowan R., O'Brien E. and Sinclair A., "The Lybian War: A diplomatic history", Center for International Cooperation, NYU, 2011.

⁴⁰ Madeleine K. Albright and William S. Cohen, "Preventing Genocide: A Blueprint for U.S. Policymakers", United States Holocaust Memorial Museum, 2008, p xxi.

There are different definitions of war crimes in different international instruments⁴¹, but the most comprehensive and precise one can be found in Article 8 of the Statute of the International Criminal Court (Rome Statute).⁴² With 119 states parties⁴³, the Statute is not as such universally applicable, but its definition of war crimes embodies at least to some extent customary international law.⁴⁴ Article 8 (2) of the Rome Statute lists four different categories of war crimes, namely:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949 [...]
- (b) Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law [...]
- (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949

The prohibition of war crimes has not generally been recognised as a peremptory norm of international law, but at least some of these crimes have been argued to amount to breaches of *jus cogens*. The International Criminal Tribunal for former Yugoslavia (ICTY) pronounced in the Kupreškić case that “most norms of international humanitarian law, in particular those prohibiting war crimes”, are peremptory⁴⁵, and the ICJ considered in the Legality of the Nuclear Weapons case that the fundamental rules of international humanitarian law constitute “intransgressible principles of international customary law”.⁴⁶

⁴¹ See for example Article 50 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Article 51 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Article 130 of the Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949; Article 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949; Articles 2-3 of the Statute of the ICTY; Article 4 of the Statute of the ICTR; Article 8 of the Rome Statute of the ICC.

⁴² Bothe, “War Crimes” in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, 2002, p. 381.

⁴³ Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XVIII10&chapter=18&lang=en#Participants.

⁴⁴ Bellamy & Reike, “The Responsibility to Protect and International Law”, *Global Responsibility to Protect*, Vol. 2, No. 3, 2010, p. 277; Danilenko, “ICC Statute and Third States” in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, 2002, p. 1894.

⁴⁵ *Prosecutor v. Zoran Kupreškić et al.*, ICTY Trial Judgement, Case No. IT-95-16-T, 14 January 2000, p. 520

⁴⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, p. 79; Greenwood, “Historical Development and Legal Basis” in Fleck (Ed.), *The Handbook of International Humanitarian Law*, Second Edition, 2008, pp. 27-28.

So far, the states have not adopted any international convention prohibiting crimes against humanity.⁴⁷ The commission of these crimes is, however, prohibited under customary international law⁴⁸, and their prohibition has also been recognised as a *jus cogens* norm. Crimes against humanity were for the first time criminalized in the Charter of the International Military Tribunal of Nuremberg (IMT) in 1945⁴⁹, but more recently also for example in the Statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). The most comprehensive and specific definition of these crimes can be found in Article 7 (1) of the Rome Statute⁵⁰, according to which a “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution, against identifiably group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

⁴⁷ A Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity has, however, been drafted by the Crimes Against Humanity Initiative at the Whitney R. Harris World Law Institute of Washington University School of Law. see <http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf>.

⁴⁸ Cassese, *International Criminal Law*, Second Edition, Oxford University Press, 2008, p. 81; Werle, *Principles of International Criminal Law*, Oxford University Press, 2005, p. 269; Bellamy & Reike, “The Responsibility to Protect and International Law”, *Global Responsibility to Protect*, Vol. 2, No. 3, 2010, p. 277; Danilenko, “ICC Statute and Third States” in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, 2002, p. 1894.

⁴⁹ A/56/10 (SUPP), p. 208, p.5; Bassiouni, *Crimes Against Humanity in International Criminal Law*, Second Revised Edition, 1999, p. 210.

⁵⁰ Ibid; Danilenko, “ICC Statute and Third States” in Cassese, Gaeta and Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, 2002, p.1892.

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Where mass slaughter is termed genocide, intervention becomes an international obligation; for the most powerful, the obligation presents an opportunity. But if genocide involves an international obligation to intervene, war and counter-insurgency do not – it would be the ICC’s claim to punish individual perpetrators of war crimes – for they are understood as part of the exercise of sovereignty by states. They give expression to the *normal* violence of the state, the reason why states are said to have armies and armed forces.

When genocide, ethnic cleansing, war crimes or crimes against humanity are being committed, it is important that world governments respond with quick, concerted diplomatic action, and, if necessary, that the UN Security Council give swift authorization for the deployment of a non-UN peace enforcement operation, with or without the consent of the host government. However, the authorization of non-consensual intervention continues to be politically controversial.

Specifically, the permanent members of the UN Security Council are extremely reticent to authorize the deployment of international forces without the consent of the host government, even when the host government is perpetrating violence against its own people. One recent example was the lengthy Security Council debates over the deployment of peacekeepers in Darfur, and the insistence by Security Council members that it was necessary to submit to the many compromises demanded by the Sudanese Government in order to secure its consent for the deployment. This made a farce of the international commitment to R2P given the fact that the Sudanese Government had been implicated in the very crimes that the Security Council was seeking to halt.

The case of the ICC raises a more general question: that of the relationship between legal and political questions. One may begin by asking: what is a legal issue and what a political issue? In a democracy, the domain of the legal is defined through the political process. Even where there is a

human rights regime, both the fact and the content of rights (e.g. the Bill of Rights in the US) is defined in the country's constitution – that is, in its foundational political act. At the same time, its actual operation in any given period is subject to the will of the country's political organs which have the political power to qualify it in light of the changing context (as, for example, with the Homeland Security Act in the US War on Terror).

What happens if one detaches the legal from the political regime? Two problems arise, both related to the question of political accountability. The only formal gathering of the global community today is the United Nations, where the General Assembly has a full representation of states, but the Security Council is a congress of big powers that emerged from the ashes of the Second World War. To the extent the ICC has any accountability it is to the Security Council, not the General Assembly. It is this relationship that has made it possible for the only superpower of the post-cold war era to turn the workings of the ICC to advantage.

This problem was raised most directly by India. Like the US and Sudan, India also refused to sign the Rome Statute. India's primary objection had to do with the relationship between the Security Council – of which India is not yet a permanent member – and the ICC. The Rome Statute gives the Security Council minimal powers of oversight over the ICC: the Council has the power to require the ICC to look into particular cases, and to forbid it from doing so in other cases. India's 'basic objection was that granting powers to the Security Council to refer cases to the ICC, or to block them, was unacceptable, especially if its members were not all signatories to the treaty' for it 'provided escape routes for those accused of serious crimes but with clout in the U.N. body.' At the same time, 'giving the Security Council power to refer cases from a non-signatory country to the ICC was against the Law of Treaties under which no country can be bound by the provisions of a treaty it has not signed'.⁵¹

⁵¹ "Duplicity on Darfur", *The Hindu*, 2005.

FOUNDATIONS OF THE PROTECTION OF CIVILIANS MANDATE IN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

While International Human Rights Law (IHRL) and International Humanitarian Law (IHL) may not provide a direct legal basis for the protection of civilians mandate in UN peacekeeping, they are still relevant and normatively connected to this issue. IHRL protects a broad range of rights, but its core is intended to ensure protection against the arbitrary exercise and abuse of power by authorities for all human beings who find themselves within a state's 'effective control' (that is, over territory or otherwise over the individual, for example through detention).⁵²

IHL, by contrast, has two main aims.⁵³ The first is to protect persons who have not taken, or are no longer taking, a direct part in hostilities, including civilians as well as wounded, sick, and captured combatants. The second is to regulate the means and methods of warfare through rules on the conduct of hostilities and the use of weapons.⁵⁴ While the provisions of IHRL apply to all persons at all times within a state's jurisdiction, IHL only applies in times of armed conflict and draws a fundamental distinction between civilians and combatants who are taking a direct part in hostilities.⁵⁵

⁵² International Covenant on Civil and Political Rights (ICCPR), Art. 2(1); UN Human Rights Committee, General Comment No. 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004) para. 21; Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, GA Res. 8052, 18 September, 1970; European Court of Human Rights, *Loizidou v. Turkey* (Preliminary Objections), Application No. 15318/89, Series A, No. 310, 1995, para. 62; Milanovic, Marko, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.

⁵³ Best, Geoffrey, *War and Law since 1945*, Clarendon Press, Oxford, 1994; Fleck, Dieter (ed.), *Handbook of Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008; Greenwood, Christopher, *Essays on War in International Law*, Cameron May, London, 2006; ICRC, Customary International Humanitarian Law, Vol. I: Rules, Henckaerts, Jean-Marie and Beck, Louise Doswald (eds.), Cambridge University Press, Cambridge, 2005 [hereafter 'ICRC Customary Law Study'], Rules 1–11; SC Res. 1894, 11 November 2009.

⁵⁴ Sometimes referred to as the Hague law, these rules are mainly contained in the 1907 Hague Regulations respecting the Laws and Customs of War on Land, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1925 Gas Protocol, the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention, and the 1997 Antipersonnel Mine Convention. Bugnion, Francois, "Law of Geneva and Law of The Hague", *International Review of the Red Cross*, Vol. 83, No. 844, 2001, pp. 901–922.

⁵⁵ Quéguiner, Jean-François, "Precautions under the law governing the conduct of hostilities", *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 793–821; Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, GA Res. 8052, 18 September, 1970.

IHL prohibits all attacks against civilians, unless and for such time as they are directly participating in the hostilities.⁵⁶ IHL also specifies that, in international armed conflicts (and arguably non-international armed conflicts), precautions should be taken to try to ensure that civilians are not killed or injured in attacks on military targets.⁵⁷ While Article 1 of the Geneva Conventions *prima facie* provides a positive obligation to protect (that is, ‘to ensure respect’ for IHL), in practice this provision is read and implemented more narrowly.

IHRL is potentially of broader relevance for the protection of civilians mandate. This is particularly so when recognising that while IHL does apply *per se* to UN peacekeepers, such UN forces are generally not considered to be party to an armed conflict.⁵⁸ The Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law provides a test which treats UN peacekeepers as more analogous to civilians or non-combatants than to a party to the armed conflict. The Bulletin does this by prescribing that IHL applies to UN forces ‘when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement’.⁵⁹ This is however controversial, and the International Committee of the Red Cross (ICRC) adopts a different view of the issue.⁶⁰

The most important rights under IHRL for the protection of civilians in peacekeeping include the right to life, the prohibition against torture and ill-treatment, and the freedom from arbitrary detention.⁶¹ These are human rights that any host state will have an obligation to respect and ensure

⁵⁶ Common Article 3 to the Four Geneva Conventions.

⁵⁷ Additional Protocol I to the Geneva Conventions, Art. 48; Additional Protocol II to the Geneva Conventions, Art. 13(1).

⁵⁸ UN Secretary-General’s Bulletin, Observance by UN Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13, section 1.1; Sheeran, Scott, “A constitutional moment? United Nations peacekeeping in the Democratic Republic of Congo”, *International Organizations Law Review*, Vol. 8, 2011, pp. 55 and 113–114; Christopher Greenwood, ‘Scope of application of humanitarian law’, in ICRC, Customary International Humanitarian Law, Vol. I: Rules, Henckaerts, Jean-Marie and Beck, Louise Doswald (eds.), Cambridge University Press, Cambridge, 2005, pp. 39 and 46; Zwanenburg, Martin, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 171–174; ICRC, statement of the ICRC to the United Nations General Assembly 50th session, 16 November 1995, Fourth Committee, Agenda Item 86. Available at: www.icrc.org/eng/resources/documents/statement/57jmrn.htm.

⁵⁹ UN Secretary-General’s Bulletin, Observance by UN Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13, section 1.1.

⁶⁰ Zwanenburg, Martin, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden, 2005, pp. 171–174.

⁶¹ See Universal Declaration of Human Rights, Arts. 3, 5, and 9; ICCPR, Arts. 6(1), 7, and 9(1).

respect for (that is, a positive obligation), including by non-state actors.⁶² In relation to these human rights, only the freedom from arbitrary detention may be derogated from in a state of emergency.⁶³ While the applicability of IHRL to UN peacekeeping operations is difficult to contest, the precise content of these obligations is more unclear than for IHL obligations. The UN is not party to human rights treaties and the greatest difficulty lies in understanding the scope and extent of obligations for a UN force, which has no sovereignty over a territory and has lesser powers than a state. No equivalent of the Secretary-General's Bulletin on IHL exists to guide the application of IHRL to UN peacekeepers.

The 2000 Report of the Panel on United Nations Peace Operations (the Brahimi Report), a landmark UN document on peacekeeping, indicated that:

*“[P]eacekeepers – troops or police – who witness violence against civilians should be presumed to be authorised to stop it, within their means, in support of basic United Nations principles and ... consistent with ‘the perception and the expectation of protection created by an operation’s very presence’.”*⁶⁴

This statement is connected to a potential UN obligation to ensure respect for IHRL (also known as the ‘due diligence’ obligation) by others such as non-state actors, private individuals and even local authorities. While there is real scope for this argument of positive obligation, it is complicated and requires untangling a range of legal issues which are outside the scope of this article, including: the basis and scope of human rights obligations of the UN and its peacekeepers; the extent to which

⁶² International Covenant on Civil and Political Rights (ICCPR), Art. 2(1); UN Human Rights Committee, General Comment No. 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004) para. 3 and 10. Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras* (Preliminary Objections), Serie C, No. 1, Judgement, 26 June 1989, para. 172 (referring to ‘the lack of due diligence to prevent the violation or to respond to it as required by the Convention’); Human Rights Committee, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995), paras. 8.2 and 10.

⁶³ ICCPR, Art. 4(2); Svensson-McCarthy, Anna-Lena, *The International Law of Human Rights and States of Exception*, Martinus Nijhoff Publishers, Leiden, 1998; Sheeran, Scott, “Reconceptualising states of emergency under international human rights law: theory, legal doctrine, and politics”, *Michigan Journal of International Law*, Vol. 34, No. 2, 2013, pp. 101–168.

⁶⁴ Report of the Panel on United Nations Peace Operations (the Brahimi Report), 2000, A/55/305 and S/2000/809, para. 62, quoting the report of the Independent Inquiry on Rwanda, S/1999/1257.

derogation is possible (as for states of emergency) for any such applicable obligations⁶⁵; and the UN's legal authority to use force in a peacekeeping operation without an express mandate from the Security Council to do so (which is usually the case for a non-Chapter VII operation).

CONCLUSION

The protection of civilians framework can be broadly conceived as comprising legal authority and obligations of protection, and activities undertaken to realise those legal protections. The humanitarian, human rights and peacekeeping communities have each constructed discrete understandings of what 'protection of civilians' means, drawing on various bodies of law and building a concept of protection to frame their own narrative and practical activities. In order to improve the implementation of protection activities, there is a need to articulate an overarching framework in which the various concepts of 'protection of civilians' are coherently conceived, and can interact in a complementary and mutually reinforcing manner.

A range of activities contributes to realising the legal obligations of protection drawn from the UN Charter, IHL and IHRL, including human rights monitoring, reporting and advocacy; the use of force to provide physical protection to civilians; the provision of humanitarian assistance to sustain civilians; and rights based programmatic activity contributing to building a protective environment.

Although protection concepts and activities may not always be easily reconcilable, there is a need for a more nuanced approach that recognises shared objectives, clarifies responsibilities, and promotes complementary and mutually supportive activities in the field. In the UN peacekeeping context, this should lead to a reorientation towards the Security Council mandate language, which

⁶⁵ de Wet, Erika, *The Chapter VII Powers of the United Nations Security Council*, Hart, Oxford, 2004, pp. 201–202; Scott Sheeran and Catherine Bevilacqua, 'The UN Security Council and international human rights obligations: towards a theory of constraints and derogation', in Scott Sheeran and Sir Nigel Rodley (eds.), *The Routledge Handbook on International Human Rights Law*, Routledge, London, 2013; Michael Wood, 'The UN Security Council and international law', Hersch Lauterpacht Memorial Lectures, Lauterpacht Centre for International Law, University of Cambridge, 8 November 2006, para. 29. Available at: www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_2.pdf.

is focused heavily on the protection of civilians from imminent physical violence. There is also a need for an explicit recognition of the full legal framework in which the peacekeeping mandate exists, including the rights and obligations of peacekeepers arising from international law governing the use of force and the UN Charter's purposes and principles. The broader interpretation of the peacekeeping mandate, which is currently prevalent, risks undermining the core and original intent of the Security Council, and renders unclear expectations of the use of force by UN peacekeepers.

