

### §3.1.a Common Ethical Roots of R2P and PoC

This section's focus on R2P and PoC's common origins and presence in international humanitarian law and human rights law should not obscure the fact that they spring from the same, and deeper, ethical roots. Both principles emphasise the value of protecting members of other communities from violence (R2P and PoC) and other severe deprivations (PoC). All cultures celebrate the special ties people have with particular groups of fellow humans (kin, locality, ethnicity, religion and culture itself). While these values may be utilised to generate conflict, most or all cultures also recognise, in one form or another, a common humanity and a concern for others. The duties to avoid harming others and to go to the aid of those who are suffering are a prominent part of many religions. In the last century it has been formalised in IHL, reinforced by the UN Charter, the UN Declaration on Human Rights and the Human Rights Conventions. While these are obligations to which all nations have committed, this does not mean the variety of supports found within the diverse cultures and religions of the world should be ignored. To the contrary, these should be emphasized as part of "norm localisation" and a community-centred approach to implementing principles. Both principles emphasize the primary responsibility of the relevant sovereign States – an idea that is grounded in the long standing attempts by rulers to legitimise their regimes based on the claim that they protect their people. While there were other claims to legitimacy, this is always, at least, a supplementary claim of those who justify the power they wield.<sup>38</sup>

38 Sampford, "A Tale of Two Norms."

## 3.2 Commentary

### §3.2.a UN Charter

**UN Charter: Art. 1(3) The Purposes of the United Nations are: ...To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...**

#### UN Charter: R2P

The UN Charter provides a lynchpin normative framework for R2P. Since R2P's beginnings in the ICISS report, the human rights commitments of the Charter have been invoked to ground national and international duties to protect populations from atrocity crimes.<sup>39</sup> These commitments are set out in thematic form in the Charter's Preamble, where it announces its determination both, "to save succeeding generations from the scourge of war", and "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". These commitments are then given concrete form in the Charter's human rights articles, including Articles 1(2), 1(3), 13(1), 55 and 56. This incorporation of human rights as a fit subject for international attention and concern is a hallmark of the UN Charter. It is one of the central ways in which the

39 International Commission on Intervention and State Sovereignty ICISS, *The Responsibility to Protect* (Ottawa: IDRC, 2001), p. 14. For further commentary building on this link, see: Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" *American Journal of International Law* 101.1 (2007): 99-120; Thomas G. Weiss, *Humanitarian Intervention* (Cambridge: Polity, 2007); Jennifer Welsh, "Taking Consequences Seriously: Objections to Humanitarian Intervention," in J. Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004), 52-68.

**Invocations of "Ch. VII of the Charter" indicate that the Security Council is using its powers under Articles 41 and 42 to respond to a threat to the peace. Such powers are necessary for the legal authorization of transnational use of force.**

Charter differs from prior international instruments such as the Covenant of the League of Nations.<sup>40</sup>

Needless to say, the Charter's principles uphold not only human rights but also – and with at least equal force – the vital principle of non-intervention. As well as being motivated by the human rights articles, then, R2P must not be in breach of articles 2(4) and 2(7) of the Charter. R2P has two mechanisms ensuring its compliance with these parts of the Charter. First, it envisages a suite of actions to be taken under *Pillar Two* with the willing consent of the State in question. The consensual nature of such measures allows Pillar Two protection and prevention to occur wholly within the non-interventionist framework of the Charter.

Second, in *Pillar Three* situations where the State is itself implicated in the atrocities, coercive and/or military R2P action can only be taken with the authorization of the Security Council under its Chapter VII powers.<sup>41</sup> The Security Council has authority under Articles 41 and 42 of Chapter VII of the UN Charter to take such actions as it considers necessary to maintain or restore international peace and security.

40 Robert Kolb, *An Introduction to the Law of the United Nations* (Portland: Hart Publishing, 2010).

41 Or by other mechanisms consistent with the Charter, such as through the General Assembly *Uniting for Peace* process: see Secretary-General, *Implementing the Responsibility to Protect*.

SECRETARY-GENERAL KOFI ANNAN, S/1998/318.

“Although the United Nations was intended to deal with inter-State warfare, it is being required more and more often to respond to intra-State instability and conflict. In those conflicts the main aim, increasingly, is the destruction not just of armies but of civilians and entire ethnic groups. Preventing such wars is no longer a matter of defending States or protecting allies. It is a matter of defending humanity itself.”

**United Nations Charter Art. 2(4):** All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.  
**Art. 2(7):** Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Hence, with the declaration that large-scale violence to civilians can constitute a threat to international peace and security, the Council operates wholly within the UN Charter when it authorizes *Pillar Three* measures.<sup>42</sup> The WSOD paragraphs – especially paragraph 139 – explicitly emphasize R2P’s conformity with these parts of the UN Charter. Indeed, from the initial ICISS report to the 2009 Secretary-General Report, it has been argued that an effective UN-based R2P will make Kosovo-style unauthorised military action for protective purposes less necessary and less defensible, making R2P a force supporting, rather than merely being in conformity with, the Charter’s principles of non-intervention and the place of the UN Security Council in upholding international peace.<sup>43</sup>

In all, R2P is tightly interwoven with the UN Charter, drawing positive impetus from the Charter’s articles on human

42 S/RES/1265; S/RES/1296.

43 Secretary-General, *Implementing the Responsibility to Protect*.

rights and protection from the scourge of war, and being negatively constrained to operate within the confines of the Charter’s system of non-intervention by the (Pillar Two) mechanism of host-state consent, and the (Pillar Three) mechanism of Security Council authorization under Ch. VII of the Charter.

**UN Charter: POC**

**UN Charter Preamble:** We the Peoples of the United Nations Determined... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained...

The UN Charter is likewise a key normative framework for POC. Apposite here are not only the Charter’s determination to save generations from the “scourge of war” and its human rights commitments, but its explicit concern for promoting the international rule of law. With the legal core of POC constituted both by treaty (especially the Geneva Conventions and Additional Protocols) and by the *jus cogens* (non-derogable) parts of international law, POC links together these three major commitments of the UN Charter: protection from war, protection of human rights, and the international rule of law.

Similar to R2P, the positive actions required by POC actors to protect civilians and promote IHL are made consistent with the non-interventionist articles of the Charter through a combination of State consent and – in the limit case – action authorised by the Security Council under Ch. VII of the Charter. The possibility for intervention for POC purposes under Ch. VII of the Charter was noted by the Secretary-General in his first POC

report.<sup>44</sup> This stance was endorsed in the Council’s declarations in its first thematic resolutions on POC, which declared that large-scale violence against civilians could constitute a threat to international peace and security.<sup>45</sup> The lessons of Rwanda and more recently the Democratic Republic of the Congo all too clearly attest to the correctness of the Council’s declaration on this matter.

Turning to the practice of peacekeeping in particular, the relationship with the Charter is somewhat nuanced. On the one hand, peacekeeping operations – and their POC elements in particular – are clearly guided by the Charter. As the seminal 2000 *Brahimi Report* on peacekeeping declared: “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.”<sup>46</sup> On the other hand, given the centrality to the UN of peacekeeping at least since the 1990s, it is remarkable that the authorization and deployment of peacekeepers has little clear and direct textual support in the Charter.<sup>47</sup> Still, such deployments are justifiable in terms of the institution’s primary function in providing for international peace, and widely-accepted practice since the UN’s very beginnings has consolidated by institutional custom what aptly may be called the “non-written law of the Charter.”<sup>48</sup> Most contemporary

44 S/1999/957, ¶67.

45 S/RES/1265; S/RES/1296.

46 Brahimi, *Brahimi Report* p. 9.

47 See Sean D. Murphy, “Criminalizing Humanitarian Intervention,” *Case Western Reserve Journal of International Law* 41 (2009): 341-77; Kolb, *Law of the United Nations*, pp. 86-91; Security Council Report SCR, *Special Research Report: Security Council Action under Chapter VII: Myths and Realities*, 2008 No. 1, 23 June 2008, pp. 16-17.

48 Kolb, *Law of the United Nations*, p. 91. Similarly Bruce Oswald, Helen Durham, and Adrian Bates, *Documents on the Law of UN Peace Operations* (New York: Oxford University Press, 2010), pp. 18-23.

### UN SECRETARY-GENERAL 1999 POC REPORT (S/1999/957):

“The plight of civilians is no longer something which can be neglected, or made secondary because it complicates political negotiations or interests. It is fundamental to the central mandate of the Organization. The responsibility for the protection of civilians cannot be transferred to others. The United Nations is the only international organization with the reach and authority to end these practices.”

robust peacekeeping missions in fact avail themselves of *both* mechanisms of compliance with the UN Charter – routinely ensuring that protective operations have executive consent from the host State through an approved *Status of Forces Agreement* (SOFA) and Security Council authorization under Ch. VII of the Charter.<sup>49</sup>

### §3.2.b 1948 Genocide Convention

#### 1948 Genocide Convention: R2P

The primary legal foundation for R2P is the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention). While the definition of genocide provided in the Convention is overly narrow in some respects,<sup>50</sup> significantly – and as contrasted with IHL – its Article 1 allows that the crime of genocide can be committed in times of war *and in times of peace*. R2P follows this determination, and includes in its scope atrocities against populations committed in times of peace. Ultimately, the powerful prohibition of genocide laid down under the Convention’s Preamble and first article contributed to the normative backdrop that gave rise to R2P measures aimed to prevent the crime’s commission.<sup>51</sup>

More directly, the Genocide Convention can be seen as providing a legal framework that R2P specifies and clarifies. The Genocide Convention takes note of the importance of enacting domestic measures and legislation to prevent and prohibit genocide (Art. 5), and R2P’s Pillar One commitments, for instance as described in the Secretary-General’s 2009 R2P report, can be understood as a clarification of Art. 5’s required measures and legislation. Furthermore,

49 SCR, *Council Action under Ch. VII*.

50 Gareth Evans, “Crimes against Humanity: Overcoming Indifference,” *Journal of Genocide Research* 8.3 (2006): 325-39.

51 Scheffer, “Atrocity Crimes.”

#### Genocide Convention:

**Art. 1:** The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish...

...

**Art. 8:** Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide...

the Genocide Convention’s Art. 8 gives support to aspects of R2P Pillars Two and Three, with its provision to call upon UN organs to prevent and suppress genocide. While it would be too much to claim that the Genocide Convention itself directly requires member States to consider UN-authorized military action,<sup>52</sup> it is certainly possible to see R2P Pillars Two and Three as one way of *specifying* and *making concrete* the Convention’s open-ended Art. 8 duties. This conjunction does not suffice to make the positive duties of R2P hard international law, but they do move those responsibilities in the direction of soft law, and indicate where future legal development may be expected to occur.

Some parts of the Genocide Convention are hard law, however – and not merely the negative constraints on a State that it must not commit genocides itself. The

52 Carlo Focarelli, “The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine,” *Journal of Conflict & Security Law* 13.2 (2008): 191-213; Lee Ward, *Toward a New Paradigm for Humanitarian Intervention*, Public Policy No. 50, 2007; Alex De Waal, “No Such Thing as Humanitarian Intervention: Why We Need to Rethink How to Realize the ‘Responsibility to Protect’ in Wartime,” *Harvard International Review* (2007): 1-4.

ICJ in its 2007 Judgment on the *Crime of Genocide* found that Serbia violated its obligation to prevent genocide.<sup>53</sup> Though it did not itself commit genocide, Serbia was required to use its influence over the agents under its support and control to prevent their commission of genocide. This decision thus gives rise to a legal obligation of “due diligence” held by all States, similar in several respects to the common law notion of a “duty of care”.<sup>54</sup> Through the ICJ reading of the Genocide Convention therefore, States have a limited but determinate legal R2P duty to prevent genocide. Such a duty has elements of R2P Pillars One and Two; like Pillar One it imposes prohibitions on acting in support of genocide; like Pillar Two it concerns one State’s duties to the population of another State. (In what follows this Policy Guide will place this duty under the Pillar Two category.) It is arguable – though much more controversial – that other analogous “duty of care” R2P requirements may through the Genocide Convention come to be applied to other agents – even UN organs such as the Security Council.<sup>55</sup>

While R2P thus can be seen as making concrete several of the indeterminate duties of the Genocide Convention, it also builds upon the Convention by grouping

53 *Bosnia and Herzegovina v. Serbia and Montenegro* 2007, ¶¶428–29.

54 Andrea Gattini, “Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment,” *European Journal of International Law* 18.4 (2007): 695-713; Brian Barbour and Brian Gorlick, “Embracing the ‘Responsibility to Protect’: A Repertoire of Measures Including Asylum for Potential Victims,” *International Journal of Refugee Law* 20.4 (2008): 533-66; Emma McClean, “The Responsibility to Protect: The Role of International Human Rights Law,” *Journal of Conflict and Security Law* 13.1 (2008): 123-52; Arbour, “Duty of Care.”

55 Arbour, “Duty of Care,” p. 453. A related theme is developed in: UN, *Rwanda Report*, p. 38. See, however, Stephanie Carvin, “A Responsibility to Reality: A Reply to Louise Arbour,” *British International Studies Association* 36 (2010): 47-54.