

R2P³: Protecting, Prosecuting, or Palliating in Mass Atrocity Situations?

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Much focus has been put on the responsibility of the international community to protect civilians from genocide and other mass atrocities. However, the so-called responsibility to protect is only one of three human rights-related responsibilities the international community has taken on in such situations. The other two – prosecuting those who commit mass atrocity crimes and providing humanitarian assistance to those affected by these situations – also address key human rights and humanitarian issues. Yet, these three sets of norms and practices are not necessarily mutually supportive. They may at times undermine each other or, at the very least, pose significant conundrums for policymakers and practitioners.

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Introduction

How does the international community respond to mass atrocities? Why does it choose particular responses? What choices do policymakers and other actors face when deciding which response to choose? As human rights have acquired increasing normative force globally, the international community has incorporated human rights into its responses to violent conflict. In fact, human rights are used to label some conflicts as more heinous and worthy of response than others. Genocide has become the main signifier for worthiness. It is the über crime, the worst imaginable violation of human rights – attempting to wipe out an entire group of people – and its invocation automatically brings about much anguish, angst and handwringing – if less actual response – amongst global political elites and newspaper editorial writers. Genocide invokes cries of “never again” and leads to calls to “do something.” As we shall see “something” can mean many things, or nothing at all, and might lead to whispers of “yes, again” because those with the means to “do something” may not see it as in their interest to act. They may do “something,” but not necessarily what is required.

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However, this reading of events over the last couple of decades masks a much more complicated global normative political milieu. Indeed, the “somethings” which are available to global political elites are wide-ranging and the decisions complex and difficult. In the end, however, the international community has developed three types of responses which respond in some manner to the human rights issues raised by genocide, the “lesser” crimes of crimes against humanity and war crimes, and the vast humanitarian crises which accompany almost all contemporary conflict. These responses correspond to three responsibilities the international community has acquired over the last decades. The most famous and discussed responsibility – and indeed the one which provides the “responsibility” framework – is the responsibility to protect (R2P). While it incorporates a wide variety of actions, the one which most concerns us is taking forceful military action to stop genocide and other mass atrocities. It is, in some situations, the potentially most effective response. However, while it has become the most talked about responsibility, it is also the least used. While there may frequently be good prudential reasons for this, it cannot be denied that in some situations the international community has utterly failed in following through with this responsibility – which of course raises questions about how seriously this responsibility is taken. Yet, in addition to providing the idea of responsibility, it also provides the background for the other two responsibilities.

While the responsibility to protect aims to physically stop the most heinous of human rights abuses, international criminal justice – what I call the responsibility to prosecute – holds people to account after the fact for these same crimes. While in one sense this is *post facto* punishment, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created while the war in the Former Yugoslavia was still raging, and most of the cases being prosecuted by the International Criminal Court (ICC) are occurring in the midst of ongoing conflicts. So an additional motive for these activities is to affect the behavior of people who are or may engage in these human rights violations – either by arresting them, creating inducements for them to stop, or by deterring such individuals from carrying out these violations in the first place. While this prosecution impulse ties into well-developed human rights norms – it is certainly more normatively and legally grounded than R2P – it may take rhetorical invocation of R2P to activate this responsibility. Indeed, it may be used in place of R2P action – or in conjunction with it.

The final responsibility to provide humanitarian aid to people affected by conflict created by the crimes mentioned above – what I call the responsibility to palliate – does not seek to stop the conflict, nor does it seek to punish people driving the conflict. Rather, it seeks to provide the displaced and other victims of conflict with food, water, shelter, and medical assistance so that they can continue to live at the most basic level. It takes conflict for granted and tries to ameliorate – palliate – the effects of conflict. In theory it has no grand political project like the other two responsibilities, although frequently this is a convenient – and not always convincing – fiction. It may also be used when R2P is invoked, although many times the actors involved – in particular nongovernmental organizations – may be on the ground carrying out this responsibility before the invocation of “never again.” Yet it, too, is intimately tied up with the other two responsibilities.

All three of these responsibilities – protection, prosecution and palliation (R2P³) – come from the same human urge to stop suffering, and they are all heavily embedded within the 20th century human rights project. Yet, the relationships between them are complex. This paper seeks to disentangle and make clear these complexities. In the following sections I look more deeply at each of the responsibilities and associated norms and practices, briefly tracing their development and interrogating the concrete meanings of these responsibilities. I then

turn to developing a framework for understanding how these responsibilities interact and the main conundrums faced by those deciding which responses to implement.

The development of the modern human rights regime has been covered extensively elsewhere,¹ so here I will just note that what we are talking about is not one single set of norms and principles – not one regime, in other words – but an interrelated set of norms and principles. These include not only what we call human rights – as found, for example, in the Universal Declaration of Human Rights – but also *humanitarian* norms which have to do with regulating the conduct of armed conflict and assisting those affected by armed conflict. Those involved in *humanitarian* activities will sometimes argue that they are involved in *human rights*, and this is a distinction which does not always hold up in practice.

Humanitarianism: The Responsibility to Palliate

As Michael Barnett observes, “We live in a world of humanitarianisms, not humanitarianism.”² Indeed, while the modern conceptualization(s) and practice(s) of humanitarianism may have evolved from the same roots, humanitarianism has many different ideational and practical strands. This plurality of theory and practice creates a variety of dilemmas for humanitarian practitioners.

What do we mean by humanitarianism? While some use the term to denote a wide variety of human rights supporting activities,³ humanitarianism is distinct from human rights, even if they have overlapping ideational bases. Human rights is about making sure that all humans have access to the same protections from human-induced suffering and discrimination and ensure that all people have what they need to live in dignity. It is a political project which aims to order polities in such a way that individuals have access to the political process and their other rights are protected. Humanitarianism, while it may have broader social goals, is, in the end, about making sure that people can continue to live on a day to day basis, in the most horrible and extreme circumstances. While we frequently use the term “humanitarian” to describe an individual who is attempting to do good in the world, the ambit and practice of humanitarianism as an “ism” is much more circumscribed. Humanitarian organizations – as opposed to development organizations, which focus on longer term economic and social progress throughout society – are focused on providing assistance – food, water, medicine, shelter – to individuals caught in the midst of conflict. They help refugees, internally displaced persons, asylum seekers, and other war affected individuals gain access to what they need to survive on a daily basis – a “bed for the night.”⁴ This so-called “classical” humanitarianism does not deal with the broader political context in which it operates. It is all about saving lives. It is apolitical. However, this “pure” humanitarianism is under many pressures to go beyond this remit and become embedded in politics. As this occurs, life becomes much more complicated for humanitarians, and the choices faced by them – and the international community more generally – more difficult.

¹ MICHELINE ISHAY, THE HISTORY OF HUMAN RIGHTS (2004); SAMUEL MOYN, LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); HUMAN RIGHTS IN THE TWENTIETH CENTURY (Stefan-Ludwig Hoffman ed., 2011); ROGER NORMAND AND SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE (2008); DANIEL WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY (2010).

² MICHAEL BARNETT, EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM (2011), at 10.

³ DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

⁴ DAVID RIEFF, A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS (2002).

Barnett and Snyder⁵ identify four types of humanitarianism, characterized by where humanitarians stand on two issues – whether or not they accept that they are political and whether or not they accept constraints on what they can accomplish. These are – bed for the night, do no harm, back a decent winner, and peacebuilding. The first is the ICRC approach, and has been expounded by David Rieff.⁶ It is only emergency relief. It does not claim any goals or import beyond saving lives from one day to the next. Do no harm is essentially bed for the night with more reflection. While adhering to the previous goals, humanitarians will consider the consequences of their actions and whether or not their actions are doing more good than harm.⁷ Such issues came to the fore in 1990s, as questions were raised about whether aid actually prolonged conflicts by providing resources or safe spaces in the form of refugee camps to combatants. Until then, there was an uncontested assumption that good intentions resulted in good outcomes.⁸ Rwanda was one such situation where some organizations decided to withdraw because they felt they were doing more harm than good. This perspective still claims to be nonpolitical, but once one starts deciding who should or should not receive aid, one is making political as well as ethical judgments. Back a decent winner recognizes the constraints of humanitarian action while having a willingness to engage politically. It essentially looks for a “better” partner who can create a better peace even if this does not mean a broad-based liberal peace. When engaging with comprehensive peacebuilding, humanitarians look to the root causes of a conflict, including human rights abuses, and advocate the creation of a more just society which provides a basis for peace. It is avowedly political and it rejects the limited mission for humanitarianism advocated in the first strategy. This is related to the so-called rights-based humanitarianism which has developed over the last 20-30 years, and which calls for humanitarian actors to analyze situations from an explicitly human rights perspective to see how a *humanitarian* situation might be more permanently addressed by *human rights* action, including denouncing human rights abusers and, at times, calling for military intervention.

Advocating one version of humanitarianism over another will lead to different trade-offs and conundrums for humanitarians and policymakers. The more you advocate political solutions, the less able you are to claim the classical humanitarian label which, theoretically, protects you in the field. Further, you may end up supporting activities and outcomes which are at odds with your intended goals as a humanitarian.

From Palliation to Politics

In its most basic sense, humanitarianism is palliation. According to the World Health Organization,

Palliative care is an approach that improves the quality of life of patients and their families facing the problems associated with life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial and spiritual.⁹

In the medical sense, palliative care “intends neither to hasten or prolong death.” It “provides relief from pain and other distressing symptoms” and “offers a support system to

⁵ Michael Barnett and Jack Snyder, THE GRAND STRATEGIES OF HUMANITARIANISM, in *Humanitarianism in Question: Politics, Power, Ethics* 145-155 (Michael Barnett and Thomas G. Weiss, eds., 2008).

⁶ Rieff, *supra* note 4.

⁷ FIONA TERRY, CONDEMNED TO REPEAT? THE PARADOX OF HUMANITARIAN ACTION (2002).

⁸ Michael Barnett and Thomas G. Weiss, HUMANITARIANISM: A BRIEF HISTORY TO THE PRESENT, in Barnett and Weiss, *supra* note 5, at 13.

⁹ World Health Organization, “WHO Definition of Palliative Care,” <http://www.who.int/cancer/palliative/definition/en/>.

help patients live as actively as possible until death.¹⁰ The “illness,” the symptoms of which humanitarians treat, is not the malnutrition and diseases from which those affected suffer; rather, it is war and violent conflict itself. Thus, whereas palliative care “affirms life and regards dying as a normal process,”¹¹ humanitarianism as palliation affirms life but also regards war as a normal process. It takes the world and its illness – war – as it is and helps those affected by the illness – refugees, IDPs, and others – to stay alive – hopefully until the war ends and localized illness is cured, or until the illness – war – ultimately kills them. It treats the symptoms rather than effecting a cure. While many millions of people have been saved by humanitarianism, it must seem for some caught in the midst of conflict that the refugee camp is akin to a hospice, with humanitarians keeping refugees alive and comfortable until the war – either directly through an attack by armed forces or indirectly through malnutrition and war-associated diseases – kills them.

This description is in no way meant to devalue the work of humanitarians. Indeed, most people helped by humanitarians live to see the end of the war in which they are caught, and even those in hospices will appreciate the efforts undertaken to ease their pain and make them comfortable as the inevitable happens. Yet, taking war as inevitable imposes rather severe limits on the goals of humanitarians. At the same time, as we have seen, many humanitarians do not take the inevitable as such, and would attempt to go beyond palliation.

Yet, humanitarianism as palliation engages with many different interests and perspectives. The ICRC may see palliation as the ultimate expression of humanity – you are keeping people alive for this one day, and hopefully the next, and the one after that, and so on.¹² And many other international humanitarian organizations (IHOs) also see this as their humane goal, while others want to go beyond palliation and find a cure – that is, address the root causes which are leading to the disease of war which is killing so many people. As will be seen, this creates operational problems. It also brings them into conflict with others who may prefer palliation as state policy. That is, while states – especially rich, Western states with the resources to put toward stopping conflict – may want to see a particular conflict stop and prevent people from being killed – they do not necessarily want to invest the resources – i.e. troops – to do so. Palliation thus becomes the preferred course of action, and a substitute for more robust action. Thus, to bring the medical analogy to a close, instead of bringing in surgeons (troops) to excise the tumor of war and genocide, states bring in hospice workers (humanitarians) to keep people alive until the war ultimately kills them.

As a result of the changing nature of conflict,¹³ humanitarianism has become embedded within contemporary conflict. The white Toyota Landcruisers of the IHO have become a representation of the international community’s response to conflict – more evocative than the armored tank – taking humanitarians into a realm of high politics which conflicts with their humane palliation.¹⁴

As Barnett and Weiss argue,

¹⁰ *Id.*

¹¹ *Id.*

¹² Nicholas Berry argues that the ICRC actually works to undermine the institution of war itself, although David Forsythe denies that there is any evidence of such a policy on the part of the ICRC. NICHOLAS O. BERRY, WAR AND THE RED CROSS: THE UNSPOKEN MISSION (1997); DAVID P. FORSYTHE, THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS (2005).

¹³ MARY KALDOR, NEW AND OLD WARS ORGANIZED VIOLENCE IN A GLOBAL ERA (2nd ed., 2007).

¹⁴ Kurt Mills, THE POSTMODERN TANK OF THE HUMANITARIAN INTERNATIONAL, 18 Peace Rev. 261-67 (2006).

Humanitarianism has become institutionalized, internationalized, and prominent on the global agenda. It is an orienting feature of global social life that is used to justify, legitimate, and galvanize action.¹⁵

Indeed,

[G]lobal humanitarian action, and discourse over such action, has become such an increasingly visible feature of international relations that it has insinuated itself into a variety of political and operational situations. In fact, humanitarian norms have become so-important that they force their way into the general discourse of war and peace. Furthermore, humanitarianism has become an extremely valuable public relations tool.¹⁶

Of the three responsibilities which are at the core of international responses to mass atrocities, humanitarianism has the most well-defined set of principles and longest practice. Although it may have different interpretations and meanings, it is recognized and accepted as a good thing, an expression of our ultimate humanity. It is, in fact, recognized as a duty or responsibility of the international community.¹⁷ This makes it a very powerful tool, not only for humanitarians themselves but for other actors who may want to use it for purposes other than what its supporters and practitioners may wish.

International Criminal Justice: The Responsibility to Prosecute

The modern international criminal justice regime, too, has its roots in the attempts from the mid-19th century onwards to regulate how war is fought. While perhaps only successful at the margins in limiting the death and destruction of war, international humanitarian law laid the groundwork for the criminalization of certain practices of war. The introduction into international law of crimes which are punishable on individuals theoretically changes the calculus of decisionmakers – both those waging war and those attempting to stop a war. However, its broader positive effects – including deterring individuals from undertaking certain outlawed activities – will likely be a long time coming. But, of three responsibilities laid out here, it is in some ways the most legalized and embedded within international law,¹⁸ which has implications for its practice.

While there were previous instances of individuals being prosecuted for committing atrocities in war and violating the norms of the day,¹⁹ we must look to the aftermath of World War II and the Holocaust, and in particular the Nuremberg and Tokyo war crimes trials,²⁰ for the true roots of the international criminal justice regime and the evolving “responsibility to prosecute.” The Nuremberg trials and the idea of “never again” laid the foundation for the development of what has become the vast edifice of international human rights and humanitarian law. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948. Since then, genocide has become the über crime – the worst of all imaginable things one can do in war.

¹⁵ Barnett and Weiss, *supra* note 8, at 29.

¹⁶ Kurt Mills, NEO-HUMANITARIANISM: THE ROLE OF INTERNATIONAL HUMANITARIAN NORMS AND ORGANIZATIONS IN CONTEMPORARY CONFLICT, 11 *Global Governance* 161 (2005).

¹⁷ The French government asserts that “emergency humanitarian aid is a new duty encumbent upon the international community.... It obeys the principle that it is a moral duty to help civilians in distress wherever they may be.” Cited in Barnett and Snyder, *supra* note 5, at 143.

¹⁸ Eric K. Leonard and Steven C. Roach, FROM REALISM TO LEGALIZATION: A RATIONALIST ASSESSMENT OF THE INTERNATIONAL CRIMINAL COURT IN THE DEMOCRATIC REPUBLIC OF CONGO, in Steven C. Roach, ed., *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* 59-63 (Steven C. Roach ed., 2009).

¹⁹ STEVEN R. RATNER, JASON S. ABRAMS, AND JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (3rd e., 2009), at 6.

²⁰ BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT (2008), at 24-25; Ratner, et al, *supra* note 21 at 6.

The 1949 Geneva Conventions represented a significant point in the history of the attempt to “humanize” war. In addition to providing a basis for humanitarian action, it also further elaborated what states could and could not do during war and created a legal basis for individual responsibility for violations of the laws of war – war crimes – although the Cold War prevented institutionalization in the form of a war crimes court.²¹ This changed in the 1990s when, in the aftermath of the Cold War, the international community was faced with a number of conflicts which seemed to defy adequate UN involvement to properly address and stop the conflict. The first of these situations was the conflict in the Former Yugoslavia. The Genocide Convention and the “never again” norm would conspire to put pressure on the UN, and especially Western states, to intervene militarily to stop the killing and protect those being targeted. European states had an interest in the conflict in the form of the refugees flooding into Western Europe, although, rather than intervention initially, this led to the “right to remain,” and the safe havens which turned out not to be very safe.²² It took three years for NATO to take robust military action which eventually led to an end to the fighting.²³ Before that, however, the UN Security Council created the International Criminal Tribunal for the Former Yugoslavia ICTY to try individuals from all sides in the conflict. It was the first time since the end of World War II that an international court had been set up to hold individuals accountable for crimes during war. While, in one sense, this represented an effort to divert attention from the fact that the Security Council had done essentially nothing to stop the fighting and ethnic cleansing (toothless peacekeepers and vast quantities of humanitarian aid notwithstanding), it served to resurrect the principles of Nuremberg. It was also important because it was the UN Security Council, the main body with a mandate to deal with the biggest issues of international security, which created the court. It firmly put international criminal justice on the international agenda. Given that the court was set up to prosecute individuals who were involved in an ongoing conflict, the ICTY created problems for those attempting to bring the fighting to an end. Indeed, it created incentives to continue fighting rather than come to an accommodation to end the war. If the war ended, it might be more likely that those with outstanding arrest warrants might be arrested.

The next phase in the reinvigoration of the international criminal justice regime came in 1994, when the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR) in the wake of a genocide which killed 800,000 people. The UN utterly failed to prevent or stop the genocide. Nor did it adequately address the humanitarian crisis following the genocide when more than two million refugees fled to neighboring countries, setting the stage for an even bigger conflict in Zaire. However, the ICTR did allow some small measure of attention to be diverted from the failure of the international community to act. International courts thus became a substitute, yet again, for robust action to stop mass atrocities. Yet, the very fact that there was a felt need to cover up the failure to respond illustrated the effect of the “never again” norm which would culminate in the responsibility to protect. Why try to cover up inaction unless there was an expectation that the UN, the Security Council, states – somebody – should respond?

The International Criminal Court: Institutionalizing the Responsibility to Prosecute

²¹ WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, (4th ed., 2011), at 8-11.

²² James C. Hathaway, NEW DIRECTIONS TO AVOID HARD PROBLEMS: THE DISTORTION OF THE PALLIATIVE ROLE OF REFUGEE PROTECTION, 8 J. Refugee Studies 288 (1995); Jennifer Hyndman, PREVENTIVE, PALLIATIVE, OR PUNITIVE? SAFE SPACES IN BOSNIA-HERZEGOVINA, SOMALIA, AND SRI LANKA, 16 J. Refugee Studies 167 (2003).

²³ Power, *supra* note 26, at 391-441.

In 1998 the pinnacle of the modern international criminal justice regime was created with the passing of the Rome Statute of the International Criminal Court. More than 160 states were gathered in Rome, of which 120 voted in favor, 21 abstained, and seven voted against.²⁴ It came into existence in 2002 when the required number of states had ratified the statute. The creation of the ICC was, it seemed, a sign of the times – a culmination of post-Cold War democratization, expansion of global governance and global institutions, and widespread recognition, and implementation, of human rights standards. It was a partial implementation of the “never again” norm which, until Bosnia and Rwanda, had lain dormant since the end of the Holocaust.²⁵

The Rome Statute enshrines in international law individual criminal responsibility for genocide, crimes against humanity, genocide, and aggression.²⁶ Further, it created responsibilities for states parties. They accept the jurisdiction of the Court,²⁷ are required to arrest and surrender to the Court individuals for whom an arrest warrant has been issued,²⁸ and must provide other cooperation the Court may request.²⁹ And while the ICC is an independent entity, accountable to the States Parties, it also has a relationship with the UN Security Council. There are three ways a case may come before the Court. According to Article 13, a State Party may refer a case over which the Court would have jurisdiction to the Prosecutor, the Prosecutor may initiate an investigation his or herself, or the Security Council may refer a situation to the Court acting under Chapter VII of the UN Charter. Under Article 16, the Security Council may also defer an investigation or prosecution for up to a renewable 12 month period.

The ICC has had a somewhat rocky early history. None of the major global powers – the US, Russia or China – are members. The US was one of its early supporters, but turned against it during the George W. Bush administration. The US softened its stance in 2005 when it allowed the UN Security Council to refer the situation in Darfur to the ICC, and has gradually further engaged with the court in the ensuing years. US wariness and opposition to the ICC has both domestic ideational and international *realpolitik* roots,³⁰ which have not been resolved, although the US has become more open to the ICC during the Obama administration.

Although an expression of global support for human rights – which are frequently seen as in opposition to, or free from, politics – the ICC is intimately bound up in global politics. It was created through a global political process, it has ties to the most power global political body – the UN Security Council – and it touches on the most sensitive global political issues. It threatens presidents and prime ministers as well as those lower down on the political food

²⁴ Schabas, *supra* note 25, at 18-21.

²⁵ For more on the creation of the ICC see Schiff, *supra* note 22; Schabas, *supra* note 25; ERIC LEONARD, THE ONSET OF GLOBAL GOVERNANCE: INTERNATIONAL RELATIONS THEORY AND THE INTERNATIONAL CRIMINAL COURT (2005); Roach, *supra* note 20.

²⁶ While the crime of aggression was included in the Rome Statute, the Court’s jurisdiction was suspended until the States Parties agreed to a definition and the scope of application of the crime. The States Parties agreed to a definition at the Review Conference of the Rome Statute in June 2010, but its actual application has been suspended until at least 2017. International Criminal Court, Review Conference of the Rome Statute concludes in Kampala, ICC-ASP-20100612-PR546, 12 June 2010, available at <http://reliefweb.int/node/357833>.

²⁷ Art. 12.

²⁸ Art. 89.

²⁹ Art. 93.

³⁰ Kurt Mills and Anthony Lott, FROM ROME TO DARFUR: NORMS AND INTERESTS IN US POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT, 6 J. Hum. Rts. 497 (2007).

chain, as evidenced by the arrest warrants for President Omar al Bashir of Sudan and Moammar Qaddafi of Libya. It is embedded within contemporary conflict as those who are engaging in violent conflict and carrying out some of the world's worst atrocities are subject to being arrested and sent to The Hague, and it has been invoked as a conflict management tool with, it must be admitted, little degree of success in actually managing or bringing conflict to an end. One hope of its supporters is that it will deter leaders and individuals from initiating conflict and engaging in atrocities in the first place, although that hope seems far off. Although it is impossible to prove the negative, there is not a lot of evidence that the ICC has deterred individuals from doing unspeakable things. It will likely require a concerted record of numerous successful prosecutions before that hope might be realized. Further, it is at the core of accusations of neo-colonialism since all of the investigations and active cases are in the developing world while the most powerful countries in the world are exempted from its reach.

Indeed, all of the active cases the ICC is prosecuting are in Africa – Uganda, the Democratic Republic of Congo, the Central African Republic, Darfur, and Libya, with charges also filed in Côte d'Ivoire. Other potential situations for investigation include Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria, the Republic of Korea and Palestine, although these are only at the preliminary stages.³¹ It is the focus on Africa, however, which has raised the ire of many African leaders, raising accusations of neocolonialism and calling into question the support of some Africa countries for the ICC.³²

The International Criminal Justice Problematique

The world thus has a functioning, if still developing, institution to try individuals accused of committing the worst atrocities. Criminal justice is, by its very nature, *retrospective*, but the ICC is embedded within contemporary global political realities and has been called to perform a *prospective* function – deterrence. It has also been deployed in the midst of conflict to perform a conflict *management* role – induce leaders to stop their atrocities or force them to step down. All three of these functions are highly problematic. It cannot deter until there is enough evidence to convince potential war criminals that there is a high likelihood that they will eventually get caught and be taken to The Hague to stand trial. We are not anywhere near there yet; indeed, the 16 years it took to capture Ratko Mladic and bring him before the ICTY is unlikely to give an al Bashir or Qaddafi pause.

The conflict management role is problematic at least partially because issuing an arrest warrant for a president or general in the midst of an ongoing conflict is just as likely to create an incentive to continue fighting as it is to induce them to stop. If one sees only the possibility of being arrested once a conflict ends, it is not likely that a president or general would just give up and end the conflict. The Security Council might use an ICC arrest warrant as a bargaining chip, but even if this was done in good faith by the Security Council, it does not control the ICC. It can temporarily suspend proceedings for up to a year – indefinitely renewable – but it cannot permanently end an investigation or withdraw an arrest warrant – only the ICC can do that. And given the varying global political agendas of members of the Security Council, there is no guarantee that it would vote to suspend proceedings – a leader would do well not to base his or her future on the vagaries of global

³¹ Report of the International Criminal Court to the United Nations for 2010/11, United Nations General Assembly, A/66/309 (19 August 2011), p. 3, available at <http://www.icc-cpi.int/menus/icc/reports%20on%20activities/court%20reports%20and%20statements/seventhreport>.

³² Kurt Mills, "BASHIR IS DIVIDING US": AFRICA AND THE INTERNATIONAL CRIMINAL COURT, 34 Hum. Rts. Q. 4 (2012).

political will and expediency. Further, declaring an individual a war criminal and then withdrawing an arrest warrant does little to further the global human rights project embodied in the ICC. It would undermine the potential deterrent aspect of the ICC and signal that the ICC was nothing more than a global political tool of the great powers with little to do with protecting human rights.

Finally, its retrospective nature, while laudable and a significant incarnation of the global human rights project, is rendered problematic as it may interfere with domestic peace efforts. Such concerns concern arise in Uganda where the government has instituted an amnesty law to induce members of the Lord's Resistance Army (LRA) to leave the LRA and be reintegrated into society.

Invoking the ICC may seem like a rational choice for members of the Security Council who are attempting to manage a conflict. It provides further evidence to a world demanding action that it is addressing a situation when humanitarianism, inevitably, fails to end a conflict – or even keep it off the front page of major newspapers. Unfortunately, there is little evidence at this point that the ICC can address a situation any better than humanitarianism.

International criminal justice, as embodied in the ICC and other institutions, is the most legalized and legally recognized of the three responsibilities, which makes it in some ways the safest legally – and morally – to invoke. Yet, since international law itself is a highly political realm, it should come as no surprise that the ICC can become highly embedded within global and domestic political processes, raising questions about how and when the ICC is – and should be – invoked. The failure of the UN Security Council to refer the situation in Syria to the ICC, even in the face of clear and ongoing atrocities, puts these questions in high relief.

The Responsibility to Protect

The most recently recognized responsibility, but the one which also provides the conceptual justification for the prior responsibilities *qua* responsibilities, is firmly embedded within, but also challenges, the contemporary state system. By labeling it a responsibility, the international community recognizes changes in the relationship between state sovereignty and human rights while also taking onboard the necessity of international action at times. However, the responsibility to protect, or R2P as it has become known, comes with many caveats, and its status as international law is less than certain. R2P is frequently equated with humanitarian intervention, a concept with also uncertain legal qualities and which is frequently deployed by critics to imply neo-colonialism. The concept as originally put forth under its current name goes far beyond humanitarian intervention. Yet, it is precisely the interventionary aspects which are most salient in many situations, and are also the most unique from a normative perspective.

There is not space here to review the historical development of the doctrine and practice of humanitarian intervention.³³ Suffice it to say, however, that it was not until after the Cold War that the conditions were ripe for its further development into international practice. The post-Cold War world of the 1990s brought about conceptual and practical challenges to understandings of sovereignty and nonintervention. A raft of “new wars”³⁴ erupted in the

³³ For an overview, see Kurt Mills and Cian O'Driscoll, FROM HUMANITARIAN INTERVENTION TO THE RESPONSIBILITY TO PROTECT, in *The International Studies Encyclopedia* (Robert A. Denemark ed., 2010) at 2532-2552. See also Gary Bass, FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION (2008); Thomas Weiss, HUMANITARIAN INTRERVENTION (1997).

³⁴ MARY KALDOR, NEW AND OLD WARS ORGANIZED VIOLENCE IN A GLOBAL ERA (2nd ed., 2007).

aftermath of the Cold War as the Soviet Union fell apart and developing states lost their patrons, and the international community through the UN and other bodies undertook interventions to address conflicts, including the human rights dimensions. These included the Economic Community of West African States (ECOWAS) intervention in Liberia, the 1991 creation of “no-fly zones” by the US, UK and France in Iraq was intended to protect populations who were being persecuted by the Saddam Hussein regime, and a number of interventions in Somalia. These and other interventions saw human rights and humanitarian concerns cited as threats to international peace and security, thus initiating an ideational change in Security Council practice,³⁵ even if the interventions were not always successful. The failure to protect civilians in Bosnia and the deaths of 800,000 in Rwanda called into question the interest and ability of the international community to address complex humanitarian emergencies. The intervention in Kosovo in 1999 seemed to indicate renewed interest on the part of the West to intervene for human rights, but also highlighted many dilemmas, the most important being that it was done without Security Council approval.

Recognizing Responsibilities

During the 1990s, and in the context of changing ideas about human rights and the above mentioned interventions (or non-interventions), a number of authors addressed the balance between sovereignty and human rights, treating sovereignty as a function of human rights.³⁶ They argued that rather than being in opposition, human rights were constitutive of state sovereignty. If a government abused its people, it could lose legitimacy and the state might lose its immunity to non-intervention. Further, there was discussion about whether there was a right or a duty to intervene, and under what conditions. The developing norm of a right and, indeed, a duty to intervene to protect gross violations of human rights was given voice in 2001 by the Canadian-sponsored International Commission on Intervention and State Sovereignty (ICISS) in a report entitled *The Responsibility to Protect*.³⁷ It recognized a shift in the human rights vs. state sovereignty discourse by arguing that claims to sovereignty entailed responsibilities. It also moved the debate away from discussing a right to intervene to a responsibility to protect those who might be threatened by gross violations of human rights or humanitarian crises. The ICISS noted three main responsibilities: the responsibility to prevent genocide and other humanitarian catastrophes, the responsibility to react when such situations occur, and the responsibility to rebuild after a complex humanitarian emergency has ended.

This norm was endorsed by the UN Secretary-General’s High-level Panel on Threats, Challenges and Change,³⁸ and the UN-Secretary General, Kofi Annan, highlighted and affirmed this developing norm intended to set the agenda for the 2005 World Summit.³⁹ He also called on the Security Council to develop principles for the use of force. The 2005 World Summit Outcome document stated that the international community has a responsibility to address widespread gross violations of human rights, even if it means using force. However,

³⁵ Kurt Mills, UNITED NATIONS INTERVENTION IN REFUGEE CRISES AFTER THE COLD WAR, 35 Int. Pol. 391 (1998).

³⁶ Kofi Annan, TWO CONCEPTS OF SOVEREIGNTY, 352 Economist (1999); FRANCIS DENG, SOVEREIGNTY AS RESPONSIBILITY: CRISIS MANAGEMENT IN AFRICA (1996); Kurt Mills, *supra* note 56; Thomas G. Weiss and Jarat Chopra, SOVEREIGNTY IS NO LONGER SACROSANCT: CODIFYING HUMANITARIAN INTERVENTION, 6 Ethics & Int. Aff. 95 (1992).

³⁷ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

³⁸ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, United Nations, 2004, available at <http://www.un.org/secureworld/>.

³⁹ Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, United Nations, 2005 A/59/2005, available at <http://www.un.org/largerfreedom/>.

the World Summit endorsed a somewhat different and watered down version of the ICISS proposal.⁴⁰ Further, neither included in any substantial way the previously mentioned responsibility to prosecute. The norm has been more forcefully recognized by the African Union in its Constitutive Act, article 4(h) of which states the following principle: "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity." While there is ongoing rhetoric in Africa regarding the neo-colonial character of humanitarian intervention, and much debate about the proper balance between human rights and sovereignty, this was still a stunning reversal – three years before the World Summit – of the unflinching support for absolute sovereignty and nonintervention, and indicates continuing global normative development.

While the original conception of R2P as put forth by the ICISS, and partly endorsed by the World Summit, was very wide-ranging, and while all three elements of the responsibility to protect identified by the ICISS – prevention, reaction, and rebuilding – are important, if one is interested in effective, long-term protection of people caught in complex humanitarian emergencies, the potentially most important element is the commitment to use Chapter VII enforcement mechanisms. This is because in some situations this may be the only way to protect people from being slaughtered. Further, it is a significant, if still somewhat ambiguous, affirmation of evolving normative and practical developments away from strict adherence to sovereignty. This is not to say that such actions may be appropriate in all instances, or that there may not be genuine disagreement about the relevant course of action. And, it certainly does not mean that such tools will be used in all, or even many, situations where large number of people are being killed. Indeed, as we have seen, there are two other main responses the international community uses, which are conceptually distinct from military intervention, are possibly less effective, and may actually impede the use of more effective measures.

Protection

From the previous discussion, we have seen the development of three broad areas of human rights norms and practices which have been recognized in some manner or another as *responsibilities* of the international community. The international community has a responsibility to: 1) palliate – ensure that people caught in the midst of conflict are fed and sheltered and provided with medical attention; 2) prosecute – eliminate impunity for those who commit genocide, crimes against humanity, and war crimes; and 3) protect – ensure that those at risk of genocide and other mass atrocities are not killed or otherwise harmed. All of these have *humanitarian* and *human rights* characteristics, but to the extent a division can be created between the two, they all have a different balance. *Palliation*, while part of the broad concern with the others that characterizes human rights, does not have the same connotations with regard to *changing society*. Rather, it *responds* to the situation in the most minimal way possible, although, as we have seen, those who practice or advocate rights-based humanitarianism alter the balance in favor of advocating for change while also offering the *humanitarian* response. *Prosecution* is the enforcement element of the development of international humanitarian law which was created to provide minimal levels of protection for particular classes of people in the midst of conflict. Yet, it is also part of the broader human rights project which attempts to remove impunity for those engaged in the worst human rights violations. *Protection* is the most far reaching. As embodied in the ICISS report, and partially recognized by the World Summit, it has a broad agenda which aims to prevent large-scale human rights abuses, stop ongoing abuses, and rebuild societies after the abuses end. Yet, the most important element of this new norm, principle, or

⁴⁰ United Nations General Assembly, 2005 World Summit Outcome, A/Res/60/1, 15 September 2005.

whatever one calls it, is the stopping or reacting element. This responsibility to react is what used to be called humanitarian intervention, although that term has fallen out of favor since it is frequently equated with neo-colonialism. But it is the formal recognition of the *intervention* – that is using military force⁴¹ – element for the *humanitarian* purpose of keeping people alive which is new and also the part of R2P which actually protects in the context of mass atrocities. Yet, as we have seen, all three practices make claims about *protection*. We thus need to further investigate the meaning of protection.

Humanitarian Protection

Humanitarian organizations like the UN High Commissioner for Refugees (UNHCR) or the International Committee of the Red Cross (ICRC) see several protective elements to their work. Providing food, shelter, medical aid and other resources to refugees and others affected by war and, genocide, etc. have direct protective benefits for the individuals affected – it can literally save their lives. However, beyond this direct effect, other types of protection can be noted. UNHCR, for example, argues that merely having a presence on the ground in a conflict situation can be a form of protection. Their presence is an indication that the international community is watching, and can thus serve as a deterrent. However, sometimes that is not enough and it becomes clear that all the international community is doing is watching – and hoping that humanitarianism will suffice. UNHCR also talks about legal protection – which is its core mandate. This involves ensuring that refugees' and asylum seekers' rights are protected – making sure that states live up to their legal obligations under international refugee law, including the prohibition on *nonrefoulement*, obligations to examine asylum claims, and requirements for providing access to resources for refugees.⁴²

The ICRC has a similar mandate, and although it frequently talks about relief and protection, David Forsythe argues that “the ICRC’s humanitarian protection in the field encompasses primarily traditional protection and relief protection.”⁴³ Traditional protection is essentially identical to UNHCR’s legal protection:

the ICRC observes the behavior of public authorities according to international humanitarian norms, either legal or moral, and then makes representations to the authorities for the benefit of persons of concern to it – namely victims of war and of other situations. The objective is to see that victims are not abused or otherwise treated inappropriately.⁴⁴

Thus, as with UNHCR, the ICRC works to protect individuals by ensuring that states live up to their international human rights responsibilities. Its prison visits seek to accomplish similar goals. “In relief protection there can be an element of supervision and representation,

⁴¹ Frequently humanitarian practitioners will label their activities as *interventions*. However, for conceptual clarity, it is necessary to separate out forceful actions from nonforceful ones. The former can only be undertaken by states and state-based entities, while the latter can be undertaken by a much wider variety of entities. Further, The former usually indicates a violation of sovereignty, while the latter frequently (although not always) does not. See Mills, *supra* note 56, at 128-130. A commonly cited definition of humanitarian intervention comes from Holzgrefe: “the threat or use of force across borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.” J.L. Holzgrefe, THE HUMANITARIAN INTERVENTION DEBATE, in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (J.L Holzgrefe and Robert O. Keohane eds., 2003), at 18.

⁴² There is concern, however, that legal protection has been undermined as UNHCR has expanded its operational capacity to provide humanitarian assistance. Gil Loescher, UNHCR AND THE EROSION OF REFUGEE PROTECTION, 10 *Forced Migration Rev.* 28-30 (April 2001).

⁴³ Forsythe, *supra* note 12, at 168.

⁴⁴ *Id.*

along with the central effort to provide the goods and services necessary for minimal human dignity in conflict situations.⁴⁵ Thus, humanitarian action, can include both traditional (legal) protection and relief (material) protection. Both are necessary for maintaining human dignity and both are responsibilities of the international community. Yet, at the same time, frequently the international community chooses to emphasize humanitarian protection, which, while immediate, only provides partial protection and does not address longer term protection issues. Further, while the terminology of protection may be used, such organizations do not have the mandate or capabilities to actually physically *protect* people. They are not armed and, if an army or group of rebels decides to invade an IDP camp, there is little they can do to stop them. Indeed, such activities might more properly be described as *palliation* rather than *protection* in that in the context of genocide or ethnic cleansing they may mitigate suffering but do little to provide robust, and long-term, action to stop the killing. Further, such activities are frequently undertaken by non-state entities who do not have the capabilities or mandate to do anything other than deliver food and water and medical care – obviously worthwhile endeavours, but not backed up by the full authority and force of the UN or individual states. And, even when the *authority* of the UN is present, if it is not backed up by the *power* of the UN, that authority is meaningless.

Prosecution Protection

Does the increasingly elaborate international criminal justice regime, with its courts in The Hague and practices of universal jurisdiction *protect* people? We consider the rule of law to be a cornerstone of a peaceful and just society. We have domestic courts and legal proceedings designed to punish wrongdoers. This legal edifice is also assumed to deter people from committing crimes in the first place. Thus, through deterrence it protects people from harm, and by putting criminals behind bars it keeps criminals from harming anybody else. The deterrent effect of domestic legal systems is difficult to measure. Further, the legal system relies on police officers to arrest wrongdoers, as well as be a presence on the street to deter wrongdoing and physically protect people. It is far from perfect, but domestic criminal justice systems do provide protection, if by no means total. The international criminal justice regime works very differently. It was conceived of as a retrospective system, which would deal with people after they had committed their atrocities, which is of little comfort to the thousands or millions of civilians who might die in a conflict. Further, compared to the crimes committed and lives lost, extraordinarily few people have been tried before international courts or domestic universal jurisdiction proceedings. And it can be no other way. Indeed, the first Prosecutor of the ICC stated that his aim was to go after maybe a half dozen of those most responsible in a particular conflict.⁴⁶ This will leave hundreds and thousands of people who have committed serious crimes in a conflict to go free. The ICC has no resources to extend beyond that small number of people. Further, it is completely reliant on states and the UN to deliver suspects to its door in The Hague, and unlike domestic contexts where there is a police force whose job is to do exactly that, the Prosecutor does not have his or her own police force to go out and arrest people. They are completely reliant on a very ad hoc process which only functions when states or other actors decide it is in their interest to arrest somebody,⁴⁷ and even when it is in their interest, they may not have the means. The fact that it took 16 years to arrest Ratko Mladic indicates that justice is far from automatic. The protective effect of deterrence, unsure as it is in domestic contexts, is, at the present time, extremely dubious, and will only have a chance of having any significant value after a long record of successful – and swift – prosecutions in The Hague is assembled.

⁴⁵ *Id.*

⁴⁶ Author interviews.

⁴⁷ CHRISTOPHER LAMONT, INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE (2010).

Although international criminal justice is retrospective in nature, there are now attempts to use it to affect the course of conflicts in which the crimes are being carried out. In most of the first cases in which the ICC has issued arrest warrants, the individuals sought are involved in ongoing conflicts. The involvement of the ICC is sought by parties or observers⁴⁸ to the conflict as a conflict management strategy. Initial experience in places like Darfur, the DRC and Libya indicate the extreme limits of the ability to use threats of being sent to The Hague to alter perpetrators' behavior. And without stopping the killing, it is difficult to make the case for the *protective* effect of international criminal justice. At the same time, invoking the ICC can make the protection of people even more difficult. Yet, it is difficult to fault the advocates of the ICC and similar mechanisms, for certainly we do want the purveyors of atrocity to be held accountable. But, we must be modest in our expectations.

Military Protection

We are thus left with R2P. As indicated, R2P includes many activities, but if we are interested in keeping people from being killed in an atrocity situation, it is the reactive, or *active*, element which is crucial. While the term humanitarian intervention has fallen out of favor, this is the type of activity which could – possibly – protect people. While humanitarians can keep people alive – at least those to which they have access – if a group is intending to kill people in a refugee or IDP camp, for example, there is little they can do. Food will not stop the *janjaweed*. Nor will all of the international legal principles advocated by the committed people at the ICRC or UNHCR or, for that matter, the legal machinations and pronouncements emanating from The Hague. No, what is sometimes needed is a soldier with a gun standing at the entrance to a refugee camp with a mandate and a will to use it against those who want to rape or kill the people in the refugee camp. And they must be there night after night, and at times they must go after the people intent on massacres and either bring them to justice, or – and let's be clear about what is required – kill them. We have seen instances where the international community has the will to countenance and support such activity. However, the record is dominated by abject failure, the Srebrenica massacre and the Rwandan genocide being only two of countless examples where those with the ability to intervene forcefully have not recognized and acted on their responsibilities.

Further, however, the 'hard edge' of R2P is hardly without problems. There are legal issues, although these are becoming less important, especially with regard to UN action. There are practical issues. You need to find the right people and the right equipment and get them to the right place at the right time. The people – and those commanding them – have to be willing to use that equipment. The resources deployed must be appropriate for the job at hand. And, you need to make sure you do not make the situation worse, by inflaming the situation, killing the wrong people, or affecting, for example, the delivery of humanitarian assistance. These are not easy things to address, and there are constant prudential debates about the appropriateness of a particular response in a particular situation. And, there may be situations where you just cannot do what is needed – or at least not all of it. You need to recognize that not every situation can be addressed. In other words, there are limits. Too often, however, the international community has not demonstrated a willingness to explore those limits.

Protection of Civilians

R2P is an inherently political construct. It gets to the heart of core issues of sovereignty and war and peace and global power politics. And while it has been superficially accepted by the World Summit, the UN Security Council, and in other fora, it is still highly controversial. It

⁴⁸ By observers I mean the UN Security Council.

attracts suspicion in parts of the world which have experienced colonialism and military intervention for less than humanitarian reasons (even if superficial humanitarian reasons are sometimes expressed) – even if the notional balance in the relationship between sovereignty and human rights has changed. The use of humanitarian arguments to justify the war in Iraq in 2003 certainly does not help the depoliticization of R2P and does little to quell the suspicion. However, parallel with, and indeed prior to, the R2P debate has been another relevant discourse having to do with the protection of civilians (PoC). PoC partially, but not completely, overlaps with R2P. It aims to protect people in the midst of conflict, and has been included in Security Council resolutions mandating peacekeeping operations since 1999. It is separate from debates over military intervention and builds upon a growing consensus about the need to protect civilians from the effects of conflict. While it may contain a military element in the form of peacekeeping, it is very different from R2P since peacekeeping is (generally) more consensual, and PoC has a much wider array of (softer) tools at its disposal.

PoC is understood as a conceptual and operational construct in many ways and has a complex relationship with R2P. Like R2P, it has its roots in the failures of the 1990s, but while its evolution has paralleled R2P, PoC has come to mean something somewhat distinct and more palatable for many countries than R2P. In 1999, then UN Secretary-General Kofi Annan stated in his Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict that

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.⁴⁹

This report helped to set the terms of the debate over PoC. The Secretary-General included a wide variety of activities under the heading of PoC, setting a broad agenda:

Discouraging abuses of civilian populations; providing stability and fostering a political process of reconciliation, supporting institution-building efforts, including in such areas as human rights and law enforcement; protecting humanitarian workers and delivering humanitarian assistance; maintaining the security and neutrality of refugee camps, including separation of combatants and non-combatants; maintaining ‘safe zones’ for the protection of civilian populations; deterring and addressing abuses including through the arrest of war criminals.⁵⁰

In 2004, the Secretary-General, noting that PoC had already been included in a number of peacekeeping operations, called for “the rapid deployment of a force to protect civilians.”⁵¹ This connection to peacekeeping is key since it is the context of peacekeeping which makes PoC more palatable than R2P for many UN member states.

There are multiple understandings of PoC. The standard starting point is the definition of protection used by the ICRC, which has been adopted by the UN Inter-Agency Standing Committee, the body created by the UN General Assembly to coordinate UN and non-UN humanitarian actors:

⁴⁹ Quoted in VICTORIA HOLT AND GLYN TAYLOR, WITH MAX KELLY, PROTECTING CIVILIANS IN THE CONTEXT OF UN PEACEKEEPING OPERATIONS: SUCCESSES, SETBACKS AND REMAINING CHALLENGES, Independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs, United Nations (2009), at 1.

⁵⁰ *Id.* at 72.

⁵¹ *Id.* at 73.

Protection is defined as all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, namely human rights law, international humanitarian law and refugee law.⁵²

This is very broad and encompasses a wide variety of activities, which, according to the ICRC, include responsive activities – those which directly respond to an abuse – remedial action – restoring dignity and living conditions – and environment-building – creating an environment where individuals can enjoy their full panoply of rights.⁵³ This is so broad as to be potentially meaningless. It is, in one sense, co-terminus with the global human rights project. How it is interpreted and implemented is key. The Office for the Coordination of Humanitarian Affairs' (OCHA) definition adapts this broad understanding:

A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation.⁵⁴

This definition was accepted by the United Nations Mission in Sudan (UNMIS) in the draft *UNMIS POC Strategy-Security Concept*.⁵⁵ The understanding of what this means for UNMIS is narrowed a bit in the Concept:

The full gamut of POC is very wide. UNMIS is taking a layered approach to developing an UNMIS-specific POC strategy. Three layers of protection will be covered in the strategy: protection of civilians under imminent threat of physical violence; protection of civilians with regard to securing access to humanitarian and relief activities; and the longer-term aspect of protection in the context of Human Rights (HR) and Conflict Prevention and Management. *This concept covers the inner layer of POC within the UNMIS POC Strategy – the protection of civilians under imminent threat of violence [. . .]. Sexual, gender or child violence will not be treated separately in this Concept as they are all forms of ‘physical violence’ [emphasis added].*⁵⁶

Thus, while still broad, it focuses more on physical protection, but also on protecting humanitarian activities. It is also tied into broader political goals of conflict management and protection. At the end it also points to a key issue in the context of the development of PoC, namely that particular groups have also been singled out for particular protection treatment in various UN resolutions – e.g. women⁵⁷ and children.⁵⁸

PoC language was included in the mandate of ten⁵⁹ UN peacekeeping operations between 1999 and 2009, and an additional six⁶⁰ UN-sanctioned operations led by regional

⁵² ELIZABETH G. FERRIS, THE POLITICS OF PROTECTION: THE LIMITS OF HUMANITARIAN ACTION (2011), at 17.

⁵³ *Id.* At 17.

⁵⁴ Glossary of Humanitarian Terms in Relation to the Protection of Civilians in Armed Conflict, OCHA, December 2003, at 25, available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=1001328>.

⁵⁵ Holt and Taylor, *supra* note 76, at 192.

⁵⁶ *Id.*

⁵⁷ UN Security Council Resolution 1325 (31 October 2000); UN Security Council Resolution 18 20 (19 June 2008).

⁵⁸ UN Security Council Resolution 1261 (25 August 1999); UN Security Council Resolution 1612 (26 July 2005); UN Security Council Resolution 1998 (12 July 2011).

⁵⁹ Sierra Leone (UNAMSIL), the Democratic Republic of the Congo (MONUC), Liberia (UNMIL), Côte d'Ivoire (UNOCI), Burundi (ONUB), Haiti (MINUSTAH), Sudan (UNMIS), Darfur, Sudan (UNAMID), Chad and Central African Republic (MINURCAT), and Lebanon (UNIFIL).

⁶⁰ The Interim Emergency Multinational Force in Bunia, Operation Artemis, in the Democratic Republic of the Congo (DRC); Operation Licorne in Côte d'Ivoire; ECOWAS in Côte d'Ivoire

organizations or individual states.⁶¹ This language frequently includes admonitions for peacekeepers “to protect civilians under imminent threat of physical violence” and provide a “safe and secure environment.”⁶² The mandate frequently also includes the caveat “without prejudice to the responsibility of the host state.”⁶³ This indicates the relationship of PoC to the core of UN peacekeeping and in particular that peacekeeping relies on the consent of the host state to operate. When the state does not facilitate the creation of a secure environment for their citizens by protecting them, or when it carries out violence itself against its citizens, PoC can be severely undermined. This highlights a key difference between R2P and PoC. While, as one African diplomat noted,⁶⁴ R2P is about protecting civilians, the tools available to decisionmakers under the heading of R2P are potentially more robust than with PoC. Under R2P, the UN can authorize the use of force against the wishes of a state, as was done in Libya. PoC relies on the consent and cooperation of the host state. There is frequently confusion about the status of PoC in the peacekeeping mandate. Even when robust chapter VII language is included which allows the use of force – “all necessary means” – the intent of the Security Council is not always clear, and frequently commanders in the field see the chapter VII language as an add on which fits uncomfortably with a chapter VI core. Using robust force is problematic, given that peacekeepers have to maintain relationships with multiple partners, including the state. This has been a particular issue in Darfur, where the government has placed severe restrictions on peacekeepers which interfere with the PoC mandate. This is not surprising, given that it is the government which is either carrying out or supporting a large part of the violence, but it highlights the problematic nature of PoC in the context of peacekeeping. Further, peacekeepers are frequently not given the tools they need to carry out such robust action. Nor is it frequently clear to those commanders on the ground exactly *how* they are supposed to carry out their PoC mandate, since there is no operational guidance from the Security Council for what PoC actually means in practice.⁶⁵

Yet, as noted, there is a consensus within the UN regarding PoC. Because of this consensus, and the fact that it has a somewhat independent lineage from, and different connotations than, R2P, it is easier to talk about in the Security Council and other diplomatic exchanges. UN humanitarian agencies, such as UNHCR and OCHA, use the terminology of PoC rather than R2P because it describes better what they do and also seems to take politics out of the equation. Likewise, humanitarian NGOs will frequently also engage more with the PoC terminology, even when talking about R2P situations, because it makes the conversation with states easier and less threatening. Humanitarian organizations may also not see the value added of R2P over PoC or the relevance of R2P to their activities. As many humanitarians will point out, PoC has been around for a while, and the protection activities they engage in do not fall under R2P. They perceive PoC as non-political⁶⁶ – or at least argue that PoC can be deployed non-politically – whereas R2P cuts to the core of issues related to sovereignty – issues they do not want to point to, even if their work raises significant issues of sovereignty. R2P is seen as not useful, and there is significant wariness about the equation

(ECOMICCI); the African Union in Darfur, Sudan (AMIS); Eufor R.D.Congo in DRC; and the 2007 European Union operation in Chad (EUFOR).

⁶¹ See Holt and Taylor, *supra* note 76, at 42-47, 371-384 for an in-depth look at the PoC mandate language.

⁶² *Id.* at 33-34.

⁶³ *Id.* at 44.

⁶⁴ Author interviews.

⁶⁵ Holt and Taylor, *supra* note 76, at 97-101. Indeed, as Holt and Taylor point out, “DPKO does not appear to have a codified understanding of what protection of civilians actually means for planning purposes” (144).

⁶⁶ Author interviews.

of PoC and R2P, even as many PoC activities are being repackaged as R2P.⁶⁷ R2P is seen as a Security Council concern, or something that happens in New York, whereas the more Geneva-centric humanitarian community sees PoC as much more relevant.⁶⁸ Some humanitarians can also be cynical and note that many concepts and developments do not actually result in much, and so they try to stay out of the entire debate.⁶⁹

Even though PoC may be portrayed as apolitical it is still political since it deals with highly charged political situations, but it appears to *depoliticize* situations. In some situations, this may be positive since it allows states to talk about concrete measures to protect people without getting caught in the high politics of sovereignty. On the other hand, these situations *are* political and require political response at the highest levels, and thus PoC might undermine the debates which need to happen within the R2P framework. Further, to the extent PoC is seen as something which happens in the context of peacekeeping, it can be an impediment to genuine *protection* in the sense of physically protecting people under imminent threat of harm. If a peacekeeping commander needs to get the permission of the host state to fly helicopters – assuming he or she has been given helicopters and other requisite tools in the first place – his or her ability to deploy troops when and where needed to respond to that imminent threat is severely compromised. Thus, while PoC can play a significant role in protecting civilians, it is ill-defined and not well understood. And while R2P is less accepted as a political, legal, and operational concept, it does bring an element of robustness which is lacking in most peacekeeping PoC mandates and, more importantly, practice.

Complementary or Conflicting Responsibilities?

I have outlined above the main human rights and humanitarian tools and concepts the international community has to respond to mass atrocities and associated humanitarian crises. They all in one sense derive from the conceptual and practical developments in the human rights regime over perhaps the last 150 years, but in particular the last 60 years. They all have the same goal – to protect lives. One might assume, then, that they are mutually supporting. That is, the implementation of one would support the implementation of another. As we will see, however, this is not necessarily the case. Indeed, applying one or more of these responses may, in fact, conflict with, or undermine, other responses. Further, having recourse to one may provide an excuse to diplomats and policymakers not to implement another response which may be more effective. In this section, I will briefly outline some of the conundrums faced by practitioners and advocates of these approaches (see Figure 1).

Humanitarianism, even in its most basic palliative form, can save lives. There is no question of this, even though, as we have seen, it may not be enough. Humanitarianism cannot end the conflicts which lead to atrocities. This requires political action. Nor can humanitarianism save lives in all circumstances – particularly when parties to a conflict have as their goal – or significant tactic – to kill civilians or drive them out of their territory. Yet, the presence of humanitarians on the ground can give the illusion of adequate response when, in fact, the response is far from adequate. More robust action may be required, but the mere presence of humanitarians may reduce pressure on states to act. Thus, palliation reduces the prospects for protection. However, with rights-based humanitarianism, humanitarian actors themselves may be highlighting human rights abuses and calling for further action. This can put pressure on states to take further action, but it can also make their positions as

⁶⁷ Author interviews.

⁶⁸ Author interviews.

⁶⁹ Author interviews.

humanitarian actors more precarious. They may either be targeted by parties to the conflict or kicked out of the country by the government, thus reducing or eliminating their ability to provide food and other resources to victims of conflict. As a result, people may die as a result of malnutrition or lack of medical care. So the question becomes whether the greater good of a possible (if unlikely) humanitarian intervention to stop a conflict or more robustly protect civilians from attack is outweighed by the almost certain death of more people because of a lack of humanitarian assistance. This is a rather difficult decision to make, since you may be condemning people who are in your care to death in the faint hope that more lives will be saved in the end. Most NGOs, because of their innate humanitarian ethos and mission will choose to stay, although on occasion, they have decided that they are doing more harm than good, thus violating the "do no harm" principle outlined above. UNHCR attempted to suspend its activities in Bosnia for this reason, but was prevented from doing so. NGOs will also sometimes pull out because the situation is too dangerous. There is thus a negative symbiotic relationship between palliation and protection (notwithstanding humanitarian claims to protection). Palliation saves lives, but it is also significantly limited in what it can actually achieve in protecting people from violence.⁷⁰ It can also, at times, contribute to the continuation of a conflict, and also provides a smokescreen for states who do not want to intervene. Calling for intervention might bring further long-term protection, although that is far from certain; it is more likely to reduce the humanitarian assistance available to victims of conflict.

Prosecution can punish people for their crimes. This is its institutional purpose. However, inserting prosecution into the middle of a conflict can have unforeseen consequences and require difficult trade-offs. The most obvious, as mentioned above, is that potential prosecution can have an impact on peace negotiations, with the very unhumanitarian impact of prolonging the conflict. Combatants with arrest warrants against them may be less likely to come to an accommodation, knowing what possible fate might await them. Such international action might also interfere with domestic efforts to institute amnesty laws which might contribute to peace processes and post-conflict reconciliation. States who have become a party to the ICC⁷¹ no longer have complete autonomy in their domestic criminal affairs. At the same time, they may try to use the ICC for their own domestic purposes as a weapon in the conflict.

Further, however, the ICC poses difficult questions and danger for both palliators and protectors. For palliators, who may have significant information which could be of use to prosecutors,⁷² they are posed with the same question *vis a vis* intervention. Do they release the information, exposing the crimes, or pass it on to the prosecutors, thus helping to ensure that perpetrators face justice – an outcome which pretty much all palliators would support⁷³ – or do they keep silent? The former action might further one *human rights* goal, but it could also imperil their activities, as they are branded as informers and targeted or kicked out of the country, thus undermining their *humanitarian* mission. Most IHOs will follow the latter course of action for this reason, although they may quietly pass information to human rights organizations, who can thus use it for their advocacy activities. This creates a division of labor, which could have positive outcomes – the information gets out, while humanitarian organizations are not recognized as the source of the information.

⁷⁰ Marc Dubois, PROTECTION: THE NEW HUMANITARIAN FIG-LEAF, presented to the conference Protecting People in Conflict and Crisis, Refugee Studies Centre, Oxford University (22-24 September 2009), available at <http://www.rsc.ox.ac.uk/pdfs/endnotemarkdubois.pdf>; Ferris, *supra* note 79.

⁷¹ 121 as of 6 July 2012.

⁷² Although some will deny that they have any specific knowledge which prosecutors may not already have access to. Author interviews.

⁷³ Some of the biggest supporters of the ICC were humanitarian organizations.

In addition, ICC action might negatively affect humanitarians, even when they have no connection to the action. They can be tarred with the same brush as *human rights* actors. Some parties to a conflict might see them as all part of the group of *internationals*, and blame *humanitarians* for the actions of their *human rights* brethren, thus imperilling their actions. More generally, with the development of individual criminal responsibility, combatants have an interest in ensuring that there are no witnesses to their atrocities, including humanitarians, and thus may want to deny them access to protect themselves.⁷⁴ The ICRC has been granted a specific exemption from being called to provide evidence in the Rome Statute,⁷⁵ although NGOs have not. During the Rome Statute preparatory meetings, Médecins sans Frontier (MSF) specifically did not request such an exemption, seeing such action as part of its *temoignage*. At the same time, it did not want to be one of “informal auxiliaries to the justice process” where it participated in a formal evidence gathering function (leaving that, instead, to human rights NGOs).⁷⁶ Or, they can be used as pawns in other ways; when Sudanese President Omar al-Bashir had an arrest warrant issued against him by the ICC, 13 international humanitarian NGOs were kicked out of the country. Although attempts were made to connect them to the ICC, it was, as much as anything, a show of force. The palliators were used as a tool to make a point to the prosecutors and interveners.

Also, as with palliation, prosecution can create an excuse not to intervene and protect. It is one more action which can demonstrate that states are doing “something” while not necessarily taking the action required to protect people and stop fighting. While this should certainly not deter the prosecutors from doing their jobs, the mere fact of the existence of the ICC and other international criminal justice mechanisms can contribute to a more complicated and complex global geopolitical context in which decisions on how to respond to mass atrocities are taken. Although, in some cases, such as Syria, which lies at the heart of extremely complicated global geopolitical dynamics and which engages directly with conflicting great power interests, there is no appetite for even the ICC.

Finally, to come full circle, R2P protection activities can have multiple possible outcomes, which may have positive or negative consequences for humanitarianism and human rights. A military intervention might just succeed and end the fighting, which in turn creates space for a political settlement. We have seen precious few of these cases. It might provide a presence, for a time, which has a significant protective effect. These situations are slightly more numerous, but the issue always becomes the will to continue the action, particularly if the interveners take increasing numbers of casualties.⁷⁷ The intervention might also provide space for the humanitarians to do their job and deliver humanitarian assistance. These are all possible positive effects. But an intervention might have negative consequences. It might imperil the humanitarian mission. This has certainly been a concern in Darfur. It might create incentives for certain parties, in particular rebel groups, to become more intransigent or otherwise encourage them, thus prolonging a conflict.⁷⁸ Again, this has been a concern in

⁷⁴ Eric Dachy, JUSTICE AND HUMANITARIAN ACTION: A CONFLICT OF INTEREST, in *In the Shadow of “Just Wars”: Violence, Politics and Humanitarian Action* (Fabrice Weissman ed., 2004): 318.

⁷⁵ Gabor Rona, *The ICRC privilege not to testify: Confidentiality in action*, 845 INT. REV. RED CROSS International Review of the Red Cross (2002), available at <http://www.icrc.org/eng/resources/documents/misc/59kcr4.htm>.

⁷⁶ Dachy, *supra* note 101, at 322-3.

⁷⁷ Such as was the case with the US in Somalia, or Belgium in Rwanda.

⁷⁸ Roberto Belloni, *The Tragedy of Darfur and the Limits of the “Responsibility to Protect,”* 5 ETHNOPOLITICS 327 (2006); Alan Kuperman, *Suicidal Rebellions and the Moral Hazard of Humanitarian Intervention*, 4 ETHNOPOLITICS 149 (2005).

Darfur, was a dilemma for allied forces in Libya,⁷⁹ and has likely been a factor in Syria. It can also lead to civilian casualties. It must be recognized from the start of any R2P action that civilian casualties are inevitable. There are ways to mitigate this and reduce the potential for dead civilians. Yet, all too often, the interveners do not want to take such actions, at least partly because it may imperil their own troops. This was illustrated all too clearly in Kosovo, where NATO restricted itself to high-altitude bombing of Serb positions, rather than exposing their airplanes to anti-aircraft fire or putting troops on the ground, which would inevitably lead to NATO casualties. As a result, more civilians were killed than might have been the case otherwise. Humanitarians thus need to keep this in mind when advocating for intervention.

Conclusion

We thus have a very complicated relationship between these three sets of responsibilities and associated practices. The choices made by decision-makers and actors on the ground are difficult and complex. While the three responsibilities – protection, prosecution, and palliation – all come from the same broad human rights and humanitarian project, their efficacy and eventual impacts are such that they are not necessarily mutually reinforcing. Rather, they may at times undermine each other – either intentionally or unintentionally.

Further, the question of how best to protect those affected by mass atrocity situations and associated humanitarian crises is difficult to answer. Palliation saves lives; yet, in the most extreme circumstances it cannot protect individuals from government troops, warlords, paramilitaries, or rebel forces. Prosecution punishes criminals; yet it also makes peace negotiations more difficult. And, absent evidence of a significant deterrent effect, it cannot be claimed to protect people in harm's way. Robust R2P activities can physically protect people, but it can also endanger them. There is also little appetite on the part of those who could protect to actually do so in most situations. It is thus a very unsure route to protection. All three of these responsibilities have a role to play in assistance and protecting those affected by widespread violent conflict and human rights abuses. The issue, as always, comes down to political will to choose and implement the most appropriate response(s). This will is in little evidence in too many situations.

⁷⁹ Although the goal for the allied forces became the overthrow of the regime by the rebels. Mission creep thus also becomes a concern.

Figure 1
Responsibility Conundrums

	Protectors	Prosecutors	Palliatiors
Protection	+protect people +end fighting -civilian casualties -create incentive to prolong conflict	+deter abuses -reduce prospects of humanitarian intervention	+protect palliative efforts +highlight abuses -create illusion of protection -reduce prospects of needed protection -contribute to continuation of conflict
Prosecution	+increase pressure to surrender -undermine efforts to apprehend	+punish perpetrators +uphold idea of human rights/ rule of law -undermine peace processes -prolong conflict -use as weapon	+support human rights -endanger humanitarian activities
Palliation	+support humanitarian assistance -endanger humanitarian assistance	+protect humanitarians -endanger humanitarian assistance	+keep people alive -well-fed dead