The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Review and Analysis

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Abbreviations

DPKO: UN Department of Peace Keeping Operations

DRC: Democratic Republic of the Congo

ECOWAS: Economic Community of West African States

ICC: International Criminal Court

ICJ: International Court of Justice

ICISS: International Commission on Intervention and State Sovereignty

IHL: International Humanitarian Law

IHRL: International Human Rights Law

NATO: North Atlantic Treaty Organisation

OCHA: UN Office for the Coordination of Humanitarian Affairs

PS: United Nations Security Council Permanent Five

PSO: Peace Support Operation (including peace-keeping and peace-enforcement operations)

SC: UN Security Council

SG: UN Secretary General

UN: United Nations

UNHCR: UN High Commissioner for Refugees

USG: Under-Secretary General

GA: UN General Assembly
Introduction and Terminology

This literature review covers the two concepts of the Responsibility to Protect and the Protection of Civilians in Armed Conflict. Each of the first two parts delineates in turn the two concepts, before moving in the third section to consider literature on their basic conceptual, normative, legal and practical overlaps.

The Responsibility to Protect (R2P) has two main forms. First, there is the concept expressed in the seminal 2001 International Commission on Intervention and State Sovereignty (ICISS) Report of the same name. I term this R2P2001. Second, there is the norm as ultimately accepted by the UN General Assembly and UN Security Council – R2P2005. R2P2005 is a specified and to some extent diluted form of R2P2001, though retaining much of its spirit and substance. When I use the general term R2P, I am speaking of the concept in a broad sense inclusive of both R2P2001 and R2P2005.

The concept of Protection of Civilians in Armed Conflicts (PoC) is considerably more plastic. In what follows I distil four separate PoC concepts, and note the literature on each. PoC1 is the “protection of civilians” norm that constrains militaries in armed conflicts. Normatively we have application of the jus in bello aspect of Just War Theory; legally we have the relevant Geneva Conventions and similar instruments of International Humanitarian Law. PoC2 is the “protection of civilians” concept as it appears in Peace Operations literature, especially as produced by UN bodies like the DPKO and OCHA. PoC3 is the “protection of civilians” concept used by the UN Secretary General in his reports on the subject, and subsequently by the UN Security Council when considering action. PoC4 is the developing concept of humanitarian protection – the commitment to protection and civilian safety as enacted by humanitarian actors such as ICRC, UNHCR, Oxfam and so forth. As above, when I use the general term PoC, I am speaking of it in a broad sense ambivalent between these four specifications.

Finally, I have chosen – out of deference to the terminological judgment of the original ICISS report and the reasoning behind that judgment – to refer to coercive military actions undertaken without the consent of the host state in order to protect the civilian population as “military intervention for human protection purposes”, rather than the more orthodox “humanitarian intervention”.  


Part 1. The Responsibility to Protect

§1 The ICISS Concept: R2P2001

Throughout the 1990s the international community – and the UN in particular – was faced with an array of humanitarian crises, including genocide, ethnic cleansing, mass internal displacement of citizens, and humanitarian disasters arising from such.⁴ In some cases (e.g. Somalia and Sierra Leone) the UN sanctioned military intervention for human protection purposes in various forms and to various degrees of success. In others (e.g. Kosovo) non-sanctioned intervention occurred. And in still others (e.g. Rwanda) no substantial intervention took place, and atrocities proceeded effectively without interdiction.

By the decade’s end, the tension and conflicts between intervention and sovereignty was a major topic of legal, political and philosophical debate.⁵ UN Secretary General Annan called for change and


⁵ For example the World Congress on Legal and Social Philosophy in New York on June 29 1999 devoted its final plenary to sovereignty and intervention with the final keynote delivered by Sampford on “Democratic and Global Challenges to the concepts of Sovereignty and Intervention” (later published as: Charles Sampford, “Sovereignty and Intervention”, in Human Rights in Theory and Practice, ed. T. Campbell and B. M. Leiser (London: Ashgate, 2001). For a general overview of the context at this time, see Alex Bellamy, Responsibility to Protect: The Global Effort to End Mass Atrocities (Cambridge: Polity, 2009), pp. 19-32.
reform, and for the international community to do more to prevent such atrocities. Similar sentiments were aired by key heads of state, and influential reports. Annan explicitly invoked a “moral duty” of the Security Council to act on behalf of the international community when faced with crimes against humanity. While he did not himself solve the dilemma posed by the apparently conflicting principles of humanity and sovereignty, he placed it before the General Assembly in telling terms:


9 Annan, We the Peoples, p. 48.

10 The initial reaction of the General Assembly to Annan’s position on intervention was frosty at best: see Roberts, "The So-Called 'Right' of Humanitarian Intervention", p. 32. For an overview of Annan’s influence thereafter, see Adam Roberts, "The United Nations and Humanitarian Intervention", in Humanitarian Intervention and International Relations, ed. Jennifer Welsh (Oxford: Oxford University Press, 2004), 71-97, pp. 86-87. Roberts summarizes: “Annan’s campaign should be interpreted as a partially successful attempt to change the terms of international debate, rather than as a call for any specific change in international
But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?\(^\text{11}\)

Against this background the Canadian government commissioned the *International Commission on Intervention and State Sovereignty*, and in 2001 it provided its report.\(^\text{12}\)

\textbf{§1.1 Central Normative Structure/Principle: the \textit{R2P}core}

The conceptual core of R2P as drawn out by ICISS has two central elements. The first concerns a shift in the understanding of sovereignty from "sovereignty as control" to "sovereignty as responsibility".\(^\text{13}\) That is, sovereignty is no longer to be understood as a right to perform whatever internal actions the state desires. The reason for sovereignty, it is submitted, is at base the protection of the people’s most fundamental rights from the most egregious acts of violence, and as such sovereigns have an inviolable responsibility to fulfil this protection. The second element of R2P is that, while the state has primary responsibility for protecting its citizens, if the state should be unwilling or unable to fulfil that mandate, then the responsibility shifts to the international community.\(^\text{14}\)

While the state whose people are directly affected has the default responsibility to protect, a residual responsibility also lies with the broader community of states. This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or

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\(^\text{12}\) For a detailed account of the development of the concept of R2P2001 through the work of ICISS and earlier consultations/workshops, see Bellamy, *Responsibility to Protect*, pp. 35-51. For a description of the role of commissions like ICISS in international law and legal discourse, see Johnstone, "The Power of the Better Argument", p. 479.

\(^\text{13}\) (ICISS), *The Responsibility to Protect*, p. 14, q.v. p. 13.

\(^\text{14}\) Ibid., p.14.
where people living outside a particular state are directly threatened by actions taking place there.\textsuperscript{15}

The international community is on this basis called upon to fill what Ramesh Thakur calls the “responsibility deficit” that arises when the state fails to fulfil its primary obligation.\textsuperscript{16}

We might call this broad view the “core principle”\textsuperscript{17} of R2P (what I will term R2P\textsubscript{core}). R2P\textsubscript{core} is thus a broad vision of human protection and the assignation of responsibilities to ensure it. R2P\textsubscript{core} imposes a responsibility on states to not harm and to pro-actively protect their populations; and imposes a responsibility on the wider community to engage in appropriately authorised and multilateral actions – including, if need be, using coercive force – to protect those populations if the state cannot or will not live up to its responsibility. R2P\textsubscript{core} can be specified in different ways – in particular in the manner ICISS would go on to present (R2P2001) and then in the further specified (and somewhat diluted) form UN member states would accept (R2P2005). It is by reference to R2P\textsubscript{core} that it can be plausibly claimed that, for instance, the Constitutive Act of the African Union,\textsuperscript{18} and perhaps the Genocide Convention, embody R2P, even as they differ in various specifics regarding the assignation of obligation and authorisation.\textsuperscript{19, 20} Similarly, we would want to say that

\textsuperscript{15} Ibid., p.17.
\textsuperscript{17} Ibid., p. 330.
\textsuperscript{19} Note that placing the requirement of appropriately authorized and multilateral action within R2P\textsubscript{core}, as I have done, means that appeals to R2P with regard to, for instance, recent (allegedly humanitarian)
R2Pcore is invoked in various other proposed systems for protective intervention, including those that envisage authorising bodies outside the UN Security Council, though such bodies were not a part of either R2P2001 or R2P2005.21

Thus understood, R2Pcore is strongly distinguished from a “right of intervention”.22 Later work has largely affirmed the significance of this distinction,23 though some have argued the point of incursions into Iraq and Georgia are misplaced. Kosovo would be at best a borderline case. This seems in keeping with the central thrust of R2P2001. See Ramesh Thakur, “In Defence of the Responsibility to Protect”, The International Journal of Human Rights, 7, no. 3 (2003): 160-78, pp. 174-5. Critics of the concept often use the term in a looser sense, where it applies to any rhetorical invocation of humanitarian intervention, including those made with reference to Hitler, Mussolini and 17th Century colonial ventures: Chomsky, Statement on the Responsibility to Protect, p. 1; later Chomsky deploys the term even more broadly to apply to mass starvation: Ibid., p. 5.

Similarly, we may use R2Pcore to apply to the commitments governing action in a particular case, while remaining neutral between more specific applications of R2P. E.g., a pre-2001R2P case might be the peace-enforcement operation in East Timor, where the international pressure for Indonesia to consent to the force had a decidedly R2P tone. See Ian Martin, “International Intervention in East Timor”, in Humanitarian Intervention and International Relations, ed. Jennifer Welsh (Oxford: Oxford University Press, 2004), 142-62, pp. 156-8.


Earlier views had spoken of a “duty” of humanitarian intervention. See IICK, Kosovo Report, p. 185, re resistance to such a duty: Ibid., pp. 189, 191. Such a vision, gesturing in the direction of R2P, seems also at work in International-Panel, The Preventable Genocide, ¶10.8, 12.36, 12.51; UN, Rwanda Report, pp. 38, 50. In 2000, Roberts lists the problems with viewing humanitarian intervention as a right, but goes on to consider the fundamental problem with viewing it as a duty: “in view of the delicate political, military and moral judgements that have to be made in each case, it is essentially absurd to speak of a duty of intervention as such: what there may be is a duty to consider appropriate action in the circumstances that are faced.” Roberts, "The So-Called 'Right' of Humanitarian Intervention", p. 50. In this connection, the ICISS’s use of the term “responsibility” – with its open-ended-ness (characteristic of what ethicists would call an imperfect duty and what in the international law context is termed a soft law) – may have been an improvement on both “right” and (perfect, determinate) “duty”.

Gareth Evans, "The Responsibility to Protect: An Idea Whose Time Has Come... And Gone?", International Relations, 22, no. 3 (2008): 283-98, pp. 290-92; Louise Arbour, "The Responsibility to Protect as a Duty of Care in International Law and Practice", Review of International Studies, 34, no. 03 (2008): 445-58, pp. 446-47. Newman highlights the standard understanding of “humanitarian intervention” as being too wide in scope – responsive to concerns about democracy and suchlike, and notes also its narrow focus on military intervention, rather than the diverse ways that R2P can respond to human security issues. Michael Newman, "Revisiting the 'Responsibility to Protect'", Political Quarterly, 80, no. 1 (2009): 92-100, pp. 94-7; see similarly Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶¶11(c), 55. Ki-Moon cites Kenya as illustrative of R2P reaction being effective without being interventionist.
difference can be overplayed.\textsuperscript{24} Weiss, for example, critiques several of the major claims by R2P that distinguish it from “Humanitarian Intervention.” In particular, he thinks that the significance of prevention, as distinct from reaction, is substantially overplayed, and that the wisdom of beginning with less coercive and intrusive measures is highly situational.\textsuperscript{25}

\textbf{§1.2 R2P2001 Justifications/Foundations:}

The ICISS put forward four inter-related justifications for the R2P and subsequent research has extended and developed these lines of argument. I note these developments as we proceed.

\textbf{§1.2.1 Sovereignty as Responsibility:} First, the ICISS considered the meaning of sovereignty, and the obligations inherent in the concept. Sovereignty, it determined, is in an important sense bestowed by and protected in the UN organisation. If so, this has consequences for the type of sovereignty that is effectuated.\textsuperscript{26} Not only is sovereignty conditioned by requirements on respecting other countries’ equal sovereignty,\textsuperscript{27} it also must be fitted into the fundamental mandate of the UN itself: “to save


\textsuperscript{25} Weiss, \textit{Humanitarian Intervention}, pp. 103-4.

\textsuperscript{26} The UN Charter has resources both for and against military intervention for human protection purposes. Against are the crucial non-interventionist Articles 2(4) and 2(7). In favor are the Charter’s human rights mandates in the Preamble and Articles 1(2), 1(3) and 55, and the discretionary powers it vests in the Security Council: Articles 39, 42 and 51. See Roberts, “The United Nations and Humanitarian Intervention”, pp. 71-73.

\textsuperscript{27} (ICISS), \textit{The Responsibility to Protect}, p. 12. The theoretical implications of this are discussed in Henry Shue, “Limiting Sovereignty”, in \textit{Humanitarian Intervention and International Relations}, ed. Jennifer Welsh (Oxford: Oxford University Press, 2004), 11-28, p. 15. Bellamy notes, however, that many earlier visions of the rights of sovereigns did not include a right of non-intervention: Bellamy, \textit{Responsibility to Protect}, p. 14. Putting the point in Hohfeldian terms, ICISS and Shue are understanding sovereignty as giving a claim-right to freedom from interference. Bellamy’s point is that historically sovereignty only effected a naked liberty to rule. W. Hohfeld, \textit{Fundamental Legal Conceptions, as Applied in Judicial Reasoning}, ed. W. Cook (New Haven: Yale University, 1946). On a similar theme, Cohen points out the newness of sovereign equality, self-determination and non-intervention as opposed to the old Westphalian system that contained no such universal principles: Jean Cohen, “Whose Sovereignty? Empire Versus International Law”, \textit{Ethics and International Affairs}, 18, no. 3 (2004): 1-24, pp. 12-14; she proceeds to list, very much in tune with the idea of sovereignty as responsibility, the “key “transformative” developments in international relations since World War II: sovereign states gave up their “sovereign” right to go to war and aggressive war became illegal; colonialism was dismantled and deemed a violation of the principle of self-determination; sovereign states began actively to pursue cooperation in a multiplicity of international institutions; and they accepted being limited by human rights principles, renouncing impermeability to international law in this domain.” Ibid., p. 20.
succeeding generations from the scourge of war.”\textsuperscript{28} Given that most modern conflicts are not external but internal, understanding sovereignty as responsibility promises to dissolve the dilemma between respecting states and respecting the people that inhabit them.\textsuperscript{29}

In reconstruing sovereignty in this way, the ICISS built not only upon the practices of states\textsuperscript{30} and the UN itself,\textsuperscript{31} but also upon a substantial literature.\textsuperscript{32} The main impetus for “sovereignty as

\textsuperscript{28} (ICISS), The Responsibility to Protect, p. 13. International Commission on Intervention and State Sovereignty

\textsuperscript{ICISS, Responsibility to Protect: Supplementary Volume. Research Essays, pp. 7-9.}

\textsuperscript{29} For a recent treatment of the sovereignty as responsibility concept, see Anne Peters, "Humanity as the A and O of Sovereignty", European Journal of International Law, 20, no. 3 (2009): 513-44.

\textsuperscript{30} As Thakur says: “This is a less radical departure from established precept and practice than it appears. The authority of the state is nowhere regarded as absolute.” Ramesh Thakur and Thomas G. Weiss, "R2P: From Idea to Norm - and Action?", Global Responsibility to Protect, 1, no. 1 (2009): 22-53, p. 27. Shue observes: “Even for Wolff and Vattel, whose theoretical objective was to establish sovereign states as moral and legal entities, sovereignty was by no means a matter of each state’s having some indefeasible and total discretion.” Shue, "Limiting Sovereignty", p. 13. See also ICISS, Supplementary Volume, pp. 10, 16-19; Jennifer Welsh, "Taking Consequences Seriously: Objections to Humanitarian Intervention", in Humanitarian Intervention and International Relations, ed. Jennifer Welsh (Oxford: Oxford University Press, 2004), 52-68, pp. 55-56; Alex Bellamy and P. D. Williams, Protecting Civilians in Uncivil Wars, Working Paper No. 1, pp. 12-15; Bellamy and Williams, Protecting Civilians in Uncivil Wars, pp. 13-21; Bellamy, "Trojan Horse?", pp. 34-5; Deng, "From ‘Sovereignty as Responsibility’”. While sceptical about many of the ostensible changes in the post Cold-War world, Frohardt et al emphasize the weakening status of absolute sovereignty in relation to humanitarian goals: Frohardt, Paul, and Minear, Protecting Human Rights, pp. 19-23; see similarly Nsongurua Udombana, "When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan", Human Rights Quarterly, 27, no. 4 (2005): 1149-99, pp. 1169-70; Note also Susan Breau, "The Impact of the Responsibility to Protect on Peacekeeping", Journal of Conflict and Security Law, 11, no. 3 (2007): 429-64, pp. 442-63, who considers the presence in state practice of R2P elements such as Early Warning; Robust Peacekeeping, and Disarmament, demobilisation and reintegration.

\textsuperscript{31} Vesselin Popovski, "Sovereignty as Duty to Protect Human Rights", UN Chronicle, 41, no. 4 (2004-5): 16-18, p. 17; Deng, "From ‘Sovereignty as Responsibility’”, pp. 360-3; Clear statements of state responsibility to police and prosecute atrocity crimes can be found in UN Security Council resolutions prior to the ICISS Report, and of international community’s duties to aid states in protection capacity-building: e.g. UNSC, UN Security Council Resolution 1325: On Women and Peace and Security, S/RES/1325, 31 October 2000, ¶11; UNSC, UN Security Council Resolution 1366 (2001) on the Role of the Security Council in the Prevention of Armed Conflicts, S/RES/1366, 30 August 2001, ¶¶2, 7, 20. Indeed, the view that peacekeeping obligations should reflect that “prohibition from intervention in internal conflicts cannot be considered to apply to the senseless slaughter of civilians or fighting arising from tribal hostilities” (UNSG Hammarskjold, cited in Siobhán Wills, Protecting Civilians: The Obligations of Peacekeepers (Oxford: Oxford University Press, 2009), p. 10) dates back to the very dawn of UN peacekeeping. As Wills argues, “Protection was regarded as intrinsic to the nature of peacekeeping from the very beginning.” (Ibid., p. 18) For a detailed exposition of the persistent (though sometimes unacknowledged) tension between state sovereignty and civilian protection in UN missions, see: Ibid., Ch. 1.

\textsuperscript{32} See the summary in ICISS, Supplementary Volume, pp. 11-12. Bellamy gives a comprehensive overview of the discursive context at work at the time: Bellamy, Responsibility to Protect, pp. 19-32.
responsibility” in the 1990s had been the work of Francis Deng and Roberta Cohen on Internally Displaced Persons. Similar claims had been put forward in UNSG Boutros Boutros-Ghali’s 1992 Agenda for Peace, in an influential article by Kofi Annan, and in the earlier Kosovo Report and DUPI Report. Tesón’s earlier work on International Relations and military intervention also had significant similarities. And, of course, there was a suite of natural law and social contract theories dating back through and past the early modern era with just this understanding of sovereignty.

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That there has been some such change in the vision of sovereignty is perhaps the part of R2P that is

and the Logic of Rights”, p. 56; Bassiouni links R2P to rule of law, the notion of an international social contract, and the classic Roman civitas maxima; Cherif Bassiouni, “Advancing the Responsibility to Protect through International Criminal Justice”, in Responsibility to Protect: The Global Moral Compact for the 21st Century, ed. R. H. Cooper and J. V. Kohler (New York: Palgrave MacMillan, 2009), 31-42. For a general analysis of the inter-relations between sovereignty and human rights see Bellamy, Responsibility to Protect, Ch. 1; For a specific application of Locke to R2P see: Lee Ward, "Locke on the Moral Basis of International Relations”, American Journal of Political Science, 50, no. 3 (2006): 691-705, pp. 701-3. Taking a contrary view, Focarelli critiques any swift move from natural law to, on the one hand, military intervention for humanitarian purposes, and on the other hand, international law: Carlo Focarelli, "Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?”, European Journal of International Law, 21, no. 1 (2010): 125-71, pp. 195-6. Note also that there is a subtle tension in emphasizing the contract view of the state regarding R2P. While it mandates the first strut of the responsibility to protect, the fiduciary duty owed to citizens arguably diminishes the second strut regarding international obligations, at least on some construals. See Allen Buchanan, "The Internal Legitimacy of Humanitarian Intervention”, The Journal of Political Philosophy, 7, no. 1 (1999): 71-87. This tension explains why the Hobbesian state can be used to support the responsibilities of the state to its citizens, yet presses against international responsibilities to those citizens. This last feature makes Hobbes’ state appear as an exemplar of Westphalian sovereignty in, e.g., Bassiouni, "Atrocity Crimes”, p. 36. The tension is also detailed by Pattison, who notes what he calls the ‘Lockean’ and the “Rousseauian” concerns emerging here, regarding principles of property and self-determination respectively: James Pattison, “Legitimacy and Humanitarian Intervention: Who Should Intervene?”, The International Journal of Human Rights, 12, no. 3 (2008): 395-413, pp. 404-5. Welsh considers a variety of normative objections to military intervention for human protection purposes regarding aspects of sovereignty: Welsh, "Taking Consequences Seriously”. Peters notes not only Locke and Hobbes, but looks as far back as Guiccardini in 1520: Peters, "Humanity as the A and Ω of Sovereignty”pp. 518, 526. The general view that the sovereign rules only for the sake of the ruled dates back to the very dawn of political philosophy – where Socrates and Thrasymachus spelt out their differences in Plato, The Republic, trans. Desmond Lee, Revised ed. (London: Penguin, 1987).

most widely accepted. However, there remained a tension between the theory and practice of sovereignty in international law and international relations and that within what was now a majority of states that recognized each other as democracies. The basis for sovereign legitimacy within the latter had changed from “effectiveness” (or, more pointedly, “the prior successful use of force”) to the active choice of the governed. Despite the rhetoric, international law and international relations still recognized governments on the former basis as demonstrated by the way in which regimes that ousted democratic governments still got the keys to the embassies, seats at the UN and the ability to issue sovereign debt.

§1.2.2 Human Rights: Second, the ICISS considered the significance of human rights to the issue of R2P. Citing Article 1.3 of the founding 1945 UN Charter, the 1948 Universal Declaration of Human Rights, and noting the universal reach of international criminal tribunals (especially the ICC), the ICISS argued that both the substance and process of human rights law is increasingly “without borders”. An otherwise cautious critic of aspects of R2P, Stahn similarly links the UN Charter and

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41 See Sampford, "Sovereignty and Intervention" where he suggested ways in which this tension might be resolved. Further directions in which sovereignty was changing and might be changed are discussed in Charles Sampford, R. Thakur, and T. Jacobsen, eds., Beyond Westphalia: Reconceiving Sovereignty (Aldershot: Ashgate, 2008). One of the natural corollaries of “sovereignty as responsibility” has appeared to some to be that international acknowledgement and recognition of sovereignty — especially by the UN — should be predicated on successful fulfilment of sovereign responsibility, and thus that state recognition should be stripped from genocidal regimes. Neither the ICISS nor the 2005 UN WSOD pursued this controversial possibility in any depth, though it has appeared to some as a promising way forward: see Jütersonke’s report of proceedings in: Oliver Jütersonke, "Conference Report”, in From Rights to Responsibilities, ed. Oliver Jütersonke and Keith Krause (Geneva: Programme for Strategic and International Security Studies (PSIS), 2006), 7-22, p. 12; US Task-Force, American Interests and United Nations Reform (Washington: United States Institute of Peace, 2005), p. 31.


43 (ICISS), The Responsibility to Protect, p. 14. Though, of course: “It is only when national systems of justice either cannot or will not act to judge crimes against humanity that universal jurisdiction and other international options should come into play.” ICISS, Supplementary Volume, p. 8.
other articles to a widespread duty-imposing understanding of sovereignty, while Welsh and Banda draw out human rights as being the final source of R2P.

The use of human rights to obligate military intervention for human protection purposes is a common thread in the ethics literature. Walzer imposes imperfect duties to respond when the international community is confronted with crimes that “shock the moral conscience of mankind.” Others consider Lockean, Kantian and other rights-based grounds for such intervention. Shue argues that a duty of military intervention for such purposes is a correlative of the most basic and uncontroversial assignations of human rights.

On a legal footing, McClean has argued that International Human Rights Law (IHRL) can both support and specify R2P, on all three of its pillars of Prevention, Reaction and Rebuilding. Similarly, Gierycz tracks in detail the confluence of IHRL and R2P, and notes the ways that the latter can “be recognised as an opportunity to give force to the implementation of the underlying human rights instruments.” Rosenberg argues likewise, using IHRL to demonstrate positive state protection


\[^{46}\] Walzer, Just and Unjust Wars, p. xii, xiii, 101-108. The link to human rights specifically is at Ibid., p. 108. See also his use of "obligation" in: Walzer, "The Politics of Rescue".


responsibilities to their own people, and then turning to the Genocide Convention to consider the current legal responsibilities of states to prevent other states, under their influence, from committing genocide (and perhaps atrocity crimes more generally).

As Ban Ki-Moon recently asserted:

...no community, society, or culture publicly and officially condones genocide, war crimes, ethnic cleansing or crimes against humanity as acceptable behaviour. On this principle, Member States are united. Although there have been lively debates about how best to implement the responsibility to protect, no Member State has argued against trying to curb abuses of such magnitude or against developing partnerships at the national, regional and global levels to achieve this.

§1.2.3 Human Security: In the 1990s the idea of “human security” had arisen to juxtapose the idea that security in international relations and law referenced solely the security of states. This latter “narrow national security” concept had increasingly appeared to lose sight of the reason why national security was itself to be valued – because of its capacity to protect and promote the legitimate interests of individuals and societies. The concept of human security had drawn favour from some nations, UN bodies, and the UNSG, and it was clearly well-placed to serve as a normative and legal basis for R2P.

Further work on the links between Human Security and R2P has been done by Newman, Popovski, and Mickler, while Strauss discusses the Japanese use of this concept in the buildup to

52 Ibid. pp. 461-476.
53 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶20.
57 Newman, "Revisiting the ‘Responsibility to Protect’", p. 95.
59 David Mickler, "Protecting Civilians or Preserving Interests? Explaining the UN Security Council’s Non-Intervention in Darfur, 2003-06" (PhD Thesis, Murdoch University, 2009), pp. 53-64.
the 2005 Summit Outcome.\textsuperscript{60} Still, the distinctions between the two concepts need to be kept in mind – human security is much larger in scope, covering many more concerns.\textsuperscript{61}

\textbf{§1.2.4 State Practice and International Humanitarian Law (IHL):} The ICISS noted a substantial gap between codified best practice of nations and their actual state practice – where the latter was suggestive of an emerging guiding principle of R2P.\textsuperscript{62} The UNSC had authorised action in Somalia for at base humanitarian reasons (or, more obliquely, had been willing to envisage the humanitarian disaster as a threat to international peace and security).\textsuperscript{63} Similarly on a humanitarian basis, the Economic Community of West African States (ECOWAS) had taken action in Liberia and Sierra Leone, and NATO had acted in Kosovo. Further cases of relevant state practice preceding the ICISS report,

\begin{itemize}
  \item \textsuperscript{62} (ICISS), The Responsibility to Protect, pp. 15-16, 50. For a view critical of reliance on the developing practice of states, see McClean, "The Role of International Human Rights Law", pp. 135-7. For a sketch of the arguments against any norm of military intervention for protective purposes based on state practice, see Nigel Rodley and Basak Cali, "Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law", Human Rights Law Review, 7, no. 2 (2007): 275-97, pp. 279-80, c.f. p. 281. Focarelli also questions the use of state practice to justify R2P’s obligations, and in particular draws attention to the need to distinguish law based on international customary law (that requires state practice and \textit{opinio juris}) from that based on the prescriptions of treaties (which does not). He argues these two are not appropriately distinguished by the R2P doctrine: Carlo Focarelli, "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine", Journal of Conflict & Security Law, 13, no. 2 (2008): 191-213, p. 211. In regard to practice, Murphy makes the important point that: “To a certain extent, the entire history of Security Council conflict management is one that finds no clear textual support in the U.N. Charter: the numerous U.N. peacekeeping deployments have no express or even strongly implied basis in the Charter; and Security Council authorization of forcible deployments—such as authorization of the coalition of states that expelled Iraq from Kuwait—are not firmly anchored in the original scheme of Articles 43-49...” Sean D. Murphy, "Criminalizing Humanitarian Intervention", Case Western Reserve Journal of International Law, 41 (2009): 341-77, p. 353.
where international military action was defending on the basis of (inter alia) civilian protection, include (arguably) Burundi, Indonesia, Iraq (1991), and many others.

Additional evidence for the emerging guiding principle was to be found, the ICISS Report asserted, in:

- fundamental natural law principles;
- the human rights provisions of the UN Charter;
- the Universal Declaration of Human Rights together with the Genocide Convention;
- the Geneva Conventions and Additional Protocols on international humanitarian law;
- the statute of the International Criminal Court;
- and a number of other international human rights and human protection agreements and covenants.

This use of international law as evidence for an emerging principle has been taken to be a crucial point. In particular, it is the grounding of R2P in *International Humanitarian Law* that has attracted the most sustained research attention.

**The Genocide Convention and the Crime of Genocide:** Many authors use the Genocide Convention to underwrite R2P. Arbour argues that the Genocide Convention has been understood by the ICJ as imposing justiciable obligations on States to the citizens of other countries, and that this duty can be

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65 Consider the discussion in Ibid., pp. 293-94.
66 UNSC, *UNSC Res. 688*. See Wheeler, "The Humanitarian Responsibilities of Sovereignty".
68 (ICISS), *The Responsibility to Protect*, p. 16.
69 e.g. Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶13; ICRtoP, *Report on the GA Plenary Debate*, p. 5; UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All* UN Doc. A/59/2005, ¶133. Thakur and Weiss emphasize the general relationship: "Discussion and analyses of the protection of civilians and the prosecution of perpetrators have hitherto proceeded along separate lines. In fact they are two sides of the same coin." Thakur and Weiss, "R2P: From Idea to Norm - and Action?" p. 42.
70 For a brief but measured overview see Roberts, "The United Nations and Humanitarian Intervention", pp. 76-78.
reasonably understood through the common law idea of a “duty of care”. In particular, she singles out the UNSC Permanent Five (P5) for special obligations commensurate with and following from their roles and powers. Strauss agrees that the Crime of Genocide (including but arguably not limited to the parties to the Genocide Convention) can entail states have international obligations (as distinct from criminal liability) to prevent genocide. The Crime of Genocide thus could arguably support “a general obligation of states to prevent the commission of acts contrary to certain norms of general international law.” (See similarly the position of Pogge.) Lee Ward provides a contrary view on the significance of the legal obligations imposed by the Genocide Convention, as does de Waal. Similarly cautious, though not quite as deflationary, is the view of Wills. Focarelli, building on prior judicial opinion, suggests that while the text of the Genocide Convention might conceivably open a space for third-party duties of genocide prevention, state practice (in the form of inaction in the face of known genocides) tells decisively against such an obligation.

Evans notes the problems caused both by the Genocide Convention’s precise language regarding victims – they must be of a national, ethnic, racial or religious group (thus meaning that cases like Cambodia would not count) – and the demanding evidentiary requirement of showing the intent to destroy the targeted group.

Gattini describes how the ICJ in its 2007 Judgement on the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) eschewed consideration of a general duty to prevent genocide (and so of R2P) and instead focused on the specifics of the Genocide Convention. Still, the judgment was not unsupportive of the thinking behind R2P. As noted by Barbour and Gorlick, the ICJ did not constrain responsibility to sovereign borders but to “a capacity to effectively influence”,

72 Arbour, "Duty of Care”, pp. 450-452.
73 Ibid., pp. 453; see similarly: UN, Rwanda Report, p. 38.
75 Ibid., p. 317.
76 Pogge, "Moralizing Humanitarian Intervention”, pp. 164-5.
80 Focarelli, "Common Article 1 of the 1949 Geneva Conventions”, pp. 139-140.
and the court explicitly invoked positive duties and due diligence. From this platform, McClean argues that the judgment of the ICJ can be used to fill out key areas of ambiguity in R2P2001.

The Geneva Conventions and the Additional Protocols: Wills considers application of Article 1 common to the four Geneva Conventions (combined with, if necessary, Additional Protocol 89).

Wills holds that duties of intervention may be suggested in these articles – at least under the ICRC reading of them – but that any response must be ultimately specified and legitimated by other legal and political mechanisms: most especially under UN Charter. More sceptical again of substantial links between R2P and the ICJ judgments on the Geneva Conventions is Viotti, who emphasizes that the ICJ does not consider the use of armed force an appropriate method of ensuring respect for jus in bello norms. Strauss’s view is that the Hague Regulations, Geneva Conventions

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86 ICRC, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: International Committee of the Red Cross, 12 August 1949), Art. 1. “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”
87 Arguably, for many of the significant rules of IHL, not being a signatory of a particular treaty is irrelevant, as most such rules are sufficiently well-established in State practice and *opinio juris* to count as customary international law. See Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict”, *International Review of the Red Cross*, 87, no. 857 (2005): 175-212, pp. 177, 188-89. Note, however, that the ICRC study isolates few positive duties (of intervention, or otherwise) of international humanitarian law that resemble R2P. See text to nn. 95-97 below.
88 ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Geneva: International Committee of the Red Cross, 8 June 1977), Art. 89 provides that: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” Note though that the generally more specific and demanding, in terms of Protection of Civilians, Additional Protocol II is explicitly non-interventionist.
(esp. common Article 3) and Additional Protocols create a substantial legal responsibility – for which ICJ action is applicable – for states not to commit crimes against humanity, but for positive duties of prevention he moves from these to consideration of the Crime of Genocide (see above). Fleck argues that Common Article 1 is now to be understood very much through the lens of “sovereignty as responsibility”. Still, he agrees that this article: “certainly does not allow a state to use force in the absence of a Security Council mandate; but in taking effective action below this threshold, a state cannot today be seen as unlawfully interfering in the internal affairs of another state.” Fleck’s general position is that IHL does not make the case for intervention, but that in line with R2P it does, (i) impose state (including state agents) responsibility and legal accountability for its actions and omissions, and (ii) support and to some degree require the non-interventionist aspects of the international community’s Responsibility to Prevent, and perhaps some aspects of the Responsibility to Rebuild. He emphasizes that:

The existing range of measures to implement and enforce international humanitarian law in contemporary armed conflicts goes far beyond the personal responsibility of individual perpetrators. It includes economic, political and military consequences of violations of international rules and also measures to secure and promote compliance, such as special arrangements, fact finding and education and training.

The International Law Commission (ILC) Articles on State Responsibility: Stahn is largely sceptical of the view that states have substantial obligations to protect founded in existing international law. However, he locates the largest support for such a duty in the ILC Articles on State Responsibility – especially Article 41 (1). (Strauss also pursues this possibility. The obligations imposed here have substantial similarities to the general idea of R2P, though they are more limited in scope and

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94 Ibid., p. 183.
95 Ibid., pp. 183, 188. Fleck draws in particular on Jean-Marie Henckaerts and Louise Doswald-Becks, Customary International Humanitarian Law and Henckaerts, "Study on Customary International Humanitarian Law".
97 Ibid., pp. 181, 184, esp. fact-finding: pp. 189-91.
98 e.g. Ibid., p. 191, 194, 199.
99 Ibid., p. 184.
narrower in assigning duties – most pertinently in not authorising military force. However, Stahn emphasizes that the ILC, “acknowledged that it is open to question whether general international law at present prescribes a positive duty of cooperation and concede[d] that in that respect Article 41(1) ‘may reflect the progressive development of international law,’ rather than the law as it currently stands.

Peace Support Operations Doctrines: Wills considers the doctrines of Peace Support Operations in use by various countries, finding some support for the general notion of R2P. She gives a measured appraisal of the extent to which troops themselves may be said to have legal or moral responsibilities in this regard.

Other Legal Instruments: Wills further considers IHL responsibilities when laws of occupation will apply. Though perhaps only narrowly applicable, these arguably impose positive obligations. On a different tack, Haacke notes Luck’s use of the Guiding Principles on Internal Displacement agreed to by the UNGA in 2007. Looking even further afield, Sarkin traces the provenance of R2P back to the Martens clause in the Hague Conventions of 1899 and 1907.

§1.3 Content of R2P2001
R2P2001 had three key struts: the responsibilities to prevent, react and rebuild.

The Responsibility to Prevent imposed upon states and the international community the obligation to prevent large-scale loss of life through various avenues. Primary responsibility falls on the sovereign state, but even at this earlier preventive stage the international community has important responsibilities. The Responsibility to Prevent applies both to the root cause of conflicts and for their

\[\text{References here}\]

102 Stahn, “Political Rhetoric or Emerging Legal Norm?” pp. 115, 119.
103 Ibid., p. 116.
105 Ibid., pp. 399-409.
106 Ibid., p. 411; and more fully: Wills, Protecting Civilians, pp. 126-133, 145-170; See also Gierycz, "Legal and Rights-Based Perspective", pp. 258-9.
107 Jürgen Haacke, "Myanmar, the Responsibility to Protect, and the Need for Practical Assistance", Global Responsibility to Protect, 1, no. 2 (2009): 156-84, p. 175. Haacke also considers the concordance between the Responsibility to React to humanitarian catastrophes and, for instance, the guiding principles adopted by ASEAN members. Ibid., p. 176.
direct prevention. Root causes can include poverty, repression and failures of distributive justice, and the ICISS report noted in particular the international community’s responsibilities regarding developmental assistance and the removal of damaging restrictive trade policies. Responsibilities to engage in diplomacy and mediation are also emphasized, as is the significance of developing effective “early warning” procedures. One consistent focus of the Responsibility to Prevent in recent years has been the halting of hate speech.

The Responsibility to React triggers when attempts at prevention fail. It includes non-interventionist measures, and the ICISS Report notes the significance of certain forms of targeted sanction. The core of the Responsibility to React lies in the capacity for direct intervention however. The ICISS put forward six criteria for legitimating intervention against the consent of the state in question.

1. **Right Authority**: the ICISS placed the UNSC at the centre of its legitimate authority for intervention, but crucially allowed other multilateral avenues, including through the General Assembly, and allowing for other regional associations to play a role.

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109 (ICISS), *The Responsibility to Protect*, Ch. 3. The ICISS were measured in their optimism about the current state of prevention strategies. ICISS, *Supplementary Volume*, pp. 27-28.


113 UN Secretary-General, *Report of the Secretary-General: Early Warning, Assessment and the Responsibility to Protect*, A/64/864, 14 July 2010, ¶¶12-13; Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶55.


115 (ICISS), *The Responsibility to Protect*, Ch. 6. In detail see: UN Authority under its Charter: pp. 47-48; General Assembly avenues under the 1950 “Uniting for Peace” resolution: p. 48; Regional Organizations: pp. 53-4; concerns with P5 veto in the UNSC: p. 51. A philosophical account dovetailing neatly with the ICISS position here is: Ned Dobos, “Is U.N. Security Council Authorisation for Armed Humanitarian Intervention Morally Necessary?” *Philosophia*, 38 (2010): 499-515, esp. p. 511. In the wake of Kosovo, it had been argued that the possibility of action outside a paralyzed UNSC was legitimate: e.g. IICK, *Kosovo Report*, pp. 174-6, 186, 194; Thomas Weiss, "Instrumental Humanitarianism and the Kosovo Report", *Journal of*
2. *Just Cause*: triggered by either of the following:
   a. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
   b. large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.\(^\text{116}\)

3. *Right Intention*: The intention behind the intervention must be to reduce human suffering, and not some other or ulterior purpose.\(^\text{117}\) The Report recognises that perfectly pure motives are unrealistic, but emphasizes the significance of multi-lateral response in this regard.

4. *Last Resort*: requiring that every other feasible diplomatic and non-military avenue for resolution has been explored.\(^\text{118}\)

5. *Proportional Means*: The military intervention should be no greater than that required to achieve the protection objectives.\(^\text{119}\)

6. *Reasonable Prospects*: The military intervention must have realistic prospects for success.\(^\text{120}\)
   The report notes in passing that this criterion will effectively rule out action against any one of the five permanent members of the UNSC.

The *Responsibility to Rebuild* involves ensuring that, post-intervention, the state is left in such a condition that it will not swiftly return to hostilities and renewed threats to civilians.\(^\text{121}\) Central here is the disarmament, demobilization and reintegration of local armed forces,\(^\text{122}\) but emphasis is also

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\(^{116}\) (ICISS), *The Responsibility to Protect*, ¶¶4.18-4.31.

\(^{117}\) Ibid., ¶¶4.33-4.36.

\(^{118}\) Ibid., ¶¶4.37-4.38.

\(^{119}\) Ibid., ¶¶4.39-4.40.

\(^{120}\) Ibid., ¶¶4.41-4.43.

\(^{121}\) Ibid., Ch. 5.

\(^{122}\) Ibid., ¶5.9.
placed on measures to prevent “reverse ethnic cleansing” and to ensure the safe and secure return of refugees.\textsuperscript{123}

\textbf{§2 The Summit Outcome Document: R2P2005}

Though the ICISS report was born into unpropitious circumstances for a rethinking of sovereignty – released around the same time as the 9/11 attacks in the US and the subsequent “Bush doctrine” – it steadily attracted endorsement.\textsuperscript{124} UNSG Annan praised it shortly after its publication,\textsuperscript{125} as did USG Egeland.\textsuperscript{126} Crucially, the influential 2004 Secretary-General’s High-Level Panel on Threats, Challenges and Change: \textit{A More Secure World: Our Shared Responsibility} affirmed the central thrust of the ICISS report.\textsuperscript{127} In 2005 UNSG Annan’s \textit{In Larger Freedom} built upon the HLP report and argued further for embrace of R2P.\textsuperscript{128} There were further shows of support in both US and Chinese papers and reports,\textsuperscript{129} especially in the 2005 bipartisan \textit{American Interests and UN Reform}, which

\textsuperscript{123}Ibid., ¶¶5.8-5.18.


\textsuperscript{125}Thakur, "In Defence of the Responsibility to Protect", p. 176; Thakur, "Experiences from ICISS" pp. 337-38.

\textsuperscript{126}2003 USG Egeland to the SC open meeting on POC (then in 2006 see Jaya Murthy, "Mandating the Protection Cluster with the Responsibility to Protect: A Policy Recommendation Based on the Protection Cluster’s Implementation in South Kivu, DRC", \textit{Journal of Humanitarian Assistance}, 5 (2007): fn 12-13.)


\textsuperscript{128}Secretary-General, \textit{In Larger Freedom}, ¶¶126, 133-5. For a report on the GA debate regarding R2P in the Report, see: Focarelli, "Responsibility to Protect Doctrine and Humanitarian Intervention", pp. 201-5.

\textsuperscript{129}Weiss, \textit{Humanitarian Intervention}, p. 116.
arguably endorsed an even stronger version of R2P than the ICISS rendering. Through the determination of the Secretary General and other R2P advocates, R2P became a key topic at the 2005 UN Millennium Summit, and negotiations ultimately led to R2P’s presence in the UN World Summit Outcome Document.

§2.1 R2P2005 Actualisation and further utilisation

The Responsibility to Protect, though in a modified form from its 2001 incarnation (and from its substance in the prior UN documents) was accepted unanimously at the UN Millennium Summit, and expressed in paragraphs 138-140 of the 2005 UN World Summit Outcome Document: G.A. Res. A/Res/60/1 (Oct. 24, 2005). Notably, these paragraphs are placed in Sect. IV on Human Rights and Rule of Law, and not Sect. III on Peace and Collective Security. The paragraphs are worth citing here in full:

Responsible to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

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

139. 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 to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to

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130 Task Force on the United Nations, American Interests and UN Reform (Washington: United States Institute of Peace, 2005), pp. 7-8, 15-16, 30-33. The Report called for action in the face not only of genocides and mass killings, but also “sustained human rights violations” (p. 16). It envisaged genocidal regimes being expelled from the UN (p. 31), and supported development of rapid reaction capabilities. Indeed, it arguably presses on the outmost limits of what I have termed R2Pcore by more firmly “insisting” that action must take place in cases where UNSC, or even regional, authorization fails. Ibid., p. 15.


133 This constituted a shift from earlier documents: for instance in the HLP, A More Secure World, R2P was placed in Part 3 on Collective Security and the Use of Force.
take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.

The formulation in these crucial paragraphs I term R2P2005. While not itself capable of imposing specific new legal obligations, the presence of R2P in the Outcome Document was a profoundly significant result. It is worth noting that, in addition to the key paragraphs quoted above, other commitments in the World Summit Outcome Document have a similar commitment to broad humanitarian responsibilities to prevent and resolve threats to civilians. Consider, for example, ¶133 committing member states to:

... safeguarding the principle of refugee protection and to upholding our responsibility in resolving the plight of refugees, including through the support of efforts aimed at addressing the causes of refugee movement, bringing about the safe and sustainable return of those populations, finding durable solutions for refugees in protracted situations and

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135 Exactly what is imposed by R2P2005 is subject, naturally, to considerable interpretation. Some of these controversies will be advanced in the following section. Others are worth mentioning here. Barbour and Gorlick, for instance, put forward an interpretation of the responsibility that imposes direct obligations on the UN organization. Barbour and Gorlick, "Embracing the R2P", pp. 557-558.

136 "The Summit Outcome Document was adopted by the General Assembly by resolution, which is a non-binding recommendation for member states. However, resolutions can make an important contribution to the development of international treaties by promoting main principles for future agreements.” Strauss, "A Bird in the Hand", pp. 292-93. (Similarly: Gierycz, "Legal and Rights-Based Perspective", p. 251.) Strauss argues that the negotiation process leading up to the 2005 Summit Outcome Document shows that R2P2005 was meant to rest upon existing IHL, and not impose new legal obligations: Strauss, "A Bird in the Hand"p. 314 and throughout. See also Stahn, "Political Rhetoric or Emerging Legal Norm?"p. 101; Bellamy, Responsibility to Protect, pp. 96-7.

137 Bellamy expresses the change as being a transition from R2P2001’s status as a “concept” (still in need of development and agreement) towards being a “principle” (where there is shared understanding and consensus). Bellamy, Responsibility to Protect, pp. 4-7.
preventing refugee movement from becoming a source of tension among states. [emphasis added].

On a similar tenor, the paragraphs on the creation of the Peacebuilding Commission may be seen as giving substance to the Responsibility to Rebuild, the paragraphs on peacekeeping include mention of building capacity for rapid deployment and improved policy capacities, while the paragraphs on the Rule of Law aligns with R2P’s attempt to include and constrain military intervention for humanitarian purposes by set criteria, procedures and authorities.

Subsequently in 2006, after substantial further negotiations, R2P2005 was affirmed by UNSC in Resolution 1674, a resolution on the Protection of Civilians in Armed Conflict that has itself provided the basis for biennial debates on the Protection of Civilians in Armed Conflict. Later in 2006, Resolution 1706 regarding Sudan explicitly invoked R2P2005, again explicitly placing it under the rubric of the protection of civilians in armed conflict. Resolution 1738 is a less clear case. Here the link to R2P is inexplicit and mediated by reference to other UNSC Resolutions, rather than

138 UN, UN Summit Outcome Document, ¶¶133. The parallels to R2P here are drawn explicitly by Barbour and Gorlick, “Embracing the R2P”, p. 541.
139 UN, UN Summit Outcome Document, ¶¶97-105.
140 See Stahn, “Political Rhetoric or Emerging Legal Norm?” p. 110. Note also the Indonesia view on this link: Asia-Pacific Centre for the Responsibility to Protect (APCRtoP), “The Responsibility to Protect in Southeast Asia,”(2009), http://www.responsibilitytoprotect.org/files/R2P_in_Southeast_Asia%5B1%5D.pdf, p. 26; As Bellamy observes: “among the summit’s other reforms were a whole range of initiatives with the potential to contribute directly to the realisation of the vision set out by the ICISS.” Bellamy, Responsibility to Protect, p. 93.
141 UN, UN Summit Outcome Document, ¶¶92-3.
142 Ibid., ¶¶119-120, 134.
143 For an account of the negotiations leading to this see: Strauss, "A Bird in the Hand" pp. 303-4. Early signs did not look good, and the slim likelihood of the Council adopting criteria for voting and vetoing was apparent: Bellamy, "Trojan Horse?"; Milton Leitenberg, "Beyond the 'Never Again'”, Asian Perspective 30, no. 3 (2006): 159-65, pp. 161-162. On the ambivalent relation between the SC and R2P, see Focarelli’s reports on several key discussions: Annan, “Two Concepts of Sovereignty”, pp. 205-9.
144 Importantly, China altered its opposition to R2P, provided that the UNSC resolution used the exact same language as the 2005 Summit Document. Strauss, "A Bird in the Hand", p. 303.
145 UNSC, UN Security Council Resolution 1674: Protection of Civilians in Armed Conflict, S/RES/1674, 28 April 2006, ¶2. The UNSC “Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity...”
directly to the paragraphs of the WSOD.\textsuperscript{148} Indirect R2P2005 references and links may also be traced to several other resolutions on the crisis in Darfur, including Res. 1672, Res. 1679, Res. 1755 and Res. 1769.\textsuperscript{149} Language resonant of R2P has become common parlance in Council resolutions (though it must be noted that traces of such language may be found at least as far back as 1999\textsuperscript{150}). For example, in 2008, Resolution 1814 on Somalia referenced the earlier R2P resolutions and stressed, “the responsibility of all parties and armed groups in Somalia to take appropriate steps to protect the civilian population in the country.”\textsuperscript{151} The UNSC’s first explicit affirmation of R2P since 2006 was in Res. 1894 (2009) in a thematic resolution on the Protection of Civilians.\textsuperscript{152} At time of writing (March, 2011) R2P is being used by key actors in relation to the crisis in Libya.\textsuperscript{153} US President Obama spoke of the responsibility to act when innocent people were being brutalised, and the significance of the international community as a whole and in concert bearing that responsibility.\textsuperscript{154} UK Prime Minister David Cameron explicitly broached the issue of selectivity in intervention, arguing that West must act (and must be seen to be acting) in situations where direct economic interests were not implicated.\textsuperscript{155} Alongside these affirmations and invocations of R2P the UNSC has been increasingly willing to authorise protection missions with Ch. VII mandates and broader powers regarding the use of coercive force.\textsuperscript{156} International diplomatic action taken in Kenya in 2007 to quell post-election violence occurred against a backdrop of UNSG Ban Ki-Moon’s, UN Genocide Adviser Francis Deng’s, and Archbishop Tutu’s invocation of R2P.\textsuperscript{157} The UN commissioned report into Darfur crisis used

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  \item \textsuperscript{149} See Matthews, "Tracking the Emergence", pp. 148-9.
  \item \textsuperscript{150} e.g. UNSC, \textit{UN Security Council Resolution 1270 (1999) on the Situation in Sierra Leone, S/RES/1270 (1999)}, 22 October 1999, ¶14.
  \item \textsuperscript{155} Liam McLaughlin, "Cameron Backs Potential Military Intervention in Libya " New Statesman, http://www.newstatesman.com/2011/03/cameron-intervention-libya
  \item \textsuperscript{156} See the summary in Murthy, "Mandating the Protection Cluster".
  \item \textsuperscript{157} Secretary-General, 2009 UNSG Report: \textit{Implementing the Responsibility to Protect}, ¶11(c); Evans, "An Idea Whose Time Has Come", p. 287. For a more cautious view of the role of R2P in Kenya, see Monica Serrano,
\end{itemize}
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R2P2005 to evaluate the failures of the Sudanese government, and the ensuing obligations on the international community.\textsuperscript{158}

R2P’s popularity in international relations has, however, both waxed and waned in recent years.\textsuperscript{159} In the years shortly after its 2005 adoption, the mood at the UN was at best cautious, and at worst – as Evans expressed it – one of “buyer’s remorse”, with some nations willing to go so far as to argue that R2P had not been endorsed by the World Summit at all.\textsuperscript{160} Since the end of 2007 however, its prospects have seemed more favourable.\textsuperscript{161} Recently, its significance to UNSG Ban Ki-Moon has been underscored (more on this below).\textsuperscript{162} The General Assembly Plenary Debate on R2P in 2009 reaffirmed the principle of R2P and was widely taken to be a success for R2P advocates in the face of some concerted opposition.\textsuperscript{163} Following from the debate was the General Assembly’s first resolution on R2P.\textsuperscript{164}

R2P has since played a role in various other UN reports and debates.\textsuperscript{165} It was embraced by Pope Benedict XVI\textsuperscript{166} and has broken ground and endorsements outside UN arenas, to NGOs, committees,


\textsuperscript{159} This is true not just as regards the UN as a whole, but regarding its treatment in individual countries. For example, see the discussion of the episodic nature of R2P and the US in Feinstein and Bruin, "Beyond Words".

\textsuperscript{160} Evans, "An Idea Whose Time Has Come", p. 288.


\textsuperscript{164} UNGA, \textit{Resolution Adopted by the General Assembly: The Responsibility to Protect}, 63/308.

\textsuperscript{165} see, e.g. Strauss, "A Bird in the Hand", p. 302. R2P appears in SG Reports to the SC on Protection of Civilians in Armed Conflict: e.g. UN Secretary-General, \textit{Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict}, S/2007/643, 28 October 2007, ¶¶3, 10, 11; Secretary-General, 2010 Report: Early Warning, Assessment and the Responsibility to Protect, ¶30. R2P has also been the subject of two UNSG reports: Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect; Secretary-General, 2010 Report: Early Warning, Assessment and the Responsibility to Protect.
civil society institutions and so forth. R2P thinking has been found in Peace Support Operations documents and guidelines, and been used in international legal arguments concerning state culpability under the Genocide Convention. R2P enjoys substantial popularity within not only the citizens of Western states but of many non-Western countries. Perhaps most significantly, it is arguable that R2P has gained sufficient ground to frame the discourse and set the terms around which discussions of sovereignty and international action must now take place.

§2.2 R2P2005 differences from R2P2001

The importance of conceptually distinguishing what was agreed to at the UN Millennium Summit (R2P2005) and the ICISS concept (R2P2001) is emphasized by many authors.

There are five major changes from R2P2001 to R2P2005 discussed in the literature.

1. R2P2005's narrow focus on intervention:

1.i) There is no explicit mention in the key paragraphs of R2P2005 of the third strut of R2P2001 – the responsibility to rebuild or reconstruct. Still, to some extent this elusion is mitigated by the

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169 Used by Bosnia against Serbia before the ICJ. See Rosenberg, "A Framework for Prevention", p. 471.
171 See Serrano, "The Power of R2P Talk".
172 e.g. Bellamy, "Problem of Military Intervention", pp. 622-24. In 2009 he noted: "At the risk of oversimplifying matters, when the overwhelming majority of the world’s states speak of the R2P, they mean the R2P as set out in the WSOD, not the ICISS version of it, or any other interpretation." Bellamy, Responsibility to Protect, p. 196. For general discussions on the 2005 dilution of the ICISS concept, see Alex Bellamy, "What Will Become of the Responsibility to Protect?", Ethics and International Affairs, 20, no. 2 (2006): 143-69; Holt and Berkman, The Impossible Mandate? pp. 32-33; Bellamy, "Whither the Responsibility to Protect?" pp. 151-167. Stahn outlines the major differences between R2P’s several incarnations: in R2P2001, the High-Level Panel Report, the UNSG Report, and finally R2P2005: Stahn, "Political Rhetoric or Emerging Legal Norm?" pp. 102-110.
173 These five changes are not exhaustive. For example, R2P2005 removes a requirement for judgment about the motivations of the sovereign, advertsing rather to their manifest failure to meet the responsibility. See Strauss, "A Bird in the Hand", p. 299. R2P2005 also emphasised the primacy of state responsibility over that of the international community. Cottee, "The New Politics", p. 436.
174 Newman, "Revisting the Responsibility to Protect", p. 97 cf. 94-96. Mickler, "Protecting Civilians or Preserving Interests?" p 76. Still, it might be argued this responsibility is implicit in the final sentence of WSOD ¶139: to “build capacity” can presumably include rebuilding capacity.
creation of the Peacebuilding Commission earlier in the Outcome Document,\(^\text{175}\) whose role is precisely to help countries move from conflict to stability and peace.

1.ii) It is argued by some commentators that there is less emphasis on prevention and other duties of facilitation and support. For instance, Newman takes the view that R2P2005 was effectively divorced from the gamut of early-stage measures that characterised (and in his view made attractive and equitable) R2P2001. He notes in particular the significance of concerns and responsibilities regarding extreme poverty that were present in R2P2001 but effaced (or at least inexplicit) in R2P2005.\(^\text{176}\) Still, this charge is very controversial: R2P2005 does have explicit provisions for prevention and for the responsibility of the international community to assist states in such prevention\(^\text{177}\) – what it lacks however is any specific mention of issues of economic development. Putting aside the precise question of economic development and poverty,\(^\text{178}\) several authors argue that the military-centric way of thinking about R2P is more a function of mindset rather than the actual wording of R2P2005.\(^\text{179}\) Evans asserts however, “as every relevant document from the ICISS report to the 2005 Summit Outcome Document makes abundantly clear, R2P is about taking effective preventive action, and at the earliest possible stage.”\(^\text{180}\) As we will see in §2.3 below,


\(^{177}\) UN, *UN Summit Outcome Document*, ¶138: “The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.” Ibid., ¶139: “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.”

\(^{178}\) This issue of aid is touched upon in the recent report of the SG. Secretary-General, *2009 UNSG Report: Implementing the Responsibility to Protect*, ¶43. There is no mention, however, of trade policies and other subjects relevant to poverty and development. The attempt of a small group of Member States to link R2P Prevention to under-development, poverty and inequality was rejected as “unhelpful” by advocates of R2P. See ICRtoP, *Report on the GA Plenary Debate*, p. 7. A treatment re-emphasizing its importance is in Sarkin, “Dealing with Africa’s Human Rights Problems”, pp. 11-12.


\(^{180}\) Evans, “An Idea Whose Time Has Come”, pp. 290-91. Still, there are certainly changes of emphasis in different reports; the High Level Report most closely linked R2P to military action – an emphasis removed by the Secretary General’s subsequent report. See Stahn, “Political Rhetoric or Emerging Legal Norm?” p. 107.
subsequent Reports by the UNSG have drawn out and increasingly emphasised the non-military measures present in the WSOD.

These discussions tap into a larger question of whether the core of R2P surrounds the issue of non-consensual military intervention, with responsibilities of prevention being granted only a secondary focus. 181

2. **Only explicit UNSC mandate:** R2P2005 made no mention of regional bodies or other avenues to authorising intervention; the envisaged R2P intervention could only happen with authorisation by the UNSC. 182 This omission was central to Weiss’s famous characterisation of R2P2005 as “R2P lite”, 183 equally though, the UNSC requirement was central to the (relative) acceptability of R2P2005 to others. 184 Still, R2P2005 does not explicitly rule out other types of authorisation – even unilateral

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181 Bellamy understands Weiss to be asserting this position (though Weiss is not entirely explicit). See Bellamy, “Problem of Military Intervention”, p. 617 and Weiss, *Humanitarian Intervention*, p. 106. Still, as Bellamy notes elsewhere, the provenance of the report (prompted by Kosovo and the UNSG’s challenges regarding sovereignty), the very name of the commission that created R2P (the International Commission on *Intervention and State Sovereignty*), and the asymmetrical emphases in focus are telling. Bellamy, “Problem of Military Intervention”, pp. 620-21.

182 UN, *UN Summit Outcome Document*, ¶139: “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…” [Emphasis added.] See Mickler, “Protecting Civilians or Preserving Interests?” p. 76; Kristin Haugevik, “Regionalising the Responsibility to Protect: Possibilities, Capabilities and Actualities”, *Global Responsibility to Protect*, 1 (2009): 346-63, pp. 349-50.


184 e.g. Chomsky, *Statement on the Responsibility to Protect*. In his 2009 speech to the GA, Chomsky categorizes norms of humanitarian intervention on the basis of the nature of their authorization requirements. While this approach is rather one-dimensional (eliding mention of all other differences between R2P and military intervention for humanitarian purposes) it is worth noting here. At the most acceptable we have, (i) action taken with the consent of the host state. Next, we have, (ii) action taken with UNSC authorization. Both such actions are legitimated in R2P2005, and Chomsky views the WSOD concept as a re-affirmation of accepted international norms. Next we have, (iii) action taken by a regional organization on its member states, and Chomsky notes the AU constitution as an instance of this type. Moving into more controversial terrain, there is (iv) action taken by a regional organization on a non-member state (such as NATO’s bombing of Serbia). Finally, there is (v) action taken unilaterally by one state or a small coalition of states on another state. These latter two Chomsky describes as “humanitarian intervention” (Noam Chomsky, “Kosovo, East Timor, R2P, and Ian Williams,” *Foreign Policy in Focus*(August 17, 2009), http://www.fpif.org/articles/kosovo_east_timor_r2p_and_ian_williams). Chomsky calls R2P2001 this the “Evans version”: though the term is inapt since Chomsky contrasts this version of R2P with that in the High-Level Panel on Threats Challenges and Change (HLP), *A More Secure World: Our Shared Responsibility* of which Gareth Evans was also a panel member. R2P2001 allows for these last two possibilities, though perhaps it should be stressed that it only does so after the preferred channels of legitimacy – host state consent, UNSC, internal regional intervention – have been exhausted. Chomsky thus declares that R2P2001 “simply reinstates” the controversial right of humanitarian intervention (Ibid.). He further remarks that it is the only “high-level proposal” he knows of that extends legitimacy this far:
action remains a possible action outside of the R2P2005 aegis. Bellamy remarks of the “creative ambiguity” utilised in negotiations at the World Summit on this point: It is notable, in this regard, that SG Ki-Moon recently reumed the ICISS position regarding the potential for UN General Assembly action in the face of the Security Council’s failure to exercise its responsibility, under the “Uniting for Peace” resolution.

3. R2P2005 did not adopt the use of ICISS’ criteria for the use of force in UNSC deliberations. As Strauss explains the negotiations process: “The draft paragraph on the responsibility to protect was completely altered by the amendments and the clause urging the five permanent members of the Security Council not to veto action aimed at halting or preventing genocide or ethnic cleansing was deleted.” Combined with the loss of the criteria was the explicit inclusion of acting only on a “case by case basis” and the use of the notion of “preparedness” rather than “responsibility” in reference to Security Council action.

Some have seen this omission of criteria to be crucial – the objective criteria were required in order to give genuine legal substance to the establishment of a duty of the UNSC to intervene. However, Bellamy develops a concerted argument against the significance of the dissolution of the criteria, arguing that the three putative functions of the criteria would in fact not have been fulfilled by their

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185 Chomsky, Statement on the Responsibility to Protect, p. 4. (Presumably Chomsky thinks the earlier Kosovo Report was not “high-level”, as it is explicit on this point: IICK, Kosovo Report, p. 194, and links are routinely drawn between the Kosovo Report and the ICISS report on just this matter: e.g. Murphy, “Criminalizing Humanitarian Intervention”, p. 350.)
187 Bellamy, Responsibility to Protect, p. 85.
188 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect ¶¶56-57, 63.
191 UN, UN Summit Outcome Document, ¶139: “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...” [Emphasis Added.] See Bellamy, "Problem of Military Intervention", p. 623. Holt and Berkman, The Impossible Mandate? p. 32.
192 Bellamy, "Whither the Responsibility to Protect?" p. 167; Matthews, "Tracking the Emergence" p. 147.
adoption.\textsuperscript{193} The expectation of action on specific cases was, Bellamy argue, in any case set out by R2P2005’s initial specification of the responsibilities of states and the international community to protect against the listed crimes,\textsuperscript{194} and adoption of further criteria was unlikely to have put significant further pressure on use of the veto by members of the P5.\textsuperscript{195} (A similar point is made by Luck.\textsuperscript{196}) Second, the criteria were unlikely to impact substantially on the legitimation of actions outside UNSC endorsement, as the argument would simply shift its language to debate about whether the criteria had been met on any occasion.\textsuperscript{197} Third, Bellamy argues the criteria were unlikely to prevent abuse, as R2P2005 limits legitimate action to the UNSC, whose mechanisms for intervention are in any case highly conservative.\textsuperscript{198} Accepting the inefficacy of criteria, some scholars have argued that what is needed is a specific numerical threshold,\textsuperscript{199} while others have argued that International Human Rights Law is well-placed to delineate when action is required.\textsuperscript{200}

4. Change of scope to specific crimes.\textsuperscript{201} As Haake describes:

The key differences between the ICISS report and the World Summit Outcome Document are all too apparent. The former builds on the idea of human protection in situations of civil wars, insurgencies, state repression and state collapse, whereas the Outcome Document explicitly limits the responsibility to protect to instances of genocide, war crimes, ethnic cleansing and crimes against humanity.\textsuperscript{202}

Specifically, R2P2001 required that states have very general responsibilities to protect, including at minimum when “a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure...”\textsuperscript{203} Applied to the question of international intervention, R2P2001’s “just


\textsuperscript{194} Bellamy, “Problem of Military Intervention”, p. 627.

\textsuperscript{195} Ibid., p. 628.


\textsuperscript{197} Bellamy, “Problem of Military Intervention”, p. 629.

\textsuperscript{198} Ibid., pp. 629-30.

\textsuperscript{199} Leitenberg, “Beyond the 'Never Agains'”, p. 165.

\textsuperscript{200} McClean, “The Role of International Human Rights Law”, pp. 149-150.

\textsuperscript{201} UN, \textit{UN Summit Outcome Document}, ¶138: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”


\textsuperscript{203} (ICISS), \textit{The Responsibility to Protect}, p. xi.
cause” included “large-scale” loss of life and ethnic cleansing.\(^{204}\) R2P2005’s specific list of atrocities – “genocide, war crimes, ethnic cleansing and crimes against humanity”\(^{205}\) – does seem to narrow the state’s responsibilities to its citizens, but whether it narrows the criteria for intervention is more controversial\(^{206}\), arguably depending upon how expansively R2P2005’s “crimes against humanity” and “war crimes” are interpreted.\(^ {207}\) As Scheffer argues, it is plausible that the atrocity crimes listed in R2P2005 must meet a “Substantiality Test”, ensuring that the crimes are sufficiently large-scale, and (especially if R2P military intervention is to be considered) linked to widespread violence and civil unrest. R2P2005 is not responsive to small-scale war crimes, nor perhaps even to “slow-motion” crimes against humanity, such as institutionalised apartheid, disappearances and sexual violence, all of which may occur without widespread conflict and internal disruption.\(^ {208}\) Scheffer suggests that this narrow scope may be appropriate as a testing ground for R2P action, before an enlarged purview can be considered.\(^ {209}\)

Bellamy argues that not only was the R2P2005 threshold for action set too high in terms of the nature of the crisis,\(^ {210}\) the replacement of R2P2001’s reference to states being “unwilling and unable” with (in R2P2005) the state’s “manifest failure” raised the triggering threshold on a further dimension.\(^ {211}\)

\(^{204}\) Ibid., p. xii, 32-33.

\(^{205}\) UN, *UN Summit Outcome Document*, ¶138.

\(^{206}\) Arbour considers the obligations in R2P2005 to parallel the requirements of the Genocide Convention, and thus judges its scope to be “probably just right, for now.” Arbour, “Duty of Care”, p. 458.


\(^{208}\) Scheffer, “Atrocity Crimes”, pp. 86-92. Bellamy similarly takes the view that recent debate over R2P in relation to various controversial cases has effectively narrowed the scope of R2P’s concept of “crimes against humanity” to covering only crimes of deliberate killing and displacement. Bellamy, “Five Years On”, p. 151. A similar emphasis regarding requirements of “widespread”, “systematic”, “protracted” and links to government and policy regarding the R2P crimes is: APCRtoP, *The Responsibility to Protect and the Protection of Civilians: Asia-Pacific in the Security Council* (Brisbane: Asia Pacific Centre for the Responsibility to Protect, 2008), pp. 5-7.


\(^{211}\) Ibid., p. 165; Bellamy, *Responsibility to Protect*, p. 90.
In the final analysis, these alterations were in some ways perhaps the most pivotal in what was to follow – they created at least a toe-hold for delegates to deny that the UN Member States had in fact committed to R2P at all, rather than just to protect civilians from specific crimes.212

5. Weakening the Responsibility to React.

Bellamy notes the pointed lack of the word “responsibility” regarding the non-consensual use of force by the international community. As distinct from other areas of action, in the relevant sentence the Member States do not invoke responsibility, but merely “reaffirmed their preparedness to use other measures if they saw fit – a significantly lower standard.”213 Luck similarly notes the caveats and qualifications in the collective measures of coercive force, compared to the other statements.214

§2.3 UNSG R2P Reports 2009-2010 The “Three Pillars” approach.

There have been two UNSG reports directly on R2P: in 2009 the report on Implementing the Responsibility to Protect215 and in 2010 the report on Early Warning Assessment and the Responsibility to Protect.216 The 2009 report, in particular, is significant in terms of the clarification of the R2P2005 concept, consensus-building surrounding it, and concretization of its various operational aspects.217 Its intention was not to depart, or to encourage departure, from the key paragraphs of R2P2005, but to show how they might be filled out and specified in a way that made R2P more, rather than less, attractive and tractable: “the task ahead,” as Ban Ki-Moon expressed it,

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212 See the discussion in Evans, "An Idea Whose Time Has Come", p. 288.
213 Bellamy, Responsibility to Protect, p. 90. While the word “responsibility” is perhaps conspicuous by its absence in the key sentence of ¶139, at least some caution is worthwhile here. The idiom “we are prepared to...” is often used to connote normative acquiescence. Moreover, if “prepared” is envisaged as synonymous with mere “willingness” (or some such) then the powerful constraint immediately following it “in a timely and decisive manner” seems mystifying. On the other hand, if “are prepared” means something like “acknowledge an obligation”, then the forthcoming constraint on the nature of the action is expected.
214 Luck, "A Response", pp. 180-181. Again some caution: there is a question whether the key phrases ("on a case-by-case basis and in cooperation with relevant regional organizations as appropriate") are qualifications or specifications, and, moreover, whether they should be read in terms of the preceding very powerful language about taking collective action in a timely and decisive manner.
215 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect.
216 Secretary-General, 2010 Report: Early Warning, Assessment and the Responsibility to Protect.
217 Though it is arguable how the weight was distributed between these objectives, and the extent to which they were in tension. See: Serrano, "The Power of R2P Talk", pp. 169-76; Luck, "A Response", p. 179.
“is not to reinterpret or renegotiate the conclusions of the World Summit but to find ways of implementing its decisions in a fully faithful and consistent manner.”

In the report Ban Ki-Moon advances a ‘three pillars’ approach to R2P:

- Pillar One: The Protection Responsibilities of the State.
- Pillar Two: International assistance and capacity building.
- Pillar Three: Timely and decisive response.

The Three-Pillars’ construal shifts the emphasis of R2P in various ways. Most significantly, coercive military intervention loses much of its centrality. R2P2001’s Responsibility to Prevent is split into the first two pillars – delineating the preventive activities required by the state and the international community respectively. The Responsibility to React becomes Pillar Three – though even here there is substantial emphasis on pacific measures rather than military action. The Responsibility to Rebuild also loses emphasis, briefly mentioned under Pillar 2’s discussion of post-trauma peacebuilding. Doubtless the shift in emphasis was to some degree directed towards consensus-building for R2P; Pillars One and Two are less controversial – both in terms of non-Western worries about sovereignty and Western resistance to the imposition of costly responsibilities – than the coercive military interventions in Pillar Three. But it is perhaps also worth noting that the 2009 report was able to shortcut lengthy exploration of Pillar Three precisely because it could gesture towards the detailed earlier work on the topic – such as R2P2001’s use of the criteria for the use of coercive force.

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219 Note the earlier delineation of this approach in Bellamy, Responsibility to Protect, pp. 96-7.

220 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶11(c), ¶¶51-59.

221 Ibid., ¶48.

222 As many commentators have noted, with regard to the 2009 Report: e.g. Jennifer Welsh, "Turning Words into Deeds? The Implementation of the ‘Responsibility to Protect’", Global Responsibility to Protect, 2 (2010): 149-54, p. 152.


224 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶62. Still, Welsh observes the relative "lack of specificity over how the UN will mobilise resources (both financial and military) to respond to crises when more peaceful means have failed." Welsh, "Turning Words into Deeds?" p. 151.
Two general features of the 2009 rendering of R2P2005 warrant note. First, R2P is described as narrow in scope – protecting only against the four crimes listed – but deep in response – eliciting a wide variety of actions on the part of various agents in order to prevent the four crimes. In particular, by fleshing out the many diverse actions required under Pillar Two, the Report at once illustrates the depth of response required, and at the same time helps to specify those responses into discrete and hence tractable areas of concern. This deepening of response has not gone unchallenged: Evans worries that concerns with structural prevention will dissolve the strength of R2P as a “rallying cry”. Second, the 2009 Report holds that there is no set sequence in moving from one pillar to the other – R2P must be applied flexibly in the face of different circumstances.

The 2009 Report uses the three pillars approach to flesh out in some detail the brief paragraphs in the WSOD of 2005. In summary:

**Pillar One: The Protection Responsibilities of the State.** Drawing on the first three sentences of WSOD Paragraph 138, Pillar One delineates the responsibilities of the state to: i) inculcate appropriate values (including respect for human rights and diversity, tolerance, inclusiveness and individual responsibility), ii) to build institutions that facilitate protection (including rule of law, rights-respecting legislation, civil society capacities), and, iii) to consider the use of various learning devices and training capacities (including peer-review and NGO programmes).

**Pillar Two: International assistance and capacity building.** Drawing on the final respective sentences of WSOD Paragraphs 138 and 139, the 2009 Report describes the international community as having two types of Pillar Two duties, viz. to persuade individual states to perform their Pillar One duties,

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225 Secretary-General, *2009 UNSG Report: Implementing the Responsibility to Protect*, ¶10(c).

226 There remain, of course, some questions about the breadth of Pillar Two. For instance, how extensive are the international community’s R2P duties of development assistance to the ‘bottom billion’? Ibid., ¶43.

227 Evans, *An Idea Whose Time Has Come*, pp. 294-5. A similar point about the evolution of R2P towards prevention is made, as part of a larger critique on R2P, by Hehir, *Sound and Fury*, pp. 226-8; Bellamy agrees with Evans that R2P’s focus on structural prevention is incompatible with its function as a rallying cry, but he urges that the former should take precedence: Bellamy, *Five Years On*, pp. 159-60. Luck argues, contrary to both, that both functions are compatible on an operational level: Luck, *Growing Pains or Early Promise?* p. 357.

228 Secretary-General, *2009 UNSG Report: Implementing the Responsibility to Protect*, ¶¶12, 50.

229 Ibid., ¶¶13, 15, 16, 20, 21, 27.


and to help states build capacities empowering them to do so.\footnote{Ibid., ¶28.} This latter can include such measures as providing a UN or regional presence, granting development assistance, aiding states’ security sectors, and building mediation and dispute resolution capacities.\footnote{Ibid., ¶¶35-48.} An important innovation of the Report is the addition that the International Community might have duties to provide troops and police units in order to support the state against violent non-state-actors.\footnote{Ibid., ¶¶39-42. Edward Luck notes the significant innovation here: Luck, "A Response", p. 182. This recent addition is perhaps one of the most tangible examples of the way that R2P can be seen as strengthening, rather than undermining, sovereignty.} Early warning and assessment are also granted a substantial place in the 2009 Report, and formed the subject of the UNSG’s 2010 Report.\footnote{In the Annex to Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect; Secretary-General, 2010 Report: Early Warning, Assessment and the Responsibility to Protect.}

**Pillar Three: Timely and decisive response.** The Report draws on the first sentence of WSOD Paragraph 139 to delineate, (a) pacific measures that the International Community can use in response to states in breach of their R2P Pillar One responsibilities (including fact-finding investigations, alerting agents to their legal responsibilities, public advocacy, and imposing sanctions and arms embargoes\footnote{Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶¶51-59. Luck elsewhere notes the under-utilized possibilities of using mechanisms such as the withdrawal of state recognition, reduction of diplomatic representation, and suspension of UN membership. Luck, "Sovereignty, Choice, and the Responsibility to Protect", pp. 15-16.}) and draws on the second sentence of that paragraph to describe (b) the coercive use of force, and the duties of individual states, the UN General Assembly, the Secretariat and the Security Council.\footnote{Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶¶56, 60-66.}

**§3 R2P Challenges, Critiques and Responses**

As might be expected for any norm dealing with controversial issues like state responsibilities and sovereignty, R2P has been the subject of many diverse criticisms.\footnote{These criticisms are backed by significant institutional force. Welsh adumbrates key areas of resistance to R2P implementation: Luck, "A Response", pp. 425-6.} In this section I list the major critiques by subject.

**§3.1 Issues of Specificity and Codification**

Bellamy sums up the wide-ranging problems regarding specificity in R2P2005:
It is imperative that states now return to some of the fundamental questions the ICISS raised: Who, precisely, has a responsibility to protect? When is that responsibility acquired? What does the responsibility to protect entail? And how do we know when the responsibility to protect has been divested? If they do not, there is a real danger that states of all stripes will co-opt the language of the responsibility to protect to legitimate inaction and irresponsibility.239

We consider these in turn:

**What is to be protected?** To some commentators, it has seemed quite unclear what issues trigger the R2P. For instance, it has been questioned whether crushing poverty is itself a trigger (setting aside the *preventive* question of whether abject poverty can subsequently create a triggering situation). The same question has been raised in the context of Climate Change, and nuclear non-proliferation240. More concretely, it is debated whether the crisis in Myanmar was an instance where R2P should have been deployed or invoked.241 Similar questions may be raised for

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239 Bellamy, "Whither the Responsibility to Protect?" p. 169.


241 See Newman 2009, pp. 97-8; Bellamy and Williams, *Protecting Civilians in Uncivil Wars*, p.15; Thakur and Weiss, "R2P: From Idea to Norm - and Action?" pp. 48-49; Hunt, *Perspectives and Precedents in the Asia-Pacific*, p.18; Ian Holliday, "Beijing and the Myanmar Problem", *The Pacific Review*, 22, no. 4 (2009): 479-500, pp. 6-7; Popovski, "Responsibility to Protect", p. 210; Bellamy, "Five Years On", pp. 151-2; And especially: Haacke, "Myanmar", pp. 169-199 where the change from R2P2001 to R2P2005 becomes pivotal, as the latter only applies if Myanmar were guilty of crimes against humanity. This question is specifically addressed by Caballero-Anthony and Chng, "Cyclones and Humanitarian Crises", pp. 142-3, who argue that even the widest definition of “crimes against humanity” (Art. 7 of the Rome Statue) – requiring “discriminatory, widespread and systematic violence or aggression” – will not capture such cases. Accepting that R2P2005 is not applicable to instances like Cyclone Nargis, Cabellero-Anthony and Chng argue for a non-coercive “R2P-Plus” that is explicitly responsive to such catastrophes. Ibid., pp. 145-49. The issue of practicality also loomed large. See similarly: Aba and Hammer, "Yes We Can", pp. 5-6, 10-12. In Myanmar the situation was in regards to the poor response of the government in allowing humanitarian aid after a *natural disaster*. More complex cases exist however. It may be that restrictions on humanitarian aid for populations, where the cause of the population’s parlous straits is government or government-backed action (as in Darfur, e.g.) can be one piece in a larger picture of ethnic cleansing or genocide, and for that reason evidence of a state’s manifest failure of R2P. Barber accounts the applicability of R2P2001, at least, to such cases: R. Barber, "Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law", *International Review of the Red Cross*, 91, no. 874 (2009): 371-97, pp. 377-9, 396-7. On the other hand, it is arguable that an exclusive focus on whether there was a violation of (political-duty) R2P obligations by Myanmar shifted attention from the more pertinent issue of whether the state was in breach of legal duties of IHL. See: Turid LaeGreid, *Protecting Civilians from Harm: A Humanitarian Perspective*, NUPI Report No. 6 2008, p. 8: this problem may generalise: pp. 13-14, 18.
Chechnya, Georgia, Lebanon, North Korea, Kyrgyzstan, Zimbabwe and others. On a different tack, there is the question of the extent R2P applies to refugee protection and asylum. R2P theorists have typically responded by arguing that R2P must stay focused on imminent large-scale crimes, as trying to solve everything leads to solving nothing. UNSG Ban Ki-Moon utilises the idea that R2P2005 should be “narrow and deep”; narrow in terms of the specific crimes to which it responds, but deep in the sense of a wide array of responsibilities, institutions, organs and actions to prevent, respond and rebuild from those specific crimes. (Still, this then appears to widen at least the purview of the Responsibility to Prevent, thus eliciting the following criticism.)

What form can prevention take? Despite consistent emphasis on the significance of R2P’s preventive aspects, it has been argued that the Preventive Responsibility in R2P2005 (Pillar Two) is too broad.

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251 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶10(c). This vision may also be called ‘upstream R2P’: Luck, The United Nations and the Responsibility to Protect, p. 6. Still, possible expansions in the notion of “crimes against humanity” might threaten R2P’s narrowness. See the references in n. 207 above. On the one hand it might be argued that such expansion in R2P2005 would lead it further towards the more justifiable R2P2001 – see Aba and Hammer, "Yes We Can", p. 12. On the other hand, note Thakur’s critical response to such expansionism in: Ramesh Thakur, "Law, Legitimacy and the United Nations", Melbourne Journal of International Law, 11, no. 1 (2010): 1-26, pp. 13-14.
252 E.g. Permanent Representative of the Republic of Indonesia to the United Nations Ambassador, "Statement," (New York: United Nations, 23 July 2009), p. 3. There may be powerful logistic reasons for the difficulties observed in effective prevention. For instance, after-the-fact reaction and sanction are typically much more cost-effective oversight measures than before-the-fact preventive oversight.
to be workable. However, Strauss notes some possible improvements on this matter regarding the potential application of attempted R2P measures and indicia created for Darfur, while McClean and Nasu each consider the use of International Human Rights Law to resolve several key ambiguities. Popovski notes that the broadness of the Responsibility to Prevent moves it closer to the concept of human security, and suggests that threshold standards developed for human security might be used as indicia of potential R2P situations.

Bellamy takes the potential breadth of the Responsibility to Prevent as a central issue requiring resolution. His solution involves, (a) focusing primarily on largely *direct preventive* measures (such as early warning, preventive diplomacy, preventive deployment and ending impunity) rather than more mediated *structural prevention* measures (such as a right to economic development), and (b) honing in on preventing the four key crimes in particular, rather than being concerned with armed conflict in general. While these two moves constrain the scope of the Responsibility to Prevent considerably, it is arguable whether they do so enough to make the norm workable. As Hehir ripostes, “one may well wonder whether preventing ‘genocide, war crimes, ethnic cleansing and crimes against humanity’ can reasonably be prefixed with the word ‘only’. Paralleling Bellamy’s solution, as noted in §2.3 above the 2009 report of the UNSG goes some way towards concretizing the broad Responsibility to Prevent into discrete and hence tractable areas of concern. Still, the remaining indeterminacy of R2P in its Pillar Two and Pillar Three duties may have consequences for the strength or “compliance pull” of these duties. That is, when it is unclear to observers precisely

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256 Popovski, "Responsibility to Protect" pp. 210, 216.

257 Bellamy, *Responsibility to Protect*, Ch. 4.

258 Hehir, "Sound and Fury", p. 228. Still, Hehir does not engage with the reasonably determinate preventive policies (e.g. development of early warning capacities, that are set out in Secretary-General, *2009 UNSG Report: Implementing the Responsibility to Protect; Secretary-General, 2010 Report: Early Warning, Assessment and the Responsibility to Protect*.

what any given individual state should do, it becomes easy for the state to justify its most minimal or
self-interested response. 260

*When do various duties obtain?* Commentators have drawn on issues regarding the progression and
overlap from one phase to the next (e.g. from Prevention to Reaction), and ambiguities within this
sequence. 261 For instance, what exactly is meant by attributing primary responsibility of the State?
Clearly this does not mean other bodies do nothing until there is state failure – this would, after all,
render otiose the international community’s Responsibility to Prevent. 262 The view of UNSG Ki-Moon
on this issue has been to emphasize that there is “no set sequence for moving from one to another,
especially in a strategy of early and flexible response.” 263 Rosenberg has suggested that the ICJ
standard for extra-territorial prevention when there is a “grave risk” is a plausible candidate for the
triggering of direct preventive obligations on third-party states.264

*Would increased codification help?* While a strong proponent of the work of ICISS, Lee Ward
critiques R2P for its lack of focus on the possibilities and desirability of increased codification. 265
Ward’s view is that the required oversight and enforcement measures required by humanitarian
rights can only be procured by codification – specifically in the form of treaties. 266

260 Bellamy, “Five Years On”, p. 166.
261 Arbour, “Duty of Care”, p. 457. ICRtoP, Report on the GA Plenary Debate, p. 6. This concern may be tied in
with critiques about using force only as a last resort: Leitenberg, “Beyond the 'Never A gains'”, p. 164.
262 As Nasu puts the apparent contradiction: the international community is required, “to respect state
sovereignty and the principle of non-intervention unless there are exceptional circumstances that
genuinely ‘shock the conscience of mankind’, whilst at the same time, urging the international community
to commit to early peaceful engagement to prevent mass atrocities.” Nasu, “Dilemmas of Civilian
Protection”, p. 215.
263 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶12. See similarly
265 Ward, Toward a New Paradigm, pp. 2, 9-11. Matthews also notes that further codification or
implementation is required before R2P crystallizes into binding international law, but his focus is on the
Cramer-Flood also notes the significance of future treaties or conventions, alongside a general practice of
R2P: Cramer-Flood, “An Emerging Legal Doctrine?” p. 35. For a view critical of codification, see Waal, “No
Such Thing as Humanitarian Intervention”.
266 Ward, Toward a New Paradigm, pp. 14-16. One example of further areas of ambiguity within the UN
Summit Outcome Document is drawn by Stahn: “The express reference to the need for conformity with
‘the principles of the Charter and international law’ creates further ambiguity. It almost seems to suggest
that the drafters of the Outcome Document had some doubts whether their own proposal was consistent
with international law and the Charter.” Stahn, “Political Rhetoric or Emerging Legal Norm?” p. 110.
Whose (Second Pillar and Third Pillar) obligation is it to protect? And what is the status of that obligation? Commentators have queried what the precise obligations of the international community (and the individual states constitutive of that community) imposed by R2P are. They have asked the same question regarding the obligations of the UN and its organs and agents, of the sovereign state itself, and of the soldiers on the ground. On a more general level, political theorists have enquired into the deep normative structure of the R2P responsibility and considered its nature, plausibility and coherence – especially as regards the duty to intervene militarily. Many see the question of who should act as pivotal:

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267 Arbour, "Duty of Care" pp. 450-453; Bellamy and Williams, Protecting Civilians in Uncivil Wars, p. 5; Wills, "Military Interventions on Behalf of Vulnerable Populations", pp. 393, 396-413. Wills argues that lack of specificity here contributes to the perception of R2P as a tool of Western powers to undermine sovereignty: Ibid., pp. 414-416. She elsewhere notes the "international community" as being largely a "rhetorical device" in contexts of rule of law. Wills, Protecting Civilians, p. 233; Welsh and Banda note the long tradition of states shifting responsibility onto the UN and then failing to support it: Welsh and Banda, "Clarifying or Expanding States' Responsibilities?" p. 225; similarly Roberts, "The So-Called 'Right' of Humanitarian Intervention", p. 47. On a more philosophical footing, Jütersonke and Wennman draw on Miller's theory of responsibility – in particular his "connection theory" for "remedial responsibility". Oliver Jütersonke and A Wennmann, "Non-State Actors, the Mediated State, and the Prevention Agenda of the Responsibility to Protect," in ISA (New Orleans: ISA, 2010); David Miller, National Responsibility and Global Justice (Oxford: Oxford University Press, 2007), pp. 81-109, esp. 98-9. Note the resistance of Western countries evinced in R2P negotiations to any scheme that may imply an "automaticity of response", removing their choice about the deployment of their military forces. See Luck, "Sovereignty, Choice, and the Responsibility to Protect", pp. 19-20.


269 Bellamy and Williams, Protecting Civilians in Uncivil Wars, p.32.


271 James Pattison, "Whose Responsibility to Protect? The Duties of Humanitarian Intervention", Journal of Military Ethics, 7, no. 4 (2008): 262-83; Pattison, "Legitimacy and Humanitarian Intervention"; James Pattison, Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene? (New York: Oxford University Press, 2010); H. M. Roff, "Response to Pattison: Whose Responsibility to Protect?", Journal of Military Ethics, 8, no. 1 (2009): 79-85. Of particular relevance for R2P is the view that that responsibility for this "imperfect duty" should be institutionalized. See Tan, "The Duty to Protect", pp. 102-106. Bagnoli also argues for institutionalization, though she goes so far as to make the initial nation's duty perfect: Bagnoli, "Humanitarian Intervention as a Perfect Duty", pp. 132-34; see similarly Jovana Davidovic, "Are Humanitarian Military Interventions Obligatory?", Journal of Applied Philosophy, 25, no. 2 (2008): pp. 134-44. Rodin argues from a Hohfeldian footing that ICISS, at least, gave no argument that the international "responsibility" was in fact anything more than a liberty-right. Rodin, "The Responsibility to Protect and the Logic of Rights", pp. 54-60. Still, Rodin does not seem to allow the possibility that the Hohfeldian apparatus might be used to discern moral (as distinct from legal) rights and duties; ICISS's
It is the lack of clarity about who will lead international action, and when, that is the biggest drawback in the current formulation of R2P, for it threatens to set up a mismatch between the expectations of individuals being oppressed on the one hand, and the capabilities and willingness of outside actors to provide for security on the other.\footnote{Welsh, "Securing the Individual in International Society", pp. 43-4.}

One important part of this larger critique is the question of whether there is a legal (as distinct from moral or political) obligation to intervene.\footnote{Note the US position on this matter. Stahn, "Political Rhetoric or Emerging Legal Norm?" p. 108. Note, however, that the distinction between hard law, soft law and political arrangement is a graduated one, and one that ranges across multiple dimensions: Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", \textit{International Organisation}, 54, no. 3 (2000): 421-56.} Many authors argue the language and status of R2P2005 implies there is no legal duty,\footnote{E.g. Stahn, "Political Rhetoric or Emerging Legal Norm?" pp. 109, 117-118, 120; Welsh and Banda, "Clarifying or Expanding States’ Responsibilities?" p. 230. For a contrary view, see Arbour, "Duty of Care".} and this is the position widely accepted across UN member

appeal to human rights was presumably intended to ground at least a moral duty. (On the application of Hohfeld to moral as well as legal duties, see Leif Wenar, "The Nature of Rights", \textit{Philosophy and Public Affairs}, 33, no. 3 (2005): 223-52.) Additionally, the Hohfeldian apparatus, with its strict correlation between precise duties and rights, is not well-placed for dealing with soft law, imperfect duties and (for that matter) open-ended responsibilities, thus offering promise for the middle way between the liberty and strict duty that Rodin briefly considers: Rodin, "The Responsibility to Protect and the Logic of Rights", p. 58. Finally, the several ways Rodin pictures rights and responsibilities being acquired and rescinded (Ibid., pp. 52-3) do not seem to include the ways other’s actions and situations might impose new duties. I analyze both these possibilities in: Hugh Brekey, "Without Consent: Principles of Justified Acquisition and Duty-Imposing Powers", \textit{The Philosophical Quarterly}, 59, no. 237 (2009): 618-40; Hugh Brekey, "Property, Persons, Boundaries: The Argument from Other-Ownership", \textit{Social Theory and Practice}, 37, no. 2 (2011): 189-210.


\footnote{Note the US position on this matter. Stahn, "Political Rhetoric or Emerging Legal Norm?" p. 108. Note, however, that the distinction between hard law, soft law and political arrangement is a graduated one, and one that ranges across multiple dimensions: Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", \textit{International Organisation}, 54, no. 3 (2000): 421-56. esp. 422-4 (independent dimensions include, i) the extent to which the obligation is legal, ii) the preciseness of the obligation, and iii) the delegation of authority for interpreting and implementing the law).} Note the US position on this matter. Stahn, "Political Rhetoric or Emerging Legal Norm?" p. 108. Note, however, that the distinction between hard law, soft law and political arrangement is a graduated one, and one that ranges across multiple dimensions: Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", \textit{International Organisation}, 54, no. 3 (2000): 421-56, esp. 422-4 (independent dimensions include, i) the extent to which the obligation is legal, ii) the preciseness of the obligation, and iii) the delegation of authority for interpreting and implementing the law).

\footnote{E.g. Stahn, "Political Rhetoric or Emerging Legal Norm?" pp. 109, 117-118, 120; Welsh and Banda, "Clarifying or Expanding States’ Responsibilities?" p. 230. For a contrary view, see Arbour, "Duty of Care".} Given the analysis of soft law performed by Abbott and Snidal in 2000, it would have been almost unprecedented, regarding the Pillar Three Responsibility to React at least, for members of the international community to accept precise legal obligations and to delegate authority for interpreting those obligations (e.g. to an international court or the SC), in a matter as closely tied to national security as the decision to go to war for humanitarian purposes. See Abbott and Snidal, "Hard and Soft Law in International Governance", pp. 426, 435-444. As they describe: “sovereignty costs are especially high in areas related to national security. Adversaries are extremely sensitive to unanticipated risks of agreement for the standard reasons advanced by realists, including relative gains. Even allies facing common external threats are reluctant to surrender autonomy over their security affairs.” Ibid., p. 440. More generally, Abbott and Snidal use a three-dimensional system for analysing the softness of laws. Ibid., pp. 423-4. They consider the extent to which the law is legally \textit{Obligatory} (O=Legal obligation, o=moderately obligatory, \(\sim\) low level of obligation), \textit{Preciseness} of the law (P=Very precise, p=somewhat precise, and \(\sim\)little precision), and the extent to which there is \textit{Delegation} of authority for action or interpretation of the law (D=Substantial delegation, d=moderate delegation, \(\sim\)little delegation). I hazard the following analysis: R2P Pillar One (O,p,d), R2P Pillar Two (\(\sim\),p,\(\sim\)), R2P Pillar Three: (\(\sim\),p,\(\sim\)). Arbour’s argument noted above suggests
states and key UN actors, and present in the negotiations leading up to the Outcome
Document. As Luck says:

While the third pillar of R2P does not, of itself, impose new legal obligations on the
international community in cases of genocide, war crimes, ethnic cleansing, or crimes
against humanity, it is consistent with evolving state practice, at least since the 1990s,
toward enhanced cooperation in such situations.

If this is right, then there are questions regarding viewing R2P as an emerging legal norm. Two
further problems loom.

First, if there is no legal duty to be beholden to a responsibility to react to atrocities, then one can
question the likelihood that states will in fact recognise a political or moral duty to react, or whether
their choices in such matters will be entirely self-interested. Focarelli sums up the concerns of a
number of member states (especially from the Non-Aligned Movement) at the 2005 debate on R2P:

they stressed that the responsibility to protect doctrine was formulated in a way that
lets major powers discretionally decide whether and where to intervene. As the
strongest states have a power, not an obligation to intervene, these states predicted
that interventions will only be made by the strongest to further their interests and
values.

If so, then R2P’s distinctiveness from prior doctrines of “humanitarian intervention” is effaced, and it
becomes arguable that R2P effectively extends the sovereignty of powerful intervening states, by
granting them a discretionary liberty to invade the borders of other weaker states.

Pillar Three should be understood, with such instruments as the Genocide Convention motivating legal
obligations and with the ICC and ad hoc courts as delegated authorities, as (o,p,d).

275 ICRtoP, Report on the GA Plenary Debate, p. 8: “many supportive Member States rebutted that they had
never argued that RtoP is a legal concept, or a legally binding commitment, but is instead a political one.”
277 This outcome was especially motivated by the US, who wished to make sure there was no legal obligation
requiring it to precommit troops, and so stressing the difference between the state responsibilities to its
citizens, and those of the international community. See Feinstein and Bruin, "Beyond Words", pp. 183,
186; Bellamy, “Whither the Responsibility to Protect?” p. 164. Note the similar concern, relating to the
international community in general, and the undesirability of a duty to act, reported in Jütersonke,
"Conference Report" p. 14. As a general matter, the use of soft norms to reduce what would otherwise be
substantial limitations on state sovereignty and autonomy is common: see Abbott and Snidal, "Hard and
278 Luck, The United Nations and the Responsibility to Protect, p. 5.
280 Ibid., p. 202. This discretion further infects the decision by the UN SC whether a given situation crosses the
R2P threshold. See §3.4 below.
Second, another worry with reading R2P as imposing only a “soft” norm or “political” (rather than legal) obligation is that assumption of responsibility without accountability may be then interpreted as rhetorical flourish: grandiose speech-making rather than problem-solving,\(^{281}\) of the sort unlikely to create the degree of pressure and political will needed to alter foreign policy.\(^{282}\) It is also open to a critic to consider whether actual troop-allocations to UN civilian-protection missions support or belie Member State’s acceptance of a weighty political duty.\(^{283}\) On the other hand, Barbour and Gorlick respond to the view that R2P is political rhetoric by placing the concept within the last fifty years of development of IHL, while also emphasizing what it adds to these laws.\(^{284}\) And generally, most theories of international norm development would predict, here as elsewhere, rhetorical flourish to precede substantial action by a considerable margin; as time goes on nations and global institutions are increasingly entrapped by their prior asseverations, and increasingly modify their preferences in the light of their previously stated commitments.\(^{285}\) In any case, and whatever the answers to these questions, the present ambiguities may have substantial practical consequences. Durch explains that consensus:

remains to be built on whether third-party actors are legally obligated to protect... Without this consensus, however, peacekeeping operations will continue to struggle to implement their mandates, fulfill expectations, and protect civilians.\(^{286}\)

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\(^{281}\) On various formulations of the “rhetoric” challenge, see the summary in Matthews, "Tracking the Emergence", p. 146. See also Leitenberg, "Beyond the 'Never Again'". Robertson describes some similar critiques of the rhetorical and self-congratulatory aspects of R2P, and provides a measured response. Sue Robertson, "Beseeching Dominance: Critical Thoughts on the Responsibility to Protect Doctrine", Austl. Int'l L, 12 (2005): 33-55.


\(^{284}\) Barbour and Gorlick, "Embracing the R2P", pp. 551-3.


This ambiguity regarding individual state’s international R2P responsibilities thus feeds into a larger critique – that states have not evinced the political will to engage in R2P activities – to which we now turn.

§3.2 Lack of commitment to R2P duties by individual states in the international community.

The Second and Third Pillars of R2P call upon members of the international community to engage in a variety of activities and to offer up various resources (I will discuss shortly in §3.3 the obligations of the Security Council in particular). But it is arguable that individual states display at best an inconsistent commitment, and at worst a flagrant disregard, for these duties. As might be expected, the case of Darfur looms large in the literature on this point: as Breau argues, what is lacking: “is the sense of legal obligation necessary to truly implement the responsibility to protect. Darfur is the key example of where the international community is failing in its responsibility.”

Some caution is necessary here however; as Luck points out; “the fighting broke out in Darfur some three years before the World Summit adopted R2P, making this an inappropriate test case for a doctrine that did not yet exist.” Specifically, the noted failures of the international community, in general and in specific relations to Darfur, are to, (a) provide troops, lift-capacity and air-support, and formed police units to authorised peace support operations, (b) provide monetary and logistical support


289 Other problems are also notable: e.g. the need to have a realistic grasp on the prospects of various forms of action – especially military intervention. See Alex De Waal, “Darfur and the Failure of the Responsibility to Protect”, International Affairs, 83, no. 6 (2007): 1039-54, pp. 1044-5.

for such missions, including support for and execution of necessary fact-finding tasks – especially providing support in cases where responsibility has been placed onto non-UN actors like the African Union, as happened during the early to mid-stages in Darfur, (c) consider the possibility of non-consensual military action under Ch. VII, (d) provide consistent and forceful political pressure regarding non-military solutions such as targeted sanctions, embargoes, humanitarian access, ending impunity by appropriately supported international courts, (and also to consider quasi-military solutions such as enforcing no-fly zones, and finally to, (e) consider seriously issues of structural prevention such as large-scale Western policies of “unfair trade, punitive economic and development policies, as well as their participation in small arms deals and ‘conflict resources’.”

This last point in particular is pressed by Chomsky, who highlights the seeming hypocrisy of speaking...
about responsibilities to positively intervene when enlightened nations will not even take measures to stop their facilitation of atrocity crimes.\textsuperscript{296}

A central part of the problem here is clearly one of “political will”.\textsuperscript{297} Bellamy argues that the ICISS vision of R2P intervention assumed that international (or at least domestic) pressures on the basis of R2P could shame nations into intervention – an assumption he questions.\textsuperscript{298} Austin and Koppelman approach the issue from the opposite direction, arguing that the, “political will’ for committing to and resourcing such ventures does not fall from the sky – there is a responsibility to create it – as the US and UK did quite effectively for the Iraq war...”\textsuperscript{299}

§3.3 R2P as “Trojan Horse” and “redecorated colonialism”

Perhaps the central critique levelled at R2P, and the main impediment to action on its behalf, is the view that R2P is a “Trojan horse” – a rhetorical vehicle for increased self-interested invasions by powerful international actors.\textsuperscript{300, 301} In its strongest form, some member states (and the President of


\textsuperscript{297} Problems regarding the lack of political will and the self-interested behavior of states when it comes to military intervention are discussed by many authors: e.g. Hamilton, "What of Implementation?"; Dastoor, "Responsibility to Refine"; Bergholm and Badescu, "The Big Let-Down".

\textsuperscript{298} Bellamy, "Whither the Responsibility to Protect?" pp. 149-151.

\textsuperscript{299} Austin and Koppelman, \textit{Darfur and Genocide}, pp. 39-41. Their charge is not leveled only at Western states however: both Arab and Islamic states failed to exert appropriate pressures on the government of Sudan. Ibid., p. 45.


\textsuperscript{301} Note that this challenge is incompatible with the above-noted charge of R2P as grand speech-making. If, for instance, the lack of Western troop allocation to humanitarian missions is evidence of their not accepting a genuine responsibility to protect, then it is equally evidence of their lack of interest in colonialist enterprises. See Chandler, “The Security–Development Nexus”, p. 373.
the UN General Assembly) recently charged that R2P was a vehicle for, effectively, “redecorated colonialism”. More mildly, it may be argued that R2P2005 at least opens the door to such worries by being a force for unilateral coercive action. Proponents of R2P in response have emphasized its multilateralism, in particular the way R2P2005 authorises action only with UN SC imprimatur. (However, it has also been pointed out that even preventive measures – well short of coercive military force – can be intrusive, and hence in tension with state sovereignty.)

As might be expected, this “Trojan Horse” challenge assumed a central role after the US-led war in Iraq. (This is not the only problem for R2P opened by the invasion of Iraq; the treatment of Iraq can be offered as an exemplar – when counterpoised with the treatment of Israel, say – of the selectivity of and inconsistency in geopolitical actions.) When justifications in terms of Weapons of Mass Destruction were found to be fraught, the US and UK laid increasing emphasis upon humanitarian justifications. This made it possible for a conceptual link to be drawn between US-


304 ICRtoP, Report on the GA Plenary Debate, p.5. See also Stahn, "Political Rhetoric or Emerging Legal Norm?" p. 106.

305 Welsh, “Turning Words into Deeds?” p. 153. Note that Carment and Fischer’s analysis of the preventive capacities and commitments in regional organizations worldwide suggest “there is a direct connection between organisations’ adherence to the principle of non-interference and their position toward the preventative component of the R2P.” Carment and Fischer, “The Role of Regional Organisations”, p. 282.


308 Evans, "From Humanitarian Intervention to the Responsibility to Protect", p. 717; See also Bellamy, "Trojan Horse?" p. 39; Chomsky, "Simple Truths, Hard Problems", p. 13. Note though, that some level of humanitarian concern was present from very early on: see Teson, "Ending Tyranny in Iraq", pp. 10-11.
style pre-emption and R2P. In response, R2P advocates like Evans and Weiss hold that Iraq would have been rightly on a R2P watchlist, but with no imminent catastrophe looming, the situation could not have been a justifiable case for military intervention under its aegis. While a critic of R2P, Hehir is dismissive of the Trojan Horse charge:

the link between the emergence of R2P and the invasion of Iraq can only be sustained if we can determine that without the framework of R2P the United States-led coalition would not have been able to justify its invasion on humanitarian grounds. This is patently not the case.

More generally, R2P proponents have emphasized the current limitations on R2P (such as its scope or potential limitations (such as limitations (i.e. use of set criteria or thresholds) on SC action regarding military intervention for humanitarian purposes that would serve to cabin its capacity to be used for neo-colonialist purposes. Peters has also argued as a general matter that the current geo-political situation offers very little incentive for colonialist ventures by liberal democracies like the US: “The era of globalization is post-imperial.”

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312 Luck, The United Nations and the Responsibility to Protect, p. 5.

313 Thakur argued this re R2P2001: Thakur, "In Defence of the Responsibility to Protect", pp. 174-5; the idea that the use of criteria could help mitigate concerns with neo-colonialist ventures is a common view: e.g. Zacklin, "Beyond Kosovo", p. 937.

Other issues in regard to sovereignty have also arisen, even outside military interventions. With the shift in emphasis towards Pillar Two duties rather than Pillar Three interventions, sovereignty concerns have been raised regarding early warning and information gathering.  

One further part of the charge of colonialism is the view that R2P is a peculiarly Western concept. Advocates of R2P have been keen to rebut this view – pointing out its significance in Africa, and in particular the presence of the central claims of R2P (what I termed R2Pcore) in the Constitutive Act of the African Union, five years prior to the World Summit Outcome Document. The limited but significant R2P commitments of China and Asia-Pacific region have also been well documented.

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315 See Bellamy, "Five Years On", p. 148.
316 Note the view of Glennon, "The Emerging Use-of-Force Paradigm", p. 313. The position of NAM on humanitarian intervention – at least outside UNSC authorization – is explicit: Movement of the Non-Aligned Countries (NAM), XIII Ministerial Conference, 8-9 April, 2000, ¶263. Chomsky’s cynical view of norms like R2P invokes Thucydides as providing a general principle of international affairs: “the strong do as they wish, while the weak suffer as they must,” and the guiding principle that “Norms are established by the powerful, in their own interests...” Chomsky, Statement on the Responsibility to Protect; Chomsky, "Simple Truths, Hard Problems", p. 7. (It is unclear why the norm of non-intervention is not judged by Chomsky via application of these precepts.) For a more nuanced view of the relation between hegemonic power and international law, see Krisch, "International Law in Times of Hegemony". For a further (pre-R2P2005) view on some of the issues in play here, see Martti Koskenniemi, "'The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law", Modern Law Review, 65, no. 2 (2002): 159-75, pp. 170-1.
318 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect, ¶8. Sarkin, "Dealing with Africa’s Human Rights Problems", pp. 17-19; Luck, "A Response", p. 180; For more cautious account see Bellamy, "Whither the Responsibility to Protect?" pp. 157-162. While the situation of Western inaction in Rwanda was clearly a factor in the AU founding document here, there may well have been less altruistic factors in play as well. Drawing on the prior work of Carolyn Haggis, Welsh observes that “Libya leader Muammar Quaddafi was determined to create a legal text that would make it difficult for non-African states to intervene on the African continent.” Welsh, "Securing the Individual in International Society", p. 41.
With an eye to cross-cultural penetration, links have been noted between Islamic and Christian doctrines regarding rights and duties of military intervention for human protection purposes, and the Jewish case for R2P explicitly made. However, the radical power differentials between international actors remain – especially once we move from the UN General Assembly to the Security Council – and the resultant inconsistency and selectivity in application of R2P looms as a problem moving forward.

One response to worries with colonialism has been to emphasize the international community’s R2P duties to support states by empowering them to adequately perform their obligations to their citizens. Ideally, this has the twofold effect of, a) illustrating that the international community is indeed committed to preventing harms to civilian, rather than casting about for justifications for neo-colonial ventures, and, b) reduces the likelihood of situations where sending in the marines is the only practical option.

§3.4 Concerns with the role of the UNSC and the use of the veto

R2P2005 explicitly makes reference to the authorisation of the UNSC regarding the use of coercive force. While to some extent allaying concerns about unilateralism, this feature created controversy and discontent in its own right. As Thakur argues:

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320 While Islamic nations have clear concerns about Western imperialism, their views on the need for intervention in Bosnia show that they are not averse to military intervention for human protection purposes in principle – quite the contrary. See Ramsbotham, "Islam, Christianity, and Forcible Humanitarian Intervention", pp. 95-100.

321 Dorfman and Messinger, "Toward a Jewish Argument for the Responsibility to Protect ".


323 Bellamy, Responsibility to Protect, pp. 197-98. Note also developments in this regard: Luck, "A Response", p. 182. Welsh notes that, in a sense, this rendering of R2P returns the concept to the initial vision of “sovereignty as responsibility” envisaged by Deng. Welsh, "Where Expectations Meet Reality", p. 420.

324 Thakur characterizes the different positions theorists may hold on this issue of SC authorization and unilateralism: Thakur, "In Defence of the Responsibility to Protect", p. 171-2. See also: Popovski, "Responsibility to Protect", pp. 213-4; Chomsky, Statement on the Responsibility to Protect, p. 7; Nasu, "The Responsibility to React?" pp. 346-8; Franck sees the UNSC as at least holding some prospects for “jurying” responsibly, though he does discuss the significance of using certain criteria: Thomas Franck, "Legality and Legitimacy in Humanitarian Intervention", in Nomos XLVII: Humanitarian Intervention, ed. T.
The legitimacy of the Security Council as the authoritative validator of international security action suffers from a quadruple legitimacy deficit: performance, representational, procedural and accountability. Its performance legitimacy suffers from two strikes: an uneven and a selective record. It is unrepresentative from almost any point of view. Its procedural legitimacy is suspect on grounds of a lack of democratisation and transparency in decision-making. And it is not answerable to the General Assembly, the World Court, the nations or the peoples of the world.\textsuperscript{325}

These problems are placed into sharp relief when the issue at stake is a humanitarian emergency. As Clark characterises the position of key states in the buildup to action in Kosovo:

In no small measure, the feeling amongst NATO governments was that further resort to Security Council approval might, \textit{in extremis}, be pushed aside. This, in turn, was fuelled by the perception that the much-vaunted Russian veto was, in the circumstances, unreasonable. If unauthorized action placed a question mark over the legality of the war, then the veto offended against the requirement for consensus given the high humanitarian stakes. Thus was one legitimacy narrative set against another.\textsuperscript{326}

Recently, some UN Member States tried to link the legitimacy of R2P2005 to Security Council reform.\textsuperscript{327} While this was a marginal position, more common was a call for members of the P5 to resist using the veto, with 35 governments in the 2009 General Assembly discussions of R2P calling for restrictions on its use in cases of genocide, war crimes, crimes against humanity and ethnic cleansing.\textsuperscript{328} As the Secretary General put it in 2009:

\begin{itemize}
\item Thakur, "Law, Legitimacy and the United Nations", p. 18, see also pp. 17-21.
\item Clark, "Legitimacy and Norms", p. 216.
\item e.g. ICRtoP, \textit{Report on the GA Plenary Debate}, p. 7. (In the context of the 2009 discussions, it is unclear how substantive this critique was, as distinct from strategic.)
\item Ibid., p. 6; SC unwillingness to relinquish votes and vetoes may be a case of naked abuse of power, but it may also reflect a lack of trust in alternative arrangements in the UN. See Hoffman, "A Conceptualization of Trust", p. 385 (relinquishing vetoes as discretion-granting policy potentially indicative of trust); Benno Torgler, "Trust in International Organizations: An Empirical Investigation Focusing on the United Nations", \textit{The Review of International Organizations}, 3, no. 1 (2008): 65-93, pp. 82, 88 (developed countries have least amount of trust in the UN). It is perhaps also worth noting Focarelli’s point that, “non-aligned states themselves, while opposing humanitarian intervention, are favourably disposed to the right of veto of the five permanent members as a \textit{guarantee} against abuses of the great powers.” Focarelli, "Responsibility to Protect Doctrine and Humanitarian Intervention", p. 210.
\end{itemize}
Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect.\textsuperscript{329}

While it may have played some role in diluting responses to the crises in Myanmar and Zimbabwe,\textsuperscript{330} the veto-power of the Security Council over R2P action has been seen as a particular problem in the face of the Darfur genocide. The politicized substance and self-interested nature of UNSC decision-making, voting and vetoing allowed and encouraged inaction on what is widely seen to be a paradigm case for R2P action and perhaps intervention.\textsuperscript{331} Combined with other factors,\textsuperscript{332} the nature of this process led the Council to make demands that were “not coherent, nor were they accompanied by enforcement mechanisms.”\textsuperscript{333, 334}

\textsuperscript{329} Secretary-General, \textit{2009 UNSG Report: Implementing the Responsibility to Protect}, ¶61. On earlier assertions of the increased need for SC reform, especially in UN documents, see Slaughter, "Security, Solidarity, and Sovereignty".


\textsuperscript{331} Mickler, "Protecting Civilians or Preserving Interests?"; Bellamy and Williams, "The Crisis in Darfur", pp. 32-6; Bellamy, "Trojan Horse?" pp. 40-52, esp. 42. Bergholm and Badescu, "The Big Let-Down" p. 303; Grono, "The International Community's Failure to Protect", p. 628; Traub, \textit{Unwilling and Unable}, pp. 10-11,15. Udombana, "When Neutrality Is a Sin", pp. 1171-2, 1185; Breau sees Darfur as being an exception to an otherwise prevalent pattern of robust peacekeeping missions and mandates: Breau, "The Impact of the Responsibility to Protect on Peacekeeping", pp. 452-4. For a less critical view of the Security Council, R2P and Darfur, see Matthews, "Tracking the Emergence"pp. 148-152, and of the general process of SC decision-making, see Johnstone, "The Power of the Better Argument".

\textsuperscript{332} It must be emphasized that not all the problems creating inaction were created by narrow self-interest: e.g. the US and UK were impeded by a post-Iraq weakening of their status as "norm-carriers", and they also had investment in sustaining the separate North-South Sudan Comprehensive Peace Agreement. Bellamy, "Trojan Horse?" pp. 45-51; Traub, \textit{Unwilling and Unable}, pp. 6-7, 13-15.


\textsuperscript{334} The UNSC was more forthright however on the legal front, establishing an International Commission of Inquiry in 2004, and subsequently referring the situation to the ICC for investigation. See Grono, "The International Community's Failure to Protect", pp. 626-7. Even on this front however, “the council did not remain engaged on the issue of accountability. According to Juan Méndez, the Secretary-General’s Special Advisor on the prevention of genocide, ‘The Council acted as if once they made the referral, everything was in the hands of the ICC, and they didn’t need to worry about it.’” Traub, \textit{Unwilling and Unable}, p. 17.
Darfur may have been poor and partial, \(^{335}\) it is not clear how this problem is to be fixed; Chataway and Murphy each note parallel problems arise at the level of the General Assembly, \(^{336}\) and various other UN organs and regional organisations seem little more promising. \(^{337}\) Leitenberg argues not merely for criteria, but for set automatic numerical thresholds for Security Council action, \(^{338}\) however, as noted above, Bellamy mounts an important argument against the significance of the

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\(^{335}\) Even so, this does not mean SC authority is not highly significant. While accepting the Council’s problems regarding democracy and external accountability, Rodley and Cali nevertheless emphasize (in the context of appraising NATO’s action in Kosovo) “the fact that the legal authority of the Security Council is recognised by all members of the international community through appropriate procedures of law-formation.” Rodley and Cali, "Kosovo Revisited", pp. 295-6: re the UNGA and intra-regional actions, see p. 296. Also writing with regard to Kosovo, and the Kosovo Report more specifically, Booth cautions that we should not underestimate, "how important the veto principle is in sustaining whatever degree of commitment the most powerful states have to the far from perfect but only multi-purpose universal international organization that foreseeably exists." Ken Booth, "The Kosovo Report", Journal of Refugee Studies, 14, no. 3 (2001): 336-7, p. 337.

\(^{336}\) See Chataway, "Towards Normative Consensus", p. 213; Murphy, "Criminalizing Humanitarian Intervention", pp. 355-6. The Kosovo Report judged that NATO’s action in Kosovo would have fared little better under the GA Uniting for Peace procedure: IICK, Kosovo Report, p. 174. Still, as Thakur urges in a broader context, the General Assembly has comparatively greater claims to authority on the basis of its wider and more representative membership: Thakur, "Law, Legitimacy and the United Nations", pp. 5-6, 18, though compare, p. 21. Malaysia holds the view that the GA should have an oversight role over the SC on such matters: (APCtoP), "The Responsibility to Protect in Southeast Asia," p. 34.

\(^{337}\) E.g. the politicization and apparent corrupting of the UNHRC’s reports and resolutions on the Sudan. Bellamy, "Trojan Horse?" p. 41; Traub, Unwilling and Unable, p. 8. The AU’s processes and actions were, if anything, at least as ineffectual and politicized as the SC’s: see the account in: Traub, Unwilling and Unable, pp. 16-21; though Carment and Fischer locate the AU’s deficiencies more at the level of capacity: Carment and Fischer, "The Role of Regional Organisations", pp. 285-6. The now defunct Human Rights Commission’s failures were numerous and egregious: for a brief overview, see Nanda, "The Protection of Human Rights", p. 358, while the evaluations of the Human Rights Council are more mixed: Ibid., pp. 359-364. Haugevik recounts the widespread use of consensus in many regional organizations, that serves as a strong constraint on action against unwilling states, though – more positively – she also notes their self-interest in securing local peace and stability: Haugevik, "Regionalising the Responsibility to Protect", pp. 361-2. For a nuanced appraisal of the preventive capacities and realities of different regional organizations on several distinct dimensions see: Carment and Fischer, "The Role of Regional Organisations", pp. 274-85. Still, some understandings of R2P emphasize particularly the role of regional organisations as an additional layer of protection against intervention. The Indonesian position is a good example of using regional consent to craft a norm lying in between the more interventionist Western states and the more conservative Developing Countries. Indonesia statements and action at a regional level (e.g. in ASEAN) suggest a policy whereby various coercive measures may be applied to a state (sanctions, external prosecution, and perhaps intervention) if they have the support not only of the SC, but also of the relevant regional and sub-regional organisations. See (APCtoP), "The Responsibility to Protect in Southeast Asia," pp. 26-9.

UNSC adoption of any criteria. 339 Johnstone argues that the legal discourse engaged in by the SC suggest that a list of considerations (not criteria) could “give ‘the better argument’ a fighting chance in Security Council decision-making.” 340 Even requiring making Council debates public, or that vetoing parties put forward written justifications for their use of the veto, Johnstone argues, could improve the role of law and lessen the influence of narrow self-interest. 341 Perhaps most optimistic is the view of Peters, who thinks R2P, combined with other developments in international law, will begin to challenge the traditional reading of the UN Charter as it applies to Council discretionary powers:

the humanization of sovereignty has shifted the focus from rights of states to the needs of humans and has thus promoted a significant evolution of international law in the direction of a legal obligation of the Security Council to take humanitarian action. The legal strategies to enforce this nascent obligation still await elaboration. 342

On a slightly different tack, a proposal by Dastoor keeps the central role of the UNSC, but augments it with a new committee. Dastoor considers any reform of UNSC P5 veto usage unlikely, and instead envisages a R2P Security Council Committee whose role is to assess situations and recommend action to the UNSC. 343 Dastoor’s thought is to craft an institution capable of the objective ex post judgments of legitimacy Franck argued a global jury could deliver, but that could make such judgments prior to action and intervention, and thus impact upon the self-interested incentives notoriously at work in UNSC deliberations. 344

Some argue, however, that as a general matter the Security Council is not the correct forum for such judgments and authorisations. Viotti argues that the UNSC is ill-fit as an actor on the basis of humanitarian reasons – he argues that the jus ad bellum mandate (of the promotion of international peace) of the UNSC makes it a poor vessel for incursion into what he sees as jus in bello realms (humanitarian action/protection of civilians). 345 A similar concern is raised by Nasu, who proposes a

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341 Ibid., p. 463.

342 Peters, "Humanity as the A and Ω of Sovereignty", pp. 537-540.

343 Dastoor, "Responsibility to Refine".

344 Ibid. pp. 49-52; re Franck see: Franck, "Legality and Legitimacy in Humanitarian Intervention".

345 Viotti, "In Search of Symbiosis", pp. 143-153.
separate council to deal with the “value-based” and “deontological” concerns of civilian protection—leaving the Security Council to its traditional role of impartially keeping the peace.\textsuperscript{346}

\textbf{§3.5 Practical Problems}

Several potential problems to the practical realisation of R2P specifically\textsuperscript{347} are canvassed by various authors, including the distracted and over-stretched status of the US, the post-Iraq loss of “norm-carrier” credibility of the UK and US, problems arising from war and aid economies, and the contemporary humanitarian identity crisis.\textsuperscript{348} The development of capacities often looms large here; the issue of early warning is a good example of a specific R2P requirement that is yet to be realised to the required level of efficacy.\textsuperscript{349}

\textbf{§3.6 The “Nothing new” critique}

One argument levelled against R2P2005 is that – far from being a “revolutionary change”\textsuperscript{350} in international relations – it effectively contributes nothing new to international affairs. After all, it may be charged, the UNSC has the authority to intervene in internal conflicts that it views pose a danger to international peace and security, and it had previously shown its willingness to view R2P-type-situations in just this way.\textsuperscript{351} In response, proponents of R2P have made the following points:

First, it is one thing in law and policy to have a variety of actions and interpretations that have somewhat intermittently occurred in the last decade or so – especially when they occurred in what were often widely perceived as unique (and so non-precedent-setting) circumstances.\textsuperscript{352} It is quite

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\textsuperscript{347} as distinct from the literature on practical realization of PoC2, which can be one subset of R2P. See below.

\textsuperscript{348} Weiss, \textit{Humanitarian Intervention}, pp. 130-152; Bellamy, “Trojan Horse?”

\textsuperscript{349} Breau, “The Impact of the Responsibility to Protect on Peacekeeping”, p. 431; see also pp. 439-442. Though see Secretary-General, 2010 Report: \textit{Early Warning, Assessment and the Responsibility to Protect}.

\textsuperscript{350} e.g. Cramer-Flood, “An Emerging Legal Doctrine?” p. 35.

\textsuperscript{351} Hehir, “Sound and Fury”, pp. 228-32; Chomsky, \textit{Statement on the Responsibility to Protect}, pp. 3-4, 7. Chomsky’s argument here is not straightforward, however. He argues “that the consensus of the World Summit adheres to the Corfu [non-intervention] principle and its descendants only if we assume that the Security Council is a neutral arbiter.” Since, as Chomsky himself immediately states: “It plainly is not,” the consequent in the conditional is denied and the antecedent therefore must be false: as such, the WSOD did not adhere to the Corfu principle and its descendants. Put less technically, provided the UNGA had realistic views about the (lack of) neutrality of the SC, then in the WSOD they were in fact moving beyond prior precedents in declaring the Council’s authority to act in the face of atrocity crimes.

\textsuperscript{352} In 2000 Roberts had stated: “as debates in the UN General Assembly in 1999 and 2000 have shown, the international community is not yet at a point where there is agreement on the general principle of a right of humanitarian intervention even with Security Council blessing.” Roberts, “The So-Called ‘Right’ of Humanitarian Intervention”, p. 4. (On exceptionalism and non-precedent-setting claims regarding Kosovo, Haiti and Somalia, see pp. 26-8; Similarly, as Johnstone noted in 2003, while there had been substantial
another to group together those actions and interpretations and explicitly endorse and concretise a specific principle underlying them, and then to declare one’s intentions to cleave to it in future. As Nanda says: “What the skeptics miss is the importance of the solemn core declaration, reached by consensus among member states that each state has the responsibility to protect its populations from violations of the specified human rights.” The attempt to address the problems posed by sovereignty and atrocity in a principled and lawful way is also in itself significant – for it is a viable position to prefer exceptional and ad hoc responses to atrocities, rather than formalised ones occurring through the rule of law. The WSOD is suggestive, therefore, not merely of whether humanitarian necessity can trump sovereignty, but of how it can do so.

Second (these next three points are made inter alia by Edward Luck), the grouping together of the four crimes was significant – ethnic cleansing, war crimes and crimes against humanity were related to the prevention of genocide. R2P2005 declared that efforts to prevent the latter needed to encompass dealing with the former. Rosenberg develops this theme, arguing that the 2005 R2P commitment, when read alongside other international legal instruments and decisions, may “eventually solidify into a legal norm” the grouping of all atrocity crimes together with genocide, and

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353 Luck’s first point on Luck, The United Nations and the Responsibility to Protect, p. 3; Rodley and Cali, "Kosovo Revisited" pp. 276-7. Rodley and Cali also view the listing of the four crimes (as defined by, e.g., the Rome Statute) as advancing a workable threshold for international intervention, as against previous use of concepts of proportionality: see Ibid., pp. 284-5;


355 Note the views canvassed by Thakur in: Thakur, "In Defence of the Responsibility to Protect", pp. 171-2. For further consideration of the use of exception or rule of law in such matters, see, e.g., the discussion in: Falk, "Legality and Legitimacy", pp. 36-37. Also see Franck’s position sketched in: Murphy, "Criminalizing Humanitarian Intervention", p. 349. Re the use of ‘exceptionalism’ as regards the NATO action in Kosovo, see the references cited in: Clark, "Legitimacy and Norms", p. 213. In the responses to the speeches of Annan in 1999, Zacklin describes that the most common response of Member States: “while not opposed outright to humanitarian intervention, nevertheless emphasized the need to provide clear and consistent criteria to ensure that the doctrine of humanitarian intervention is applied on an equitable basis.” Zacklin, "Beyond Kosovo", p. 935. R2P2005 may thus be seen as the result of this need articulated by this majority position.

356 The document is throughout in favor of the development of the international rule of law: see esp. General-Assembly, WSOD, ¶¶119-120, 134.

357 Luck, The United Nations and the Responsibility to Protect, p. 3.
therefore that the current requirements in law to positively prevent genocides may be extended to apply to all the atrocity crimes.\footnote{Rosenberg, "A Framework for Prevention", pp. 475-6.}

Third, while various aspects of R2P may have been present in IHL and prior UNSC resolutions, R2P2005 gestures towards the wide gamut of “tools, actors, and procedures” that could be called upon to protect civilians.\footnote{Luck, \textit{The United Nations and the Responsibility to Protect}, p. 3.} That is, the WSOD declares the depth of appropriate actions that may be required to prevent the four crimes.

Fourth, Luck emphasizes the significance of the \textit{process} of the World Summit that led R2P to succeed where so many other arresting issues failed.\footnote{Ibid., p. 3.} Luck’s point, I think, is that affirmations and endorsements that arise from genuine and lengthy debate have an additional legitimacy that stretches beyond the mere fact of the endorsement itself. As a product of the World Summit process, R2P acquires this added legitimacy.

Fifth, prior to R2P2005 it was possible to argue that the UNSC had overstepped its bounds in claiming that internal mass violations of human rights constituted a threat to international peace and security. Plausibly, it is an entirely contingent and empirical matter if this is true in any given case. Thus Cohen argued in 2004 that the UNSC had “arrogated to itself” the right to authorise intervention into conflicts that did not cross borders.\footnote{Cohen, "Whose Sovereignty?" p. 23; Similarly in 2001: Ayoob, "Humanitarian Intervention and International Society" p. 225.} Post R2P2005 and the unanimous and explicit endorsement of the SC’s capacity to act in such cases, the Council’s authority on these matters is substantially galvanised.\footnote{This point was made by, e.g., Australia’s Foreign Minister Kevin Rudd, shortly after UNSC Res. 1973 concerning Libya: Rudd, "Security Council Heeds Lessons from Rwanda and Balkans ". Even prior to R2P this position was galvanizing; as Bonwick stated: “By 2004 the question of Security Council jurisdiction over the situation in places such as Darfur simply no longer arose: it is now \textit{assumed} that the protection of civilians is its concern.” Andrew Bonwick, "Who Really Protects Civilians?", \textit{Development in Practice}, 16, no. 3 (2006): 270-77, p. 272. It is arguable, however, that rather than licensing the SC to act in R2P situations, the WSOD could be read as \textit{limiting} R2P to traditional Ch. VII concerns – and thus asserting that R2P reaction can only take place when (the SC determines) there is a threat to international peace and security. This last view is suggested by Welsh, "Securing the Individual in International Society", p. 41, and approximates the Malaysian position on R2P: (APCRtoP), "The Responsibility to Protect in Southeast Asia," pp. 34-6.}

\section*{§3.7 Other Critiques}

Five other critiques are worth noting. First, Kuperman puts forward the important worry that the type of humanitarian response encapsulated in R2P could in fact embolden insurgents to provoke
brutal state-responses by promising a shield against such response – a result he terms the “moral hazard” of military intervention for human protection purposes.\(^{363}\) On a similar tack, De Waal argues that the prospect of robust UN military action in Darfur made local insurgents less willing to compromise and so to sign the Darfur Peace Agreement.\(^{364}\) Kuperman envisages, however, that it may be possible to formulate policy so that such strategically driven provocations do not trigger R2P responses. Bellamy has responded by arguing that in fact Kuperman’s key proposals are found within R2P2005 (properly understood) and thus that it could act as a dampener on these sorts of moral hazard.\(^{365}\)

A second concern has been that R2P may be able to be rhetorically deployed – was in fact rhetorically deployed by the government of Sudan – as a norm telling against humanitarian intervention, by demanding that the protection of civilians is the sovereign state’s responsibility.\(^{366}\) Cottey suggests that the changed emphasis on the primacy of state responsibility from R2P2001 to R2P2005 made this argument possible.\(^{367}\)

Third, some critics have charged that R2P was in fact too deferential towards state sovereignty.\(^{368}\) A sophisticated version of this challenge notes the significance of mediation with local actors and stakeholders as an efficacious route to peacemaking. The R2P focus on the state as the primary agent of responsibility for protection may make it less effective in bringing about peace in such cases, as it implies a top-down engagement with the government, rather than a bottom-up decentralising approach. As Jütersonke and Wennman argue: “the logic of the R2P may need to be broadened to encompass non-state actors as well, if its proponents do not want to run the risk of

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363 Alan J. Kuperman, “Humanitarian Hazard”, *Harvard International Review* 26, no. 1 (2004): The general worry here was noted by Annan in 2000. See Bellamy, *Responsibility to Protect*, p. 35. Note a broader concern here is that the UNSC does not have a coherent policy on how states may manage and respond to internal threats – a broad lacuna regarding R2P of which the problem of moral hazard is but one part. See Thakur, “Law, Legitimacy and the United Nations”, p. 25. See also Ayoob, "Humanitarian Intervention and International Society", p. 227.


366 Bellamy, "Trojan Horse?" esp. pp. 44, 47, 52 (as he describes, even Francis Deng thought this was implied by the R2P logic: p. 46). See similarly Stahn, "Political Rhetoric or Emerging Legal Norm?" pp. 116-7.


368 e.g. McClean, "The Role of International Human Rights Law", p. 135; note also the relevant arguments of Shue, "Limiting Sovereignty", p. 19. Thakur considers and responds to Warner’s position on this issue: Thakur, "In Defence of the Responsibility to Protect", p.165.
being undermined by their own preventive agenda of capacity building.\(^{369}\) The point may also be made that the consistent focus on statehood (typified in R2P) can allow a failure of imagination in dealing with environments – Somalia may be an example\(^{370}\) – where statelessness is normal, rather than exceptional. A different critique is mounted by Mégret, who argues that R2P elides the fact that potential victims might be capable of protecting themselves.\(^{371}\) At minimum, he argues, external R2P action must at least ensure that it is not hampering self-protection efforts (as it may do by offering false promise of protection, or disarming or cutting off arms supplies to local civil defence forces).\(^{372}\) More positively, Mégret argues the international community can do more to assist local resistance and self-protection, including by politically supporting such actors, by furnishing them with information about the risks they are under, by aiding strategies of avoidance and escape, and – in some cases at least – by offering military support.\(^{373}\)

Four, as Welsh describes, resistance to R2P can be based on progressive liberal grounds. As well as principled pacifism, she notes in particular that the idea of *sovereign equality* that mandates a horizontal system of justice between states, rather than a potentially hierarchical one, has substantial moral attractions.\(^{374}\) Similarly, as Rodley and Cali characterise the position of the opponents of intervention: “the peace principle – the outlawing of unilateral resort to armed force – has been too long a-coming and is too weakly established to permit an exception still susceptible of

\(^{369}\) Jütersonke and Wennmann, "Non-State Actors, the Mediated State, and the Prevention Agenda of the Responsibility to Protect," p. 8.  
\(^{370}\) Mayall, "Lessons from Africa", p. 133.  
\(^{371}\) Frédéric Mégret, "Beyond the 'Salvation' Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself", *Security Dialogue*, 40, no. 6 (2009): 575-95, pp. 579-81. Similar themes, though less focused on the limitations of R2P and more on raising the awareness of humanitarian actors, were developed earlier by Bonwick, "Who Really Protects Civilians?", pp. 274-5.  
\(^{372}\) Mégret, "Beyond the 'Salvation' Paradigm", pp. 580, 586. 589.  
\(^{373}\) Ibid., pp. 589-91. Mégret’s use of Kuperman’s concern for “moral hazard” however, seems somewhat misplaced as – if anything – the potential for the provision of direct military assistance against a state would be at least as enticing a reason for local actors to provoke violent state action as any promise of international protection for civilians.  
abuse..." While Peters deflects objections against the R2P vision of humanized sovereignty (including on the basis of moral relativism, juridical equality, state function, imperialism\textsuperscript{376}), she accepts the cogency of moral concerns with self-determination and human rights must limit (though not dissolve) R2P interventions.\textsuperscript{377} Resistance to norms like R2P may also take their footing in legal theorising – as Murphy notes, positions on military intervention for humanitarian purposes map to some extent on to positions on positive versus natural law.\textsuperscript{378} In all, Hehir sums up this pluralist tradition of concern with R2P: “The fact that one agrees that – to employ a shibboleth – ‘something must be done’ does not mean that one has to support R2P.”\textsuperscript{379}

Five, R2P can seem to induce an air of naivety into proceedings, inducing ground-level actors to have unrealistic hopes for international action (or at least unrealistic hopes for the scope and extent of that action) and for states to have ungrounded fears about intervention and regime-change. Such factors make negotiation and other peacekeeping tasks considerably more difficult.\textsuperscript{380} Moreover, they can distract attention away from more manageable goals. As De Waal argues, in relation to Darfur: “In pursuit of an unachievable ideal, the international community has failed to achieve practical solutions that lay within its grasp.”\textsuperscript{381} Holt and Berkman adopt a similar theme:

While debates over sovereignty and responsibility continue in capitals around the world, more than 55,000 troops serve in six UN-led operations in volatile environs, with mandates to protect civilians, but without guarantee of the capacity to meet that mandate.\textsuperscript{382}

\textsuperscript{375} Rodley and Cali, "Kosovo Revisited", p. 285.

\textsuperscript{376} For argument against “cosmopolitan liberalism” in the international sphere, see Jean Cohen, "Sovereign Equality vs. Imperial Right: The Battle over the “New World Order”", Constellations, 13, no. 4 (2006): 485-505.

\textsuperscript{377} Peters, "Humanity as the A and Ω of Sovereignty", pp. 527-533, 541-543.

\textsuperscript{378} Murphy, "Criminalizing Humanitarian Intervention", p. 349. See similarly: Clark, "Legitimacy and Norms", p. 210, noting how the views of, inter alia, Kelsen and Weber effectively collapse legitimacy and legality.

\textsuperscript{379} Hehir, "Sound and Fury", p. 232.

\textsuperscript{380} De Waal occasionally touches upon such concerns: Waal, "Darfur and the Failure of the Responsibility to Protect".

\textsuperscript{381} Ibid., p. 1054.

\textsuperscript{382} Holt and Berkman, The Impossible Mandate? p. 181.
Part 2. The Protection of Civilians in Armed Conflict

Overview: Four Protection Concepts

In this part I characterise and discuss in turn four separate Protection of Civilians concepts: 383

PoC1: The Laws of War

PoC1 is dictated by the rules of war, both legal (International Humanitarian law (IHL): The Geneva Conventions and the Additional Protocols) and normative (the jus in bello part of Just War Theory). These dictates are for the greater part negative, agent-centred deontological duties regarding constraints on tactics and actions taken in armed conflicts.

PoC2: Peace Support Operations (PSO) Protection Obligations

PoC2 comprises the role-based duties (in a sense fiduciary duties) that are taken on by countries, institutions and organs when they undertake peace support operations. PoC2 is the concept used in, for example, UN operational discussions and reports. At

383 Perhaps the most detailed and comprehensive taxonomy of protection concepts in Ibid. pp. 37-44. I don’t follow their classification here however. Effectively, their Concept 1 (rules of combat) is my PoC1. The tasks and strategies they describe as Concepts 2-5 are all gathered here under the umbrella of my PoC2. Holt’s Concept 6 concerns when an overall UNSC mission mandate provides for the protection of civilians from mass killings, genocide and so forth. This bears some similarity to my PoC3, however there my focus is on the UNSC reasons for issuing the mandate, rather than its ultimate substance. They call their Concept 6 the “Responsibility to Protect” Concept. However, this may be misleading because: a) the SC could impose a mission mandate without taking on board the substance of R2P (they might think their involvement is discretionary, rather than obligatory, for instance), and, more significantly, b) R2P is not just about military intervention (the Responsibility to React) but also imposes obligations of prevention and rebuilding. Holt and Berkman’s classification tends to efface this point. (Wills’ position affirms Holt’s key distinction between these two quite different sorts of missions, but avoids the problem just noted by using R2P language to define both: a general R2P for all PSO, and a mission R2P for those whose primary specified goal is civilian protection: see Wills, Protecting Civilians pp. 80-1.) Another useful classificatory treatment is given by in a draft paper by Gomes, who at certain points comes close to making my distinctions between PoC1, PoC2 and PoC3. Maira Siman Gomes, ”The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Relations and Distinctions,” in ISA (New Orleans: ISA, 2010), pp. 13, 22. However, Gomes ultimately elects to treat the PoC concept as one larger whole. A third version is provided by GCR2P, Policy Brief: The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict, Global Centre for the Responsibility to Protect, January 2009, pp. 1-2. (Similarly in the most recent update: GCR2P, Policy Brief: The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict (Update), Global Centre for the Responsibility to Protect, 9 May 2011). In this short but perspicuous Policy Brief, the GCR2P distinguishes a “broad” definition of PoC that incorporates my PoC1 and (in a “subsidiary role”) PoC4, and a “narrow” definition applicable to the UNSC (my PoC3). Bonwick distinguishes protection in the SC (my PoC4) from humanitarian protection (PoC3): Bonwick, ”Who Really Protects Civilians?” pp. 272-4. He also distinguishes these further from people’s efforts at self-protection, p. 274-5 (arguably, this might give rise to a further protection concept, but I will not pursue this here).
minimum, these protection duties encompass obligations to fulfil the mandate explicitly given to the institution or organ (for instance by the UNSC). More expansively, they include fulfilling reasonable expectations of worldwide and (especially) local civilians regarding protection from mass violence.

PoC3: Concern for Systemic Violence

PoC3 is the protection concept as it arises in UNSG reports on the Protection of Civilians to the UNSC, and in the UNSC mandates themselves. It is very broad, appearing as a substantial but unspecified requirement to respond, through prevention, response and capacity-building, to widespread, human-inflicted suffering.

PoC4: Humanitarian Protection

PoC4 is the concept of protection as it appears in documents, guidelines, handbooks and policy-statements of humanitarian actors such as ICRC, UNHCR, Oxfam and so on. Like PoC3 this protection concept is very broad, responding to a wide variety of rights-violations (though only in extreme or large-scale instances, and usually with a focus on physical safety) and precipitating an open-ended array of responses (advocacy, denunciation, presence) to prevent or assuage those violations. The main limitation on PoC4 responses is that they must be non-military in nature.

Two preliminary points: First, it is widely held that the Protection of Civilians in Armed Conflicts must – plausibly enough – be limited to armed conflicts. Whether or not this is so depends on whether we understand “armed conflicts” to include not merely traditional warfighting and insurgency contexts but also armed elements systematically slaughtering masses of civilians. As we will see, the contemporary renditions of PoC1, PoC2, PoC3 and PoC4 all can encompass this latter.

Second, the four protection concepts are not mutually exclusive. For instance, the UN Security Council may decide, prompted by PoC3 considerations, to undertake a protective mission that must then be bound by the positive role-based PoC2 duties as well as the perennial negative action-constraints of PoC1, and whose mandate includes facilitating PoC4 actors.

§1 PoC1: Protection of Civilians in *jus in bello* and International Humanitarian Law

PoC1 is the Protection of Civilians in Armed Conflicts concept as it is found in *jus in bello* constraints and International Humanitarian Law – paradigmatically the Geneva Conventions, but extending to

384 e.g. Strauss, "A Bird in the Hand", p. 305.

385 All four concepts may be found in the Office for the Coordination of Humanitarian Affairs, OCHA, *OCHA on Message: Protection*, Version 1, June 2010, reflecting OCHA’s broad role of coordinating between disparate protection agents – combatants, PSO, the UNSC and DPKO, and humanitarian actors.
the Additional Protocols and other IHL instruments and institutions, including the decisions of the International Criminal Court and the Rome Statute.\textsuperscript{386}

PoC1 is for the greater part an agent-centred action-constraint (a negative duty) requiring that civilians and civilian objects should not be targeted (or disproportionately affected or exposed to risk) by combatants. The oft-noted core concepts are of distinction, proportionality and limitation.\textsuperscript{387}

§1.1 PoC1 Normative Foundations: \textit{jus in bello} and IHL
The normative basis for PoC1 could be founded on any number of modern ethical theories, including human rights and utility, but its grounding is most obviously traceable to Natural Law theorists (especially St. Augustine and St. Thomas Aquinas) and Just War Theory. While to some extent the distinction between responsibility for conduct in war – \textit{jus in bello} – and the larger justifiability of the war – \textit{jus ad bellum}\textsuperscript{388} – was not central to earlier renditions,\textsuperscript{389} by the time we reach the 20\textsuperscript{th} Century the \textit{jus in bello} requirement for negative constraints on the targeting of civilians was distinguished and defended in its own right.\textsuperscript{390} Slim recounts the theoretical and historical links between the Geneva Conventions and Additional Protocols and prior Just War – especially \textit{jus in bello} – thinking.\textsuperscript{391}

§1.2 PoC1 Applicability to non-international conflicts, guerrilla wars, civil strife and other contexts beyond traditional “armed conflict”
While IHL and the Geneva Conventions have their clearest applicability and fullest ambit in cases of traditional armed conflict of an international character, their reach extends well beyond these cases. Apposite instruments here include Geneva Convention Common Article 3.1(\textit{inter alia} protecting those placed \textit{hors de combat} in armed conflict not of an international character\textsuperscript{392}), Geneva Convention IV (\textit{inter alia} protecting non-combatants in occupied territories\textsuperscript{393}), and Protocol II of

\begin{itemize}
\item \textsuperscript{386} Barbour and Gorlick, “Embracing the R2P”, pp. 544-5, note also pp. 547-8.
\item \textsuperscript{388} Walzer, \textit{Just and Unjust Wars}, pp. 38-39, 127,
\item \textsuperscript{389} Viotti, ”In Search of Symbiosis”, p. 135
\item \textsuperscript{390} Walzer, \textit{Just and Unjust Wars}, p. 155.
\item \textsuperscript{392} ICRC, \textit{Geneva Convention 1}, Ch. 1, Art. 3. Noted by Bellamy and Williams, \textit{Protecting Civilians in Uncivil Wars}, p. 11.
\item \textsuperscript{393} ICRC, \textit{Convention (IV) Relative to the Protection of Civilian Persons in Time of War} (Geneva: 12 August 1949); Noted by Bellamy and Williams, \textit{Protecting Civilians in Uncivil Wars}p. 11.
\end{itemize}
1977 (protecting civilians in internal wars).\textsuperscript{394} Notwithstanding the applicability of these articles and protocols to non-international contexts, the recent ICRC Study holds that the custom\textit{ary} (and hence \textit{jus cogens}) laws of armed conflict would in any case reach to such contexts – and possibly with even greater specificity than the conventions alone might imply.\textsuperscript{395} Nominally, all these rules are only applicable in \textit{armed conflicts} – potentially opening the possibility that PoC\textsuperscript{1}’s scope may not include non-standard cases of armed conflict such as, for instance, the genocide in Rwanda. However, as Ward sums up: “Common Article 3 and Protocol II are widely recognized as milestones in the long march of international human rights protection. Protocol II in particular stands as an important stage in the codification of international humanitarian law adapted to the present day realities of civil strife and guerrilla warfare.”\textsuperscript{396} Moreover, the clear drift of IHL in recent decades has been to displace references to “armed conflict” and to target any crimes “when committed as part of a widespread or systematic attack against any civilian population...”\textsuperscript{397} (There is however one surprising and worrisome gap left in the applicability of IHL; UN forces may have legally less duty to be bound by the laws of war than ordinary troops, given their special status in IHL and questions of what exactly counts as “armed conflict”.\textsuperscript{398})

§1.3 The Substance and Content of PoC\textsuperscript{1} duties
This section details the content of PoC\textsuperscript{1} in both international and non-international contexts.\textsuperscript{399}

\textbf{PoC\textsuperscript{1} Negative Duties:} The core and greater part of PoC\textsuperscript{1} is constituted by negative constraints on military actions that target or endanger civilians and civilian objects. PoC\textsuperscript{1} is thus very wide in scope, including protections against the targeting of civilians,\textsuperscript{400} murder, sexual assault and exploitation,\textsuperscript{401} forced displacement,\textsuperscript{402} and the destruction and removal of cultural property and private

\textsuperscript{394} ICRC, \textit{Additional Protocol II}. The increased scope was the central reason behind Protocol II, as evinced in Article 1. The Protection of Civilians core of Protocol II is located in Art.’s 4, 13, 14 and 17.

\textsuperscript{395} Henckaerts, “Study on Customary International Humanitarian Law”, pp. 188-190.

\textsuperscript{396} Ward, \textit{Toward a New Paradigm}, p. 13.

\textsuperscript{397} Barbour and Gorlick, "Embracing the R2P", p. 547. Aba and Hammer, "Yes We Can", pp. 8-11. Even “armed conflict” has become wide enough to incorporate, e.g., the atrocities in Darfur and Somalia. See Barber, "Facilitating Humanitarian Assistance", p. 385.

\textsuperscript{398} Wills, "Military Interventions on Behalf of Vulnerable Populations", pp. 401-404, 417. Fleck also addresses this question: Fleck, "International Accountability", p. 196, and Thakur describes it as “the real UN scandal of the last dozen or so years.” Thakur, "Law, Legitimacy and the United Nations", p. 24.

\textsuperscript{399} Henckaerts, “Study on Customary International Humanitarian Law”, pp. 196-212.

\textsuperscript{400} Ibid., Rules 1-10.

\textsuperscript{401} The “fundamental guarantees”: Ibid., Rules 87-105.

\textsuperscript{402} Ibid., Rules 129-133.
property. Combatants are also restrained by laws against indiscriminate and disproportional attacks.

Furthermore, in both the normative and legal PoC literature, these constraints extend beyond prohibitions on directly targeting civilians with weapons to include, for instance, prohibitions on destruction of civilian infrastructure (e.g. electricity and sanitation facilities) and blockades of food, medical supplies and humanitarian aid.

**PoC Positive Duties:** A small number of positive duties are clearly imposed by PoC, at least in terms of state organs and commanders making sure that troops have been made aware of the demands of IHL. Some of PoC’s most important duties however, fall into a conceptually murky space between negative and positive duties. These duties are those that require combatants to distinguish themselves from civilians, and to avoid placing military objects alongside civilian objects. Rather than proscribing direct harm to civilians, these duties create a larger context by which it becomes

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403 Ibid., Rules 38-41, 49-52.
404 Ibid., Rules 11-14.
407 Henckaerts, “Study on Customary International Humanitarian Law”, Rules 141-143. I take such duties to be required by the core PoC norm “we must not harm”, and that such duties may extend to constraining non-state-actors under a state’s influence or control. Arguably, the use of “ensure respect” in Common Art. 1 of the Geneva Conventions imposes further positive duties to prevent violations by genuine third parties (not under the state’s support or control). (Though see Focarelli, “Common Article 1 of the 1949 Geneva Conventions” for the difficulties with such an expansive interpretation of Com. Art. 1.) Even if so, however, I take it that such duties lie beyond the central core of PoC – they are by all accounts less determinate, less peremptory and less enforceable.
408 Henckaerts, “Study on Customary International Humanitarian Law”, Rule 106. Note, however, this is not a customary law in non-international contexts, though of course evidence of such a constraint on war can be found in many diverse contexts: see Durham, “Laws of War and Traditional Cultures”, p. 840.
409 See Henckaerts, “Study on Customary International Humanitarian Law”, Rules 23-24. Rules regarding the investigation and prosecution by states for war crimes (Rules 157-161), and of states using their influence to stop violations (Rule 144), may also fall into this same category of contributing to an environment where violations of rights are indirectly prevented.
possible for an opposing force to continue to use military means to pursue its objectives without effectively being forced to targeted civilians.410

But are there, legally speaking, positive duties of troops or commanders to actively protect civilians in war from third parties, as distinct from negative requirements not to target or endanger them?411 Article 1 common to the four Geneva Conventions appears a potential source of positive duties with its requirement that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”412 However, this requirement of ensuring respect is typically understood to refer to combatants under its direction or control, and thus is not a duty to ensure respect by engaging with third-party violators of the conventions.413 Wills, however, suggests there is at least some moral force in this direction,414 and perhaps even – based around Geneva Convention Common Article 1 – some legal force.415 While military Rules of Engagement may not require protective action, some (e.g. US rules) at least authorize the use of force to “defend noncombatants from serious crimes such as murder, physical assault, torture, or rape.”416 The laws of occupation are a clearer case of the imposition of positive duties. While only narrowly applicable to certain contexts, they determine that “The occupant has a duty to preserve order, punish crime and protect lives and property.”417

410 A link to Shue’s typology of obligations is illustrative here. Much of PoC1 requires combatants to avoid depriving those hors de combat of their rights (Category I of Shue’s duties). PoC1 requirements regarding distinguishing oneself as a combatant and not placing military objects atop civilian ones, however, are instances of Shue’s Category II.2 duties to contribute to social institutions that avoid the creation of strong incentives [in this case, incentives of enemy combatants] to violate Category One duties. Shue, Basic Rights, pp. 52-60.

411 Wills, “Military Interventions on Behalf of Vulnerable Populations”, pp. 400, 405

412 ICRC, Geneva Convention 1, Art. 1. [emphasis added]


414 “Given that human rights abuses frequently form part of the political justification of a PSO [Peace Support Operation], it must certainly be very disheartening for troops to have to stand by when faced with the kind of atrocities that IHL (for which they must ensure respect) was intended to combat.” Wills, “Military Interventions on Behalf of Vulnerable Populations”, p. 413. Given the opening clause of Wills’ sentence, it may be that she is thinking less in terms of a PoC1-IHL norm here, and more along the lines of the PoC2 responsibilities for Peace Operations described in the following section.

415 Wills, Protecting Civilians, p. 104-107. If so, then IHL may be extending from the classic realm of PoC1 towards what I term PoC2.


417 Wills, “Military Interventions on Behalf of Vulnerable Populations”, p. 411. The Laws of Occupation thus are conceptually close to PoC2, and the idea of “sovereignty as responsibility”. See n. 429 below.
PoC1 State Duties: Stahn holds that the most widely accepted R2P claim is that states have duties to protect the citizens in their territory – this view is based, *inter alia*, on IHL (including the Rome Statute).\(^{418}\) Fleck concurs in his commentary on the ICRC Study, noting the duties of states (and non-state actors)\(^{419}\), in terms of criminal liability, reparations and more, to cohere with IHL.\(^{420}\) As he sums up: the “modern doctrine of international law may be seen as balancing sovereignty against responsibility.”\(^{421}\) As such, the negative non-harming duties of the first Pillar of R2P, and required by “sovereignty as responsibility”, can be seen as one subset of the negative, non-harming duties of the larger norm of PoC1.

§2 PoC2: Protection of Civilians in Armed Conflict in the context of Peace Support Operations: The Brahimi Paradigm

This notion of PoC is the concept found in the peacekeeping, peace-building and peace-enforcing literature, especially as regards UN operations.\(^{422},^{423}\) Central texts are the 2000 Brahimi Report,\(^{424}\) the more recent reports building upon it,\(^{425}\) and the work of authors such as Victoria Holt\(^{426}\) and Siobhan Wills.\(^{427}\)

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\(^{418}\) Stahn, "Political Rhetoric or Emerging Legal Norm?" p. 118. The state duties of IHL as understood by the ICRC are Rules 149-150, 156-161. Henckaerts, "Study on Customary International Humanitarian Law". There are duties for third party states, but these are quite narrow: e.g. Rule 144.

\(^{419}\) Fleck, "International Accountability", pp. 191-193.

\(^{420}\) Ibid., pp. 179-187

\(^{421}\) Ibid., p. 182. Note also his position on ICRC Rule 149: Fleck, "International Accountability", p. 187.

\(^{422}\) There are some differences in PoC2 thinking (or at least strategizing) between military agents in UN and other operations, but the differences are not, I think, substantial enough to constitute a separate concept. See Victoria Holt and Joshua Smith, *Halting Widespread or Systematic Attacks on Civilians: Military Strategies & Operational Concepts* (Washington: Henry L. Stimson Center, 2008), Ch. 3.

\(^{423}\) The Capstone Doctrine, though acknowledging the increasingly murky distinctions here, limits its attention to peacekeeping – including robust peacekeeping but not peace enforcement. DPKO, *The Capstone Doctrine: United Nations Peacekeeping Operations Principles and Guidelines*, 18 January 2008, pp. 18-19, 31-35. I have the concept of PoC2 applying to both peacekeeping and peace enforcement, and I will refer to this broader ambit as “peace support operations” (PSO).


\(^{425}\) Bruce Jones, Richard Gowan, and Jake Sherman, *Building on Brahimi: Peacekeeping in an Era of Strategic Uncertainty*, April 2009; DPKO, *A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping*, July, 2009. The DPKO, *Capstone Doctrine* should perhaps be noted as a striking counterexample to DPKO engagement with PoC2. This most recent edition of the Capstone Doctrine has very little to say about PoC (only a half-dozen mentions in all), consistently preferring to discuss protection issues under the rubric of “human rights”. Further, as Carment and Fischer observe, not one of the Capstone Doctrine’s six factors regarding the establishing of peacekeeping operations includes as an objective the protection of civilians.

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§2.1 PoC2: Normative Structure

Insofar as PoC2 is a normative concept (as it is generally understood to be\textsuperscript{428}), PoC2 is a conditional obligation. It does not oblige a state or an international body to engage in protection operations. Rather, PoC2 requires only that if a body does engage in such operations, then it is morally bound to perform them to a certain standard.\textsuperscript{429} An analogy might be drawn to more well-known fiduciary or

from killing. Carment and Fischer, “The Role of Regional Organisations”, p. 265; qv. DPKO, \textit{Capstone Doctrine}, pp. 47-48. Extraordinarily, the Capstone Document here chooses not to mention the profound significance of protection of civilians objectives in innumerable UNSC mandates for peacekeeping forces throughout the last decade and a half, and entirely neglects, e.g. the relevant factors considered throughout (the then most recent) OCHA, \textit{Aide Memoire: For the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict} (New York: United Nations, 2004). Instead, the Doctrine’s authors hearken all the way back to a May 1994 statement of the President of the Security Council – that is, to a period prior to the SC’s increasing concern for the protection of civilians that occurred in the wake of Rwanda and Srebrenica, the 1999 reports on these, and the subsequent first use in 1999 of SC mandates to “protect civilians”. (Indeed, the SC Presidential Report of the following month (April 1994), occurring at the height of the Rwandan massacre yet containing no mention of it, is explicitly noted by the Rwanda Report as telling evidence for the SC’s untoward focus on cease-fires to the exclusion of civilian protection, and it is the actions of the SC during this month that come under the Report’s most direct critique. UN, \textit{Rwanda Report}, pp. 21, 32, 36. As such, taking SC Presidential decrees on peacekeeping operations from this period as authoritative seems inapt, to say the least.) The change in language, emphasis and substance in the 2008 Capstone Report may have been precipitated by resistance to the “interventionism” of R2P, and concerns that PoC might lend support to such: Bellamy, \textit{Responsibility to Protect}, p. 163. Alternatively, it may be an instance of the DPKO’s occasionally ambivalent relation to civilian protection more generally, and the difficult responsibilities it engenders. A more forthright recent DPKO document on civilian protection is: DPKO, \textit{A New Partnership Agenda}, esp. pp. 19-21.

\textsuperscript{426} Holt, Taylor, and Kelly, \textit{UN Peacekeeping Operations}; Holt and Smith, \textit{Halting Widespread or Systematic Attacks}; Holt and Berkman, \textit{The Impossible Mandate}.

\textsuperscript{427} Wills, \textit{Protecting Civilians}; Wills, “Military Interventions on Behalf of Vulnerable Populations”.

\textsuperscript{428} Note n. 453 below and accompanying text for the non-moral PoC2 concept.

\textsuperscript{429} I leave open here \textit{exactly what property} of peace-support operations precipitates, morally speaking, the creation of the responsibility. For instance, it may be the avowed intention to work towards peace and protection that imposes these protection duties on peace-support operations. In this regard, Roberts notes, “the deplorable practice of promising a degree of protection when there is neither the will nor the means to back it up.” Roberts, “One Step Forward”, pp. 147-8. Alternatively, it may be the mere fact that such operations are taking “effective control” of an area. If the latter, then conceptual links may be drawn to the Laws of Occupation and the more general “responsibility of parties to armed conflict to respect, protect and meet the basic needs of civilian populations within their effective control.” (OCHA, \textit{Aide Memoire: For the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict} (New York: United Nations, 2009), §2:7; Wills, \textit{Protecting Civilians}, pp. 171-244) From here it is of course a very short step to the idea of “sovereignty as responsibility” and so to the first pillar of R2P. This link between the protection obligations of peace-support operations and R2P is made by Gierycz, drawing on both the ICJ and the UNHRC: Gierycz, “Legal and Rights-Based Perspective”, pp. 258-259.
role-based obligations. There is no duty to become a company director, for instance, but having attained that status one is ineluctably bound, in many jurisdictions of the Western world at least, by legal constraints regarding one’s behaviour in that role. As Wills describes: “The idea that states or international organisations that intervene on humanitarian grounds do have responsibilities is accepted by the UN and Western powers.” The Brahimi Report states similarly: “when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence with the ability and determination to defeat them.”

This norm informs most of the (recent) operational literature produced by and for, for instance, the UN DPKO. But intimations of it can also be found in PSO Doctrines. This is true to an extent of some Western PSO Doctrines – but it is most explicit in the Doctrine of African Military Practitioners, where it proposes in strong terms that if members of a Peace Operation “who are designated as combatants witness war crimes, but take no action to stop them, they themselves become party to that war crime.” In such cases as these PSO military doctrine moves from the familiar military PoC1 (jus in bello) terrain regarding constraints on targeting civilians to a localised and role-based duty to actively protect civilians from military predations – that is, to PoC2 commitments.

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430 Also termed “special duties”: note the clear distinction between these and general duties discussed in Joel Feinberg, "The Moral and Legal Responsibility of the Bad Samaritan", Criminal Justice Ethics, 3, no. 1 (1984): 56-69, p. 57.

431 Sarah Worthington, Equity (Oxford: Oxford University Press, 2003), pp. 136-142. For other structurally similar duties, see Breakey, "Without Consent", pp. 633-634.


433 Brahimi, Brahimi Report, p. 1. Roberts remarks: “It was symptomatic of the state of the debate in the UN that the Brahimi panel was able to make progress by entirely avoiding the question of humanitarian intervention as such. A glance at the panel’s composition, which reflected real divisions on this issue in the world generally, indicates that there would have been no prospect of agreement on the principle of humanitarian intervention.” Roberts, "The United Nations and Humanitarian Intervention", p. 93. In my terms, Roberts is noting that the Brahimi report could make valuable progress on PoC2, without embroiling itself in the controversies of PoC3 (or of R2P, for that matter).

434 For a period, extending well into the 1990s, the DPKO were breathtakingly unwilling, in various documents and reports, to respond to (or even officially notice) their recurrent failures to protect. See Wills, Protecting Civilians, pp. 37-40.


As well as UN Peace Operations literature, the ICRC may also be read as advocating this type of Protection of Civilians duty. The ICRC hesitates to ascribe any legal obligation or right on the basis of IHL that would justify military intervention for human protection purposes. However, in the ICRC position paper on this topic, Ryniker reminds the UN Security Council of the significance of its mandate to restore peace. If the UNSC elects to involve itself in armed intervention, then its duty is to make certain it provides adequate resources and facilities in order to provide protection and remove the underlying causes that were threatening the peace. The ICRC is not imputing to the Security Council a general responsibility to protect civilians (a responsibility along the lines of what I term PoC3 – see following section) but instead a duty that – if and when the UN decides to intervene – it does so effectively (the role-based duty of PoC2).

What sets the minimum standards that PoC2 demands of a protective body that has taken responsibility for protection of civilians in a given province? There are, in effect, two bottom limits. The first is that the protective body must fulfil its mission mandate. Thus the abiding focus throughout the PoC2 literature is on how UN organs, in concert with other relevant parties, can best expedite UNSC mission mandates. Carefully qualified caveats placed on protection of civilians duties in UNSC mission mandates are thus seen as helpful. As Holt explains:

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438 Ibid., pp. 530-31.
439 There is, arguably at least, a third minimum threshold for PoC2 – these are those positive duties of protection imposed by IHL and International Human Rights Law on states and actors who hold power over a territory. These may be considered an independent and third minimum standard, or as a way of filling out and delineating the proper content of UN Mission Mandates and civilian expectations. For a detailed consideration of this issue, see Nasu, "Dilemmas of Civilian Protection", pp. 220-230 and (esp.) Wills, Protecting Civilians, Ch. 4 and passim.
440 A distinction worth noting here is made by Wills, who (considering the draft replacement for the UK military doctrine (JWP3.50) favors distinguishing general RtoP from mission RtoP. The former is the lower limit (the lower limit of PoC2, as I would put it), but still requires meeting mission mandates and establishing some level of security – at least enough for humanitarian organizations to operate effectively. The latter mission RtoP obtains when the operation’s primary specified task is the physical protection of civilians, and requires a more substantial and systematic approach to protection (I would see this is as the upper limit of PoC2). Wills, Protecting Civilians, pp. 80-81.
The Council has consistently used caveats to offer useful limits for what peacekeeping missions could do for civilian security. Protecting civilians ‘within capabilities and areas of deployment’ and with ‘respect to the responsibilities’ of the host state should help avoid creating unrealistic expectations.⁴⁴²

Holt’s claim gestures in passing towards the second minimum standard: the seemingly natural expectations of relevant agents as to what counts – irrespective of mission mandate caveats – as an appropriate standard of protection. International observers, UN bodies, host governments⁴⁴³ and (most emphatically) local civilians at risk⁴⁴⁴ have expectations about the level of protection that is called for, and which would legitimate the operation in their eyes.⁴⁴⁵ Indeed, UN peacekeepers themselves have intuitive ideas of what is encompassed within their protective roles.⁴⁴⁶ And all these expectations can be quite resistant to “management”.⁴⁴⁷ One of the most-cited sentences in the Brahimi Report explicitly linked authorisation, norms and expectations:


⁴⁴² Holt, Taylor, and Kelly, UN Peacekeeping Operations, p. 75, see also pp. 40, 44, 117. Holt is earlier less enthusiastic regarding the utility of the caveats: Holt and Smith, Halting Widespread or Systematic Attacks, p. 36. Recent missions have made less expansive use of the caveats: Bellamy, “Problem of Military Intervention”, p. 636.


⁴⁴⁴ UN, Rwanda Report, p. 51; Wills, “Military Interventions on Behalf of Vulnerable Populations”, pp. 388, 405, 408-9; Wills notes local civilians demonstrations against insufficiently robust protection: Wills, Protecting Civilians, p. 61, and see also p. 82.

⁴⁴⁵ Holt, Taylor, and Kelly, UN Peacekeeping Operations, p. 16. For general links between PoC2 (fulfilling mandates and averting crimes against humanity) and credibility, see IICK, Kosovo Report, pp. 7, 186; Secretary-General, The Fall of Srebrenica, ¶504; UN, Rwanda Report, pp. 50-1; Secretary-General, 2004 Protection of Civilians Report, ¶60; See also Mayall, who notes that operations in Somalia were widely perceived to have failed: “This is not wholly true with respect to the provision of humanitarian relief, but it is true if political rehabilitation and reconstruction are considered preconditions for preventing a recurrence and hence the underlying justification for the initial intervention.” Mayall, “Lessons from Africa”, p. 132. Wills reports how “In May 2002 a massacre of 160 civilians at Kisangani just a few kilometers from a camp of 1000 MONUC soldiers led to an international outcry.” Wills, Protecting Civilians, p. 57.

⁴⁴⁶ Holt, Taylor, and Kelly, UN Peacekeeping Operations, pp. 22, 200, though cf. p. 203; Holt and Smith, Halting Widespread or Systematic Attacks, p. 9; Wills, Protecting Civilians, p. 68 reports: “In 1994, when US soldiers were ordered to stand by when Haitian police attacked civilians with tree limbs and iron pipes, the New York Times reported that the order was ‘messing with the heads’ of the young privates who believed they were there to protect the people.”

Peacekeepers — troops or police — who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and, as stated in the report of the Independent Inquiry on Rwanda, consistent with “the perception and the expectation of protection created by [an operation’s] very presence.”

Johnstone and Bah aptly express this conjunction of expectancy and obligation as a “normative expectation”. Doubtless it is a contentious matter exactly what this minimum standard requires, but as a minimum it would include requiring protection from mass violence (including sexual violence) in the immediate vicinity of the PSO and not abandoning civilians in the PSO’s care to the depredations of waiting genocidaires.

There are thus two (possibly cross-cutting) minimum standards determined by the PoC2 norm. An operation fulfils its PoC2 duties when it fulfils both its mission mandate and the base-level expectations of local civilians.

Before proceeding, it must be noted that the above-noted normative claims can be set aside, leaving us with PoC2 as purely instrumental and non-normative concept. With this move, PoC2 literature becomes essentially a “how-to” manual for effective protection of civilians. Just as a medical treatise on first aid need not adopt normative pretensions (although the healing of others is, by and large, a moral thing to do) so too we can see the PoC2 concept as a goal that can be achieved well, poorly, or not at all. On this footing, we will read the PoC2 literature as advice and recommendations on the best ways of succeeding in achieving the goals set forth by the PoC2 concept without taking any stance on there being specific moral duties at stake. It is this position described, I think, when the authors of Building on Brahimi declare at the outset that, “The paper is not normative or

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448 Brahimi, Brahimi Report, p. 11.
449 Johnstone and Bah, Peacekeeping in Sudan, p.3. Interestingly, they link this PoC2 norm to R2P: Ibid., p. 4.
450 Wills, Protecting Civilians, pp. 266-272. The former failure occurred in, for example, Kosovo in 2004, the latter in Rwanda 1994 and Srebrenica 1995. Ibid., pp. 220, 154, 269-70; UN, Rwanda Report, pp. 16-19; on sexual violence: Wills, Protecting Civilians, pp. 273-82.
451 “It certainly makes sense to match mandate and means, but as Brahimi’s panel put it, ‘operations given a broad and explicit mandate for civilian protection must be given the specific resources needed to carry out that mandate.’” This is not the same as the Security Council devising mandates with caveats that are compatible with under-resourced missions.” Paul Williams and Alex Bellamy, “Contemporary Peace Operations: Four Challenges for the Brahimi Paradigm”, International Peacekeeping, 11, no. 1 (2007): 1-28, p. 10.
452 Clear cases of failing the PoC2 duty, I submit, would at the very least include a failure to protect against mass violence in the immediate vicinity of the PSO, and not abandoning civilians in the PSOs care to the depredations of waiting genocidaires: The former occurred in, for example, Kosovo in 2004, the latter in Rwanda 1994 and Srebrenica 1995: Wills, Protecting Civilians, pp. 220, 154, 269-70.
prescriptive. It sets out a series of politically charged challenges and choices, but aims to be as objective as possible in its assessments.  

§2.2 PoC2: Substance and Content

PoC2 is broad-ranging, both in terms of the aspects of human wellbeing it aims to promote, and the types of action it might use in order to effect that promotion. Holt and Taylor utilise the view, drawn out of UNSC mission mandates, that Protection of Civilians can include a wide range of concerns, and wide-ranging modes of response to them (prevention, peacebuilding and so on). PoC2 can thus refer to:

“the physical protection of humanitarian personnel, as well as responsibilities such as facilitating the provision of humanitarian assistance, preventing sexual and gender-based violence, assisting in the creation of conditions conducive to the return of internally displaced persons and refugees, and addressing the special protection and assistance needs of children.”

453 Jones, Gowan, and Sherman, Building on Brahimi, p. 1. On the other hand, PoC2 literature can sometimes extend beyond even the normative reading of PoC2 I give in this section (that is: the conditional duty that if we take responsibility for peace operations, then we are morally bound to fulfill the responsibility to protect civilians effectively) and extend towards having normative responsibilities to intervene in the first place. Immediately prior to the denial of normative commitments noted above, the Building on Brahimi Report states: “Even an optimistic forecast of future conflict trends suggests that demand for global peacekeeping will rise, not fall. How will that demand be met?” (Ibid., p.1.) If the implication here is – as it seems to be – that the demand morally should be met, then it becomes a concern resembling PoC3 (see following section). The same may be said regarding expressions about “meeting the challenge” and following through on the “vision and purpose of the global peacekeeping partnership”. DPKO, A New Partnership Agenda, p. I; similarly wide suggestions of responsibility may also be found in Brahimi, Brahimi Report, ¶¶269, 280.

454 For instance, the Capstone Doctrine puts forward foundations (and corollary duties) on the basis of IHRL, IHL, Security Council mandates and thematic Security Council Resolutions regarding the protection of civilians, with special consideration given to women, children and other vulnerable groups (I will discuss the substance of these Resolutions in the following section on PoC3). DPKO, Capstone Doctrine, pp. 14-16. The variety of protection and other activities open to peacekeepers often falls beyond peacekeeping narrowly construed, as peacekeepers “are often required to play an active role in peacemaking efforts and may also be involved in early peacebuilding activities. United Nations peacekeeping operations may also use force at the tactical level...” Ibid., p. 19.

Added to this may be the broader concerns appearing in the Brahimi Report regarding peace-building and disarmament, demobilization and reintegration of combatants.\textsuperscript{456} Institutional and bureaucratic issues such as improved coordination and cooperation between peace operation actors are a common target of PoC2 reform agendas.\textsuperscript{457} And there are also specifically military understandings of how protection of civilians may be accomplished; for instance, the age-old practice of war-fighting and defeating evil-doers,\textsuperscript{458} as well as traditional peacekeeping, and the more recent “peace enforcement” operations\textsuperscript{459} (where there is not an agreed peace to keep).\textsuperscript{460} Within all these categories are myriad military strategies and context-specific factors for best achieving protection results.\textsuperscript{461}

Despite this wide-ranging ambit, Holt et al. note that “in its simplest form, the Council intends the instruction to ‘protect civilians’ to ensure that peacekeepers help prevent and halt acts of extreme violence.”\textsuperscript{462} While other tasks and objectives are significant, it is often upon the provision of basic safety against large-scale violence that a peace-support mission is judged (hence the two minimum standards noted in the previous subsection both centre on such protection).

PoC2 does not itself press bodies like the UN Security Council into action – that is the preserve of the following concept PoC3.\textsuperscript{463} However, PoC2 does constrain and direct the actions of bodies like the


\textsuperscript{457} e.g. Holt and Smith, Halting Widespread or Systematic Attacks, p. 18.

\textsuperscript{458} Holt and Berkman, The Impossible Mandate? p. 38.


\textsuperscript{460} Holt and Smith, Halting Widespread or Systematic Attacks, p. 8.

\textsuperscript{461} e.g. Ibid., Ch. 4. De Waal sketches the myriad staged strategies that can be necessary to achieve just the one discrete task of disarmament: Waal, “Darfur and the Failure of the Responsibility to Protect”, p. 1051.

\textsuperscript{462} Holt, Taylor, and Kelly, UN Peacekeeping Operations, p. 6. Most of the independent inquiry’s interviewees focused on this narrow reading (p. 21) though the broad reading was present as well (p. 170). See the similar PoC focus on preventing and halting “large-scale” or “high levels of violence” in Holt and Smith, Halting Widespread or Systematic Attacks, p. 5; Holt and Berkman, The Impossible Mandate?, p. 181; Brahimi, Brahimi Report, ¶¶1, 49, 62-3. The reference to the Security Council in the above quote is illustrative of the general view taken by the PoC2 literature – the investigation at hand is into what the UNSC is instructing its organs and the troops under its command to do. The challenge set by PoC2 to peacekeepers and related bodies is to fulfil that mandate through the most expeditious means available to them.

\textsuperscript{463} While noting that there are some understandings of PoC (what I would term PoC3) that might be said to incorporate R2P, de Carvalho and Lie emphasize that the OCHA understanding of PoC (my PoC2) does not: “PoC addresses the role and function of a peacekeeping already agreed to or an ongoing mission. As a concept, PoC does not provide a rationale for intervention.” Benjamin de Carvalho and Jon H. S. Lie, Challenges to Implementing the Protection of Civilians Agenda, NUPI Report 2009, May, 2009, p. 4. This is a perfect encapsulation of the purview of PoC2, and its foundational difference to the UNSC’s PoC3.
UNSC. Demanding, as it does, that if protective action is taken it must be effective, PoC2 requires of bodies like the UNSC that it be clear in its mandate about what protection activities must be performed, based on an accurate grasp of facts on the ground, and the causes and nature of threats to civilians. Furthermore, the mandate must be able to be realistically fulfilled given the resources and powers granted the PoC operation (especially the legal capacity to use coercive force – as with a Ch. VII mandate). The UNSC and UNSG have become increasingly receptive to such PoC2 dictates. In a classic statement of PoC2, and the duties it imposes on the UN, the report into the Fall of Srebrenica says:


Berman argues, contrariwise, that international law’s strength is in “complex, heterogeneously composed mandates” that allow flexible responses to changing needs. Berman, *Axes of Legitimacy*, pp. 753-4. This may seem, however, to miss the point of PoC2 literature like the Brahimi Report, against which Berman’s point is raised. An ambiguous mandate may initially seem to neatly cohere disparate values at the level of the UNSC. However, experience has shown that ambiguous mandates, combined with facts on the ground, usually translate to poor protection of civilians. The initial seeming coherence of the mandate is at this point found to be illusory as its apparent incorporation of the value of civilian protection is hollow. Unfortunately, this situation is not likely to improve, as there are powerful reasons for the opacity and ambiguity of UNSC resolutions; as Wills describes, “Since it is such a useful political tool I see little likelihood of Security Council members choosing to abandon the practice of drafting agreements in deliberately opaque terms where to do so would enable a consensus to be reached.” *Wills, Protecting Civilians*, p. 238. Note that there is possibly a legal disparity here, if PoC2 comes to have legal force (on the basis, e.g., of Geneva Convention Com. Art. 1): “However, given that the SC is essentially a political body (whose primary function is the maintenance of international peace and security through consensus decision-making) it is difficult to determine the nature of its legal obligation (if any) to provide the troops and resources to enable forces deployed in UN mandated operations to carry out their legal obligations under Article 1.” Wills, *Protecting Civilians*, p. 108. In other words, the UNSC may be able to legally mandate a mission while denying that mission the resources that it needs to perform its (potentially legal) PoC2 duties.


When the international community makes a solemn promise to safeguard and protect innocent civilians from massacre, then it must be willing to back its promise with the necessary means. Otherwise, it is surely better not to raise hopes and expectations in the first place, and not to impede whatever capability they may be able to muster in their own defence.  

PoC2 prescribes similar constraints on Troop Contributing Countries. While not itself demanding involvement in the missions, PoC2 responsibilities extend into Member States ensuring that the troops and capacities they provide to UN operations are appropriately trained and supported — and not legally restricted by domestic instruments from performing the relevant protection activities.

§3 PoC3: Protection of Civilians in Armed Conflicts in the context of UN Secretary General Reports and Security Council Resolutions

PoC3 refers to Protection of Civilians as a normative precept that directly motivates UN action. While PoC1 places mostly negative constraints on actors, and PoC2 imposes conditional duties on actors once they have committed to Peace Operations, PoC3 serves as a direct reason for positive action: for applying diplomatic pressures, sanctions, accountability, monitoring and — ultimately — military force. Overall, PoC3 is very broad indeed. Though it would perhaps be too much to claim that PoC3 includes R2P in the specific forms that the ICISS or the World Summit Outcome Document rendered that norm, thematically it is suggestive of just such a commitment. However, PoC3 extends well beyond R2P to more wide-ranging issues of civilian targeting in war (concerns with PoC1), effective protection in cases of UNSC mandate (PoC2) and much more — including concerns for refugees, arms-limitations, child-recruitment, demilitarisation of civilian camps, and so on.

§3.1 PoC3 in UN Secretary General Reports

PoC3 legal, ethical and institutional fundaments, as adduced by the UNSG

UNSG Annan (and later Ban Ki-Moon) provided a series of reports to the Security Council on the Protection of Civilians. Annan grounds the wide-ranging concept he uses in these reports in...
several ways. In his first (1999) report he notes the significance of International Humanitarian Law (particularly the Geneva Convention and the Additional Protocols of 1977)\(^{472}\) and he observes that the UNSC has acknowledged that large-scale human suffering can contribute to insecurity (thus falling within its purview of responsibility, as determined by the UN Charter).\(^{473}\) Furthermore, the SG points out that the, “Council also expressed its willingness to respond, in accordance with the Charter of the United Nations, to situations in which civilians, as such, have been targeted or humanitarian assistance to civilians has been deliberately obstructed.”\(^{474}\) In that report Annan holds that Protection of Civilians is “fundamental to the central mandate of the Organization.”\(^{475}\) And as the SC increasingly framed mandates in terms of Protection of Civilians, Annan made due reference to these as precedent.\(^{476}\)

**PoC3 content, as articulated by the UNSG**

The subjects of UNSG Annan’s concerns are wide-ranging, including all civilians subject (or, as with refugees, previously subject) to any forms of widespread and systematic armed violence. Thus “armed conflict” is not viewed narrowly in the reports; Annan cites concern with “mutilations in Sierra Leone, genocide in Rwanda, ethnic cleansing in the Balkans or disappearances in Latin America...”\(^{477}\) He makes particular reference to IDPs, refugees, women, and children.\(^{478}\) The Reports increase their scope over the years as new concerns arise; Ki-Moon’s most recent report discussed the increasing threats posed by improvised explosive devices, drones, and military and security

\(^{471}\) As well as these thematic reports, PoC3 commitments are found within the reports into UN action in Srebrenica and Rwanda: see Secretary-General, *The Fall of Srebrenica*, ¶¶501-505; UN, *Rwanda Report*, pp. 3, 50-51.


\(^{473}\) Ibid., ¶¶27-32. Annan lists the relevant UNSC resolutions to this effect at ¶31, beginning with the landmark UNSC, *UNSC Res. 688*. See also: Secretary-General, *In Larger Freedom*, ¶126.

\(^{474}\) Secretary-General, *1999 Protection of Civilians Report*, ¶27, see also ¶¶31-2, 47.

\(^{475}\) Ibid., ¶68.

\(^{476}\) Secretary-General, *2004 Protection of Civilians Report*, ¶¶7-9, 16.

\(^{477}\) Secretary-General, *1999 Protection of Civilians Report*, ¶2. Concerns for straightforward attacks on local populations are an obvious focus: Ibid., ¶13, see also ¶67.

companies, 479 and highlights further areas of human concern – such as housing, land and property issues. 480

Not only is the scope of the concern large, Annan considers PoC3 to motivate a very wide array of responses, including prevention, peace-making, peacekeeping and peace-building, 481 and he explicitly makes mention of intervention under Ch. VII of the UN Charter. 482 As well as statements of concern, demand and condemnation, specific PoC3 responses can include sanctions, arms embargoes, 483 separation of civilians and combatants, 484 ensuring access for humanitarian aid, 485 establishing safe zones, 486 protection of refugees, monitoring and reporting, 487 and counteracting hate media. 488 Ki-Moon has continued with this broad cluster of strategies, and added to it with his inclusion of, inter alia, coordination with protective humanitarian actors, 489 involvement with the civilian population’s protective strategies, 490 facilitating engagement with non-state actors, 491 potential constraints on arms trading, 492 improvements in and expansions of reporting, fact-finding and commissions of enquiry, 493 protection within refugee and IDP camps, and the safe return, including to appropriate property/land entitlements, of refugees and IDP’s. 494

There are substantial links here to R2P, as Annan consistently attributes responsibility to states, 495 and (failing that) to international bodies, 496 including regional organisations, 497 and “host states” for

479 Secretary-General, 2010 Protection of Civilians Report, ¶¶9, 17, 22.
480 Ibid., ¶14.
481 Secretary-General, 1999 Protection of Civilians Report, ¶33, Rec.12.
482 Ibid., ¶67.
483 Ibid., ¶¶54-56.
484 Ibid., ¶¶57, 64; Secretary-General, 2001 Protection of Civilians Report, ¶¶28-37.
485 Secretary-General, 1999 Protection of Civilians Report, ¶51.
486 Ibid., ¶66.
487 Secretary-General, 2004 Protection of Civilians Report, ¶¶46-47.
488 Secretary-General, 2001 Protection of Civilians Report, ¶¶38-41.
490 Secretary-General, 2010 Protection of Civilians Report, ¶40.
491 Secretary-General, 2009 Protection of Civilians Report, ¶¶38-47
492 Ibid., ¶¶21-22.
493 Ibid., ¶37; Secretary-General, 2010 Protection of Civilians Report, ¶¶87-91.
494 Secretary-General, 2009 Protection of Civilians Report, ¶¶16-17.
495 e.g. Secretary-General, 2001 Protection of Civilians Report, ¶¶5, 20, 47, 67, esp. ¶20: “It is the obligation to preserve the physical integrity of each and every civilian within their jurisdiction, regardless of gender, ethnicity, religion or political conviction, that should guide Governments in exercising their sovereign responsibility.”
refugees in crises. Annan explicitly invokes the international community’s responsibility “to ensure humanitarian aid is provided” when states are unable to fulfil their obligation. We also have increasingly strong focus on issues of monitoring and reporting. In all, Annan’s understanding of PoC is thematically inclusive of all that falls under R2P, though it also includes other broader concerns. UNSG Ban Ki-Moon has continued with this broad understanding of PoC, though, as described above, he has also reported separately and directly on R2P.

§3.2 PoC in UNSC Resolutions

The UNSG’s accounts of PoC inform, but are also informed by, how the United Nation’s Security Council (UNSC) understands the term. Protection of civilians became increasingly significant for the UNSC with the change in international circumstances precipitated by the end of the cold war. UNSC resolutions 1265 (1999) and 1296 (2000) in particular are important. In the former especially, drawing upon the earlier UNSG’s 1999 report, the UNSC adopted an understanding of Protection of Civilians of similar breadth.

Resolution 1265 speaks of concerns not only with the

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496 e.g. Ibid., ¶5 (“necessary commitment” of Member States); ¶39: obligation to counteract misuse of information; ¶67: default/backup obligations of the UNSC: “The primary responsibility for the protection of civilians falls on Governments and armed groups involved in conflict situations. Where they do not honour these responsibilities, it is up to the Security Council to take action.”

497 Secretary-General, 2004 Protection of Civilians Report, ¶49.

498 Secretary-General, 2001 Protection of Civilians Report, ¶31. The Private Sector is also an object of his concern: Ibid., ¶61.

499 Secretary-General, 1999 Protection of Civilians Report, ¶51.

500 Secretary-General, 2004 Protection of Civilians Report, ¶¶46-47.

501 The 2007 Report explicitly noted R2P (¶¶10-11) and utilised R2P language (e.g. ¶3) Secretary-General, 2007 Protection of Civilians Report. The 2009 Report did not explicitly mention R2P, and, indeed, language resonant of it was not prominent. Secretary-General, 2009 Protection of Civilians Report. Most recently, the 2010 Report explicitly incorporates R2P (¶30) and elsewhere emphasizes the protection responsibilities of states (¶40, Annex:26): Secretary-General, 2010 Protection of Civilians Report.

502 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect; Secretary-General, 2010 Report: Early Warning, Assessment and the Responsibility to Protect.


504 As Weiss notes: “During the first half of the decade [1990s], twice as many [humanitarian informed] resolutions were passed as during the first 45 years of UN history.” Weiss, Humanitarian Intervention, p. 111.

505 Viotti provides a brief summary: Viotti, "In Search of Symbiosis", p. 148.

506 This breadth of concern is carried through fairly consistently in more recent reports. For instance, the most recent Aide Memoire contains subsections on: Protection of, and assistance to, the conflict-affected population; Displacement; Humanitarian access and safety and security of humanitarian workers; Conduct of hostilities; Small arms and light weapons, mines and explosive remnants of war; Compliance,
actions of combatants, but additionally of “armed elements” (thus allowing application to non-traditional armed conflicts). It evinces concern with a wide variety of human rights and breaches of International Humanitarian Law – including noting the specific concerns of children, women, refugees and IDPs. It notes the consequences to durable peace arising from the targeting and harming of civilians (thus moving the Protection of Civilians squarely within the UNSC’s mandate) and crucially goes on to affirm:

- a willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council’s disposal in accordance with the Charter of the United Nations...

The link between the protection of civilians and potential threats to international peace and security is made more explicit in Res. 1296, and the most recent Aide Memoire opens with the telling assertion that “Enhancing the protection of civilians in armed conflict is at the core of the work of the United Nations Security Council for the maintenance of peace and security.” The capacity for PoC3 to include the robust use of force against belligerents was recently underlined with the French military action in Côte d’Ivoire against former president Gbagbo. One abiding role of the Council is to call for parties to observe international humanitarian law (i.e. to observe PoC1) and in promoting accountability for violations by setting up ad hoc courts (as in the former Yugoslavia... and

accountability and the rule of law; Media and information. It additionally contains full sections on: Specific protection concerns arising from Security Council discussions on children affected by armed conflict; and, Specific protection concerns arising from Security Council discussions on women affected by armed conflict. OCHA, Aide Memoire.


508 Ibid. Children: ¶¶12, 16, 19; Women: Preamble, pp. 1-2 and ¶13; Refugees and IDPs: Preamble, pp. 1-2 and ¶7. See similarly: UNSC, UNSC Res. 1296, ¶¶9, 10, 16. The Aide Memoire indicates the consistent concerns for specially vulnerable groups, having separate sections on women and children: OCHA, Aide Memoire. Note that unlike R2P there is no strict limitation that the violence or breaches of IHL must be systemic and large-scale.

509 UNSC, UNSC Res. 1265, ¶10.

510 UNSC, UNSC Res. 1296, ¶¶5, 14.

511 OCHA, Aide Memoire, §2.5.


Rwanda\textsuperscript{514}) or referring situations to the International Criminal Court (as in Darfur\textsuperscript{515} and recently in Libya\textsuperscript{516}).

Nor is willingness to act limited to reaction. The UNSC explicitly highlights the significance of preventive measures that may be undertaken by the UN, including dispute resolution, preventive military and civilian deployment, and avenues for fact-finding.\textsuperscript{517} Since 1999, UNSC mandates for Peace Operations evince a marked progression towards giving Protection of Civilians an increasingly central role, and in authorising coercive force under Ch. VII of the Charter (though the case of Darfur is arguably a key exception here). Breau summarises:

Although Security Council practice reveals a transformation in use of force mandates, it is clear that the responsibility to protect has not been adopted as a rule in practice. The situation has improved substantially from the failures of the mid-1990s in Srebrenica and Rwanda, but the criteria proposed of the responsibility to react in the three key reports are nowhere near to being uniformly implemented especially considering the failure in Darfur.\textsuperscript{518}

While the scope and potential responses of the PoC3 concept as it is deployed by the Security Council are similar to the UNSG’s, the Council is far more circumspect in its use of terms like “responsibility”. To be sure, the Security Council is straightforward regarding its own responsibility for the maintenance of peace and security,\textsuperscript{519} and imputes responsibilities to states to police and prosecute genocide, crimes against humanity and the like.\textsuperscript{520} Notwithstanding these imputations, SC language regarding its own protection agenda is often of “concern”, “willingness” and “intentions”


\textsuperscript{517} UNSC, \textit{UNSC Res. 1265}, ¶3; UNSC, \textit{UNSC Res. 1894}, ¶¶8-9. In their most recent report, the Council explicitly acknowledged the breadth of strategies at their disposal: “United Nations peacekeeping missions constitute one of several means at the United Nations’ disposal to protect civilians in situations of armed conflict.” UNSC, \textit{UNSC Res. 1894}, Preamble, p. 3; note also the depth and breadth of their preventive goals: ¶20.

\textsuperscript{518} Breau, “The Impact of the Responsibility to Protect on Peacekeeping”, p. 453.

\textsuperscript{519} E.g. UNSC, \textit{UN Security Council Resolution 1265}, Preamble, p. 1.

\textsuperscript{520} Ibid., ¶6.
rather than obligation, and there is appeal to scope for its judgment in proceeding on a “case-by-case” basis.⁵²¹ The following passage from Res. 1296 is illustrative; the UNSC:

*Affirms* its intention to ensure, where appropriate and feasible, that peacekeeping missions are given suitable mandates and adequate resources to protect civilians under imminent threat of physical danger, including by strengthening the ability of the United Nations to plan and rapidly deploy peacekeeping personnel, civilian police, civil administrators, and humanitarian personnel, utilizing the stand-by arrangements as appropriate...⁵²²

Here we have a broad ambit for the possible action – reference only to civilian danger as a trigger – but the use of “intention” rather than “responsibility” or “obligation”, and the qualifications “where appropriate and feasible.” In short, the UNSC – prior to 2006 at least – appeared to view the issue of Protection of Civilians in Armed Conflict as broadly as the UNSG, but was more cautious in adopting general responsibilities to enact such protection. After 2006 we have a clear implication that the UNSC sees R2P2005 as falling within the general category of the Protection of Civilians in Armed Conflict, as it discusses its commitments made in Resolution 1674 (with explicit reference to paragraphs 138-139 of the 2005 United Nations World Summit Document where R2P2005 is found) under this rubric.⁵²³ Perhaps continuing this momentum, the most recent Resolution on the Protection of Civilians, as well as containing the only explicit affirmation of R2P since 2006, notably strengthens the language relating to the SC’s responsibilities. For the first time there is acknowledged an “enduring need” for the UNSC to strengthen the protection of civilians, and of the Council’s “role” in ending impunity for serious war criminals.⁵²⁴

This understanding is consistent with the account given here of PoC3 – which is broad enough in ambit, scope and assignation of responsibilities to include R2P2005 as a proper part.

§3.3 PoC3 in UN Operations Reports and Guidelines

As noted in the previous section (§3.2), what I have termed PoC2 literature (Peace Operations doctrine and commentary) occasionally stretches towards PoC3 commitments. For instance, the Brahimi Report determines that its: “recommendations fall well within the bounds of what can be

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⁵²¹ E.g. UNSC, *UNSC Res. 1296*, Preamble, p.1. As Bassiouni puts it: “For sure, many hortatory statements have found their way into preambles of Security Council resolutions, evidencing the links between the harm created by such conflicts and international peace and security, but no resolution posits the duty to act in order to protect or to prevent.” Bassiouni, “Atrocity Crimes”, p. 33.


reasonably demanded of the Organization’s Member States.”525 The Report’s emphasis on the need for preventive systems and fact-finding missions, 526 and its overall view of the responsibility of the UN and its member states is also very broad, in line with PoC3.527 However, in some areas links between PoC3 and PoC2 should not be overdrawn. There seems a disjuncture between the aspirations of PoC3 and the focus on improvements in efficacy surrounding PoC2. As Bellamy and Williams note: “The preoccupation with technical issues looks even more out-of-place given that the UN-sanctioned reports on Rwanda and Srebrenica clearly demonstrated that it was political factors rather than institutional/bureaucratic factors that were primarily responsible for the respective failures.”528

§3.3.1 PoC3 relationship to other PoC norms

In some ways, PoC3 functions as an umbrella concept, covering all the concerns in the remaining PoC norms, and considering any and all ways that the powers of the UN Secretary General and the Security Council can further the existing PoC practices that fall under those norms. This facilitative relationship is particularly clear in Ki-Moon’s 2009 Report, where he describes five “core challenges” to PoC.529 These challenges all involve the enhancement and facilitation of PoC practices governed by the other PoC norms. Challenges One, Two and Five revolve around PoC1. Challenge One considers ways that the UN can ex ante motivate compliance with IHL, while Challenge Two moves to how this may be done with non-state actors.530 Challenge Five focuses on ex post IHL accountability, and the various measures available – criminal courts, tribunals, commissions – for ending impunity.531 Challenge Three focuses on improving and better-resourcing peace-support operations (ensuring PoC2 commitments are met),532 while Challenge Four requires ensuring the protection of humanitarian actors and their access to relevant areas (PoC4, to which we will presently turn).533 In this way, PoC3 protects civilians from large-scale assaults to their basic rights, not only by the direct actions of peace-support operations (governed by PoC2), but also by utilising

525 Brahimi, Brahimi Report, p. xiv.
526 Ibid., pp. 5-6.
527 Ibid., pp. 46-47.
528 Williams and Bellamy, "Four Challenges", p.5.
529 Secretary-General, 2009 Protection of Civilians Report, ¶¶26-73.
530 Ibid., ¶¶27-47.
531 Ibid., ¶¶61-73.
532 Ibid., ¶¶48-57.
533 Ibid., ¶¶58-60 and Annex.
legal existing instruments (PoC1 and the laws of IHL) and other actors (humanitarian agents and PoC4).

§4 PoC4: Humanitarian Protection

PoC4 is the protection concept at work in humanitarian action, such as that performed by the ICRC, UNHCR, Oxfam, Amnesty International, and similar organisations. The concept has been in flux over the last decade, undergoing considerable development. Throughout most of the latter half of the Twentieth Century, humanitarian protection was understood in two ways. First, there is what Forsythe calls “traditional protection”.534 Traditional protection involves advocating on behalf of vulnerable persons, aiding the development of legal instruments and protective policies, and getting states to ratify and act upon such instruments.535 Such may be achieved by either persuasion or reporting and denunciation – though the latter course is controversial, as it can impinge upon humanitarian neutrality, and affect the willingness of actors to allow humanitarian access.536 Second, there is “relief-protection” – the provision of necessities to those who need them. There are two senses in which relief-protection constitutes protection in its own right. On the one hand, people have rights (morally, and in international law) to the necessities of life – food, water, shelter. Provision of such necessities thus directly protects those rights.537 On the other hand, having a secure supply of such necessities makes a person less vulnerable to coercion and exploitation by others.538 539

However, beginning two decades ago, and gaining momentum in the new century, humanitarian actors have increasingly expanded the concept of humanitarian protection to include a wide variety of (non-military) activities that enhance civilian protection. From the placard around the neck of an


535 These activities, undertaken through the mandates of the UNHCR and the ICRC, are also denoted as “traditional protection” by Sorcha O’Callaghan and Sara Pantuliano, Protective Action: Incorporating Civilian Protection into Humanitarian Response, HPG Report 26, December 2007, pp. 9-10.

536 Consider the ICRC’s consistent position on matters of discretion. Forsythe, "Humanitarian Protection", pp. 686-690. Forsythe suggests denunciation is growing in relevance as absolute sovereignty wanes in influence. See §4.3 below.

537 Ibid., p. 681-2. For a philosophical defense of this notion of protecting socio-economic rights, see Shue, Basic Rights, pp. 23-25, 52-60.

538 Shue, Basic Rights, pp. 26, 30.

539 Still, some organizations find it perspicuous to draw a line between relief and protection activities. For instance, Oxfam holds that “if the specific goal of the programme is to reduce the risks of violence, coercion or deprivation faced by a population then the programme is protective.” Oxfam, Protection into Practice (Oxford: Oxfam, 2005), p. 4.
Iraqi child in 1991 – reading “We don’t need food. We need safety,” to the “well-fed dead” of Bosnia, many humanitarian actors have been motivated to expand and prioritise their protection activities. This enlarged concept of humanitarian protection I will term PoC4.

§4.1 Normative Foundations

The normative foundations for PoC4 are explicitly rights-based. In 1999 a wide array of humanitarian and human rights agencies brought together by the ICRC reached a consensus that protection includes, “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law.” Comprehensive accounts of rights – including rights to safety, dignity and integrity – are consistently invoked as the basis for humanitarian protection. Simply put, humanitarian protection sees all persons as being the holders of a wide array of rights, and considers methods whereby peaceful humanitarian agents can help – directly or indirectly – to protect those rights from threats.

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541 Inter-Agency Standing Committee (IASC), Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field (Geneva: UNICEF, 2002), p. 4. A clear indication of the developing importance of humanitarian protection is the increased prevalence of protection activities flagged in the forthcoming Sphere Handbook: see Sphere Project, “What Is New in the 2011 Edition of the Sphere Handbook,”(2010), http://www.sphereproject.org/component/option,com_docman/task,doc_details/gid,393/lang,english/, ¶C.3. See also O’Callaghan and Pantuliano, Protective Action, pp. 10-11. One key change in the post-cold-war context was simply that humanitarian actors were increasingly able to be present when and where the violations were taking place: Frohardt, Paul, and Minear, Protecting Human Rights, p. vii, 24.

542 What I term PoC4 is usefully distinguished from R2P by LaeGreid, Protecting Civilians from Harm: A Humanitarian Perspective, p. 7, and distinguished from other notions of PoC (what I call PoC2 and PoC3) at pp. 13-14. Note that there are important objections to this expansion in the role of humanitarian organizations: see the points raised, and responses made, in O’Callaghan and Pantuliano, Protective Action, pp. 17-


544 e.g. Slim and Bonwick, Protection: ALNAP Guide, pp 30-34; Frohardt, Paul, and Minear, Protecting Human Rights, p.1, see also p. 94; (IASC), Growing the Sheltering Tree, p. 4; Oxfam uses international human rights law to provide benchmarks for treatment and responsibility: Oxfam, Protection into Practice, p. 2; The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response, pp. 4-5, 12, 17. Forsythe puts the commitment in terms of “social liberalism”: Forsythe, "Humanitarian Protection", p. 678.
§4.2 Substance and Content of PoC4

PoC4 responds to threats to rights in the form of large-scale personal violence, deprivation, dispossession and forced or restricted movement. These threats may arise in various contexts, including situations of armed conflict, protracted social conflict, post-conflict, natural disasters and famine. Different humanitarian actors will often have different purviews – with a focus on different contexts or persons of concern – though expansion and overlap in scope is common. Forsythe notes how this can occur even in those humanitarian actors who have very clearly defined areas of concern:

Like the ICRC, UNHCR found it difficult to confine its humanitarian protection to a well-established but clearly limited group of persons, when similar persons presented pressing humanitarian needs. Both agencies generalized their language, talking of “persons affected by conflict” or “persons of concern” so that various definitional distinctions could be blurred in the interests of providing expanded humanitarian protection.

Given the (unarmed, peaceful) actors involved, there is in PoC4 little to no direct prevention or protection – as might require the use of coercive force. Still, imaginative and willing humanitarian actors have steadily unearthed a diverse array of potentially potent protection-activities open to them. There are myriad different ways of listing and categorising the discrete objectives and strategies open to PoC4 actors. Here I will take a common approach of using the “egg framework” for modelling protection – so called because the different spheres of action surround a common centre, but repose at different distances from it, hence making the model appear as the cross-section of an egg. The most central and immediate type of protection activity – closest to the victims themselves – is responsive action aiming to prevent or alleviate threats and harms. Next in centrality and immediacy is remedial action, aimed at assisting and supporting people after violations of their rights. Finally, on the outermost shell, there is environment-building, where institutions and cultures are structured to make them more protective of civilians. In each of these


547 Ibid., p. 23.


three domains, various strategies may be employed. The traditional protection activities of advocacy, persuasion, reporting and denunciation, as well as dissemination of information about IHL and human rights law, remain significant in all three spheres, as does the relief protection of providing vital aid. But PoC4 incorporates a raft of further strategies, including (non-exhaustively),

- the strategic, deliberate and conscious use of the presence of humanitarian actors, including accompaniment of civilians, as a way of discouraging attacks;

- the support and empowering of local populations in crafting and executing strategies to avoid and resist threats, and minimise risks in daily activities;

- the creation of safe areas (where safety is created through secrecy or an unwillingness of belligerents to brazenly attack humanitarian buildings or areas);

- the creation and dissemination of information, especially regarding early warning, areas of safety or danger, conditions for return of refugees and IDPs, location of resources, and so on;

- aiding in the transport or evacuation of civilian populations away from threats, or back to their (now-safe) homes;

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552 This can be termed the “substitution mode” of direct service provision: (IASC), *Growing the Sheltering Tree*, p. 13. It can aid in protection, e.g., by allowing people to stay away from their home villages in humanitarian camps, where they are safer: Bonwick, “Who Really Protects Civilians?”, p. 275.

553 For further possibilities, see Frohardt, Paul, and Minear, *Protecting Human Rights*, p. 2. Even as Oxfam lists myriad different strategies (pp. 14-23), they stress that although the list is, “based on several years of field experience, good protection programming inevitably requires creativity. The list is therefore illustrative rather than exhaustive.” Oxfam, *Protection into Practice*, p. 13.


557 (IASC), *Growing the Sheltering Tree*, pp. 5, 16; Slim and Bonwick, *Protection: ALNAP Guide*, pp. 95-6. Oxfam, *Protection into Practice*, pp. 18-9; Sometimes providing information about the needs of refugees can itself be vital: e.g. Oxfam in West Timor; Oxfam, *Protection into Practice*, p. 11.

• the structure and design of aid facilities and programmes to enhance civilian safety, including by the strategic distribution of humanitarian assistance, well-digging, providing fuel-efficient stoves, etc.559

Another crucial part of PoC4 is to ensure that humanitarian activities, whether of fact-finding, assistance in relocation, negotiating, providing provisions and the like, are not themselves contributing to – or are not capable of being manipulated in ways that lead them to contribute to – the harm of civilians.560 Such unwanted consequences may occur in many ways – by legitimating the political status of evil-doers, by motivating harmful activities as a way of ensuring provision and control of aid, by reducing community empowerment to find their own solutions, and so on.561

Whether PoC4 requires pro-active new strategies, or revisiting familiar ones,562 Frohardt et al note that effective protection activities are all, “based upon concepts that have been applied elsewhere: international presence, clear-eyed analysis of the perpetrators’ modus operandi, anticipation of vulnerability to abuse, issuance of clear instructions and guidelines, and education of vulnerable populations in self-protection and risk avoidance.”563

§4.3 Neutrality and Impartiality in PoC4

Traditionally, humanitarian actors have held themselves to strict constraints of action, cleaving steadfastly to principles of neutrality and impartiality.564 Changes in protection activities pose something of a challenge to humanitarian actors however.565 The terms “impartiality” and

559 e.g., Oxfam, Protection into Practice, p. 8, 12; O’Callaghan and Pantuliano, Protective Action, p. 17.
562 O’Callaghan and Pantuliano, Protective Action pp. 21-23, divide humanitarian protection into three groups: 1. Mainstreaming protection: where traditional humanitarian assistance is performed through the lens of protection, making sure assistance promotes, rather than harms, civilian protection; 2. Protective action: where new activities are pro-actively undertaken with both assistance and protection objections; and 3. Specialist Protection, where specialised (and perhaps mandated) humanitarian agencies can engage in purely protective activities.
neutrality” though, have a variety of meanings that must be distinguished. Neutrality (and impartiality) may connote: i) *non-discrimination* in who will receive relief, assistance and humanitarian protection\(^{566}\); ii) not being an *agent of state policy* or of one particular political or religious standpoint\(^{567}\) – usually requiring not taking sides in a conflict and (a separate factor again) not contributing to one outcome rather than another, and may also include upholding an arms-length relationship with local peace-enforcement actors (who may not be considered neutral); and finally, iii) *not speaking out* against a particular side on the basis of its breaches of IHL or international human rights law\(^{568}\).

The humanitarian protection of PoC4 may, at least on some interpretations, interfere with all three of these senses of neutrality. For instance, in order to provide aid to all needy civilians in a conflict (i.e. to be neutral in sense (i)), a humanitarian agency might open itself up to manipulation and exploitation by one particular side.\(^{569}\) PoC4 concerns for civilian safety may require forgoing relief protection for one side in particular – and this may impact on the war aims of the opposing side. Similarly, advocating the need for military intervention to end widespread human rights abuse against some violator of IHL,\(^{570}\) or association with peace-enforcement operations for shared humanitarian tasks,\(^{571}\) may not be consonant with neutrality in sense (ii). But it is neutrality in sense (iii) that is particularly vexing in terms of humanitarian protection; humanitarian actors may be allowed to act in an area only because they are perceived to be impartial, but may be compelled to speak out and denounce humanitarian atrocities.\(^{572}\) As such, PoC4 commitments are requiring humanitarian actors to re-consider the nature of neutrality.\(^{573}\)

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566 e.g. (IASC), *Growing the Sheltering Tree*, p.8; O’Callaghan and Pantuliano, *Protective Action*, p. 19.
568 (IASC), *Growing the Sheltering Tree*, p. 8.
569 In the manners described by Frohardt, Paul, and Minear, *Protecting Human Rights*, pp. 61-90.
570 As now forms part of Amnesty International’s policy (see Holt and Berkman, *The Impossible Mandate*? p. 30) and Oxfam’s: (Oxfam, *Protection into Practice*, p. 9).
572 For discussions of the complexity see (IASC), *Growing the Sheltering Tree*, p. 8; Forsythe, "Humanitarian Protection", pp. 686-9.
573 For an argument that such problems are not new to the ICRC, and that there is still an achievable and important level of neutrality available to it, see Rieffer-Flanagan, "Is Neutral Humanitarianism Dead?"
Part 3. Links drawn between R2P and PoC

Several authors have explicitly and systematically addressed the conceptual links between R2P and PoC. Important examples include Strauss, Holt and Berkman, and Hunt. As well as these treatments, many other commentators note isolated differences in and links between the two concepts. This section discusses the main differences discerned by these commentators.

While R2P may gain in normative and political stature by being associated with the (less controversial) PoC, it must be noted that the reverse holds true too. PoC agendas can be thwarted by the worry they are a cover for R2P action or institutionalisation.

§1 PoC is restricted to armed conflicts only.

One of the most consistently noted differences is that Protection of Civilians in Armed Conflicts is limited by being applicable only to Armed Conflicts. One might think the constraint here is not just obvious but apodictic. But in fact there is significant controversy here. If PoC includes the Geneva Conventions and other articles of international humanitarian law (what I have termed PoC1) then it includes a constraint on crimes against humanity – and recent international criminal courts have consistently expanded this term to explicitly include actions taken outside armed conflicts. Alternatively, if PoC is the type of protection viewed as a reason precipitating UN action (PoC3) then again we find the purview including acts of genocide outside those occurring in armed conflict narrowly construed.

Note that initial UNSC discussions of R2P fell very much within the rubric of PoC (my PoC3) (Strauss, "A Bird in the Hand", pp. 302-3), and their initial affirmation of R2P was placed in a thematic PoC resolution.

575 Holt and Berkman, The Impossible Mandate? Ch. 3, esp. p. 42.
577 See Welsh, "Where Expectations Meet Reality", pp. 425-6; Bellamy, Responsibility to Protect, p. 163; de Carvalho and Lie, Challenges to Implementing the Protection of Civilians Agenda.
578 e.g. Strauss, "A Bird in the Hand", p. 305; Global Centre for the Responsibility to Protect, Policy Brief: The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict, January 2009, p. 3.
580 See Part II, §1.2 above. Still, the distinction regarding the question of armed conflict, even if being progressively effaced in IHL, can retain substantial institutional significance. Consider the UNSG on capacities for early warning: "the existing mechanisms for gathering and analysing information for the purpose of early warning do not view that information through the lens of the responsibility to protect. Preventing the incitement or commission of one of the four proscribed crimes or violations is not necessarily the equivalent of preventing the outbreak of armed conflict. Sometimes such egregious acts are associated with armed conflicts, but sometimes they are not." Secretary-General, 2010 Report: Early Warning, Assessment and the Responsibility to Protect, ¶10(b).
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outside warlike contexts – as arguably was the case in Darfur and Rwanda for example – as falling with the UN’s PoC purview. And, once again, the same is true if we interpret PoC as a requirement of peacekeeping forces (my PoC2), where we find that peace operations often understand themselves to have the role of protection against all large-scale acts of violence against civilians. Durch is explicit on the expansion of the concept in this respect, holding that protection of civilians “applies to this broad spectrum of circumstances, including generalized violence and post-conflict situations that may not qualify as ‘armed conflict’.” In sum, PoC, like R2P, is not limited to armed conflicts narrowly construed. Naturally, it is open to argument that such cases of widespread slaughter as fall under PoC should be termed a species of (albeit one-sided) armed conflict. But, of course, if this move is made, then the putative point of difference between PoC and R2P in this respect dissolves completely.

**UNSC, UNSC Res. 1674, ¶4.** Further, when the UNSC refers back to its prior commitment to R2P it does so by placing it under a “Protection of Civilians” head – suggesting that it views R2P as a proper part of a larger PoC concern. E.g. UNSC, UNSC Res. 1706, Preamble, p. 1. For commentary see Strauss, “A Bird in the Hand”, p. 305.

**582** e.g. UNSC, UNSC Res. 1706, p. 1.

**583** UNSC, UNSC Res. 955; UN, Rwanda Report; Secretary-General, In Larger Freedom, ¶134.

**584** Brahimi, Brahimi Report, p. 11. As aforenoted, Annan includes under the PoC concept, “mutilations in Sierra Leone, genocide in Rwanda, ethnic cleansing in the Balkans or disappearances in Latin America”.

**585** The Brahimi Report speaks simply of “violence against civilians” as a sufficient reason for UN peacekeepers to respond. Brahimi, Brahimi Report, p. 11.


**587** Thus, we would not be surprised to find substantial links drawn between PoC2 and R2P in the literature:

**588** One way R2P might be wider in scope that PoC is that it may arguably apply to mass-death that is not directly caused by violence at all. Any such expansion in scope will not be straightforward however. Howard-Hassman envisions RtoP as having its parameters articulated not by the WSOD, but rather in the UNSC, UNSC Res. 1674, ¶27, and therefore apparently limiting RtoP itself to situations of armed conflict, Howard-Hassmann, "Mugabe’s Zimbabwe", pp. 518-9. While this is a marginal position, Howard-Hassman is correct that RtoP appears to be functionally limited, in a manner similar to PoC, to sudden, direct, violent slaughter, as opposed to slow, indirect, mass-death by, say, intentionally-created famine. Still,
In sum, evolutions in the PoC concepts – especially and most explicitly in PoC1 – suggest that the term *Protection of Civilians in Armed Conflict* has become misleading, and that we perhaps would be better served with a term such as *Protection of Civilians in Armed Conflict and from Mass Atrocities*, or even just, more succinctly, *Protection of Civilians*.

§2 PoC as a limited or secondary direction; R2P as the overall mission objective.

Holt and Berkmann (and subsequently Holt and Smith) used R2P to refer to those missions that had an overall mission focus on the protection of civilians, and Ch VII authorization, as contra-distinguished from those missions where the protection of civilians was just one set of tasks amongst other mission roles. Other commentators have made similar suggestions, often associating R2P, but not PoC, as with the exceptional and large-scale use of force. It might be argued, however, that there is good reason to resist this mode of distinction between PoC and R2P, as it inevitably ties R2P more or less exclusively to coercive military force, making it essentially synonymous with military intervention for human protection purposes.

§3 R2P narrowly focused on four crimes: PoC applies to all large-scale rights violations

Strauss argues that PoC’s ambit is different to R2P. PoC includes focus on all large-scale violations of human rights and humanitarian law, whereas R2P is focused on particular categories of crime (this is clearly the case with R2P2005, though Strauss’ point is also true in application to R2P2001). On a

Howard-Hassman herself gestures towards such an expansion by drawing on the original ICISS position and by arguing for the inclusion of state-induced famine as a crime against humanity. Ibid., pp. 909, 918.

Holt and Smith, *Halting Widespread or Systematic Attacks*, p. 3.

Holt and Berkman, *The Impossible Mandate?* pp. 42, 50. R2P here was envisaged as one protection concept (among five others).

In an interesting draft paper on the topic, Gomes argues that we can distinguish UN missions and UNSC mandates as being R2P or PoC not on the basis of which UNSC mandates specifically invoke R2P (few do, and Gomes does not consider this mode of classification), but instead on the use of other tell-tale language. R2P mandates, Gomes suggests, use the characteristic “threat to international peace and security” and, possibly, “all necessary means” phrases, while PoC mandates instead refer to civilians “…under imminent threat of physical violence”. Gomes, “The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Relations and Distinctions,” p. 20.

Ibid. pp. 19-20. Something like this view also may be found in PoC literature. For instance, the *Building on Brahimi Report* places intervention against state opposition as arguably outside the purview of the peacekeeping the report considers. Jones, Gowan, and Sherman, *Building on Brahimi*, p. iii.

See my comments above n. 383. Note also, for example, that the UNSG does not take this narrow approach, and links R2P explicitly to several missions occurring with state consent: Secretary-General, *2009 UNSG Report: Implementing the Responsibility to Protect*, ¶¶41-2.

Strauss, "A Bird in the Hand", p. 305. In the draft paper noted earlier, Gomes makes a similar point, emphasizing that R2P focuses on intentional/deliberate mass-violence and harm – “harm against civilians as an aim” – while PoC is more widely responsive to non-intentional harms – “harm against civilians as a
like footing, Hunt describes R2P as a framework for realising PoC in the most egregious cases.\textsuperscript{595} The foregoing analysis of Part II supports the position here of Strauss and Hunt – all the versions of PoC outlined have an ambit well beyond the strict confines of R2P2005, though the four crimes of R2P2005 will still appear as paradigm areas of concern regarding PoC.

§4 PoC is, where R2P is not, a humanitarian norm.

Strauss argues that PoC employs the humanitarian principles of humanity, neutrality and independence – while R2P often requires taking a side and not remaining neutral between parties.\textsuperscript{596} It seems right to say that R2P is not impartial in the humanitarian sense, but the view that PoC is impartial is becoming controversial. The Brahimi Report, for instance, seems to require that PoC (PoC2, in my terms) requires a non-traditional understanding of impartiality:

Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement.\textsuperscript{597}

Similarly, while PoC1 is largely neutral to war objectives and questions of \textit{jus ad bellum}, it necessarily aligns itself – both morally and in terms of future legal action – against those actions which are criminalised by IHL and proscribed by \textit{jus in bello}, and so aligns itself straightforwardly against the authors of those actions. PoC3 is even less neutral again, with both the UNSG and the SC willing to

\textsuperscript{595} Hunt, \textit{Perspectives and Precedents in the Asia-Pacific}, p. 8.

\textsuperscript{596} Strauss, "A Bird in the Hand", p. 306. It may be that the UNSC also holds this position, or some variant of it. Various resolutions and statements on PoC stress the significance of the humanitarian principles: see, e.g., the Statement by the President of the Security Council in OCHA, \textit{Aide Memoire}, §2.4.

\textsuperscript{597} Brahimi, \textit{Brahimi Report}, pp. ix, 9. As Bellamy expresses the Brahimi statement: “impartiality should be understood, not as a form of neutrality – as it has in the past – but as a commitment to treating all parties equally in relation to their compliance with the relevant mandates and peace agreements.” Bellamy, \textit{Responsibility to Protect}, p. 157. Holt and Berkman explicitly distance peace operations protection (my PoC2) from the neutrality prized by humanitarian actors (including my PoC4). Holt and Berkman, \textit{The Impossible Mandate}? p. 39; as does the DPKO, \textit{Capstone Doctrine}, p. 33. See also Wills, \textit{Protecting Civilians}, p. 86; and Roberts, "The So-Called 'Right' of Humanitarian Intervention", pp. 48-9, questioning the appropriateness of neutrality to modern peace support operations. With regard to Srebrenica, the Secretary-General notes the errors of judgment "rooted in a philosophy of impartiality and non-violence wholly unsuited to the conflict in Bosnia": Secretary-General, \textit{The Fall of Srebrenica}, ¶499, see also ¶¶235, 506.
condemn, and in various ways to act against, all manner of rights-violating agents.\(^598\) Recent action in Libya and Côte D’ivoire exemplify this non-neutrality against regimes with questionable claims to sovereignty and who are willing to target civilians.\(^599\) It is not at all clear that the sense of impartiality and objectivity at work in these PoC concepts (viz. impartial application to all persons regardless of race, sex, ethnicity, and so on) is not equally in play in R2P, which is presumptively impartial in just this sense. The only place where neutrality is highly significant in regard to PoC is in PoC4:

For humanitarian staff, neutrality means providing food to all members of a needy population, regardless of the population’s previous actions or political allegiances. Ensuring that their operations are perceived as neutral by combatant parties is often essential for maintaining access to vulnerable populations in hostile territory and ensuring the safety of humanitarian staff.\(^600\)

PoC4’s humanitarian neutrality is encapsulated in classic form in *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief*. Of particular note are Principles Three and Four:

3: Aid will not be used to further a particular political or religious standpoint;

4: We shall endeavour not to act as instruments of government foreign policy.\(^601\)

All that said, and as noted above,\(^602\) the changes created by the incorporation of protection into humanitarian agendas may require modifications to their impartiality and neutrality. For instance:

Amnesty International, after years of maintaining a policy of relative neutrality on the use of force and military intervention, decided in 2005 to develop guidelines for when it will call for military intervention to end widespread and grave human rights abuses.\(^603\)

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\(^{598}\) More broadly, Roberts notes the lack of recognition in the ICISS report of the need which often arises to take sides when involved in military protection operations (he notes Bosnia and Sierra Leone): Roberts, “One Step Forward”, p. 147.


\(^{600}\) Holt and Berkman, *The Impossible Mandate*? p. 39.

\(^{601}\) ICRC, "The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief ", p. 318.

\(^{602}\) In Part II, §4.3.

Thus, the extent to which PoC4 includes the traditional constraints of neutrality and impartiality is an open and developing question, and may in future move further towards the impartial-but-not-neutral policy of PoC1, PoC2, PoC3 and R2P.

§5 R2P is concerned with prevention and rebuilding as well as reaction
Strauss argues that PoC only applies to types of reaction, but not more broadly with R2P on prevention and rebuilding.\(^{604}\) It is certainly true that R2P, at the least, is much more explicit about such duties, and the emphasis upon prevention is a substantial point of difference between the two concepts. Still, it is worth noting that we can find many concerns for more than reaction (including both prevention and peacebuilding) in key PoC documents such as the Brahimi Report\(^{605}\) (a PoC2 document) and UNSG reports on PoC\(^{606}\) (PoC3 documents). For its part, the outer two layers of PoC4’s egg model include remedial and environment-building actions, extending beyond immediate response.\(^{607}\)

§6 R2P as a proper part of PoC
It is sometimes suggested that R2P should be seen as a proper part of a much broader concern for Protection of Civilians.\(^{608}\) If we are speaking of the PoC as it appears in the outputs of the UNSG and UNSC (i.e. if we are speaking of PoC3) then there is much to be said for this suggestion. PoC3 documents often make reference to the perceived responsibilities of states for the protection of their civilians, and to the responsibility of the international community to take up this role if the state defaults on it.\(^{609}\) On the other hand, R2P seems to clearly go beyond PoC1 in requiring substantial positive duties of protection against third-party violators of civilian rights, and beyond

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\(^{605}\) Brahimi, *Brahimi Report*, pp. xiv, 1, 5, 44-47. See also the breadth of protection considered in Holt and Berkan, *The Impossible Mandate?* pp. 19, 21.

\(^{606}\) e.g. Secretary-General, *1999 Protection of Civilians Report*, ¶29, 33, 45-47.

\(^{607}\) See above n. 550.

\(^{608}\) e.g. Gomes, “The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Relations and Distinctions,” p. 21.

\(^{609}\) e.g. “The primary responsibility for the protection of civilians falls on Governments and armed groups involved in conflict situations. Where they do not honour these responsibilities, it is up to the Security Council to take action.” Secretary-General, *2001 Protection of Civilians Report*, ¶67; for further attributions of responsibilities to protect see ¶¶5, 20, 31, 39, 47. See also, e.g., Annan, *We the Peoples*, p. 48. To the extent we see early reports like the Kosovo and DUPI reports (IICK, *Kosovo Report*; DUPI, *Humanitarian Intervention: Legal and Political Aspects*) as PoC literature, then the clear conceptual links drawn to (what would later be specified as) R2P furnish further links between PoC and R2P. See Wills, "Military Interventions on Behalf of Vulnerable Populations", pp. 390-92. For an overview of PoC3 and its relationship to R2P, see APCRtoP, *Asia-Pacific in the Security Council*, pp. 8-9.
PoC2 in being a reason for the SC to issue mandates, rather than just arising conditionally from them.

Further links can be drawn with R2P and PoC2 – for instance in the way the R2P doctrine and terminology fills out and amplifies PoC2 duties (and the way PoC2 documents anticipated R2P language). As Wills puts it, noting both the original R2P responsibility to begin PSO, and the new duties arising from it: “This suggests that once a State exercises its RtoP through intervention, a new relationship should come into being between the protected population and its protectors. If not, the population that the humanitarian action is intended to benefit are left exposed.”

610 Still, links between R2P and PoC2 are plausible – See Wills, Protecting Civilians, pp. 51-2
611 Ibid., p. 85.
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