

**Additional Protocol 1, Art. 89:** “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.”

The second provision of relevance is *Additional Protocol 1 Art. 89*, which provides for action to be taken in response to serious violations of the Conventions and Protocols.<sup>63</sup> This article clearly provides impetus for Pillar Two R2P duties, and perhaps even some Pillar Three activities – again with the explicit qualification that any such action would have to take place under UN auspices and in conformity with the Charter, and not unilaterally.<sup>64</sup>

#### **International Humanitarian Law (IHL): POC**

As previously noted, the relationship between POC and IHL is extremely tight: the Geneva Conventions and Additional Protocols form the legal core of POC: *Narrow POC*. The bare legal minimum of POC for States and their combatants is that they must respect the peacetime and wartime duties of IHL. From the perspective of combatants and their commanders, POC will be essentially synonymous with IHL – as obeying and ensuring the requirements of distinction, proportionality and limitation. Many of the key articles of IHL have the status of *Customary International Law* – meaning that even those parties to a conflict who are not themselves signatories to the Geneva Conventions and Additional Protocols are legally bound by the many of the most important laws of war.<sup>65</sup> In

63 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, 1977).

64 See Wills, “Military Interventions on Behalf of Vulnerable Populations,”; Durham and Wynn-Pope, “IHL, War Crimes & R2P”

65 Henckaerts and Doswald-Becks, *International Committee of the Red Cross: Customary International Humanitarian Law*.

**“Fundamental guarantees apply to all civilians in the power of a party to the conflict and who do not or have ceased to take a direct part in hostilities, as well as to all persons who are *hors de combat*.”**

ICRC 2005 Study: *Customary International Humanitarian Law*, Henckaerts/Doswald-Becks.

line with the ICRC’s recent *Montreux Document*, private military and security companies are similarly bound, whether through their Contracting States, Territorial States or Home States.<sup>66</sup> This does not mean, however, that IHL is always the major reference point for all POC action. For example, UN Peacekeepers will in the first instance fashion their understanding of POC from the substance of the Security Council Resolution(s) on the PKO in question, and the mandate’s specific directives with respect to the POC objectives of the PKO.

#### **§3.2.d International Human Rights Law (IHRL)**

##### **International Human Rights Law: R2P**

IHRL refers to those elements of international law promoting and protecting human rights, including the UN Charter (especially Articles 1, 13 and 55), the 1948 *Universal Declaration of Human Rights* (UDHR), the two 1966 covenants (the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)), as well as various other human rights treaties. IHRL’s primary focus is on the conduct of States, and it includes negative duties (prohibitions on what the State cannot itself do to people) as well as positive duties to protect rights from violations by third parties.<sup>67</sup>

The emerging universal reach of human

66 ICRC, “The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict,” (Geneva: ICRC, 2009).

67 Rosenberg, “A Framework for Prevention,” pp. 450–453.

**ICISS 2001: The Responsibility to Protect:** “Together the *Universal Declaration* and the two *Covenants* mapped out the international human rights agenda, established the benchmark for state conduct, inspired provisions in many national laws and international conventions, and led to the creation of long-term national infrastructures for the protection and promotion of human rights... What has been gradually emerging is a parallel transition from a culture of sovereign impunity to a culture of national and international accountability.”

rights instruments across international borders is of particular significance to R2P. As IHRL came to prohibit atrocity crimes undertaken even in wholly domestic contexts, the normative ground was laid for “sovereignty as responsibility” and for methods of prevention and reaction. The *World Summit Outcome Document* emphasized its rights-based understanding of R2P by placing its authoritative declaration of R2P in its paragraphs in Sect. IV on *Human Rights and the Rule of Law*, rather than, for example, in Sect. III on *Peace and Collective Security*. Previously, the ICISS had linked R2P with human rights and the UDHR from the very beginning. Citing Article 1(3) of the founding 1945 UN Charter, the UDHR, and noting the universal reach of international criminal tribunals and courts, ICISS argued that both the substance and process of human rights law is increasingly “without borders”.<sup>68</sup>

As well as offering normative support to R2P, the framework of IHRL allows the specification of different aspects of R2P duties. This is particularly true in terms of the Pillar One protection responsibilities of the State (or, indeed, any occupying power) not to harm its own people. As one commentator argues:

68 ICISS, *The Responsibility to Protect*, p. 14. On the significance of the placement of human rights in the Charter and thus of legitimising external scrutiny of rights, see Kolb, *Law of the United Nations*, p. 28.

“The legal obligation upon states not to commit mass atrocities against its own populations is straightforward.”<sup>69</sup> Moreover, IHRL’s concept of “due diligence” fleshes out a State’s duties to prevent atrocities and the conditions that precipitate atrocities.<sup>70</sup> A State obeying its core IHRL duties therefore could not be subject to Pillar Three action. The converse point is also relevant: IHRL can be used to develop human rights indicators that – when breached on a sufficiently large scale – trigger SC consideration of the situation and possible Pillar Three action.<sup>71</sup> Meanwhile, Pillar Two also may be fleshed out by IHRL. The “duty of care” noted above pursuant to the Genocide Convention may, through both the R2P commitment and IHRL, come to be applied to the other atrocity crimes, meaning that States have determinate IHRL legal duties to use their influence to curb potential atrocities.<sup>72</sup> Through IHRL therefore, aspects of R2P Pillar Two are developing towards enforceable international law.

Although it provides a key normative foundation for R2P, it must be emphasized that the scope of IHRL is far larger, promoting and protecting the full gamut of human rights, and applying to non-atrocity contexts. R2P-related atrocities are only the most visible tip of the much larger IHRL agenda.

### **International Human Rights Law: POC**

The question of how to characterize the relationship between POC and IHRL is complex. It is sometimes asserted that IHRL is relevant to peacetime and applicable to the actions of States, while IHL is targeted to apply to armed conflict and individual combatants.<sup>73</sup> But developments in law in the latter stages of the twentieth century, especially in recurring judgments of the ICJ, ICC and ad hoc international criminal tribunals, have affirmed that IHRL does remain in application in situations of armed conflict.<sup>74</sup> As such, there is reason to consider IHRL implicated in POC.

Pressing further in favour of the closeness of IHRL and POC is the ICRC rights-based definition of protection, endorsed by the IASC, which decrees that protection includes the promotion of human rights, as determined by, among other instruments, IHRL. A similarly broad protection of rights is found in the DPKO/DFS *Operational Concept on POC for UN Peacekeeping operations*.<sup>75</sup>

Drawing with a broad brush, there are two particular aspects of IHRL of direct significance to POC. First, IHRL and IHL overlap in providing for the most basic protection of individuals from large-scale violence. In cases where IHL’s “armed conflict” does not apply, it will be IHRL that requires action to protect and promote individual’s security. When *Broad POC* actors like peacekeepers, the UN Secretariat, or the Security Council respond to (or consider responses to) large-scale violence *outside* armed conflict in order to protect civilians (Syria in 2011

**ICRC:** Protection, “encompasses all activities aimed at obtaining **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, humanitarian and refugee law).”

being an example), it is the moral call of human rights, rather than the laws of war, that is most directly relevant.

Second, IHRL will be relevant to POC actors when they come to have jurisdiction over persons (captives), areas (safe-zones) or territories. The extent of the geo-political control that a State, army or international peacekeeping force comes to have over an entity determines the extent of its duties under IHRL regarding that entity. The greater the capacity for State-like powers, the more IHRL imposes State-like human rights duties of protection and minimally decent treatment.<sup>76</sup>

More generally, even if IHRL does not apply as direct and determinate law to some particular *Broad POC* agent (such as, in certain cases, a UN peacekeeper), it will nevertheless guide action by delineating “best practice” for that agent.<sup>77</sup>

In summary, then, the relationship between POC and IHRL is not the tight relationship observed between POC and IHL. Rather, IHRL should be seen in a supplementary role as filling in potential gaps in the protection of civilians provided by IHL, in particular by ensuring coverage in situations of mass violence outside armed conflict, and by shaping the duties of peacekeepers to those in their jurisdiction.

69 Rosenberg, “A Framework for Prevention,” p. 451.

70 See McClean, “The Role of International Human Rights Law,” pp. 145–46. See also Dorota Gierycz, “The Responsibility to Protect: A Legal and Rights-Based Perspective,” *Global Responsibility to Protect 2* (2010): 250–66 pp. 258–259; Rosenberg, “A Framework for Prevention,” pp. 454–59.

71 McClean, “The Role of International Human Rights Law,” pp. 148–50.

72 See Rosenberg, “A Framework for Prevention.”

73 Red Cross, *Promoting Respect for International Humanitarian Law: Handbook for Parliamentarians*.

74 Though derogation may be allowed in cases of national emergency: See Oswald, Durham, and Bates, *Documents on the Law of UN Peace Operations*, p. 95; UN Commission on Human Rights (UNCHR), *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, 28 September 1984.

75 DPKO/DFS, *2010 Draft Operational Concept on POC*.

76 Wills, *Protecting Civilians*, Ch. 3.

77 Oswald, Durham, and Bates, *Documents on the Law of UN Peace Operations*.

### §3.2.e Rome Statute of the International Criminal Court (ICC)

#### Rome Statute of the ICC: R2P

Including the statutes of the *International Criminal Tribunal for Rwanda* (ICTR) and the *International Criminal Tribunal for the former Yugoslavia* (ICTY)

Along with War Crimes, the Rome Statute of the ICC determines the legal scope and substance of the atrocity crimes of Genocide (Art. 6) and Crimes against humanity (Art.7) in international law.<sup>78</sup> Importantly, neither of these crimes require a link to armed conflict, with Crimes against Humanity explicitly requiring only its being “committed as part of a widespread or systematic attack directed against any civilian population” (Art. 7). Ethnic Cleansing is not a separately listed crime in the Statute. Rather, acts of ethnic cleansing will be Crimes against Humanity under Art. 7(d) concerning forced displacement and/or Art. 7(g) concerning persecution. The Rome Statute thus determines the scope of all four of R2P’s atrocity crimes, and provides an international legal framework criminalizing the violation of State’s R2P Pillar One duties.<sup>79</sup> The Rome Statute, however, does not itself provide any authority whatsoever for R2P Pillar Three action, at least in terms of military intervention for protective purposes. As its Preamble declares: “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.” Rather, the ICC contributes to long-term (Pillar Two) structural prevention through stopping impunity for atrocity crimes.

The *ICTY Statute* similarly gives

78 ICC, “Rome Statute of the International Criminal Court” (Rome: 1st July 2002).

79 Fleck, “International Accountability,” pp. 191–93; Stahn, “Political Rhetoric or Emerging Legal Norm?” p. 118.

**The three international criminal statutes provide for the crimes of genocide, crimes against humanity and war crimes.**

**R2P’s fourth atrocity crime – ethnic cleansing – is not expressed as a crime distinct from these. When it does not amount to genocide, ethnic cleansing in the statutes falls under specific elements of *Crimes against Humanity*, in particular, a) forced displacement, b) deportation, and/or, c) persecution.**

determinacy to the crimes of Genocide (Art. 4) and Crimes against humanity (Art. 5). Crimes against Humanity include, relevant to ethnic cleansing, the crimes of deportation (Art 5(d)) and persecution (Art. 5(h)). The Statute dealt with war crimes under the rubrics of *Grave breaches of the Geneva Conventions of 1949* (Art. 2) and *Violations of the laws or customs of war* (Art. 3). Again, there is clear application here with regard to R2P Pillar One. For example, Art. 7(3) describes the responsibility of authorities that have failed to prevent violations being performed by their subordinate actors. Additionally, paving the way for the Rome Statute, the ICTY court supported the possibility that crimes against humanity do not need to be linked to armed conflict.<sup>80</sup>

Likewise, the ICTR Statute provides for the crimes of Genocide (Art. 2) and Crimes against Humanity (Art. 3, including deportation and persecution), and deals with war crimes under the specific rubric of *Violations of Article 3 common to the*

*Geneva Conventions and of Additional Protocol II* (Art. 4).

#### Rome Statute of the International Criminal Court (ICC): POC

The Rome Statute’s Art. 8 provides for war crimes and so for the application of IHL – *Narrow POC*. With the crimes of genocide and crimes against humanity applying outside armed conflict, war crimes are expressly limited by the Statute to occurring in armed conflict and are thus distinguished from “social tensions” (Art. 8(d)). Importantly, the Rome Statute has a substantiality requirement, responding only to “grave breaches” of IHL, so its scope is more restrained than the overall class of POC situations.

Similarly, the statute of the ICTY provides in Art. 2 and Art. 3 for grave breaches of the Geneva Conventions, while the ICTR Statute’s Art. 4 refers to violations of Com. Art. 3 and Add. Protocol II.

80 Louis G. Maresca, “Case Analysis: The Prosecutor V. Tadic the Appellate Decision of the ICTY and Internal Violations of Humanitarian Law as International Crimes,” *Leiden Journal of International Law* 9 (1996): 219-31 p. 229.