



Jan Karski Conference

9-20-2014

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Recommended Citation

Bussière-Wallot, Jean-François. The Mechanisms of the Optional Protocol to the Genocide Convention and its links to R2P. Presented at the Jan Karski Memory and Responsibility Conference, September 20, 2014.

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The Mechanisms of the Optional Protocol to the Genocide Convention and its links to R2P

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The Optional Protocol to the Genocide Convention was drafted taking into account the UN Charter and practice to fit neatly into the UN and regional system. This is done by respecting the various roles and powers assigned to the General Assembly, the Security Council and the Regional Organizations under the UN Charter. The specific roles of each under the Protocol will be discussed, as well as the specific mechanisms for Regional Organizations under Article 5. The decision-making on genocide and its preparatory steps under Article 3, working in conjunction with Article 4, creates an obligation to act on normally non-binding recommendations by the UN General Assembly or by a relevant Regional Organization, assuming the Security Council fails to act. The Protocol also addresses potential peacekeeping issues in emergency genocide prevention or suppression to ensure the effective protection of civilians and the funding of such missions. This presentation also discussed the links between the Optional Protocol and the Responsibility to Protect.

Greg Stanton has already explained to great length why we feel this proposal is necessary². What I want to do is explain the scope of the protocol, its mechanisms and its relationship with the UN Charter as well as the Responsibility to Protect (R2P). Wherever possible, I'll link my explanation of the Protocol and its mechanisms to examples of how

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² This presentation was made jointly with Dr. Gregory H. Stanton of Genocide Watch and George Mason University, in a panel on the Responsibility to Protect. The Presentation was called "Dealing with deficits of R2P – An Optional Protocol to the Genocide Convention". Because this paper was meant to be explained, it is lightly foot-noted, mostly for the reader's convenience and to clarify some arguments. Readers who would like to consult the Protocol directly may refer to the documents provided by Greg Stanton to the Conference, or to genocidewatch.net.

that could work. Please keep in mind that a lot of its provisions are meant to be flexible and adaptable. The Protocol intentionally leaves a lot of room for policy decisions so that it can remain pertinent as the field of genocide prevention evolves, but also as the world and international law evolve. It is similar in that respect to the Responsibility to Protect, largely because it is inspired by it, and rather than focusing on a specific solution, seeks to provide tools to alleviate risks of genocide while also integrating the norm of R2P within the folds of international law. R2P is already much linked with international law currently, because it is a norm which is inspired from the legal obligations States and other international actors have to respect the Conventions and covenants they have signed, such as the Geneva and Genocide Conventions, and because it draws on the legal vocabulary of state responsibility. In practice however, R2P is much more of a political commitment not to tolerate violations of the most important norms of international law protecting human rights, and in particular, the right to life³.

The Scope of the Protocol

Let's start with mentioning briefly the scope of the Protocol. It has three principal mechanisms that deal with preventing or halting genocide. The three principal mechanisms involve cooperation in the prevention of genocide through information sharing and leadership training⁴, establishing institutions to rapidly recognize situations that may lead to genocide⁵ and strengthening both the regional mechanisms for intervention in the event of genocide, and the cooperation between the UN and regional organizations⁶. I will discuss each of the mechanisms in turn while linking them to the appropriate decision-making bodies and illustrating how that might work out. Because the Genocide Convention, through measures like criminalizing incitement⁷, addresses the first pillar of R2P which is the question of state responsibility to protect its population from genocide, the Protocol focusses more on the two other pillars of R2P, namely the responsibility of the international community to assist the state in fulfilling its protection

³ See also International Coalition for the Responsibility to Protect (ICRtoP), « A Toolkit on the Responsibility to Protect », p. 6: "What is the Responsibility to Protect?" (ICRtoP)

⁴ Article 2

⁵ Article 2 and 3

⁶ Article 5

⁷ Genocide Convention article III(c) defining incitement to commit genocide as a crime, article V for inclusion into national legislation and article VI for prosecution.

obligations and if necessary, to take collective action⁸.

The Preventive Aspect

The main disposition for early prevention is found in Article 2 which aims to create an international network in genocide prevention. According to Article 2 (a), states would have to monitor and document genocide and early warning signs of genocide... wherever they may occur. This would include information regarding the other crimes that are war crimes and crimes against humanity, if only for the reason that some of those crimes may overlap with genocide acts if the intent is there. This information would then be freely shared with Regional Organizations and Multilateral Organizations of which the signatory states are members if those organizations conduct genocide prevention⁹. These organizations could be traditional regional ones like the European Union or the African Union, they could be sub-regional organizations and they could be non-regional as well, provided they are involved in genocide prevention in one form or another.

Cooperation would also be done between the national level and the UN, between the regional or multilateral organizations and the UN, as well as between regional organizations¹⁰. From a legal point of view, binding an international organization through a treaty is tricky, since non-state international actors like the UN and regional organizations are not always explicitly allowed to join a treaty, and therefore are hard to bind by treaties they haven't signed. For an example of this, let me just point you out to the decades-long debate over whether, or how much, the UN is or is not bound by the two human rights covenants it helped to negotiate or whether its peacekeepers need to respect international humanitarian law.

The approach I took was a very practical one: make it an explicit state responsibility to get the various organizations, whether regional or multilateral, that are involved with genocide prevention, to talk to one another and likewise share information¹¹. In some

⁸ For more information about the three pillars, see ICRtoP, p. 20

⁹ Article 2 (b)

¹⁰ Article 2 (c) and (d)

¹¹ The wording is "Support freely sharing information" between Regional and Multilateral Organizations in article 2 (c) and "Ensure cooperation and information sharing" in article 2 (d).

cases it may require getting enough states in an organization on board with the protocol for the cooperation to be mandated by the treaty, if only because those organizations need to follow their own rules; in practice, I don't expect it to be a major issue. The European Union and the African Union talk to one another, the U.S. Department of State at times works with sub-regional African organizations and the Latin American Network for Genocide and Mass Atrocity Prevention is in contact with the UN, for example. Likewise, the individual state actors would have to collaborate among each other¹². One particular issue I singled out for cooperation between state parties is the criminal activities of militias and organizations operating across their national boundaries¹³, since those can often be involved in attacks on civilians, or are génocidaires themselves. As an example of this, let me just point to the militias in East Congo, some of whom were active in the Rwandan genocide¹⁴.

The Office of the Special Advisor on the Prevention of Genocide would serve as the center of contact at the UN, for obvious reasons. It would coordinate UN prevention and suppression of genocide, dispatch the information to the appropriate UN agencies, as well as offer leadership training on risk assessment and genocide prevention to those states and organizations which need it¹⁵. He would also ensure that urgent information reaches the media and the public, he would also make it available to NGO's involved in human rights, humanitarian activities, or which have otherwise declared themselves interested by that information. Those organizations would be taken straight from the list of those in consultative status with ECOSOC or associated with the UN Department of Public Information, since there's no need to create an extra structure when one is already in place.

One word about the graphic: it may look hierarchical, but that's mostly due to my modest

¹² Article 2 (e)

¹³ Article 2 (e)

¹⁴ This is the case for Hutu-led Democratic Forces for the Liberation of Rwanda (FDLR), counting among its officers old members of the Interahamwe that carried out the 1994 Rwandan genocide. It is still a source of regional tensions, having attacked Tutsi forces both in Eastern Congo and in Rwanda since 2000. There are also counter-militias to FDLR in Eastern Congo, such as Tutsi-led March 23 Movement (M23) which was dissolved after a defeat on November 5, 2013 by government forces with UN backing, or Raia Mutomboki which is known for targeting all Kinyarwanda-speaking civilians.

¹⁵ The role of the Special Advisor's office is detailed in Article 2 (d)

illustration skills¹⁶. What you need to envision is a global network, a web, of national, regional and multilateral actors coming together for the purpose of early warning and genocide prevention, with civil society acting as a check and watchdog for inaction. The goal is to ensure that the efforts which are being deployed in some regions become global, but also that they are sustained through time. This section gives legal weight to pillar 2 of the R2P by bringing the international community to help national actors with early warning, and also implements effectively paragraph 138 of the 2005 World Summit Outcome, in which the larger international community committed not just to pillar 2, but also to help the United Nations establish an early warning capability¹⁷. It also addresses two challenges which are recurrent in implementing R2P, namely insufficient international, regional and local capacity to prevent atrocities as well as the systematic gaps in communication and cooperation among actors involved in prevention and early warning.

Quick Recognition of Genocide

The second mechanism aims at establishing institutions to rapidly recognize situations that may lead to genocide. Under the Genocide Convention's Article VIII, the states which are party to the Convention "may call on the competent organs of the UN to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide". The key word here is may, in other words at the present, they may as well do nothing, or at least nothing that has to do with the larger international community. We believe this vision is outdated, especially since the development and adoption of the Responsibility to Protect, and Article 3(c) of the Protocol spells out a clear duty for the States to bring acts of genocide, including preparatory steps towards the accomplishment of such acts, to the attention of the proper forum. Those forums are the UN General Assembly, the UN Security Council and relevant Regional Organizations. Those regional organizations which are considered relevant for the purpose of the Protocol are those which have been empowered by their

¹⁶ I am referring here to Slide 4 – Information Flow of the accompanying PowerPoint presentation.

¹⁷ "The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability."

members to intervene to prevent or stop genocide in their region¹⁸. This is currently the case of the African Union¹⁹, notably, but it could involve other such organizations in the future, as decided by those organizations and their members.

So what happens when the attention is brought at the UN or in a regional organization? Essentially, the members of that organization or organ deliberate according to their internal rules over whether the acts or preparatory steps could lead to genocide or constitute genocide²⁰. My colleague may have made that point already, but the point is to lower the burden of proof so that it doesn't act like a trial, but rather, the decision should be a collective acknowledgment of the duty to prevent genocide before it occurs, or if that failed, then to suppress it. This can be seen as an implementation of the responsibility to protect civilians from genocidal violence, essentially. Here, the obligation for states is to take a collective decision by assessing the acts and the risks.

After they take the decision, if they acknowledge the risk or the nature of the act, then they have to take further steps, but the content of the steps will remain in the policy arena²¹. Keep in mind that the decision will be made in both organs of the UN, and possibly in one or more regional organization at the same time. This can serve in part as a check against the political paralysis that the UN Security Council can be prone to, perhaps even an incentive for it to act effectively or to avoid vetoing such questions – something which a growing number of States have called on the permanent members to do - but I would argue it's also a way to involve the regions even more since they have the potential to be the most effective actors in genocide prevention within their region. The decision-making process, along with the requirements on national actors I will discuss shortly, would also mainstream mass atrocity prevention goals within the work of national, regional and international actors, thus strengthening R2P.

Taking action

¹⁸ Article 3 (1) (b) and Article 5 (1) (a)

¹⁹ African Union Constitutive Act, Article 4: “The Union shall function in accordance with the following principles: [...] (h) 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;”

²⁰ Article 3 (1) (a)

²¹ Article 3 merely established the duty to take a decision, and collective action following that decision.

Once a decision is made, states have to take a certain number of internal steps, including conducting a review of their armed forces, police and equipment that could be made available to a UN mission or to a regional intervention to ensure the effective protection of civilians²². The Protocol doesn't mandate committing resources, but at the very least it's liable to make states more proactive and hopefully speed up the long delays that can come before a peacekeeping mission is deployed, since states would have to be aware of their ability to commit personnel and equipment rapidly, possibly before the decision to deploy is made – if the early warning system works properly rather than wait for a late intervention when slaughter has started. They also have the obligation not to exclude the use of force to protect civilians in any mission in which they participate²³. Most importantly, they are the wheels which move the other organs into actions.

All decisions are obviously made according to the rules of the appropriate UN or regional organ. At the Security Council level, a decision is made by 9 out of 15 members, with the risk of vetoes. The Security Council already has all the tools it needs to take effective action, and under the Protocol retains its primacy in matters of international peace and security²⁴. In other words, if the Security Council is doing its job, its decisions will be applied as they should be. One specific step it should take it to pre-authorize relevant Regional Organizations to intervene within their region following a decision recognizing a risk of genocide²⁵.

Assuming the Security Council fails to effective action, the General Assembly and relevant Regional Organizations have the power to make their recommendations binding on the States signatory to the Protocol according to article 4. At this time, the General Assembly has the competence to make recommendations on matters of international peace and security following the mechanisms of emergency sessions implemented following the Uniting for Peace resolution²⁶. Such questions are decided by two-thirds

²² Article 6 (2) (d)

²³ Article 6 (1)

²⁴ To do otherwise would be to conflict with the Charter of the United Nations, which would ultimately mean the Protocol would become useless in a conflict of obligations between a binding Security Council resolution and one under the Protocol, due to Article 103 of the UN Charter.

²⁵ Article 5 (2) (a)

²⁶ United Nations General Assembly *Resolution 377 A (V) "Uniting for peace"* of November 3 1950 establishes a system of emergency special session under which the general assembly can intervene on issues relating to international peace and security when the Security Council "because of lack of unanimity

majority, however, like all General Assembly recommendations, are nonbinding²⁷. In regional organizations, they would be decided according to the mechanisms the members of the organization have implemented.

By signing the Protocol, states would recognize those recommendations are binding, whether they come from the General Assembly or a Regional Organization, and carry the same weight as obligations stemming from the Charter²⁸. In other words, they would prevail over obligations derived from treaties not linked to the Charter, allowing for effective smart sanctions regimes, for example. This is possible precisely because genocide prevention is compatible with the Purposes and Principles of the UN Charter and also because the Protocol is specifically attributing a competence to an existing organ of the United Nations that falls under its general broad mandate²⁹.

A specific measure that the General Assembly would have to take would be to finance regional interventions, when intervention is deemed necessary to prevent or halt genocide³⁰. One recurring issue with peacekeeping is finding the funding for it. The idea here is not to solve all peacekeeping issue – that is not within the scope of the Protocol – but rather to make sure uncertain funding doesn't become an obstacle when an emergency intervention is deemed necessary to prevent genocide. This would go a long way towards insuring that regional organizations that might be struggling with funding will not bear all the weight that is shifted to them from the larger international community.

Speaking of peacekeeping, one disposition of the Protocol is that State Parties must collectively review the equipment, number and mandate of peacekeeping forces in a State or region where a risk of genocide is recognized, as well as the possibility of deployment,

of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression”.

²⁷ The Charter is explicit in allowing the General Assembly to make recommendations, where the Security Council may choose to either make recommendations or to decide, the later decisions being binding, unlike its recommendations.

²⁸ In other words, they would prevail over other treaties in an event of a conflict of obligations, such as trade embargo coming into conflict with a trade agreement. See Article 103 of the UN Charter: “

²⁹ Genocide being both a threat to peace and also a massive violation of fundamental human rights which the UN Charter is supposed to promote.

³⁰ Article 5 (2) (b)

and make recommendations if appropriate³¹. The Protocol doesn't specify in which forum this would be done, and indeed this could be done in any of the three forums we've discussed, depending on who deployed the force in the first place, and also keeping in mind the idea of the complementarity of the organs.

³¹ Article 6 (2)