



Enhancing Protection Capacity: **Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts**

Dr Hugh Breakey Griffith University

Dr Angus Francis Queensland University of Technology

Professor Vesselin Popovski United Nations University

Professor Charles Sampford Griffith University

Major General Michael G. Smith AO (Ret'd)

Australian Civil-Military Centre

Professor Ramesh Thakur Australian National University

With a Foreword by **Gareth Evans**



*A joint initiative of the United Nations University,
Griffith, ANU, QUT, OP Jindal Global University
and the Center for Asian Integrity*

COPYRIGHT GRIFFITH UNIVERSITY
ISBN: 978-1-921760-87-7

AUTHORS

Dr Hugh Breakey
Griffith University

Dr Angus Francis
Queensland University of Technology

Professor Vesselin Popovski
United Nations University

Professor Charles Sampford
Griffith University

Major General Michael G. Smith AO (Ret'd)
Australian Civil-Military Centre

Professor Ramesh Thakur
Australian National University

*This research project was funded by the
Australian R2P Fund, supported by the Australian
Government, AusAID and the Asia Pacific
Centre for the Responsibility to Protect.*

ENHANCING PROTECTION CAPACITY: POLICY GUIDE TO THE RESPONSIBILITY TO PROTECT AND THE PROTECTION OF CIVILIANS IN ARMED CONFLICTS

Both this *Policy Guide* and the shorter *Overview Document* are available for free download at: <http://www.griffith.edu.au/criminology-law/institute-ethics-governance-law/research/responsibility-to-protect-protection-of-civilians-policy-guide>



CONTENTS

Foreword by Gareth Evans.....	iv
Acronyms	vi
Policy Guide Executive Summary	vii
Enhancing Protection Capacity: <i>Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts</i>	1
Acronyms	3
Part 1. Introduction	4
1.1 The importance of R2P and POC	4
1.2 The purpose of the Policy Guide.....	4
1.3 The objectives of the Policy Guide	5
1.4 The structure of the Guide.....	5

Part 2. R2P and POC: A comparative analysis: Overview	6
2.1 What are they?	6
§2.1.a R2P	6
§2.1.b POC in Armed Conflicts	8
§2.1.c Basic Convergence of R2P and POC	9
§2.1.d Basic Divergence of R2P and POC	10
2.2 What is the scope of each principle?	12
2.3 By which actors are they applied? ...	17
§2.3.a Main R2P and POC actors	17
§2.3.b R2P and POC Convergence and Divergence	18
§2.3.c Complementarity within and between different R2P and POC actors.....	18
§2.3.d The use of R2P language, policy and resources by peacekeepers, human rights and protection actors	19
2.4 When and how do they apply?	19
§2.4.a When does R2P apply? What R2P measures are required at each stage?.....	19
§2.4.b When does POC apply? What POC measures are required at each stage?.....	22
§2.4.c Main points of convergence regarding the “when” and “how” of POC and R2P	24
§2.4.d Main points of divergence regarding the “when” and “how” of POC and R2P	24
2.5 Conclusion and Summation.....	25

Part 3. R2P POC Normative Frameworks.....	26
3.1 Overview	26
§3.1.a Common Ethical Roots of R2P and POC	27
3.2 Commentary	27
§3.2.a UN Charter	27
§3.2.b 1948 Genocide Convention	29
§3.2.c International Humanitarian Law (IHL).....	30
§3.2.d International Human Rights Law (IHRL)	31
§3.2.e Rome Statute of the International Criminal Court (ICC).....	33
§3.2.f 2005 World Summit Outcome Document: R2P.....	34
§3.2.g UN Security Council Resolutions	34
§3.2.h UN General Assembly Resolutions	39
§3.2.i Women and Women’s Rights	40
3.3 Conclusion and Summary.....	41
§3.3.a The “Legal Concept”/“Political Concept” Dichotomy	43
§3.3.b Developing and Emerging International Norms /Principles	44

Part 4 R2P POC	Part 5. Implementing R2P and POC.....80	Part 6. Conclusion.....94
Institutional Structures46	§5.1 Overview80	§6.1 R2P and POC Perceptions and Realities.....94
§4.0 Five Modes of Protection46	§5.2 Global81	§6.2 Concluding Remarks99
§4.1 Global Institutions responsible for R2P or POC action48	§5.2.a UN General Assembly81	Appendix 1 Resources and Links for Further Reading101
§4.2 Commentary: Global Institutions ...49	§5.2.b UN Security Council82	UN Guidance Documents101
§4.2.a UN General Assembly49	§5.2.c ICC84	Non-UN Guidance Documents101
§4.2.b UN Security Council50	§5.2.d ICJ85	Appendix 2 Author Details.....102
§4.2.c International Court of Justice52	§5.2.e DPKO/DFS85	
§4.2.d International Criminal Court.....54	§5.2.f UN Women87	
§4.2.e Department of Peacekeeping Operations (DPKO)/ Department of Field Support (DFS)56	§5.2.g UNHCR87	
§4.2.f UN High Commissioner for Refugees (UNHCR): R2P and POC.....62	§5.2.h Humanitarian agencies87	
§4.2.g Office of the High Commissioner for Human Rights (OHCHR): R2P and POC63	§5.3 Regional and sub-regional88	
§4.2.h Office of the UN Secretary-General:64	§5.3.a Regional Organizations: R2P.....89	
§4.2.i Office of the UN Special Advisor on the Prevention of Genocide: R2P.....65	§5.3.b Regional Organizations: POC90	
§4.2.j Office for the Coordination of Humanitarian Affairs (OCHA): POC66	§5.3.c Case study: South-East Asia90	
§4.2.k Humanitarian Agencies67	§5.4 National91	
§4.3 Regional Organizations.....68	§5.4.a Local communities91	
§4.4 Commentary: Regional Organizations.....68	§5.4.b Civil society.....91	
§4.5 National Institutions.....74	§5.4.c Executive and Parliament92	
§4.6 Commentary: National Institutions.....74	§5.4.d Military and Police93	
§4.6.a Parliaments and Executives74	§5.4.e Human rights commissions: R2P.....93	
§4.6.b National Armed Forces.....77		
§4.6.c Civil Society: R2P and POC78		
§4.6.d Local communities79		
§4.7 Conclusion79		

Citation: Hugh Breakey, Angus Francis, Vesselin Popovski, Charles Sampford, Michael G. Smith, and Ramesh Thakur *Enhancing Protection Capacity: A Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts* (Institute for Ethics, Governance and Law, 2012).

FOREWORD BY GARETH EVANS

The tragedies in Rwanda in 1994 and Srebrenica in 1995, and the ineffective international responses to halting them, resulted in two major new international initiatives aimed at improving the protection of civilian populations.

On the one hand, the Responsibility to Protect (R2P) dealt squarely with the political controversies surrounding intervention and sovereignty. Based on the 2001 work of the International Commission on Intervention and State Sovereignty, and authoritatively affirmed in 2005 by the General Assembly and in 2006 by the UN Security Council, R2P asserted the primary responsibility of states to protect their own populations from mass atrocity crimes, the responsibility of the international community to help willing states develop the capacities to protect their populations, and – ultimately – the responsibility of the international community, under the direction of the Security Council, to respond decisively to situations where states were manifestly failing to protect their populations.

On the other hand, the atrocities of the 1990s also stimulated the rapid development – after the Secretary General's first report on the subject in 1999 – of a much older protection regime: the Protection of Civilians in Armed Conflict (POC). In international law, POC was already well-established, most fundamentally through the guarantees provided to civilians caught in armed conflict by International Humanitarian Law (IHL), especially the 1949 Geneva Conventions and the 1977 Additional Protocols. As an instrument of policy, POC had been present in peacekeeping

since the United Nations first deployed peacekeepers – though POC objectives were only rarely made explicit in that context. After Rwanda and Srebrenica – where UN peacekeepers had been on the ground – mandates for peacekeeping operations began to include express POC directives, and increasingly prioritised them. And other actors took on more proactive POC roles. Responding to the “well-fed dead” of Bosnia, humanitarian agencies focused attention on protection issues, while the UN Security Council after 1999 made it clear that flagrant violations of IHL could constitute a threat to international peace and security, and so warrant Council action.

The relationship between these two protection regimes has been seen by many as confusing, and there are complexities and sensitivities involved in understanding in principle, and working out in practice, their related but distinct functions. That there is a close relationship between the two concepts is undeniable. They are both concerned with the protection of civilians, have common normative foundations and have regularly been invoked together. For example, most of the specific affirmations of R2P by the Security Council have been in the context of thematic POC resolutions, and the Council's Resolution 1973 (2011) mandating the use of force in Libya, makes very clear in the preamble its reliance on both R2P and POC norms. Where mass atrocity crimes – defined for R2P purposes as “genocide, war crimes, ethnic cleansing and crimes against humanity” – are occurring in the course of an internal armed conflict situation, the overlap is effectively complete.

On the other hand, there are clear differences in their scope. POC is broader than R2P, to the extent that the rights and needs of those caught up in armed conflict go well beyond their protection

from the particular mass atrocity crimes on which R2P is specifically focused. But it is also narrower, to the extent that POC is only concerned with armed conflict situations, whereas R2P is concerned with preventing and halting mass atrocity crimes regardless of whether they occur in a war environment (as was the case, for example, with the atrocities committed in Cambodia in the mid-1970s, Rwanda in 1994, Kenya in 2008 and Libya at least at the time of the first Security Council Resolution 1970 in February 2011).

The potential for overlap between the two concepts does generate some sensitivities. Although POC does not itself eschew military force – it has been invoked regularly over the last decade to justify giving strong Chapter VII coercive mandates to peacekeeping forces, essentially to enable them to deal with violent threats to civilians that may arise – and although R2P only envisages the use of coercive military force as a last resort, in extreme and exceptional circumstances, when it is clear that lesser measures will not halt or avert the harm in question, peacekeepers and humanitarians are often uneasy about the spectre of broader R2P “interventions” being seen to hover over situations where they are trying to gain the cooperation of states to improve the protection of civilians within their borders.

So, understanding the relationship between POC and R2P is important. In the field and in New York and Geneva, the protection of civilian populations can be undermined by a lack of knowledge about, and the institutionalization and operationalization of, the cross-cutting inter-relationships between R2P and POC. Civilian populations can fall through gaps in protection, while R2P and POC actors can impair – or at least fail to complement – each other’s work through a discrete pursuit of their own objectives. With

these complexities and sensitivities in mind, this Policy Guide provides welcome clarity on the normative, institutional and operational inter-relationships between R2P and POC.

The Guide draws many important distinctions, illustrating that, while there is a fundamental core concern that links together POC actors, different instruments and institutions can nevertheless display quite distinct perspectives on POC itself, even before R2P comes into the picture. It distinguishes, for example, between “Narrow POC”, covering the legally binding civilian protection instruments of IHL, and “Broad POC”, applying to the policies and practices of actors and institutions that take POC as an action to be performed or an objective to secure.

The Guide helpfully develops a “five-mode” protection framework, comprising prohibitions on harm, direct protection, dedicated protection activities, mainstreaming protection and restorative protection. It utilizes this framework to map out clearly the basic nature of different POC perspectives and the ambit of different R2P actors, and to draw attention to often under-recognized modes of protection, such as the “bottom-up” ground level self-protective efforts undertaken by communities themselves.

The Guide challenges, interestingly, several widely held assumptions about the relationship between R2P and POC. For example, while it is often declared that R2P is not a concern of peacekeepers, the Guide argues that peacekeepers can and should adopt an atrocity-prevention lens informing their protective stance, albeit with the firm proviso that they cannot be enlisted in any non-consensual (“Third Pillar R2P”) coercive action against states. So too, while it is widely held that POC is strictly limited to situations of armed conflict, the Guide shows that in the hands of peacekeepers, humanitarians

and the Security Council, POC can extend to situations of civil strife. In some detail, the Guide distinguishes such “internal disturbances and tensions” from armed conflict on the one hand, and from state repression on the other.

The arrival of this Policy Guide could not be more timely, with the international community still struggling with the lessons learned from the intervention in Libya, and at the same time confronting the even more challenging situation of civilian protection in Syria. While there is now much more conceptual clarity and commitment in principle now than a decade ago about the international community’s responsibility to act when civilians face the horror of war or atrocity crimes, it unhappily remains the case that translating principles into effective consensual action will be work in progress for a long time yet. But this Guide will be a real help in hastening that process.

Melbourne, September 2012

Gareth Evans co-chaired the International Commission on Intervention and State Sovereignty (2001), co-chairs the International Advisory Board of the Global Centre for the Responsibility to Protect, and is the author of *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, 2009).

Acronyms

AU: African Union

C34 Committee:
The UN General Assembly's
Special Committee on
Peacekeeping

DFS: UN Department of Field
Support

DPKO: UN Department of
Peacekeeping Operations

DRC: Democratic Republic of the
Congo

ECOWAS:
Economic Community of
West African States

GA: United Nations General
Assembly

ICC: International Criminal Court

ICISS: International Commission
on Intervention and State
Sovereignty

ICRC: International Committee of
the Red Cross

IDPs: Internally Displaced Persons

IHL: International Humanitarian
Law

IHRL: International Human Rights
Law

NATO: North Atlantic Treaty
Organization

OCHA: Office for the Coordination
of Humanitarian Affairs

OSAPG:
UN Office of the Special
Advisor for the Prevention
of Genocide ('Joint Office')

POC: Protection of Civilians

PKOs: Peacekeeping Operations

R2P: Responsibility to Protect

UDHR: Universal Declaration of
Human Rights

UN: United Nations

UNHCR:
United Nations High
Commissioner for Refugees

UNSC: United Nations Security
Council

WSOD: World Summit Outcome
Document (A/RES/60/1)

POLICY GUIDE EXECUTIVE SUMMARY

PURPOSE AND OBJECTIVES

This Policy Guide seeks to enhance the ability of policy makers and practitioners – in governments, regional and international organizations, and civil society – in strengthening their efforts to protect civilians from conflict-related grave harm and mass atrocity crimes.

The Guide clarifies and compares the twin principles of the Responsibility to Protect (R2P) and the Protection of Civilians (POC) in their normative, institutional and operational dimensions, distinguishes the principles' different actors and methods, and specifies the situations when the two principles converge for specific actors and organizations.

With full acknowledgement of the controversies, diversities of position and ongoing developments within these issues, the objectives of this Policy Guide are to:

- » **Inform** relevant protection actors about the normative, institutional and operational scope of R2P and POC;
- » **Clarify** the relationship between R2P and POC, including their points of intersection and divergence (with a specific focus on the needs of policy makers and practitioners); and
- » **Provide** practical guidance regarding when, how and by whom R2P and POC might be implemented.

OVERVIEW

Civilian populations face unprecedented threats in modern conflicts. No longer at risk merely of being caught in the crossfire, civilians have been placed in the crosshairs of combatants. Murder, assault, terror, displacement and rape are now the settled strategies of many contemporary armed actors.

Two distinct international protection principles aim to protect vulnerable peoples from mass violence: the *Responsibility to Protect* (R2P) and the *Protection of Civilians* (POC) in *Armed Conflict*. **Yet in a theatre where a lack of coordination and shared understanding can cost lives, there remains much confusion and controversy regarding the normative, institutional and operational links between these two principles.** This Summary Document clarifies the nature of the principles, their similarities and differences, and the common myths and misperceptions surrounding them.

POC

Born out of the horrors of international wars in the 19th and 20th Centuries, the traditional idea of POC (*Narrow POC*) is the principle that non-combatants should – so far as possible – be spared the harms of war. *Narrow POC* – part of the humanitarian constraints on the means and methods of war – is found in *International Humanitarian Law* (IHL), especially the Geneva Conventions of 1949 and the Additional Protocols of 1977, and the customary international law of armed conflicts. *Narrow POC*'s immediate roots stretch further back to the work of Henry Dunant and the *International Committee of the Red Cross* (ICRC) in the 1860s, but countless cultures across the globe have developed norms protecting unarmed civilians from armed soldiers. In the first instance, then, POC is a canon of international law determining that combatants in armed conflicts must distinguish between enemy combatants and civilians, and must not target or disproportionately harm the latter.

SECRETARY-GENERAL KOFI ANNAN, 2000:

“To the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”

As well as its presence in IHL, POC is an activity and objective positively pursued by a variety of institutional actors in accordance with wider understandings of POC (*Broad POC*) drawing on different aspects of international human rights law, international criminal law, international refugee law and Security Council Resolutions as well as IHL. For example, when authorized by the UN Security Council, peacekeepers contribute to the protection of civilians affected by conflict and violence. In so doing, the peacekeepers work alongside other UN agencies and NGOs that seek to protect civilians in accordance with their own mandates and policies. Consistent with their distinct capacities, resources, constraints, mandates and legal authority, each of these actors has developed its own distinct POC role. Yet despite their differences all POC actors aim to contribute to the protection of communities caught in armed conflict and other situations of violence.

R2P

Whereas POC has a broad protection focus, R2P addresses four specific atrocities: genocide, war crimes, ethnic cleansing, and crimes against humanity.

Throughout the 1990s the world was faced with an array of humanitarian crises, culminating in the atrocities in Rwanda, Bosnia-Herzegovina and Kosovo. In Rwanda and Bosnia-Herzegovina, the United Nations failed to act decisively, and the genocides in those two countries proceeded without effective intervention. In Kosovo, and in the face of on-going UN Security Council paralysis, NATO intervened militarily to prevent ethnic cleansing – arguably in breach of international law and the sovereignty of Serbia. The need for a principled, legal and effective response to atrocities was manifest, and the Responsibility to Protect (R2P) developed to fill this need.

R2P is the principle that, while States bear the primary responsibility for protecting their populations from atrocities, the international community bears a backup responsibility for protection. In cases where States are unable to meet their primary responsibility, the international community should assist them in developing the capacities to do so. In cases where States are unwilling to protect their populations – and, indeed, are the very agents of their destruction – the international community should act to ensure their protection from atrocities. Consistent with international law, the UN Security Council is required to authorize any R2P coercive measures taken against the State, including sanctions, embargoes and – in extreme cases – military intervention to protect populations.

The initial idea of R2P originated in the 2001 Report of the *International Commission on Intervention and State Sovereignty*. The principle was authoritatively formulated and adopted by the General Assembly in the World Summit Outcome Document (WSOD) of 2005, and affirmed by the UN Security Council in Resolution 1674 of 2006. Four Secretary-General Reports over the last four years have developed the principle, and the General Assembly issued its first specific R2P resolution in 2009 (A/RES/63/108).

Shared Origins

While R2P was created directly in response to failures in Rwanda and the former Yugoslavia in the 1990s, the shadow of these atrocities also played a major role in framing the contemporary concerns of “Broad POC”. As the 1990s drew to a close, many humanitarian actors began to develop explicit protective strategies in response to the phenomenon of the “well-fed dead” of Bosnia. Equally, the United Nations’ POC agenda emerging at this time was back-dropped by a series of reports analysing the failures of (inter alia) UN organs to halt attacks on civilians in Rwanda and Srebrenica. The significance of these two genocides to the emerging protection of civilians agenda is apparent in two landmark POC documents of this period: the Secretary-General’s first report to the Security Council on the protection of civilians in armed conflict (S/1999/957), and the Report of the Panel on UN Peace Operations (*Brahimi Report* S/2000/809). Well before the inception of R2P, therefore, POC was beginning to confront deliberate and widespread attacks on civilians, as well as more limited violations of IHL.

DISTINGUISHING R2P AND POC: SCOPE

Three situations are material in distinguishing R2P and POC.

1. Narrow POC in Armed Conflict Proper (IHL)

Narrow POC applies only to “armed conflict” as IHL defines that term. This requires:

- » International forces (including United Nations forces) being involved in fighting; or,
- » Any occupation of territory by an international force; or,
- » Fighting between two armed groups, each holding territory and having a recognisable military structure.

IHL can continue to apply to a situation if it has previously qualified as armed conflict, even if later it does not reach this threshold.

2. Broad POC in Situations of Mass Violence

In the context of civilian protection, “armed conflict” can also refer to a broader context of grave, mass, lawless violence, even if these do not strictly meet the requirements for the application of IHL. These “situations of mass violence,” which include “internal disturbances,” go beyond the usual lawful state use of force to preserve order in three respects:

- I. **Grave violence:** Violations of the minimum and non-derogable guarantees of IHL and IHRL, involving direct violence causing death, injury or loss of basic dignity (such as in cases of rape).
- II. **Widespread:** Large number of interconnected violent acts, spread over distance or protracted over time.
- III. **Lawlessness:** Violence occurs outside the operation of local domestic law, and may even be denied by those perpetrating it.

These situations of mass violence can include internal disturbances and (extreme cases of) internal tensions.

Internal disturbances are serious confrontations involving extra-legal violence, usually in the context of state response to disruptions of internal order.

Internal tensions occur when States use violence preventively to protect internal order, such as through enforced disappearances and mass arrests without judicial guarantees.

Low levels of internal disturbances and (especially) internal tensions are unlikely to involve protection actors. Even so, humanitarians and peacekeepers can find themselves in situations outside of armed conflict proper where internal tensions and disturbances are substantial enough to constitute a widespread and persisting danger to civilians. Such violence can also precipitate armed conflict proper. So too, the attention of the UNSC and other UN organs can be seized by such situations. In both armed conflict and other situations of mass violence these protection actors may seek to implement POC policies and procedures.

In sum, *Broad POC* applies to armed conflict broadly construed, include traditional armed conflict as well as situations of mass violence.

3. Atrocity Crimes

R2P applies to atrocity crimes, namely, genocide, war crimes, ethnic cleansing and crimes against humanity. While all four crimes constitute massive violations of IHRL and/or IHL, the first three have their own strict legal definitions, provided in the 1948 *Genocide Convention* and in the 1998 Rome Statute of the *International Criminal Court*. The last, ethnic cleansing, is a subset of crimes against humanity.

- I. **Genocide:** the deliberate attempt to destroy in whole or in part a national, ethnic, racial or religious group, especially by systematic violence.
- II. **Crimes against Humanity:** the deliberately systematic policy of attacking civilian populations through methods such as mass murder, enslavement, torture, rape and enforced disappearances.
- III. **War Crimes:** Grave breaches of the laws and customs of armed conflict (in particular, serious violations of Com. Art. 3 of the Geneva Conventions).
- IV. **Ethnic Cleansing:** a subset of Crimes against Humanity, ethnic cleansing involves systematic attacks on sect-defined groups of civilians by persecution, deportation and forced displacement.

To count as atrocity crimes, all these must meet a ‘substantiality test’,¹ requiring that there must be huge numbers of civilians at risk of imminent, systematic and intentional violence. Genocide, ethnic cleansing and crimes against humanity can all occur outside armed conflict, in other situations of violence.

1 David Scheffer, “Atrocity Crimes: Framing the Responsibility to Protect,” in R. H. Cooper and J. V. Kohler (eds.), *Responsibility to Protect: The Global Moral Compact for the 21st Century* (New York: Palgrave MacMillan, 2009), 77-98, pp. 86-92.

SUMMARY OF SCOPE

Broad POC has the widest scope, applying to all situations of mass violence; it therefore includes both armed conflict and atrocity crimes.

Narrow POC has a tighter focus; IHL applies only to situations of armed conflict.

R2P Atrocity Crimes have the smallest scope, applying only to the comparatively rare case of atrocities. These usually occur in armed conflicts, but can occur in peacetime.

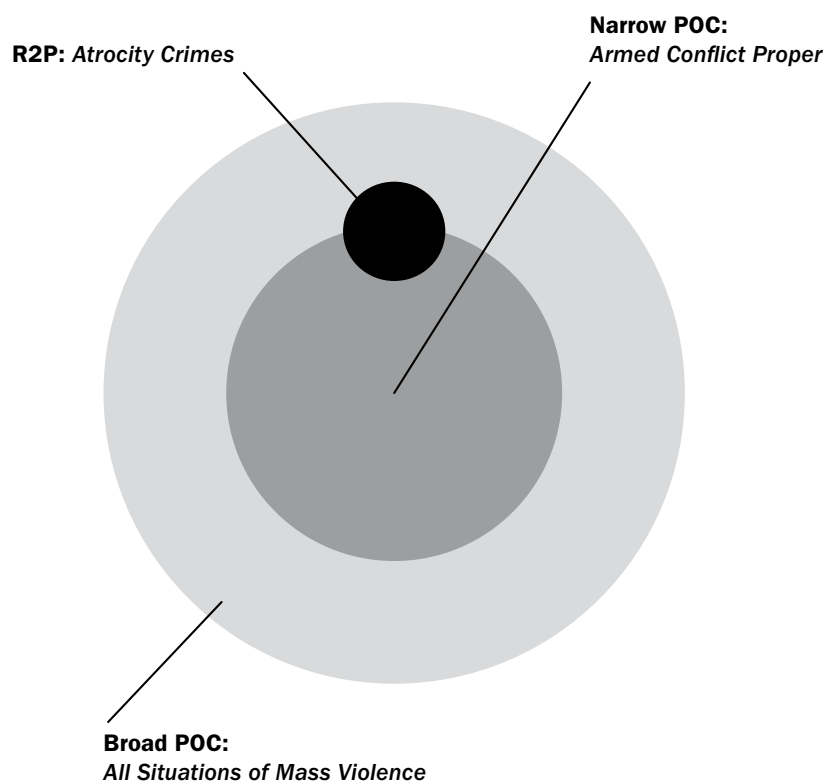


Figure 1: Scope of protection principles

POC applies to crimes against civilians: R2P applies to crimes against populations.

While there remain ambiguities in certain (non-international) contexts regarding the legal definition of “civilians”, broadly speaking a civilian is a person who is not a member of State armed forces or organized armed groups of a party to the conflict, and who is not taking a direct part in hostilities. “Populations”, on the other hand, refers to the total number of people in a nation, region or other larger grouping, irrespective of their involvement in hostilities. Three points follow:

1. POC’s concern for civilians includes isolated and small-scale attacks against individuals. R2P’s focus on populations, on the other hand, requires assaults, (a) of a much larger-scale, and (b) with the specific intention to persecute or destroy the group as such.
2. Especially in the context of IHL and Narrow POC, the distinction implies that POC occurs primarily in situations where the civilian-combatant distinction is material. Since R2P crimes explicitly can occur in times of peace, the term “populations” is more apt in this regard.
3. Without the limitation to apply only to unarmed civilians, R2P crimes can include certain types of attacks against combatants, if such attacks are part of a larger assault against a group. A genocidal regime might modify its treatment of enemy combatants (such as with declarations of “no quarter”) as one part of its overall purpose of destroying the enemy population. In such a case, egregious violations of duties to enemy combatants may comprise part of an R2P atrocity crime.

FIVE MODES OF PROTECTION

There are five distinct modes through which civilians' lives and dignity can be protected. In different ways, both R2P and POC draw on each of these modes.

The five modes illustrate the ways protection can be understood as a *constraint* (Mode I), as an *action* (Mode II), or as a larger *objective* (Modes III, IV and V). In different ways, both R2P and POC draw on each of these modes. The following two sections use the five modes to describe the roles of different POC actors and the different tasks called for by the R2P's Three Pillars. Pursuant to their capacities, roles and the legal authority they operate under, different types of actors are able to use some modes but not others. Similarly, specific situations will require some modes of protection and not others. For example, in some contexts the use of force for direct protection (Mode II) may do no more than further militarize or inflame a conflict. In such cases protective efforts may have to focus on more indirect protection (Modes III and IV), or even be limited to remedying the situation of those who have already been harmed (Mode IV).

These five modes may be set out graphically illustrating the proximity of each mode to the harms it seeks to prevent.

Note that each mode is not isolated from the others (as the successful use of one mode can contribute to the others) and that the ordering of the modes presented is not a sequence or a prioritization. For example, Direct Protection (Mode II) may often only be considered after the indirect protection activities of Mode III have been attempted.

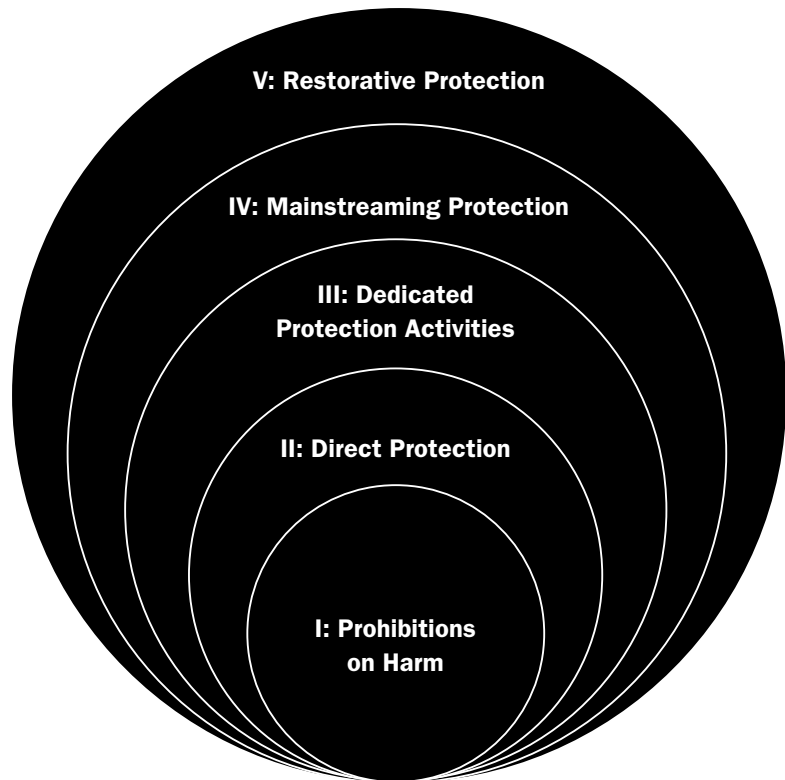


Figure 2: Five Modes of Protection

Mode I: Prohibitions on harm

Mode One prohibits actions that harm or risk harm to the lives, bodies or dignity of civilians, and the incitements to such acts. It can include laws prohibiting murder, rape, pillage, the use of certain weapons, the targeting of civilians and civilian objects, and enlisting children as combatants.

Mode II: Direct protection

This second mode involves the actor directly protecting civilians from third parties attempting to harm them. The activity is performed in order to protect the civilians and it aims to accomplish their protection directly (that is, without relying on other actors undertaking further complementary actions). Protecting civilians may include the use of a security presence, patrolling, escorts or the interposition of forces, and ultimately the threat or use of robust force against perpetrators.

Mode III: Dedicated Protection Activities

In this third mode, actors undertake specific activities to achieve protection objectives. These activities contribute to a better protection environment where threats to civilians are diminished. Dedicated protection activities may include early warning and assessment, monitoring and reporting, advocacy, moving or hiding vulnerable civilians, the strategic use of unarmed presence and information dissemination (for instance through radio broadcasts).

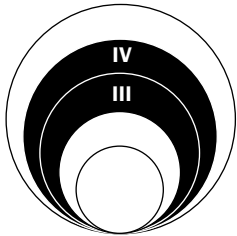
Mode IV: Mainstreaming Protection

The fourth mode does not require protection actors to perform entirely new actions (as Modes II and III do). Instead, mainstreaming protection requires that protection actors alter the manner in which they perform, prioritize or resource their other activities in such a way as to improve – and never to impair – the larger protective environment. Such protection measures are important in peacebuilding programs to promote local capacity and enhance prospects for sustainable peace. The single most important element of Mode IV is to *do no harm* – to make sure that the way the operation or agency pursues its other goals does not have downstream consequences exacerbating civilian vulnerability. Useful mainstreaming protection activities can include the sighting and lighting of latrines and wells so as to reduce everyday civilian vulnerability, and facilitating political solutions and ceasefires in such a way as to ensure protective outcomes.

Mode V: Restorative Protection

Mode V comprises actions which remedy the situation of those persons who have previously been harmed (either civilians or combatants whose injuries have placed them *hors de combat*). Restorative protection can itself be divided into different modes of action, as it can include (for instance) *legal prohibitions* on attacking those helping the injured, *dedicated protection activities* to return displaced persons to their homes, and *mainstreaming protection* by including peace and reconciliation commissions in plans for long-term peace arrangements.

POC PERSPECTIVES AND COMPLEMENTARITY



Cross-cutting Approaches to Protection

“Complementarity” means that one institution’s protection work respects and facilitates (and does not unnecessarily duplicate) the protection activities of other actors. Complementarity usually has implications for more than one mode of protection. For example, complementarity can require an actor accepting (Mode I) prohibitions on harming or risking harm to protection actors (like humanitarians), or (Mode II) the need to positively protect other protection actors, or (Mode III) designing dedicated protection activities that, in concert with the work of others, will contribute to a larger protective environment, or (Mode IV) altering the way other non-protective activities are performed to ensure they do not undermine the protection contributions of others.

Two key types of complementarity are community-based and authority-based protection. *Community-based (bottom-up) protection* involves respecting, empowering and facilitating local attempts at self-protection, while *Authority-based (top-down) protection* does the same for the recognized legal authorities (usually State figures). Mode III includes dedicated activities such as soliciting input from local communities on their perceived safety risks, and exhorting State authorities to shoulder their protection responsibilities. The key contribution of Mode IV to community- and authority-based protection is that interveners should avoid superseding, or impeding the development of, indigenous protection efforts and institutions.

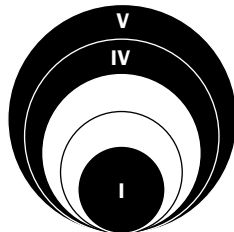
FOUR POC PERSPECTIVES

All POC actors share the fundamental objective of limiting harm to civilians in armed conflicts and other situations of violence.

While they differ in the modes of activity they use to protect civilians, POC actors share a common goal, namely, the protection of civilians' lives, security, dignity and basic human rights. The key threats to civilians, and the basic rights to security and dignity such threats transgress, are described in IHL (and in the core, non-derogable articles of International Human Rights Law). This common objective ensures that different POC actors are in principle capable of coordinated activity. *Common Article Three* of the Geneva Conventions (see below text-box) sets out the minimum legal standards of treatment required in any armed conflict.

Notwithstanding this shared concern for civilian protection, different protection actors operate under distinct constraints – they have different means, resources and liberties to act in a given situation. For some, one mode of protection will be crucial to protection; others may have no possibility of using that mode at all. For this reason, many protection actors have developed specific perspectives on POC commensurate with their sphere of activity.

This section describes four POC perspectives to help illustrate these distinct roles and complementary approaches—acknowledging that variation can occur within these perspectives depending on the institution in question, and also that different specific contexts call for further specification and prioritization within a given perspective.



Combat-related POC (Narrow POC)

IHL (especially the Geneva Conventions and Additional Protocols) is directed to States and parties to a conflict. It includes:

- I. **Prohibitions on Harm:** prohibiting direct targeting of civilians and disproportionate harms to them (see Com. Art. 3 text-box).
- IV. **Mainstreaming Protection:** by distinguishing themselves from civilians, and placing military objects apart from civilian objects and populations, combatants contribute materially to a larger environment where enemy combatants can pursue war objectives without necessarily targeting civilians.
- V. **Restorative Protection:** Combatants have specific duties to aid the injured, and wide duties not to target or harm those whose role it is – such as medical personnel and the Red Cross, who are specifically earmarked in IHL – to aid those in need.

FUNDAMENTAL LIMITING PRINCIPLES OF NARROW POC

IHL is applicable only in armed conflicts, leaving a domain between war and peace ("other situations of violence") that is not covered by the full application of either IHL or International Human Rights Law.

CURRENT OPERATIONAL CHALLENGES FOR NARROW POC

The major challenge for *Narrow POC*, reflective of the environment of armed conflict within which it operates – and the corollary breakdown of traditional mechanisms of law enforcement – is combatting impunity: including the lack of courts with jurisdiction to try alleged crimes, and of police to arrest those charged.

Key IHL Instrument: Common Article 3 of the 1949 Geneva Conventions

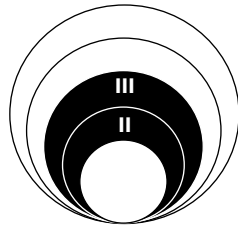
[...] Each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth [...]

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- » violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- » taking of hostages;
- » outrages upon personal dignity, in particular humiliating and degrading treatment;
- » the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

- (2) The wounded and sick shall be collected and cared for ...



Security Council POC

This is the POC perspective taken by the UNSC, and in Secretary-General Reports on POC to the Council.

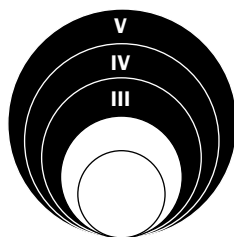
- II. **Direct protection:** The UNSC can authorize peacekeeping operations to protect civilians; in extreme situations it can authorize military action (as it did in Libya in 2011).
- III. **Dedicated Protection Activities:** The UNSC can create international pressure for State and non-State actors to obey IHL, including through sanctions and arms embargoes. It can play a role in encouraging dialogue and peacefully resolving armed conflicts. In the 1990s the UNSC created ad hoc international courts for Rwanda and the former Yugoslavia; since the coming into force of the Rome Statute in 2002 it has used its powers to refer situations to the ICC. The UNSC also gives PKOs peacebuilding mandates to help States develop protective institutions and capacities.

Fundamental Limiting Principles of Security Council POC

The Council's mandate, as provided for in the UN Charter, is to maintain international peace and security. While responding to large-scale threats to civilians can be a crucial means to this end, the Council must ensure that it does not inflame a situation or widen a conflict-zone. Additionally, due to the structure of UNSC decision-making, the possibility of veto by one of the Permanent Five Council members is a significant constraining factor on Security Council POC.

Current operational challenges for Security Council POC

Major challenges for Security Council POC action involve: (a) The political nature of the UNSC, where Council members often base their decision-making on concerns of narrow state interest, infecting both the motivations of those proposing, and those vetoing, responses to situations where civilians are imperilled; and, (b) The need for shared understanding of the meaning of UNSC Resolutions relating to POC, whether in a peacekeeping context like Cote d'Ivoire or a military action like Libya, so as to ensure that all Members can have confidence in knowing the basic parameters of any military action they are authorizing (a central feature of Brazil's *Concept Note: Responsibility While Protecting: Elements for the Development and Promotion of a Concept*, A/66/551; S/2011/701).



Humanitarian POC

Humanitarian POC is the perspective on protection taken by humanitarian actors – including mandated organizations like the ICRC, UN agencies, and non-mandated agencies like Amnesty International and Oxfam. *Humanitarian POC* is one of the most flexible POC perspectives, reflective in particular of the different types of constraints regarding neutrality and impartiality the specific organization upholds.

III. **Dedicated Protection Activities:**

includes advocacy and persuasion, visitation, humanitarian diplomacy, mobilizing third party pressure on violators, condemnation and denunciation, the use of unarmed presence, and of hiding, moving or sheltering civilians.

IV. **Mainstreaming Protection:** includes ensuring actions do not increase long term civilian vulnerability (e.g., by paying armed groups for ‘protection’), and positively contributing to a protective environment by strategically distributing aid and designing camps so as to reduce everyday civilian vulnerabilities.

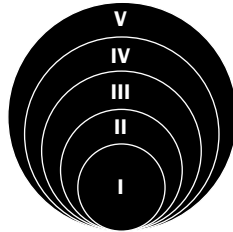
V. **Restorative Protection:** includes providing information to refugees and Internally Displaced Persons (IDPs) about conditions for safe return, providing humanitarian aid to the dispossessed, refugees and IDPs, and giving medical care and support to the injured or sick.

Fundamental Limiting Principles of Humanitarian POC

All actions undertaken by humanitarian actors: (a) require the consent of all parties to the conflict; (b) must be nonviolent; (c) must avoid superseding State protection activities; and, (d) must remain neutral and impartial (though different humanitarian agencies interpret the requirements of neutrality and impartiality differently).

Current operational challenges for Humanitarian POC

Operational challenges involve present limitations on knowledge (and knowledge sharing) regarding the best strategies for nonviolent civilian protection, the best approaches to the use of controversial measures like condemnation and calls for international action, and for coordination and complementarity among agencies who have (and should retain) a diversity of POC objectives and capacities.



Peacekeeping POC

Peacekeeping POC is the concept of protection guiding peacekeeping operations (PKOs) with protection mandates. Its primary source is not IHL, but the specific mandate for that PKO, issued by the UNSC or other (e.g. regional) executive body.

- I. **Prohibitions on harm:** PKOs are expected to fully uphold the spirit and rules of IHL's protection of civilians provisions.
- II. **Direct protection:** While PKOs must pursue every available avenue to contribute to civilian protection, Council mandates can direct PKOs to prioritize protecting-as-an-action. Indeed, PKOs are commonly judged on their ability to use presence, patrolling, inter-position and (ultimately) the robust use of force to protect local civilians under imminent risk of violence.
- III. **Dedicated Protection Tasks:** Includes monitoring and reporting of rights violations, early warning and assessment of risks of civilian harm, and conveying and receiving information on the security of local civilians.

IV. **Mainstreaming Protection:** requires that activities like the facilitation of political processes, humanitarian aid, ceasefires, disarmament, demobilization and reintegration of combatants, and institutional capacity-building all must be pursued in ways that do not expose civilians—especially vulnerable groups like women and children—to danger.

V. **Restorative Protection:** includes aiding the return of refugees and IDPs to their homes and – ideally – their properties.

Fundamental Limiting Principles of Peacekeeping POC

Peacekeepers, a) must have the formal consent of the Host State (usually in a *Status of Forces Agreement*); (b) will be limited by their mandate and area of deployment; (c) must avoid superseding indigenous protection efforts; and (d) will be tempered by the value of maintaining a perception of neutrality and impartiality by all parties to the conflict.

Current operational challenges for Peacekeeping POC

Current challenges involve: i) knowledge management, lessons learned practices and information sharing with respect to POC strategies and policies, including the development of doctrine and guidelines at the national level; ii) the need for increased training of troops and police on POC; and, iii) the abiding issue of resource allocation to PKOs from the international community.

	SITUATION WITH REGARD TO CIVILIAN VIOLENCE	OPERATION'S PRIMARY MANDATE	OPERATION'S POC ACTIVITIES
Incidental POC Mission	Organized violence against civilians is not anticipated.	Monitor ceasefire; facilitate political process; ensure humanitarian aid; etc.	Force only used reactively against isolated actors in urgent situations.
Mixed POC Mission	Substantial violence anticipated as a symptom of the conflict.	Protect civilians alongside other force priorities.	Presence and patrolling key; if necessary the use of force at a tactical level.
Primary POC Mission:	Grave violence anticipated as war strategy or geopolitical goal of parties to the conflict.	Civilian protection is the <i>raison d'être</i> of mission.	Pro-active, system-wide preventive action. Robust force may be necessary at a strategic level.

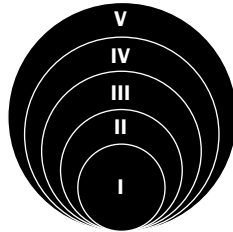
Table 1: Three Types of POC Peacekeeping Operation

THE THREE PILLARS OF R2P

R2P actors utilize the different modes of protection according to their own capacities and constraints. However, rather than protecting against all the major harms to security and dignity that armed conflict and situations of violence present to individuals (as POC aims to do), the shared objective of R2P actors is exclusively to protect populations from *atrocities crimes*.

All protection actors will, just by the nature of their activities and objectives, contribute to atrocity-prevention. The effective protection of civilians from the harms of armed conflicts and other situations of violence will also help protect them from the risk of atrocities. **To be an R2P actor, however, requires having a specific concern for atrocity-prevention, additional to a general concern for POC.**

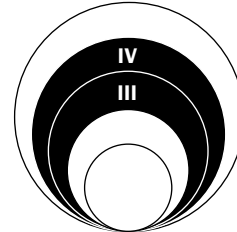
The following summarizes the main protection responsibilities of actors using the Secretary-General's 2009 "Three Pillar" formulation of R2P (A/63/677).



R2P Pillar One

"Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement..." (WSOD, ¶138)

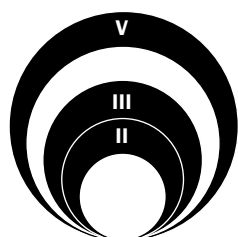
- I. **Prohibitions on atrocity:** the State is prohibited from visiting atrocities upon its own population.
- II. **Direct protection from atrocity:** the State must protect different groups of its population against attacks by each other.
- III. **Dedicated atrocity-protection activities:** Includes building capacities specifically to minimize the risks of atrocity, and to raise awareness when atrocity risks emerge.
- IV. **Mainstreaming Atrocity Protection:** Includes incorporating an atrocity-prevention perspective into key areas of legislation and executive action: for instance, diminishing hate speech and identity-politics, encouraging civil society actors, security sector reform and implementing human right treaties.
- V. **Restorative Protection:** Includes protection for refugees and IDPs, and, where appropriate, the use of reconciliation and "truth and justice" commissions.



R2P Pillar Two

"The international community should, as appropriate, encourage and help States to exercise this responsibility." (WSOD, ¶138)

- III. **Dedicated atrocity-protection activities:** includes neighbouring states, United Nations organs and Regional Organizations – always with the consent of the State in question – contributing to *Primary POC PKOs* that have atrocity-prevention mandates, playing a role in early warning and assessment, and helping mediate between armed groups and factions.
- IV. **Mainstreaming Protection-from-Atrocity:** includes efforts at structural prevention implicating other policy areas, such as curbing small-arms trade and the trade of conflict resources. An atrocity-lens can also be important in human rights, anti-discrimination and power-sharing arrangements, laws and machinery.



R2P Pillar Three

“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations... In this context, we are prepared to take collective action, in a timely and decisive manner... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” (WSOD, ¶139)

II. **Direct protection from atrocity:**

Robust measures, including military interventions to protect populations from atrocity crimes, may be required to directly protect civilians. R2P places exclusive authority – and the correlating responsibility – for deciding on such matters on the UN Security Council.

III. **Dedicated atrocity-protection activities:**

Through playing a role in creating international pressure and univocal condemnation of atrocity situations, and in contributing to UN authorized arms-embargoes and targeted sanctions, the international community creates an environment where States are pressured to assume their protection responsibilities.

V. **Restorative Protection:** includes the responsibility to rebuild nations and indigenous institutions where interventions have occurred.

R2P Pillar Three and “Humanitarian Intervention”

R2P differs in several key ways from the prior notion of a “right of humanitarian intervention”:

- » In focusing on the obligations of the international community, rather than their rights, it makes central the needs of the vulnerable.
- » Even in its Third Pillar, R2P includes non-military strategies aiming to protect civilians.
- » R2P is strictly limited to responding to the four atrocity crimes. It does not justify intervention to free populations from repression, or to promote democracy or human rights.
- » According with international law, R2P places exclusive responsibility for authorizing military action on the UNSC. It does not legitimize unilateral intervention.

The Legal Status of R2P’s Three Pillars

R2P Pillar One is strict international law:

A State’s performing or failing to attempt to prevent atrocity crimes on its own citizens constitutes a direct violation of a wide array of international legal instruments, including IHL, IHRL, the Genocide Convention and the Rome Statute. Violations of Pillar One will also, in almost all cases, be a direct violation of domestic law.

R2P Pillar Two has key elements in law:

Both the letter and the spirit of different parts of international law have implications for some (but not all) Pillar Two international duties of atrocity prevention – especially as regards the use of influence over perpetrators and the protective actions of peacekeepers. Relevant instruments include Geneva Convention IV and the two Additional Protocols, the Genocide Convention and IHRL (including the human rights provisions in the UN Charter).

R2P Pillar Three is a Political Obligation:

some international legal instruments imply international action should occur through UN processes in response to atrocities, such as the Genocide Convention and (arguably) Com. Art. 1 of the Geneva Conventions. However these instruments do not amount to a determination of legal duties.

Main R2P Actors

Main R2P actors include:

- » **States**, negatively, must not perform or foment risks of atrocities, locally or globally; and, positively, must protect their population from third parties. This includes – perhaps with help from the international community – building capacities that protect the population from risk of atrocity, such as by cultivating civil society, an independent judiciary, security sector reform and by implementing and institutionalizing international human rights treaties.
- » **The International Community** plays a role in helping willing States to build capacities to protect populations, in contributing to international peacekeeping, and in supporting and enforcing Security Council decisions.
- » **The UN Security Council** must, when States are manifestly failing to protect their population, and should peaceful means be inadequate, consider the use of coercive measures such as embargoes, targeted sanctions, travel bans and ultimately – should all other measures be exhausted – the authorization of military force for protective purposes.
- » **Regional Organizations** play a role in developing conflict resolution and intra-regional mediation capacities, human-rights measures, early-warning capacities, contingency planning, in sharing lessons-learned and best practices for atrocity-prevention, in contributing to regional peacekeeping operations and preventive deployments, and in mediating with and advising the global community when risks of atrocity emerge.
- » **The Secretary-General and UN Secretariat:** The Office of the Special Advisor on the Prevention of Genocide (OSAPG) acts as an early warning and awareness-raising mechanism on potential atrocities, with the Special Advisor advising the Secretary-General, and through him the Security Council. Many other offices and departments that make up the Secretariat have a broad range of roles that contribute to implementing R2P.

- » **The International Criminal Court (ICC)** prosecutes (where jurisdiction permits) those who perpetrate atrocity crimes of genocide, crimes against humanity and war crimes, as defined in the *Rome Statute* of the ICC. In so doing it reduces impunity, and contributes in the long-term to the structural prevention of atrocities.
- » **Peacekeepers** (including the UN DPKO and DFS), act with host-state consent to develop and implement system-wide strategies to protect populations from atrocity crimes, including by preventive deployments, monitoring and reporting, and capacity-building.
- » **Civil Society** plays a key role in general advocacy for R2P, in acting as an early warning device for situations at risk of atrocities, in the implementation of preventive measures, and in mobilizing popular support for R2P responses in particular cases.

R2P's Non-Western Roots

Though sometimes characterized as a primarily Western principle, the formation and development of R2P has deep non-Western, especially African, roots. R2P's core idea of 'sovereignty as responsibility' was developed in the context of IDPs in Africa by Francis Deng. African regional organizations were at the vanguard of international protection efforts against atrocities, with the African Union's Article 4(h) of 2000 providing for the right of the Union to intervene in a Member State in cases of "war crimes, genocide and crimes against humanity". The ICISS members who formulated the initial idea of R2P included Cyril Ramaphosa from South Africa, Fidel V. Ramos from the Philippines, Eduardo Stein Barillas from Guatemala, Ramesh Thakur from India, Vladimir Lukin from Russia, and Co-Chair Mohamed Sahnoun from Algeria. Finally, Secretary-General Kofi Annan was a decisive force in R2P's affirmation at the World Summit in 2005.

Convergence and Controversy: Libya and "Responsibility while Protecting"

"Responsibility while Protecting"

While the process leading up to the passing of Res. 1973 followed in key respects the lines set down by R2P (and the broad idea of *Security Council POC*), controversy surrounds the implementation of the resolution by NATO forces and the swiftness with which military objectives seemed to steer towards supporting regime change. Some Council Members argued that NATO had overstepped the authority provided by Res. 1973 by using military force against Gaddafi strongholds. In this context the Permanent Representative of India to the Council observed that it was important to separate the doctrine of R2P from its implementation in a specific case. One could be supportive of the former and critical of the latter.

In November 2011 Brazil outlined its concerns and noted potential ways forward in its important Concept Note on *Responsibility while Protecting*, declaring that, "There is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change." On the other hand, it is arguable that the success of the local rebel Libyan forces—at least as a defensive unit—was lynchpin in protecting civilians in population centres like Benghazi, and so to this extent NATO had no choice but to act as air support for the rebel forces.

The way to resolve this impasse is at present unclear; there is a need to appropriately limit the actions and military objectives of intervening forces within basic parameters but without thereby hamstringing their capacity to offer genuine and timely protection to populations at risk. As the Brazilian Ambassador has stated: "The establishment of these procedures should not be perceived as a means to prevent or unduly delay authorization of military action in situations established in the 2005 Outcome Document."²

Resolution 1970 and 1973 Libya 2011 R2P and POC

UNSC Resolutions 1970 and 1973 in 2011 on Libya should be understood as both R2P and POC.

R2P: Resolution 1970 of February 26 considered that attacks in Libya may amount to crimes against humanity, and recalled the Libyan authority's "responsibility to protect its population". It imposed a variety of measures on the regime, including an arms embargo, travel bans, targeted sanctions and a referral of the situation to the ICC. With the perception that these non-military actions were insufficient to protect vulnerable civilians, especially in the besieged population of Benghazi, and that the Libyan authorities had failed to comply with Res. 1970, the Council authorized military intervention into Libya in Res. 1973 of 17 March 2011. The process leading up to this intervention, including the non-military measures and the ongoing United Nations and regional efforts at diplomatic solutions, followed the key lineaments of R2P.

POC: The authorized action, however, was placed by the Council under a POC rubric, and the protection of civilians was the explicit objective of the military action authorized. This determination is arguably consistent with the Council's on-going *Broad POC* agenda, and its earlier declarations that large-scale violations of IHL can amount to threats to international peace and security and so can warrant response under Ch. VII of the UN Charter (S/RES/1265; S/RES/1296).

2 Statement by H. E. Ambassador Antonio de Aguiar Patriota, Informal discussion at the United Nations on the "Responsibility while Protecting", 21 February 2012, <http://www.un.int/brazil/speech/12d-agp-RESPONSIBILITY-WHILE-PROTECTING.html>

Concept Note: Responsibility While Protecting:

Elements for the Development and Promotion of a Concept

... 11. As it exercises its responsibility to protect, the international community must show a great deal of responsibility while protecting. Both concepts should evolve together, based on an agreed set of fundamental principles, parameters and procedures, such as the following: ...

(d) The authorization for the use of force must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict;

(e) The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent; ...

(h) Enhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting; (Brazil, A/66/551; S/2011/701, 11 November 2011).

Mainstreaming R2P and POC throughout multiple institutions and actors

Attempts at protection – direct and indirect, ad hoc and institutional – have been performed by myriad actors and institutions through the last two decades, including the Security Council, combatants, peacekeepers, humanitarians, local communities, States, Regional Organizations, and International Courts and Tribunals. These efforts have demonstrated how difficult it is for national, regional and global actors to provide protection to vulnerable peoples facing determined local armed actors, who perceive they have much to gain from endangering, assaulting or murdering the unarmed.

In detailing the myriad POC and R2P actors and institutions, and the diverse roles and responsibilities they have, this Policy Guide aims to underscore the importance of mainstreaming R2P and POC throughout interlocking institutions. **The protection of civilians and populations from large-scale organized violence cannot occur without a wide range of actors performing their tasks and coordinating their activities with others to ensure they are not undercutting the efficacy of other protection actors.** Operationally, division of labour is necessary, with each institution offering its own specialised expertise and capacities, and with each institution mutually supporting the overall object of enhancing the basic security of vulnerable persons.

R2P and POC both draw on a wide range of institutional frameworks in order to effect protection. Mainstreaming R2P and POC throughout institutions is not merely a matter of imposing direct positive duties on organizations to protect vulnerable persons, but also in ensuring that various institutions play their part in creating an overall environment where they are protected. Coordinating between organizations, and ensuring that one institution is not hampering the protection efforts of others, is as important a task as developing capacities for direct protection.

INSTITUTIONAL AND OPERATIONAL OVERLAP BETWEEN R2P AND POC

As the foregoing discussion suggests, there is substantial overlap between the major R2P and POC actors. Combined with the fact that there are different Pillars of R2P and separate concepts of and perspectives on POC, the result is that there is no easy one-size-fits-all answer to the question of the institutional and operational relationship between the two. Drawing with a broad brush, however, four main inter-relationships can be discerned.

1. **Progression:** For some actors R2P will be the progression of *Broad POC* as situations erupt from conflict and violence into threatening full-blown atrocity. For these actors R2P is *Broad POC* applied to the specific and urgent case of atrocity crimes.

UN Security Council: The Security Council's Broad POC concern progresses into its engagement with R2P, with no sharp distinction at work. This explains why its affirmations of R2P have been in thematic POC resolutions (S/RES/1674; S/RES/1894) and why both R2P and POC language and processes were present in the Council's response to violence against civilians in Libya in 2011 (S/RES/1970; S/RES/1973).

States (Domestic): Domestically, States may feel more comfortable in enacting *Broad POC* measures rather than specifically R2P (Pillar One) measures, because the latter can seem to admit a risk of domestic atrocity crimes. For the most part, however, a State that pro-actively pursues *Broad POC* (the protection of its civilians from widespread, serious, lawless violence) will in so doing also fulfil its R2P Pillar One obligations.

Overlap on various aspects and institutions is not the same as conflation. Even in institutions that deal closely with each – such as the UN Security Council – it is crucial to be aware of the key differences between the two, in particular the narrow scope of R2P.

2. **Distinction (R2P & POC):** For some actors the different institutional, strategic and operational responses required to prevent atrocity crimes may mean they may need to distinguish between their R2P and POC roles.

Peacekeepers: Primary POC PKOs will always require the use of comprehensive *Broad POC* doctrine and strategies, and these will often reduce the likelihood of atrocity crimes. However, in certain cases PKOs may need to utilize a specific atrocity-prevention lens in order to gauge the risks of atrocities and the appropriate strategies to prevent them, as such crimes have different causes and require different responses as compared with less-systematic harms to civilians. To this extent, peacekeepers will distinguish between their R2P and POC tasks.

3. **Differentiation (within POC):** Some actors will distinguish between different POC concepts/perspectives:

Combatants: Combatants must distinguish sharply between IHL (*Narrow POC*) and both *Broad POC* and R2P. They will differentiate *Narrow POC*'s irremovable and determinate legal constraints on the methods and means of warfare (keeping in mind that IHL can impose positive protective duties), from the larger objective combatants have to protect particular groups of civilians in specific situations, impelled by *Broad POC* considerations, State policy and military doctrine.

Peacekeepers: Peacekeepers may in some cases need to draw the distinction between *Peacekeeping POC* – where host state consent is a necessary condition – and the POC perspective used by the Security Council, which can controversially use Ch. VII of the UN Charter to adopt measures against States' wills.

4. **Exclusivity:** Other actors will have a central role to play in one arena, but not in the other.

OSAPG: The Office of the Special Advisor on the Prevention of Genocide (OSAPG) is a specialized R2P institution. R2P's comparatively narrow scope, focusing only on the four atrocity crimes, makes the OSAPG's task of atrocity prevention and early warning both more urgent and more tractable. The same can be true for States as members of the international community, who may develop specific modalities to prevent and respond to atrocity crimes in other countries (such as the US Atrocities Prevention Board), that would be inappropriate applied more widely to *Broad POC*.

Humanitarian actors: Humanitarian actors have proven well-placed to promote *Broad POC* in a range of challenging contexts. However, their neutral and consensual status makes them less apt to invoke R2P, and their peaceful measures are of limited application in the face of the determined armed assaults on unarmed populations that characterize R2P's atrocity crimes. For this reason they will usually be POC, rather than R2P actors. (However, some humanitarian organizations may play an important role in R2P early-warning networks, and in mobilizing global attention.)

R2P AND POC: PERCEPTIONS AND REALITIES

I. “R2P has a narrower scope than POC, applying only to the four atrocity crimes.”

AGREE

Applying in law (Narrow POC) to all situations of armed conflict proper, and as a practice (Broad POC) also to other situations of mass violence, POC is broader in scope than R2P. *Broad POC* parallels R2P in this respect—both have a wide arsenal of tools to enable civilian protection.

However, R2P is deep in terms of its preventive dimension: the modes of protection utilized to prevent atrocities. Though the crimes it seeks to prevent are very specific, R2P's preventive duties apply in many contexts.

II. “POC is strictly limited to situations of armed conflict, as defined by IHL.”

DISAGREE

While IHL and *Narrow POC* are (for the greater part) limited in application to contexts that contain two military forces directly engaging one another, the consistent usage of *Broad POC* – in the hands of the UN Security Council, the Secretary-General, peacekeepers and humanitarians – also applies to internal disturbances when they reach a threshold of widespread, grave, lawless violence against civilians.

However, it is arguable that outside armed conflict proper, a term such as ‘protection of civilians in situations of mass violence’ could be developed to mark this change in the field of application. Even so, an ordinary lay understanding of ‘armed conflict’ in the context of civilian protection will include the systematic use of lethal force by military forces against civilians, meaning that the present term is still apt.

III. “POC is impartial and neutral, and – unlike R2P – it does not impact on State sovereignty.”

IT DEPENDS

- » *Humanitarian POC* – especially as understood by the ICRC – is indeed fully respecting of impartiality, neutrality and State authority.
- » *Narrow POC* can carry implications for absolutist sovereignty. For example, since Additional Protocol II of 1977 applies to non-international armed conflicts, IHL constrains the way States may confront and punish rebellions inside their own borders.
- » *Peacekeeping POC* always requires the impartial pursuit of the PKO's mandate and respect for international law. Doing so, however, can require acting decisively against perpetrators (in violation of neutrality), especially in *Primary POC* PKOs. As the Brahimi Report in 2000 stated, “Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles.” However, *Peacekeeping POC* always respects State sovereignty by requiring formal consent for its deployment.
- » While respect for sovereignty is a vital element of international peace, in extreme situations *Security Council POC* can impel the (non-neutral) use of coercive measures to protect or help protect civilians from perpetrators.

However, R2P as a whole is potentially more confronting of sovereignty than POC, as the presence of atrocities automatically implies a perpetrator that may need to be challenged. If the perpetrator that must be confronted is a State itself, then the Pillar III use of force to protect populations may well carry implications for regime change—a geopolitical outcome that some parties may desire for reasons that have little to do with the protection of populations. For these reasons R2P in general will usually be more politicized and controversial than POC.

IV. “POC is a legal concept; R2P is a political concept.”

DISAGREE

The above dichotomy was asserted by the Secretary-General in his 2012 POC Report (S/2012/376). However, it is hard to align this view with the traditional understanding of R2P as a framework drawing on international law, or with the policies and institutions of *Broad POC*. None of the Secretary-General’s prior POC or R2P reports, or the thematic Security Council Resolutions that followed them, have ever used this language, and in the Secretary-General’s later 2012 R2P Report (S/2012/578) he eschewed such formulations and returned to the traditional understanding of the normative groundings of R2P: “The responsibility to protect is a concept based on fundamental principles of international law as set out, in particular, in international humanitarian, refugee and human rights law.”

Our analysis is aligned to this more traditional position. R2P and *Broad POC* both have elements comprising international law and elements going beyond the law’s strict requirements.

R2P’s affinities with law include:

- » R2P’s Pillar One responsibilities for States to protect—and not to slaughter—their populations are firmly based in law, as the Secretary-General has often emphasized and as is apparent in the language the WSOD used to mark this primary responsibility. The four atrocity crimes have strict legal definitions, provided in the Rome Statute and the Genocide Convention. The WSOD did not redundantly create a “new” *political* obligation for what was already

widely accepted to be a *legal* duty. Rather, the 2005 WSOD R2P principle realigned human protection as a political norm in ICISS’ formulation to existing categories of international legal crimes.

- » Some R2P Pillar Two duties—namely those prohibiting complicity in genocide occurring in other countries—are found in international law, as the *International Court of Justice* has determined in the *Bosnian Genocide Case*.
- » By recourse to the UN Security Council, R2P Pillar Three aims to impel interventions that are consistent with international law (as distinct from Kosovo-style unilateralism).

Furthermore, *Broad POC* has major elements that are not specified by international law, which make confining it to a “legal concept” difficult. For example:

- » The positive duties of peacekeepers to protect and contribute to the protection of civilians are not dictated by international law (indeed, the practice of peacekeeping receives little doctrinal support from the UN Charter itself).
- » The Security Council has great discretion over the coercive measures it may utilize to protect civilians, and the situations it may employ them in, over which there is no legal oversight.
- » Many of the positive and pro-active strategies of humanitarians to improve protection are not determined by law (though IHL does give a legal mandate to the traditional protection activities of the ICRC).

The view here is that R2P and *Broad POC* are developing norms (or principles) with common roots in the longstanding claims by states to protect those who live within their borders, the empathy for the sufferings of others found in most cultures, and the acceptance that individuals as well as states have rights.³ As developing norms R2P and POC can influence both legal and political decisions – providing guides for conduct and reasons for action. As developing norms they gather support, attract critique, and shift in nature as they are applied.

Both because of their different origins and through their ongoing application, these two norms will have different trajectories, in which they may converge, diverge, wax or wane. It is possible that they might finally be distinguished in the dichotomous way suggested in the Secretary-General’s 2012 POC Report. However, it is hard to agree that we have reached this stage or that this is the distinction the international community will ultimately want to adopt.

Nevertheless, *Narrow POC*—IHL—is strict international law, based both on universally signed treaties and customary international law. In this respect *Narrow POC* must be sharply distinguished from both R2P and *Broad POC*.

3 See Charles Sampford, “A Tale of Two Norms,” in C. Sampford, et al. (eds.), *The Laws of Protection: Protection of Civilians and the Responsibility to Protect* (Geneva: United Nations University, 2012).

V. “Ground-level atrocity-prevention (R2P) always requires war-fighting against states (and so cannot be a task for peacekeepers).”

DISAGREE

- » Capacity and credible will to use robust force can often be sufficient insurance against having to fight wars.
- » Atrocities can be committed by non-state forces, and peacekeepers may have the wherewithal to confront these.
- » Even those atrocities precipitated by (elements of) the state are usually not performed by regular military forces, but instead by clandestinely state-supported (or state-unleashed) militia, as was the case with INTERFET in East Timor. Peacekeepers may have the wherewithal to confront these.
- » Atrocities often begin with smaller “trial massacres” to test the waters on international response. Early responses to these might be possible for peacekeepers, nipping violence in the bud.
- » Atrocity-prevention does not inevitably require the robust use of force. An atrocity-prevention lens used by peacekeepers may focus attention on hate-speech from local radios, for example, and warning broadcasters of their potential legal culpability may be sufficient to suppress this problem.

However, any time atrocity-protection requires acting without formal state consent, or such that peacekeepers will be confronted by state forces as a ‘third belligerent’, peacekeeping operations cannot be asked to protect civilians.

Peacekeeping operations – even those with explicit atrocity-prevention agendas – are never R2P Pillar Three operations, and a switch from one operation to the other (as perhaps should have occurred in Rwanda in 1994) requires an explicit change in mandate and operation.

VI. “Peacekeeping Operations—and even some Humanitarian and Human Rights actors – may perform specific atrocity-prevention activities, but it is better not to speak of these as R2P activities.”

IT DEPENDS

- » In many situations, it may needlessly add to controversy, and even invoke hostility and suspicion, to refer to atrocity-prevention activities as ‘R2P’ actions or operations. In such cases, ‘R2P language’ may be avoided. Even so, in situations where widespread dangers to civilians are present, the need for dedicated atrocity-prevention activities, threat-assessment and mainstreaming cannot be diminished.
- » While R2P Pillar Two language may be avoided because protection actors wish to dissociate their activities from the controversies in R2P Pillar Three, the *systematic* avoidance of R2P language by protection actors would result in R2P only being spoken about in Pillar Three situations – thus giving rise to a self-fulfilling prophecy where R2P comes to be automatically understood as Pillar Three coercive action (thus justifying the continued avoidance of R2P Pillar Two language by protection actors).
- » Many states – both Host States and Troop and Police Contributing Countries – are well aware of the potential links between R2P and POC, especially as these emerge in Secretary-General Reports and Security Council Resolutions. Indeed, in the Council’s open debates on POC, States regularly display a sophisticated understanding of the three pillars of R2P, and of the nature and scope of POC. In such cases categorical assertions that POC and R2P are unrelated are likely to be met with scepticism. It may be more

persuasive – as well as more accurate – to emphasize the strong distinctions *within* these groupings: for instance, the irremovable significance of Host State consent in R2P Pillar Two and *Peacekeeping POC*, as compared with the coercive elements that may be found in *Security Council POC* and R2P Pillar Three.

- » In some cases, clarity of language, purpose and resolve may contribute to atrocity prevention, for instance by signalling to potential perpetrators that the operation is willing and able to defend local populations against atrocities.
- » Ultimately, the surest way for any institution to assuage State concerns about infractions on its sovereignty does not lie in its strategic use of rhetoric, but rather—as the ICRC has shown for many years—about building genuine trust through long-term, consistent and institutionalized policies.
- » Additionally, the more R2P Pillar Two language is used in such cases, the more States will become familiar with it—allowing R2P’s preventive agenda to be increasingly normalized.

It is widely agreed that, in the context of dealing with atrocities, prevention is better than cure. But if the international community and the UN Secretary-General aim to prioritize Pillar Two atrocity-prevention, then the very actors who are well-placed to engage in Pillar Two action cannot be going out of their way, for fear of being perceived as R2P

“Today, I ask you to join me in making 2012 the Year of Prevention.”

CONCLUSIONS

Pillar Three fifth columns, to hold that atrocity-prevention does not fall within their mandate. The result of such a policy, when widely pursued by many protection actors – is that the most important and uncontroversial aspects of R2P are those that are not explicitly and pro-actively pursued, and mainstreaming and complementary approaches are not developed. Far from complementing other protection actors, a stance of agreeing that R2P is hopelessly politicized and must be kept distinct from all other humanitarian activities will only sideline Pillar Two atrocity prevention possibilities, as well as cementing the views of many States who consider R2P as being all about intervention.

Ultimately, without explicit vocal support and complementary recognition from other humanitarian, protection and human rights actors – both within and outside the United Nations – atrocity prevention will not occur. The ideal approach for agencies and actors that need to avoid any association with coercive military action is to explicitly distance their activities from all aspects of R2P Pillar Three, but to nevertheless firmly declare that, in accord with the view of the overwhelming majority of Member States, it is important to assist willing states to develop atrocity-prevention capabilities.

All protection actors need to understand the R2P and POC norms to enable them to contribute fully in efforts to enhance protection.

“R2P and POC have powerful synergies and mutually reinforcing applications.”

- » They are both international principles that protect vulnerable people in situations of violence.
- » They are both closely intertwined with a range of instruments of international law, including strong legal prohibitions on violence against the unarmed.
- » They both exhort a diverse group of actors to positive protective and preventive action, putting in place backup and failsafe obligations in cases where the initial legal duties are unfulfilled or ineffective.
- » In the worst of cases, when conflicts descend into atrocities that threaten international peace and security, both sets of principles converge in looking to the Security Council for decisive action.

R2P and POC are distinct norms, but share common goals – namely, the saving of civilian lives from conflict and mass violence—and common applications. Neither POC nor R2P should function without awareness of the normative, institutional and operational requirements of the other. Protecting vulnerable people requires that protection actors – whether R2P or POC – work in mutually supportive roles, and not at cross-purposes.

Yet despite these important similarities, and notwithstanding the specific cases where the two principles will overlap in scope and content, the differences between the two principles must not be dissolved.

“POC and R2P should not be conflated. They are and must remain distinct principles.”

POC aims to protect a broad range of the human rights of civilians in armed conflicts and other situations of mass violence.

- » Individual indiscretions by individual combatants, and the mistreatment of civilians and soldiers *hors de combat*, should be prevented, even if these do not rise to the pitch of atrocity crimes.
- » Strategies and types of engagement – for instance by peacekeepers and humanitarians – can improve civilian protection in these cases, even if these methods would not be productive (or even possible) in the extreme cases of atrocities.
- » ***The visible and urgent status of R2P crimes that “shock the conscience of humanity” should not distract from the more prevalent and everyday abuses of civilians in the situations of violence that POC polices.***

R2P aims to protect the most basic rights of security for populations that are targeted for deliberate, systematic, mass violence.

- » Because of its narrow scope – covering only the four atrocity crimes – R2P has a deeper and more tractable preventive agenda; preventing armed conflict in general is impossible, but the prevention of atrocity crimes through early warning and timely action presents as a challenging, but potentially worthwhile, undertaking.
- » R2P's narrow focus also makes its capacity to respond to violations greater. Because atrocity crimes are accepted by every international actor as ‘beyond the pale’ of what is acceptable, defences based on sovereignty and non-intervention in domestic affairs are increasingly inadmissible.
- » ***Atrocity crimes present very specific normative, institutional and operational challenges, and POC methods that work in lesser conflicts may be ineffective. However, the urgency and moral gravity of atrocity crimes allows new responses to become possible. These factors make R2P indispensable for the protection of vulnerable persons.***

**ENHANCING PROTECTION
CAPACITY: *POLICY GUIDE
TO THE RESPONSIBILITY
TO PROTECT AND THE
PROTECTION OF CIVILIANS
IN ARMED CONFLICTS***

Acronyms

AU: African Union

C34 Committee:
The UN General Assembly's
Special Committee on
Peacekeeping

DFS: UN Department of Field
Support

DPKO: UN Department of
Peacekeeping Operations

DRC: Democratic Republic of the
Congo

ECOWAS:
Economic Community of
West African States

GA: United Nations General
Assembly

ICC: International Criminal Court

ICISS: International Commission
on Intervention and State
Sovereignty

ICRC: International Committee of
the Red Cross

IDPs: Internally Displaced Persons

IHL: International Humanitarian
Law

IHRL: International Human Rights
Law

NATO: North Atlantic Treaty
Organization

OCHA: Office for the Coordination
of Humanitarian Affairs

OSAPG:
UN Office of the Special
Advisor for the Prevention
of Genocide ('Joint Office')

POC: Protection of Civilians

PKOs: Peacekeeping Operations

R2P: Responsibility to Protect

UDHR: Universal Declaration of
Human Rights

UN: United Nations

UNHCR:
United Nations High
Commissioner for Refugees

UNSC: United Nations Security
Council

WSOD: World Summit Outcome
Document (A/RES/60/1)

PART 1. INTRODUCTION

1.1

The importance of R2P and POC

Over the second half of the Twentieth Century, civilians increasingly have become the predominant victims of armed conflicts and mass violence. Civilians have not merely been caught in the crossfire, but in the crosshairs of combatants. The slaughter of civilian populations in civil wars across the globe has emerged as a settled aim of armed actors – whether as a strategic mechanism to obtain further war objectives, or as a war objective in itself.

Against this rising targeting of non-combatants are the twin international protection principles of the *Responsibility to Protect* (R2P) and the *Protection of Civilians* (POC) in Armed Conflict. Both R2P and POC are concerned with protecting vulnerable persons from mass violence, but they have different foci and are the products of different processes in the international system. The principles are also sometimes confused by policy makers and practitioners. POC in armed conflict consists in the first instance of the constraints on the methods and means of war, in particular as enshrined in the 1949 Geneva Conventions (and its Additional Protocols of 1977) which clearly distinguish the rights and responsibilities of combatants and non-combatants and mitigate against harm to the civilian population. In contrast, R2P takes as its focus atrocity crimes – the large-scale and systematic use of violence against populations, whether performed in times of war or peace, whether performed by regular or irregular armed actors, and whether those actors are State, non-state or state-supported. As POC was formed in response to the horrors of World War II, the need for R2P emerged in the crucible of Rwanda, Srebrenica, Kosovo, and East Timor. While their immediate areas of concern are thus distinct, there is wide scope for overlap. R2P's atrocity crimes can both *emerge out of* POC's

armed conflicts, and can *precipitate* such conflicts. The two principles have shared legal frameworks, overlapping institutional structures and face similar operational challenges.

POC pre-dates R2P, but since the affirmation of R2P in the WSOD of 2005, the question of the relationship between the two principles has arisen. If protection is to be enhanced, then clarity is required on the normative, institutional and operational dimensions of the twin principles. Policy makers and practitioners need to know their distinct responsibilities under R2P and POC, when those responsibilities converge and diverge, and how they interact with the R2P and POC agendas of other protection actors. The history of peacekeeping operations over the last decade is one context where ambiguity in the understanding of civilian protection mandates has cost lives. On the other side of the coin, the agendas of R2P and POC are controversial in several applications. Again, clarity is necessary in order for international stakeholders to predict whether specific situations will be approached by protection actors in an R2P or POC register, and how the situation can shift from one to the other, or envelope both, as occurred recently in Libya in 2011.⁴

1.2

The purpose of the Policy Guide

This Policy Guide seeks to enhance the ability of policy makers and practitioners – in governments, regional and international organizations, and civil society – in strengthening their efforts to protect vulnerable populations from conflict-related grave harm and mass atrocity crimes. The Guide clarifies and compares the twin principles of R2P and POC in their normative, institutional and operational dimensions, distinguishes the principles' different actors and methods, and specifies the situations when the two principles converge for specific actors and organizations.

4 See text box below *R2P and POC Convergence and Controversy: Libya in 2011* in §2.1.c.

1.3 The objectives of the Policy Guide

The objectives of this Policy Guide are to:

1. *Inform* relevant protection actors about the normative, institutional and operational scope of R2P and POC;
2. *Clarify* the relationship between R2P and POC, including their points of intersection and divergence (with a specific focus on the needs of policy makers and practitioners); and
3. *Provide* practical guidance regarding when, how and by whom R2P and POC might be implemented.

1.4 The structure of the Guide

After this Introductory *Part One*, *Part Two* conducts a comparative analysis of R2P and POC, overviewing the basic nature, divergences and convergences of each principle. This Part considers in detail the scope of each principle, their main actors and the “when and how” of their application.

Part Three describes the normative frameworks – the legal instruments and modalities – of R2P and POC. While an exhaustive treatment of all the legal instruments that are implicated in R2P or POC is not the intent, the aim of this section is to provide a comprehensive picture of the key principles and legal regimes relevant to R2P and POC. This comprehensive picture is crucial for a full understanding of the normative makeup of R2P and POC. A focus on just one set of legal instruments – the UN Charter, or International Humanitarian Law, for instance – can give a misleadingly narrow idea of the legal and political obligations of States and other actors. Contemporary international law is made up of a large and overlapping array of legal instruments, and it is only with full awareness that an accurate picture of the legal situation emerges.

Part Four details the institutional structures that have responsibility for R2P and POC. Again, while an exhaustive account is not possible, the aim is to provide a fairly comprehensive picture. A focus on only the major agents – the UN Security Council and Secretariat for instance – provides too narrow an understanding of how different institutions contribute to civilian protection. R2P and POC both rely for their proper functioning on a network of mutually supporting States, institutions and actors. If either principle is to provide real protection to vulnerable persons, it will be because the principles have been *mainstreamed* throughout the work of a substantial array of different institutions across the national, regional and global levels.

Part Five turns to the implementation of R2P and POC. Here attention is placed on the operational aspects of, and interactions among, the two principles and the institutions and agents – whether global, regional or national – that act on them. Part Five considers four key questions of implementation and operationalization:

1. *Efficacy*: How can the institution better fulfil its specific role?
2. *Mutual Support*: How can the institution coordinate with other actors to contribute to a larger protective environment?
3. *Will*: How can the will of actors in the institution be mobilized to improve protection outcomes?
4. *Role development*: How can the institution as a whole be enrolled into adopting protective policies and objectives?

PART 2. R2P AND POC: A COMPARATIVE ANALYSIS: OVERVIEW

2.1

What are they?

§2.1.a R2P

The General Assembly at the 2005 World Summit, the largest ever gathering of world leaders, set down and affirmed the authoritative formulation of R2P⁵ Paragraphs 138-140 of the World Summit Outcome Document (WSOD) establish the scope and substance of R2P. In 2009 the UN Secretary-General presented his first report on R2P, where he advanced a “Three Pillar” presentation of the WSOD paragraphs.⁶

R2P Pillar One describes the basic protective responsibility of each state for its population:

“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement...” (WSOD, ¶138)

R2P Pillar Two outlines the backup responsibility of the international community to assist states in fulfilling their Pillar One responsibilities:

“The international community should, as appropriate, encourage and help States to exercise this responsibility.” (WSOD, ¶138)

The World Summit Outcome Document (WSOD) 2005 A/RES/60/1

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

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security

Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

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

5 World Summit Outcome Document (WSOD), A/RES/60/1, 16 September 2005.

6 UN Secretary-General, *Implementing the Responsibility to Protect*, A/63/677, 12 January 2009.

SECRETARY-GENERAL KOFI ANNAN

We the Peoples: Millennium Report to the General Assembly (2000):

“To the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”

Finally, R2P’s Third Pillar deals with the international community’s responsibility, through the UN Security Council, to provide protection to populations when their State is manifestly failing to do so:

“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations... In this context, we are prepared to take collective action, in a timely and decisive manner... should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” (WSOC, ¶139)

Pillar Three actions can include non-military measures such as condemnation and calls for violence to end, targeted sanctions, travel bans, trade restrictions, arms embargoes and referral of situations to the ICC. As a last resort, the Security Council may authorize military intervention into the State, against its consent, in order to protect a population at risk of atrocity crimes.

Two specific points warrant emphasis: First, R2P is strictly limited to cases involving any of the four atrocity crimes and violations – genocide, ethnic cleansing, war crimes and crimes against humanity. Thus, large-scale violations of human rights or humanitarian crises are not in themselves R2P cases unless they carry a threat of one of these specific crimes. (While humanitarian crises are unlikely to rise to the pitch of atrocity crimes outside exceptional circumstances, large-scale violations of human rights, alongside other factors, may well be a precursor of atrocity.)

Second, the WSOD affirmed that the UN Security Council was the exclusive authority for mandating any R2P coercive use of force. While other (Pillar Two) R2P activities can take place outside the Council, military or coercive action against a nation must have Security Council authorization.

The UN Security Council affirmed the WSOD commitment to R2P in Resolution 1674 (2006), and the General Assembly issued its first specific resolution on R2P in 2009 (A/RES/63/308). Since his 2009 Report, the Secretary-General has presented three further reports on R2P, refining and developing the principle.⁷

Historically, the idea of R2P was first developed in 2001 by the *International Commission on Intervention and State Sovereignty*: ICISS. Throughout the 1990s, the international community – and the United Nations in particular – had been faced with a series of humanitarian crises, including genocide, ethnic cleansing, and the mass internal displacement of citizens. In cases such as Somalia and Sierra Leone, the United Nations sanctioned military intervention for human protection purposes in various forms and with mixed success. In other operations, however, including Rwanda and Srebrenica in Bosnia-Herzegovina, no robust military intervention took place and atrocities proceeded more or less without interdiction. In still others, such as Kosovo, military intervention occurred without specific Security Council authorization. By decade’s end, UN Secretary-General Kofi Annan was calling for the development of solutions to the seemingly intractable dilemma posed by humanitarian necessity on the one hand and absolute sovereignty on the other.⁸ It was against this backdrop that ICISS developed its report *The Responsibility to Protect*, setting out the arguments for a principled response, consistent with the UN Charter, to threats of atrocity crimes. In so doing ICISS drew not only

“The dialogue revealed a striking depth of consensus in support of R2P principles. This consensus was echoed repeatedly by state representatives and policy actors and reflected a shared understanding and acceptance of the responsibilities outlined in R2P’s three-pillar framework.”

Policy Memo: R2P the Next Decade Conference. 2012.

on humanitarian principles and prior international practice, but also on various aspects of international law.

Conceptually, R2P has two core elements. The first is that the sovereignty enjoyed by States is no longer to be understood as a right to perform whatever internal actions the State desires. Instead, the purpose of sovereignty is understood to be the protection of the lives and basic rights of the population of that State – in particular, to protect them from the most egregious acts of violence. This idea of “sovereignty as responsibility” requires that each State is duty-bound to protect its population from atrocities.

If a State proves unwilling or unable to protect its population, then the second element of R2P emerges: the international community’s backup or remedial responsibility to protect the vulnerable citizens in question. If the State is willing but unable to protect its population, then the international community undertakes, on a mutually consenting basis, to help that State develop its capacities to protect its population and prevent atrocities. On the other hand, if the State is manifestly failing to protect its population, then the international community has committed to adopt more coercive measures, such as targeted sanctions, assets freezes and embargoes. In limited cases, and as occurred in Libya in 2011, the international community through the UN Security Council can act militarily to ensure the protection of a civilian population from imminent atrocities.

7 UN Secretary-General, *Early Warning, Assessment and the Responsibility to Protect*, A/64/864, 14 July 2010; UN Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, A/65/877-S/2011/393, 27 June 2011; UN Secretary-General, *Report of the Secretary-General: Responsibility to Protect: Timely and Decisive Response*, A/66/874 - S/2012/578, 25 July 2012.

8 Kofi Annan, *We the Peoples: Millennium Report to the General Assembly* (New York: United Nations, 2000), 48.

Comparison: R2P Pillar Three and 'Humanitarian Intervention'

R2P differs in several key ways from the prior notion of a 'right of humanitarian intervention':

- » In focusing on the obligations of the international community, rather than their rights, it makes central the needs of the vulnerable.
- » Even in its Third Pillar, R2P includes non-military strategies aiming to protect civilians. Taking into account all three pillars, military intervention becomes just one last-resort measure that forms part of a larger protective process.
- » R2P is strictly limited to responding to the four atrocity crimes. It does not justify intervention to free populations from repression, or to promote democracy or human rights.
- » According with international law, R2P places exclusive responsibility for authorizing military action on the UNSC. It does not legitimize unilateral intervention.

§2.1.b POC in Armed Conflicts

"The Security Council must make up its mind on what it means by protection of civilians. It must have clarity about who is to be protected and what constitutes a threat. It must also clarify what kind of response it expects and who is to respond."

Indian statement in November 2011
Security Council POC Debate: S/
PV.6650.

At base, POC in armed conflicts is the idea that even war must have limits – that the violence of armed conflicts must, so far as possible, spare civilians. As such, POC is a very old concept, dating back through the many legal instruments of the twentieth century to longstanding moral traditions on the conduct of war.

The contemporary conception of POC draws in part on the larger concept of "Protection" that was developed in 2001 by the International Committee of the Red Cross (ICRC) who declared:

The concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e., human rights, humanitarian and refugee law).⁹

This definition has been endorsed by the peak international humanitarian policy body, the Inter-Agency Standing Committee (IASC), a key forum bringing together UN and non-UN humanitarian organizations.¹⁰ It is a broad definition of protection able to be applied generally by humanitarian actors, and is not explicitly confined to protection in armed conflicts. As the ICRC/IASC definition suggests, international law plays a key role in shaping the meaning of protection. With respect to POC in particular, this link is even tighter, with the legal core of POC founded on International Humanitarian Law (IHL) – especially the 1949 Geneva Conventions and the 1977 Additional Protocols. These instruments constrain the actions, tactics and weapons of armed conflict in order to protect civilians. Many (though not all) of the rules included in these instruments are not only applicable by treaty law to signatories of the conventions, but are accepted parts of customary international law, meaning they legally bind even non-signatories to the conventions. They will often also be a part of positive or common law, and military doctrine and regulation, in various jurisdictions. IHL imposes its legal duties on soldiers, force commanders and States. When POC is spoken of in the context of international law, it connotes what this Guide will refer to as *Narrow POC* – that is, the duties of IHL that provide for the protection of civilians in situations of armed conflict.

9 S. G. Caverzasio, *Strengthening Protection in War: A Search for Professional Standards* (Geneva: International Committee of the Red Cross, 2001).

10 Inter-Agency Standing Committee IASC, *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field* (Geneva: UNICEF, 2002).

International Humanitarian Law (IHL) comprises the core of *Narrow POC*.

The Major IHL Treaties include:

First Geneva Convention (1949):
Protects wounded and sick combatants.

Second Geneva Convention (1949):
Protects shipwrecked combatants.

Third Geneva Convention (1949):
Protects Prisoners of War.

Fourth Geneva Convention (1949):
Protects civilians and those in occupied territories.

First Additional Protocol (1977):
Broadens protection of civilians and limits the means and methods of war.

Second Additional Protocol (1977):
Protects civilians and civilian objects in non-international armed conflicts.

The principle of POC more generally however, applies to many different sorts of actors – including humanitarian organizations, peacekeepers and UN organs such as the Security Council and the Secretariat. All these institutions and actors aim to promote, through the various means at their disposal, the conformity of armed actors to POC's legal core. In such cases, POC becomes a positive goal to be pursued, implemented and facilitated. The Guide will refer to this larger policy-orientated concept as *Broad POC*.

Key IHL Instrument: Common Article 3 of the 1949 Geneva Conventions

[...] Each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth [...]

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- » violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- » taking of hostages;
- » outrages upon personal dignity, in particular humiliating and degrading treatment;
- » the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for [...]

The Secretary-General in his 2009 and 2010 reports¹¹ picks out five core challenges to POC, reflecting the different priorities various institutions may attach to different aspects of POC. The five challenges are:

1. Enhancing compliance of IHL by parties to the conflict,
2. Enhancing compliance by non-State armed groups,
3. Enhancing protection by UN peacekeeping and other relevant missions,
4. Enhancing humanitarian access,
5. Enhancing accountability for violations of the law.

The *Aide Memoires* on POC issued regularly by OCHA – most recently in 2011 – synthesize previous Security Council concerns and actions with respect to POC, adding further depth and breadth to each of the Secretary-General's core challenges.

As might be expected, reflecting the different capacities and powers at their disposal, States, humanitarian institutions, regional organizations, peacekeeping operations and UN organs have all developed different *modus operandi* for protecting civilians. Thus, from the broad concept of protection articulated by ICRC/IASC and found in the five core challenges of the Secretary-General, more refined perspectives on POC are crafted by institutions like States, humanitarian agencies, regional organizations, peacekeepers and UN organs. These may be thought of as specific components of, or perspectives on, the larger idea of POC.

A good example of the way specific institutions develop specific tasks, sensitive to their capacities and limitations to promote protection, is found in the 2010 UN *Department of Peacekeeping Operations* (DPKO) and *Department of Field Support* (DFS) *Operational Concept on POC in UN Peacekeeping Operations*.¹² While acknowledging that other POC agents

will utilize different POC paradigms, this document describes the component of POC as it appears in the work of UN peacekeepers – *Peacekeeping POC*, as it might be termed.¹³ The *Operational Concept* outlines three tiers, reflecting the several different activities available to peacekeepers to promote the protection of civilians:

- » **Tier One:** Facilitating the implementation of the political process and peace agreement.
- » **Tier Two:** Protecting Civilians from physical violence.
- » **Tier Three:** Establishing a protective environment, including through capacity-building, developing democracy and rule of law institutions, and disarmament, demobilization and reintegration of combatants.

As this list suggests, *Peacekeeping POC* is quite different from other *Broad POC* perspectives; peacekeepers have different capacities and operate under different constraints, as compared to (for example) humanitarian agencies and the UN Security Council. Despite these differences in perspective and capacities, however, all POC action is intended to ensure civilians are protected from the threats of violence and assaults on dignity that can occur in situations of violence.

§2.1.c Basic Convergence of R2P and POC

There are deep parallels between the two international protection principles. First, the central purpose of both R2P and POC is to protect people's most basic rights of physical security from large-scale violence. Both R2P and POC impose duties on States and their organs not to perform the prohibited acts themselves, but they also go beyond this in requiring positive acts to protect unarmed populations from third-parties and to contribute to a larger protective environment.

Second, R2P and POC both involve multi-faceted/multi-layered protection: diverse actors are called upon at different times to perform actions specifically tailored to their role and capacities. Both principles

11 S/2009/277; S/2010/579.

12 DPKO/DFS, *Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations*, 2010.

13 Ibid., ¶¶10-11.

PRESIDENT OF THE GENERAL ASSEMBLY, H.E. MR. JOSEPH DEISS (2011):

“The adoption of Security Council resolutions 1970 and 1973 this year had made the international community think about the relationship between the protection of civilians in armed conflict and its own responsibility to protect.”

involve backup duties that are in place to deal with the possibility that other actors may fail to provide the required level of protection. Both motivate action by actors such as military and police commanders, state institutions, peacekeepers and UN organs. Both POC and R2P represent a continuum of responses. For R2P this is characterized in the form of the “three pillars”. But POC, in its own way, has a similar division of labour and continuum of response: its own “pillars”. At different stages it calls upon different actors – particularly Combatants, Humanitarians, Peacekeepers and UN organs – and imposes different obligations upon them.¹⁴

Third, both R2P and POC have a close relationship to international law. With POC, the relationship with IHL is very tight; this can be expressed by saying that POC has a *legal core* in the provisions of IHL and that POC in general aims to *promote* IHL. That is, IHL puts forward a widely accepted and determinate set of legal duties, and POC actors aim, through the various means at their disposal, to promote the observation of these duties.

Turning to R2P, the negative duties of R2P Pillar One – that States may not commit atrocities on their populations – are founded on hard international law, including IHL, International Human Rights Law (IHRL), customary international law and the Genocide Convention. However, the relationship of R2P’s *positive* duties of protection in international law is more subtle. The afore-noted legal instruments (of IHL, IHRL and the Genocide Convention) do require some positive duties of direct protection against atrocities and of indirect contribution to build protective environments. However, these duties are not like those found in the negative (“thou shalt not”) rules of IHL that make up POC’s legal core. There

is not a lengthy list of specific, clear and determinate rules. Rather, these legal instruments contain provisions requiring the prevention of atrocity crimes, but without clear indications of what exactly is being mandated. The principle of R2P can be understood as *one way of interpreting – of giving specific substance to – those previously amorphous and aspirational duties*. Rather than saying R2P has a legal core which it aims to promote (as occurs in POC), it is better to think of R2P as having a *legal framework* that it *specifies* that provides the enabling authority for international actors to engage in preventing and halting potential and actually occurring atrocity crimes. On this approach, R2P clarifies and makes more concrete the (previously indeterminate) duties of protection from atrocities provided by the Genocide Convention, IHRL and IHL.

Shared Origins of R2P and Broad POC

The extent of this overlap between R2P and POC (especially Broad POC) should not be surprising. While R2P was created directly in response to failures in Rwanda and the former Yugoslavia in the 1990s, the shadow of these atrocities also played a major role in framing the contemporary concerns of *Broad POC*. As the 1990s drew to a close, many humanitarian actors began to develop explicit protective strategies in response to the phenomenon of the “well-fed dead” of Bosnia. Equally, the United Nations’ POC agenda emerging at this time was back-dropped by a series of reports analysing the failures of (inter alia) UN organs to halt attacks on civilians in Rwanda and Srebrenica.¹⁵ The significance of these two genocides to the emerging protection of civilians agenda

is apparent in the two landmark POC documents of this period: the Secretary-General’s first report to the Security Council on the protection of civilians in armed conflict,¹⁶ and the Report of the Panel on UN Peace Operations (*Brahimi Report*¹⁷). Even before the affirmation of R2P in 2005, therefore, the POC agenda was beginning to confront deliberate and widespread attacks on civilian populations, as well as more limited violations of IHL.

§2.1.d Basic Divergence of R2P and POC

The pivotal difference between the two principles is that R2P has a narrower focus in terms of the crimes it policies: it applies only to the four atrocity crimes of genocide, ethnic cleansing, crimes against humanity and war crimes. A defining feature of atrocity crimes is that they are large-scale and systematic: atrocity crimes thus must meet what is legally termed a “substantiality test”.¹⁸ If an atrocity crime is to take place, then there must be huge numbers of people at risk of imminent, systematic and intentional violence, usually by a State or state-sponsored actors. POC, on the other hand, can apply more broadly to any discrete act – even one performed by a lone combatant against a single civilian.

Two further differences between the two principles are worth note, but caution needs to be exercised with regard to both.

The first apparent difference is that R2P directly confronts the controversial question of military intervention for protective purposes. R2P explicitly allows, after other non-military options have been exhausted and further conditions have been met, for the UN Security Council to authorise the use of military force to protect populations. As noted above, the recent NATO military action in Libya,

¹⁶ UN Secretary-General, *Report to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 September 1999.

¹⁷ Lakhdar Brahimi, *Report of the Panel on UN Peace Operations*, A/44/305-S/2000/809, 21 August 2000.

¹⁸ Scheffer, “Atrocity Crimes,” pp. 86–92.

¹⁴ See Sampford, “A Tale of Two Norms”; Hugh Breakey, “The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast,” in C. Sampford, et al. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (Geneva: United Nations University, 2012).

¹⁵ UN, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN Doc S/1999/1257/Annex, 16 December, 1999; International Panel, *Rwanda: The Preventable Genocide: Special Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, July 7, 2000; UN Secretary-General, *Report of the Secretary General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica* A/54/549, 15 November 1999.

R2P and POC Convergence and Controversy: Libya in 2011

R2P: The international response to state violence against unarmed populations in Libya was in many respects a clear case of R2P action. By February 2011 it had become clear that the Gaddafi regime was committing widespread violence against civilian populations – possibly to the point of committing crimes against humanity, and unquestionably failing its *Pillar One R2P* obligations. Widespread *R2P Pillar Two* attempts at peaceful, consensual resolution of the situation, including by several regional organizations as well as the United Nations, were unsuccessful. On February 26 the UN Security Council passed Resolution 1970, recalling the Libyan authority's responsibility to protect its population, condemning the continuing violence, and imposing a range of non-military sanctions, including arms embargoes, asset freezes and travel bans on the Gaddafi regime. When it became clear that such measures were not protecting the Libyan people, and with Gaddafi's forces threatening the population of Benghazi, on 17 March the Security Council moved from *Pillar Three R2P* coercive measures not involving the use of force to *Third Pillar military*

action. Resolution 1973 authorized the use of international force to impose a no-fly zone and protect civilians. Reflective of concerns with foreign occupation and the views of key regional organizations, the Resolution precluded foreign ground troops on Libyan soil. Secretary-General Ban Ki-moon declared the resolution to be the international community acting on its responsibility to protect, and several Security Council members' statements clearly invoked R2P's idea of *sovereignty as responsibility*.

POC: The operative paragraphs of Res. 1973 did not invoke R2P, however, and the authorization of force occurred under the express rubric of protection of civilians and for that explicit objective. This determination is arguably consistent with the Council's on-going Broad POC agenda, and its earlier declarations that large-scale violations of IHL can amount to threats to international peace and security and so can warrant response under Ch. VII of the UN Charter (S/RES/1265; S/RES/1296). This invocation of POC followed a change in the Security Council's characterization of the situation, where by mid-March the Council spoke of it in terms of "armed conflict". Res. 1970, in contrast, had spoken only of "widespread and systematic attacks".

Convergence: The ambiguous nature of the resolution – R2P in substance and POC in name, as it might be put – has caused no little confusion among commentators. But in fact *Res. 1970 and Res. 1973 are both R2P and POC*. While R2P and POC are separate principles, and need to be treated differently in many respects, in certain cases and for certain actors, the principles will effectively converge. So it was with Res. 1973. With its prior determination that mass violence against civilians can threaten international peace, and with mounting evidence of violations of the laws of war by Gaddafi's regime, the Security Council's action was grounded in and consistent with its POC agenda. With Gaddafi's regime having committed crimes against humanity and threatening further assaults on its own civilians, its claims to sovereignty were forfeit, and the Security Council's action was grounded in and consistent with the R2P obligations set down in the World Summit Outcome Document and accepted by the Council in Resolution 1674.

for instance, is a clear case of military intervention envisaged and endorsed by the R2P principle. However, while POC does not confront this question of military intervention as a matter of explicit doctrine, it is difficult to maintain that it avoids it in practice. So far as the Office of the Secretary-General and the Security Council are concerned, non-consensual military action has always been considered to be an option of last resort for POC. Res. 1296 of 2000 linked large-scale violations of international

and human rights law with threats to international peace and security. As was observed with respect to Resolution 1973 on Libya, the operative part of the resolution was phrased in terms of the protection of civilians.¹⁹ Similarly, the decisive international use of force in 2011 in Côte d'Ivoire – authorized by the Secretary-General pursuant to Security Council Resolutions 1962 and 1975 – occurred under a POC aegis. While R2P

19 S/RES/1973 2011, ¶¶4-5.

and POC may at times differ in the precise contexts where they will declare a need for coercive force, both have historically proven capable of authorizing such force. As such, this alleged difference between R2P and POC is more a matter of perception than reality – a question of explicit emphasis rather than actual substance.

The second difference is the different scope of each principle – that is, the types of situations in which they apply. The next section explores this issue in some depth.

2.2

What is the scope of each principle?

Scope and Breadth: the Preventive Dimension

Even if a principle is limited in its application to a particular situation—like armed conflict—it may still impose duties *outside* that situation, in order to prevent the harms that would occur if the situation develops. For instance, R2P requires States to enact measures in peacetime in order to lessen the likelihood of future atrocities, and POC in law (the Geneva Conventions) requires peacetime preparations such as ensuring military targets are not built near civilian objects like hospitals.

The scope of a principle describes the situations where the rights-violations it seeks to prevent occur, but not where the duties it imposes should be performed.

The *scope* of each principle refers to the types of situations to which it applies. *Broad POC*, *Narrow POC* and R2P all apply to different types of situations, and these situations must themselves be distinguished from other situations of grave violence, such as state repression in violation of international human rights law, and also from legitimate use of force by authorities – such as lawful and proportional state responses to rioting, terrorism or criminality.

The following describes an array of situations, stretching from peace, to institutional repression, to internal disturbances and tensions, to armed conflict, and finally to atrocity crimes.

1: Peace. (“Business as usual”)

Peace involves the legitimate use of force by State authorities within the usual limits, in accord with both domestic law and international human rights law. Peace can include the presence of ordinary criminality and state responses to it, as well as isolated illegal acts performed by State actors or other authorities.

Example: The British police response to London riots in 2011.

2: Institutional repression

Institutional repression involves “grave violence” – violence that, (i) violates non-derogable human rights and/or the minimum guarantees of IHL, and, (ii) involves serious violence such as death, injury or severe violation of dignity (as by rape, for example), especially when targets are a vulnerable and/or non-threatening group like women, children or peaceful minorities.

While this situation involves grave violence by State actors, in *Institutional repression* the use of force is nevertheless in accordance with the operation of domestic law and ordinary local security procedures (it is performed by State actors or State-authorized actors).

Example: State repression, apartheid, violent subjugation of women and slavery (where there is no internal disruption or breakdown of order) can all be examples of Institutional repression.

If *institutional repression* is widespread enough to warrant international concern or condemnation, these will be pursued under a human rights rubric, rather than under the banner of POC. POC is not a vehicle for critiquing or responding to *institutional repression*. Often however, widespread *institutional repression* will precipitate disruption, confrontation or open fighting, and thus fall under one or more of the following three classifications.

3: Internal disturbances and tensions (“Internal strife”/“Other situations of violence”)

Internal disturbances and tensions involve the “grave violations” (violations of basic guarantees and direct suffering) noted above in *Institutional Repression* (2). However, in contrast to *Institutional repression*, in this situation the violence is neither isolated, nor in accordance with domestic law and usual security methods.²⁰

Thus, *Internal disturbances and tensions* include the following two factors:

- » 3.1 *Widespread and/or Protracted Violence*: the grave violence is not an isolated act, but an interrelated part of a larger number of violent acts, spread over time or geography.
- » 3.2 *Lawlessness*. Violence is occurring outside the operation of local domestic law (“arbitrary violence”).
(3.2 may also include the factor of *Secrecy*: there is no public acknowledgement – there are usually public denials – of the violence that occurred and of the agents or organizations responsible for it. *Disappearances* are both lawless and secret.)

3.1 and 3.2 together imply that the violence in these situations is *Disruptive*. That is, there is some level of breakdown of law and order and the normal functioning of state and security actors, and some level of confrontation between opposing factions.

20 See Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), ¶¶4474-77; IRRC, “ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law,” *International Review of the Red Cross* 262 (1988): 9-37; Hans-Peter Gasser, “A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct,” *International Review of the Red Cross* 262 (1988): 38-58; Theodor Meron, “Draft Model Declaration on Internal Strife,” *International Review of the Red Cross* 262 (1988): 59-76.

One additional aggravating factor is not strictly necessary for a situation to fall into this category, but may be material in terms of the concern of international actors, peacekeepers and humanitarians.

- » 3.3 = *Excessive force*: The force used is disproportional to the threat posed, or there were milder alternatives available that would have been able to prevent or respond to the threat. (There is a resemblance here to the IHL principles of “unnecessary suffering” and of “military proportionality”).

Internal disturbances and tensions can be distinguished from one another:

- » *Internal disturbance*: a serious or enduring confrontation, involving grave extra-legal violence and a disruption of internal order, including the use of a forceful response by authorities to restore order. In internal disturbances violence is an immediate response and often targets groups of people rather than known individuals.

Example: acts of demonstration, revolt and rioting and State responses to these, where grave and lawless violence ensues (either by initial actors or State authorities).

- » *Internal tension*: State violence used to prevent breakdown of internal order, involving the extra-legal use of grave violence. Violence often targets known individuals.

Example: disappearances and mass arrests without judicial guarantees.

4 = *Armed conflict proper*

To be an armed conflict in the sense defined by IHL requires one of the following three conditions:

- » 4.1 Open fighting between any two forces, both holding territory and with a military structure (chain of command).
- » 4.2 Any international forces involved in fighting.
- » 4.3 Any international forces occupying territory (with or without the explicit use of force).

Once the level of violence and military organization has reached the threshold that qualifies the situation as one of “armed conflict proper”, IHL will thereafter remain applicable until the conflict ends, even if those levels are no longer attained.²¹

5 = *Atrocity crimes*

Atrocity crimes comprise genocide, crimes against humanity, war crimes and ethnic cleansing. These are set down in legal instruments such as the Genocide Convention, the Rome Statute of the ICC, the Statutes of the ICTY and ICTR, and domestic acts (e.g. the Philippines R.A. No. 9851).

- I. *Genocide*: the deliberate attempt to destroy in whole or in part a national, ethnic, racial or religious group, especially by systematic violence.
- II. *Crimes against Humanity*: the deliberately systematic policy of attacking civilian populations through methods such as mass murder, enslavement, torture, rape and enforced disappearances.
- III. *War Crimes*: Grave breaches of the laws and customs of armed conflict (in particular, serious violations of Com. Art. 3 of the Geneva Conventions).
- IV. *Ethnic Cleansing*: a subset of Crimes against Humanity, ethnic cleansing involves systematic attacks on

21 Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, vol. 1 (Geneva: ICRC, 2011) §2.34.

sect-defined groups of civilians by persecution, deportation and forced displacement.

As well as requiring widespread (spread across distance and time) grave violence against populations, there are three additional factors required for the four atrocity crimes.²²

- » 5.1 *Systematic violence*: Very substantial numbers of victims are required, both in absolute terms – at least many thousands at risk of death or brutality – and with respect to the proportion of a group being targeted. (This condition is sometimes referred to as a “substantiality test”.²³)
- » 5.2 *Persecution*: Specific sect-defined groups are being targeted with discrimination (especially minorities or ethnic groups outside the ruling elite); there is a larger framework of persecution or attempts at elimination of the group.
- » 5.3 *Deliberate policy*: There is evidence that the mass-violence is deliberate systematic policy, usually with some high-level orchestration. This may be gleaned from the aforementioned factors (widespread violence targeting persecuted groups), or from the explicit statements, laws or investment of resources. Another relevant factor in this respect will be: *Impunity*: There is little or no evidence that the organisations implicated (be they State or non-State) are taking reasonable action to redress and prevent further crimes (what in legal terms may be described as a failure of “due diligence”)²⁴.

22 These thresholds are not strictly required for war crimes *per se*. It is plausible to think that, in order for war crimes to attain the status of atrocity crimes, substantiality thresholds are required. See Scheffer, “Atrocity Crimes,” pp. 91-92.

23 Ibid.

24 From IHRL and the Genocide Convention: Sheri P. Rosenberg, “Responsibility to Protect: A Framework for Prevention,” *Global Responsibility to Protect* 1.4 (2009): 442-77, pp. 452-9, 466.

Broad POC and Situations of mass

violence: Armed Conflict and serious Internal Disturbances and Tensions are both contained in the *situations of mass violence* covered by Broad POC.

All situations of violence thus include, (i) widespread, disruptive and protracted violence or fighting, and, (ii) actors using lethal force outside the operation of ordinary domestic law. In the cases of armed conflict, the violence includes armed force between two opposing military forces. In cases of internal tension or disturbance, there need be no violence between military forces – one side may be made up of no more than civilians.

Narrow POC covers only armed conflict (and post-conflict situations) as those are defined by IHL.

Broad POC covers all situations of mass violence, including armed conflict proper, as well as serious and widespread internal tensions and internal disturbances.

"There is the imperative need to prevent violence against civilians in the conduct of hostilities — I would even venture to say to prevent violence against non-combatants in general."

Brazilian statement in Security Council POC Debate: November 2011, S/PV.6650.

The evidence that *Broad POC* covers serious situations of mass violence as well as armed conflict proper includes:

- I. *The significance of Rwandan genocide as a paradigm case of the failure of POC.* While Rwanda itself was able to be characterized as an armed conflict proper, it is not difficult to imagine substantially similar acts of large-scale armed slaughter of innocents by militia or even state armed forces to which IHL would not apply. If one of the purposes of *Broad POC* is to ensure the international community is "never again" faced with inaction in the face of Rwanda-like genocides, then constraining *Broad POC* to the legal definitions of IHL is unhelpful.
- II. *The application of Broad POC to peacekeeping.* Peacekeepers can be deployed (for example preventatively) in cases where there is not an armed conflict proper. While such peacekeepers will be limited by their means and mandate, there is no provision to be found in the peacekeeping doctrine or in Council Resolutions that they should not protect endangered civilians unless the specific situation amounts to armed conflict. To the contrary, the *Brahimi Report* declares without qualification:

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

Equally, Security Council Resolutions mandating the protection responsibilities of peacekeepers typically refer simply to the "protection of civilians" (without qualifying reference to situations of armed conflict). And this makes sense: peacekeepers will rarely be in any position to make sophisticated judgments about the precise legal status of an assault on civilians.

- III. *The rationale for the involvement of the UN Security Council.* The Security Council's mandate for concerning itself with civilian protection concerns the capacity of volatile situations to threaten international peace and security.²⁵ As well as traditional armed conflicts, widespread, lawless grave violence has precisely this capacity. Since these early declarations the Council has considered many cases of civilian protection without evincing any regard to whether such regions were experiencing violent civil unrest rather than "armed conflict" legally construed. For example, Syria in 2011-2012 was an object of Security Council debate and concern long before the ICRC designated that situation as rising to the pitch of armed conflict in mid-2012.²⁶ Equally, UNSC Res. 1970 on Libya in February 2011 contains explicit concerns about attacks on the civilian population – but no mention of armed conflict per se.²⁷ This is consistent with the broad scope of the principle articulated in the Secretary-General's first Report on POC in 1999, where he declared it to include: "mutilations in Sierra Leone,

25 UNSC, *UN Security Council Resolution 1265: On the Protection of Civilians in Armed Conflict*, S/RES/1265, 17 September 1999; UNSC, *UN Security Council Resolution 1296 (2000): Protection of Civilians in Armed Conflict* S/RES/1296, 19 April 2000.

26 The country as a whole was so designated in mid-June 2012. Specific regions had been designated as "non-international armed conflict" in early May 2012.

27 The preamble of S/RES/1973 a month later, reflecting changes on the ground, does refer to armed conflicts.

genocide in Rwanda, ethnic cleansing in the Balkans or disappearances in Latin America...”²⁸

IV. The concerns and practices of humanitarian agencies: For the purposes of humanitarian agencies, the protective concern is with large-scale personal violence, deprivation, dispossession and displacement, irrespective of whether these occur in traditional armed conflict, post-conflict, or merely in the context of widespread civil strife.²⁹ The ICRC, in particular, could not be more emphatic that their humanitarian purview and their traditional protection activities extend beyond armed conflict and into “internal disturbances and tensions.”³⁰

In sum, low levels of internal disturbances and (especially) internal tensions are unlikely to involve protection actors. Even so, humanitarians and peacekeepers can find themselves in situations outside of armed conflict proper where internal tensions and disturbances are substantial enough to constitute a widespread and persisting danger to civilians. Such violence can also precipitate armed conflict proper. So too, the attention of the UNSC and other UN organs can be seized by such situations. In both armed conflict and other situations of mass violence these protection actors may seek to implement *Broad POC* policies and procedures.

As a result, *Broad POC* applies to armed conflict broadly construed, including traditional armed conflict as well as situations of mass violence. Naturally, the Security Council, the Secretariat, humanitarians and peacekeepers may also have concerns about *Institutional*

28 Secretary-General, S/1999/957, ¶2.

29 Hugo Slim and Andrew Bonwick, *Protection: An ALNAP Guide for Humanitarian Agencies* (London: Overseas Development Institute, 2005).

30 IRRC, “Internal Disturbances and Tensions: A New Humanitarian Approach?” *International Review of the Red Cross* 262 (1988): 3-8; IRRC, “ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law.”

ATROCITY CRIMES Deliberate, systematic, mass-violence.	Genocide, Crimes against Humanity, Ethnic Cleansing. <i>Nazi Germany</i>	Genocide, Crimes against Humanity, Ethnic Cleansing. <i>Rwanda</i>	War crimes, Genocide, Crimes against Humanity, Ethnic Cleansing. <i>Bosnia, Darfur</i>
SITUATIONS OF VIOLENCE Widespread, disruptive, protracted grave violence occurring outside the operation of domestic law.	Internal Tension Preventative violence (usually with specific individuals being targeted one-by-one by the State) <i>E.g. Disappearances. Concentration Camps.</i>	Internal Disturbance Large-scale grave violence occurring within or in response to demonstrations, riots or revolt (usually targeting groups). <i>E.g. Use of tanks and snipers against demonstrators.</i>	Armed Conflict Open fighting between armed combatants.
INSTITUTIONAL REPRESSION	Grave violence occurring, but it is in accord with domestic law and domestic security arrangements, and is not disruptive.		
PEACETIME ‘Business as usual’	Ordinary criminal behavior (including isolated acts by State figures) being opposed with usual and public state police and judicial measures pursuant to domestic law and IHRL.		

Graph 1 Situations of Violence

Repression (as defined above). Such concerns would be pursued under a purely human rights rubric, however, rather than as a POC issue.

Graph 1 above illustrates graphically the above five situations.

In Graph 1, the term “grave violence” specifically connotes the violation of non-derogable human rights and the minimum guarantees of IHL, especially violence such as death, injury or severe violation of dignity.

The sizes of each of the partitions in Graph 1 are not reflective of the proportion of conflicts in each category. Most obviously, peacetime “business as usual” covers a vast amount of situations, while R2P atrocity crimes occur only in extreme cases, and are comparatively far rarer than all other situations.

Reference to Graph 1 above allows the graphic representation of the scope of the protection principles of *Narrow POC*, *Broad POC* and R2P, as follows:

Cases covered by Narrow POC:

Armed Conflict Proper

Cases covered by R2P:

Atrocity Crimes

Cases covered by Broad POC:

All situations of mass violence

Origins and their role in defining the Scope of R2P and POC

Consideration of PoC at the international level began with existing armed conflicts and sought to protect civilians according to well accepted principles of International Humanitarian Law (IHL). Accordingly, PoC was, from the beginning, about reducing the effects of conflict by an institution established to prevent conflict because of the disastrous effects of previous conflicts. As such, it has grown with

less fanfare, more consensus and does not appear to depart from that core business of the United Nations. By contrast, R2P emerged as a proposed response to enormous challenges posed by Rwanda, Srebrenica and Kosovo where the consequences of internal conflict appeared so great that the creation of what is effectively a new international conflict is seriously contemplated. Indeed, the US and UK considered such consequences so urgent that they were prepared – in the case of Kosovo – to

start a war that appeared to be contrary to international law. Though there is overlap in their scope – with the two principles effectively merging in the context of Libya in 2011, for example – R2P and PoC have been developing along different paths and are characterized by different exemplars. This approach – in large part – explains the differential level of international support for each.

POC applies to crimes against *civilians*: R2P applies to crimes against *populations*.

While there remain ambiguities in certain (non-international) contexts regarding the legal definition of “civilians”,¹ broadly speaking a civilian is a person who is not a member of State armed forces or organized armed groups of a party to the conflict, and who is not taking a direct part in hostilities. “Populations”, on the other hand, refers to the total number of people in a nation, region or other larger grouping, irrespective of their involvement in hostilities.

In the context of R2P and POC, three points are significant with regard to this distinction. First, POC’s concern for civilians includes isolated and small-scale attacks against individuals. R2P, on the other hand, requires assaults, (a) of a much larger-scale, and (b) with the specific intention to persecute or destroy the group as such; crimes against populations are not merely multiple instances of crimes against individuals, but rather require a settled policy to persecute or destroy the group itself.

Second, especially in the context of IHL and *Narrow POC*, the distinction alludes to the point that POC occurs primarily in situations where the civilian-combatant distinction is

material. Since R2P crimes explicitly can occur in times of peace, the term “populations” is more apt in this regard.

Third, the use of the term “populations” implies that R2P crimes can include certain types of attacks against combatants, if such attacks are part of a larger assault against the population. Given POC’s express focus on civilians, violations of IHL against combatants (such as the use of prohibited weapons against them, or commands that “no quarter” will be given) will not be violations of POC. However, R2P’s use of the term “populations” includes within its scope certain cases of crimes against combatants (usually when they are one part of a larger objective that also involves mass violence against non-combatants of the same group). Using the legal crimes of the Genocide Convention and the Rome Statute to delineate the nature of the four atrocity crimes, the key articles provide that these crimes apply not only to harms to civilians and “civilian populations” (in the case of Crimes against Humanity²), but also to “national, ethnic, racial or religious groups” (in the case of Genocide³) and to combatants, surrendering combatants, wounded combatants *hors de combat*, persons, individuals and “nationals” (in the case

of War Crimes⁴). Even leaving aside the legal definitions, it seems quite possible that a genocidal regime might modify its treatment of enemy combatants (such as with declarations of ‘no quarter’) as one part of its overall purpose of eliminating the enemy population. As such, egregious violations of duties to enemy combatants may be part of an R2P atrocity crime.

- 1 This is primarily because Additional Protocol II, unlike Additional Protocol I, does not contain a definition of “civilians”. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* (Geneva: ICRC, 2009); Dapo Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities”, *International and Comparative Law Quarterly*, 59 (2010): 180-92. See also Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War?* vol. 1 (Geneva: ICRC, 2011), §9.7(5).
- 2 “Rome Statute of the International Criminal Court”, (Rome, 1st July 2002), Art. 7. The atrocity crime of ethnic cleansing is a subpart of Crimes against Humanity.
- 3 UN General-Assembly, “Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948,” (Geneva: United Nations, 1948), Art. 2; “Rome Statute of the International Criminal Court”, Art. 6.
- 4 “Rome Statute of the International Criminal Court”, Art. 8.

2.3

By which actors are they applied?

§2.3.a Main R2P and POC actors

R2P and POC impose their duties and roles on a wide array of actors. These are more fully detailed later in the Guide in Part 4 *Institutional Structures*.

Table 2 notes only the *major roles of key actors*.

KEY ACTORS	R2P	POC
States	Do not perform or foment risk of atrocities, locally or globally. Protect populations from atrocity crimes. Create structures for prevention and protection. Assist with R2P missions.	Ratify and implement all IHL treaties. Protect own population from violence. Assist with POC missions.
International Community	Help willing States build capacity to protect populations. Support and enforce Security Council resolutions, including contributing to PKOs.	Contribute to peacekeeping operations. Use influence to motivate others to be constrained by POC.
UN Security Council	Consider the authorization of coercive measures – sanctions, embargoes, military force – when States manifestly fail to protect their populations.	Ensure peacekeeping operations are authorized and resourced for POC; Act when large-scale threats to civilians threaten international peace.
Regional Organizations	Play a role in developing intra-regional conflict resolution and mediation capacities, human-rights measures, early-warning capacities, contingency planning, in sharing lessons-learned and best practices for atrocity-prevention, and in contributing to regional peacekeeping operations and preventive deployments, and in mediating with and advising the global community when risks of atrocity emerge.	Developing an understanding of POC. Development of POC planning, logistical and human resources for POC peacekeeping missions.
Peacekeepers	With host-state consent, develop system-wide strategies to protect populations from atrocity crimes.	Protect civilians from imminent violence within areas of operation; support political processes and institution-building.
Armed Forces	Protect populations from atrocities; Do not contribute to atrocities in times of civil strife.	Obey IHL constraints on war; Protect State's civilians from third parties.
Humanitarian Actors	Early warning monitoring and specification of potential R2P flashpoints that need to be addressed.	Promoting IHL; Practical peaceful measures to reduce risks to local civilians.
UN Secretariat	Secretary-General and OSAPG: Early warning of atrocity crimes; Raising awareness; Advising Security Council on specific cases. Providing capacity-building to Member-States, regional and sub-regional organizations and civil society groups. (Other departments and offices of the Secretariat contribute through their mandates to atrocity crime prevention.)	DPKO: Develop doctrine, strategies and training for PKOs. (Other departments and offices of the Secretariat contribute through their mandates to civilian protection.)
International Criminal Court (ICC)	With the <i>Rome Statute</i> covering R2P's atrocity crimes, the ICC institutionalizes R2P's long-term preventive agenda; accountability for perpetrating atrocity crimes and violations is a key tool for prevention.	

Table 2: Main R2P and POC Actors

§2.3.b R2P and POC Convergence and Divergence

As Table 2 illustrates, there is substantial overlap between the major R2P and POC actors. Combined with the fact that there are different Pillars of R2P and separate concepts of and perspectives on POC, the result is that there is no easy one-size-fits-all answer to the question of the institutional and operational relationship between the two. Drawing with a broad brush, however, four main inter-relationships can be discerned.

1. **Progression:** For some actors R2P will be the progression of *Broad POC* as situations irrupt from conflict and violence into threatening full-blown atrocity. For these actors R2P is *Broad POC* applied to the specific and urgent case of atrocity crimes.

UN Security Council: The Security Council's *Broad POC* concern progresses into its engagement with R2P, with no sharp distinction at work. This explains why its affirmations of R2P have been in thematic POC resolutions (S/RES/1674; S/RES/1894) and why both R2P and POC language and processes were present in the Council's response to violence against civilians in Libya in 2011 (S/RES/1970; S/RES/1973).

States (Domestic): Domestically, States may feel more comfortable in enacting *Broad POC* measures rather than specifically R2P (Pillar One) measures, because the latter can seem to admit a risk of domestic atrocity crimes. For the most part, a State that pro-actively pursues *Broad POC* (the protection of its civilians from widespread, serious, lawless violence) will in so doing also fulfil its R2P Pillar One obligations.

2. **Distinction (R2P & POC):** For some actors the different institutional, strategic and operational responses required to prevent atrocity crimes may mean they may need to distinguish between their R2P and POC roles.

Peacekeepers: Primary POC PKOs will always require the use of comprehensive *Broad POC* doctrine and strategies, and these will often reduce the likelihood of atrocity crimes. However, in certain cases PKOs may need to utilize a specific atrocity-prevention lens in order to gauge the risks of atrocities and the appropriate strategies to prevent them, as such crimes have different causes and require different responses as compared with less-systematic harms to civilians. To this extent, peacekeepers will distinguish between their R2P and POC tasks.

3. **Differentiation (within POC):** Some actors will distinguish between different POC concepts/perspectives:

Combatants: Combatants must distinguish sharply between IHL (*Narrow POC*) and both *Broad POC* and R2P. They will differentiate *Narrow POC*'s irremovable and determinate legal constraints on the methods and means of warfare (keeping in mind that IHL can impose positive protective duties), from the larger objective combatants have to protect particular groups of civilians in specific situations, impelled by *Broad POC* considerations, State policy and military doctrine.

Peacekeepers: Peacekeepers may in some cases need to draw the distinction between *Peacekeeping POC* – where host state consent is a necessary condition – and the POC perspective used by the Security Council, which can controversially use Ch. VII of the UN Charter to adopt measures against States' wills.

4. **Exclusivity:** Other actors will have a central role to play in one arena, but not in the other.

OSAPG: The Office of the Special Advisor on the Prevention of Genocide (OSAPG) is a specialized R2P institution. R2P's comparatively narrow scope, focusing only on the four atrocity crimes, makes the

OSAPG's task of atrocity prevention and early warning both more urgent and more tractable. The same can be true for States as members of the international community, who may develop specific modalities to prevent and respond to atrocity crimes in other countries (such as the US Atrocities Prevention Board), that would be inappropriate applied more widely to *Broad POC*.

Humanitarian actors: Humanitarian actors have proven well-placed to promote *Broad POC* in a range of challenging contexts. However, their neutral and consensual status makes them less apt to invoke R2P and their peaceful measures are of limited application in the face of the determined armed assaults on unarmed populations that characterize R2P's atrocity crimes. For this reason they will usually be POC, rather than R2P actors. (However, some humanitarian organizations may play an important role in R2P early-warning networks, and in mobilizing global attention.)

§2.3.c Complementarity within and between different R2P and POC actors

"Complementarity" means that one institution's protection work respects and facilitates (and does not unnecessarily duplicate) the protection activities of other actors. Complementarity can be pursued in a wide variety of ways. For example, complementarity can require an actor accepting prohibitions on their harming protection actors (like humanitarians), or the need to directly protect other protection actors, or designing dedicated protection activities that, in concert with the work of others, will contribute to a larger protective environment, or altering the way other non-protective activities are performed to ensure they do not undermine the protection contributions of others.³¹

31 In terms of the modes of protection described in §4.0 below, complementarity has implications for each of these five approaches to protection.

UN SECRETARY-GENERAL BAN KI-MOON,
ADDRESS ON R2P, 18 JANUARY 2012.

“Today, I ask you to join me in making 2012 the Year of Prevention.”

Two important types of complementarity are community-based and authority-based protection. *Community-based (bottom-up) protection* involves respecting, empowering and facilitating local attempts at self-protection. It includes soliciting input from local communities on their perceived safety risks and potential approaches for assuaging these, and ensuring that protection efforts do not undermine functioning indigenous strategies for self-protection. *Authority-based (top-down) protection* does the same for the recognized legal authorities (usually State figures). This method includes exhorting and pressuring State authorities to shoulder their protection responsibilities, and ensuring that international efforts avoid superseding, or impeding the development of, indigenous state protection efforts and institutions.

§2.3.d The use of R2P language, policy and resources by peacekeepers, human rights and protection actors

In many situations, it may needlessly add to controversy, and even invoke hostility and suspicion, to refer to atrocity-prevention activities as R2P. In such cases, “R2P language” may be avoided. Even so, in situations where systematic dangers to civilians are present, the need for dedicated atrocity-prevention activities, threat-assessment and mainstreaming cannot be diminished.

While R2P Pillar Two language may be avoided because protection actors wish to dissociate their activities from the controversies in R2P Pillar Three, the systematic avoidance of R2P language by protection actors would result in R2P only being spoken about in Pillar Three situations – thus giving rise to a self-fulfilling prophecy where R2P comes to be automatically understood as Pillar Three coercive action (thus justifying the continued avoidance of R2P Pillar Two language by protection actors).

Furthermore, many states – both Host States and Troop Contributing Countries – are well aware of the links between R2P

and POC, especially as these emerge in Secretary-General Reports and Security Council Resolutions. In the Council’s open debates on POC, States regularly display a sophisticated understanding of the three pillars of R2P, and of the nature and scope of POC. In such cases categorical assertions that POC and R2P are unrelated are likely to be met with scepticism. It may be more persuasive – as well as more accurate – to emphasize the strong distinctions within these groupings: for instance, the irremovable significance of Host State consent in R2P Pillar Two and *Peacekeeping POC*, as compared with the coercive elements that may be found in *Security Council POC* and, of course, R2P Pillar Three.

In some cases, as well, clarity of language, purpose and resolve may contribute to atrocity prevention, for instance by signalling to potential perpetrators that the operation is willing and able to defend against atrocities.

It is widely agreed that, in the context of dealing with atrocities, prevention is better than cure. But if the international community and the UN Secretary-General want to prioritize Pillar Two atrocity-prevention, then the very actors who are well-placed to engage in such action cannot be deliberately denying, for fear of being perceived as R2P Pillar Three fifth columns, that R2P atrocity-prevention falls within their mandate. **The result of such a policy, when widely pursued by protection actors – is that the most important and uncontroversial aspects of R2P are those that are not explicitly and pro-actively pursued, and mainstreaming and complementary approaches are not developed.** Far from *complementing* other protection actors, a stance of *agreeing* that R2P is, for instance, hopelessly politicized and must be distanced from all other humanitarian activities will only sideline Pillar Two atrocity prevention potential, as well as cementing the views of those States who consider R2P as being all about intervention.

Ultimately, without explicit vocal support and complementary recognition from

other humanitarian, protection and human rights actors – both within and outside the United Nations – atrocity prevention will not occur. The ideal approach for agencies and actors that need to avoid any association with coercive military action is to explicitly distance their activities from all aspects of R2P Pillar Three, but to nevertheless firmly declare that, in accord with the view of the overwhelming majority of Member States, it is important to assist willing states to develop atrocity-prevention capabilities.

In the final analysis, the surest way for any institution to assuage State concerns about infractions on its sovereignty does not lie in its strategic use of rhetoric (invocations or elisions of “R2P”), but rather—as the ICRC has shown for many years—about building genuine trust through long-term, consistent and institutionalized policies.

2.4 When and how do they apply?

At different moments in time R2P and POC require different sorts of actions be performed by various actors. These are detailed later in the Guide in the sections on *Institutional* and *Operational Frameworks*. Here it will suffice to note the major obligations that arise for key protection actors before, during and after atrocities.

§2.4.a When does R2P apply? What R2P measures are required at each stage?

R2P Before atrocity

R2P Pillar One duties, regarding the protective obligations of the State, are always in effect. States must ensure that neither they, nor agents sponsored or directly influenced by them, are visiting or risking atrocity crimes on their populations. These on-going responsibilities are hard, determinate law. They are located in the *jus cogens* laws (peremptory laws from which derogation is not permitted) of IHL,

IHRL, customary international law and the Genocide Convention. Additionally, States must be vigilant in protecting their populations from attacks by third parties. Even in times of peace and stability, R2P requires that States work to develop institutions of the rule of law, cultivate civil society organizations, mitigate ethnic and sectarian tensions and reform security sectors to guarantee future unrest cannot foment into atrocity.

The State also has pre-atrocity R2P Second Pillar duties to use its sway to prevent forces under its influence from committing atrocity crimes in another country and on another people. As the *International Court of Justice* has determined, this is a legal responsibility of international law that States must be vigilant in obeying.³²

Continuing on the international plane, States – often through regional organizations – have on-going peacetime Pillar Two duties to aid other States in developing their capacities for minimising the risk of atrocity. These duties may include, for instance, building regional conflict resolution mechanisms and playing a role in consent-based preventive deployments of peacekeepers. These peacetime Pillar Two responsibilities can also include building capacity for contributing to potential future peacekeeping operations – including training troops and police units in the difficult and often unfamiliar task of civilian protection.

A second type of Pillar Two responsibility is the obligation to contribute to and promote regional and worldwide early warning mechanisms for detecting peoples at risk of being subject to atrocity crimes – ideally so that early, preventive action can take place. This duty increases in urgency as the risk becomes more real; the need for accurate information regarding the nature and extent of threats becomes more important than ever once atrocities have started.

Some Pillar Three responsibilities can manifest before atrocities have crystallized; for instance, regional

organizations and UN organs may condemn agents responsible for inciting violence or hate-crimes, and warn them about the possible consequences – legal and otherwise – of their continuance down this path.

R2P During atrocity

Atrocity crimes are distinct from other violations of IHL or IHRL inasmuch as they are an intentional policy of an armed party, and occur on a massive scale. The conditions for recognition of an atrocity crime are thus much more onerous than mere war crimes or violations of human rights, making atrocity crimes comparatively much rarer. That said, mere ignorance of atrocity does not dissolve R2P duties: States are obliged to act when they know or *should have known* that atrocities were occurring.³³

Once atrocity crimes are imminent or actually being committed, further Pillar Two duties emerge. History has shown repeatedly – in Rwanda, Bosnia-Herzegovina, East Timor and Darfur – that it is possible to obtain executive consent from a State for the deployment of UN peacekeeping and protective operations, even as elements linked to the State are planning and committing atrocities. The Pillar Two duties here are to politically support, possibly through regional organizations, the eliciting of State consent to such robust peacekeeping operations, and to play a role – so far as means allow – in the deployment of such operations. Once forces are deployed, such peacekeeping operations will have duties to use such powers as are at their disposal to prevent or ameliorate mass violence against civilians.³⁴

Pillar Three responsibilities will require the Security Council to play its role in adjudicating whether coercive measures

not involving the use of force – such as arms embargoes, assets freezes and targeted sanctions – will prove sufficient, or whether military means should be employed. Regional organizations also play a role in this determination, as the Security Council increasingly takes their input as a key factor in its decision-making. These duties of judicious and good faith adjudication for the Council and regional organizations are political, not legal. Ultimately, if as a last resort military action is required, then some member States will need to shoulder the responsibility to allocate military assets and personnel to UN-authorised operations. R2P does not allow unilateral action without UN authorization, so member States only have Pillar Three responsibilities to directly prevent atrocities after the Security Council has authorised such a response.

R2P After atrocity

In their original report, ICISS advanced a tripartite structure for R2P in terms of the responsibility to prevent, to react and to *rebuild*. This last obligation emerges once atrocities are halted. In most cases, the responsibility to rebuild will parallel the responsibilities before atrocities crystallise, but they will have greater urgency and will need to be executed in a less permissive environment. Peacebuilding, the development of rule of law and civil society institutions, security sector reform and the disarmament, demobilization and reintegration of combatants will all be necessary to ensure violence does not again flare up along previous fault lines. The establishment of institutions of governance and the rule of law, including an effective justice and corrections system, is crucial at this juncture. In particular, peacekeepers and transitional authorities need to be alert to the risk of atrocities being committed by the victims of the previous conflict against populations associated with those who persecuted them. Finally, bringing to justice genocidaires and war criminals is a key part of R2P that occurs in the wake of atrocity crimes, as are restorative and transitional justice mechanisms, such as truth and reconciliation commissions.

32 See below §4.2.c.

33 Louise Arbour, “The Responsibility to Protect as a Duty of Care in International Law and Practice,” *Review of International Studies* 34.3 (2008): 445-58.

34 Duties here may also include ensuring that the peacekeeping operation does not go beyond its mandate for quelling violence (“mission creep”). See Brazil, *Concept Note: Responsibility While Protecting: Elements for the Development and Promotion of a Concept* (New York: United Nations, 2011).

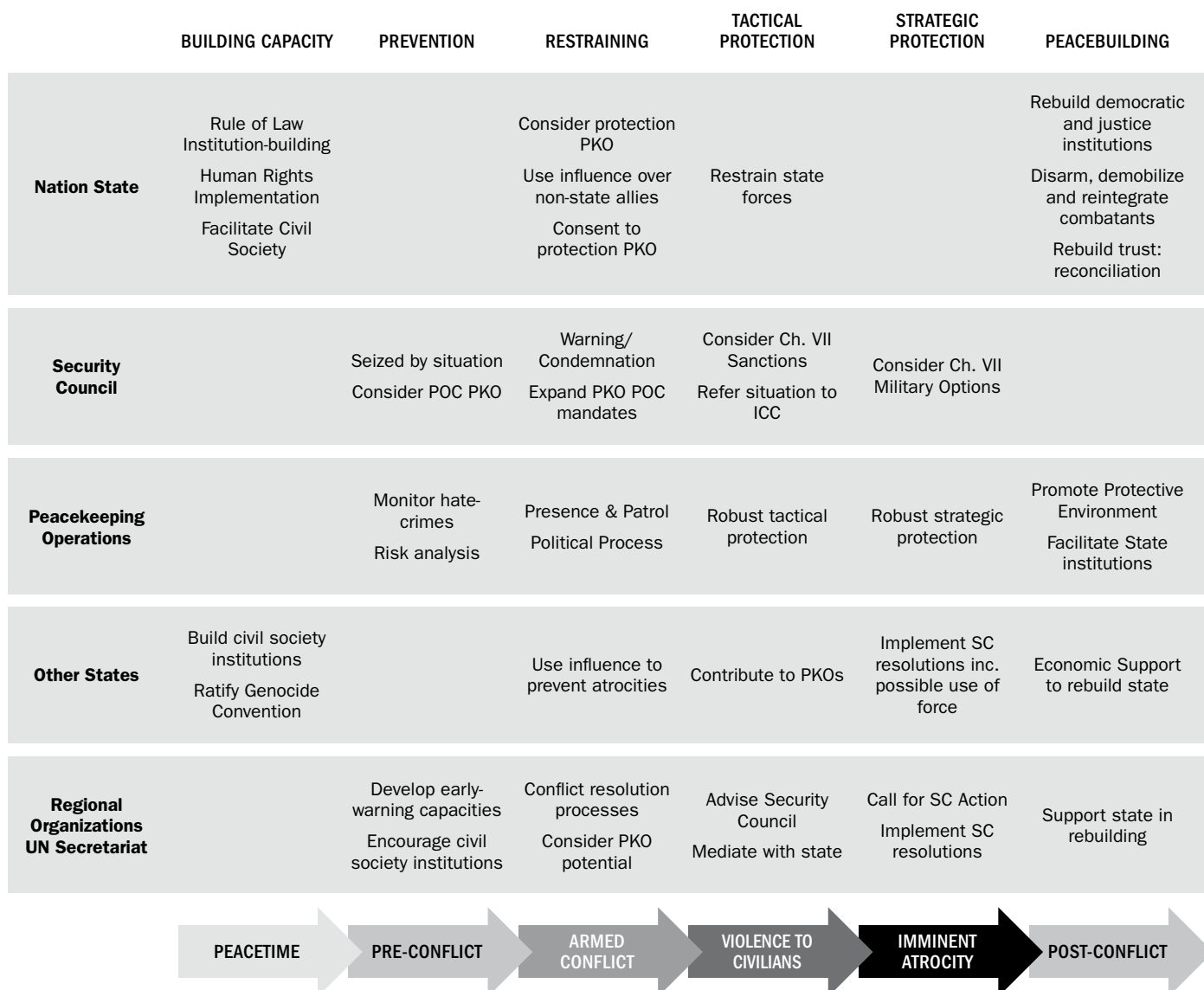


Figure 3: Timeline of Main Protective Responsibilities for R2P

Explanatory Text Figure 3: Timeline of Main Protective Responsibilities for R2P

- » The timeline is not strictly sequential: in particular, *Violence to Populations* and *Atrocity* can occur before (and indeed precipitate) *Armed Conflict*.
- » Earlier activities are *not* superseded by later ones. For example, even when Pillar Three intervention is required under Chapter VII, tasks of mediation and good offices do not dissolve. To the contrary, they acquire an even greater significance.

» Different aspects of the Timeline will be appropriate in some situations but not others. As always, a pivotal question is the involvement of the State in the threats of atrocities to populations. If the State is directly committing atrocities through its regular military forces, then peacekeeping will not be an option. On the other hand, if atrocities are being committed exclusively by actors opposed to the State, then the involvement of the UN Security Council and its Ch. VII powers will not be as necessary, as the State itself will be likely to welcome international support.

§2.4.b When does POC apply? What POC measures are required at each stage?

POC Before violence against civilians

IHL – Narrow POC – explicitly includes laws pertaining to peacetime. Pursuant to such laws, States need to train their militaries in IHL and build institutions ensuring IHL's support and enforcement. States are also required not to place military targets amongst civilian structures. Domestic legislation and military regulation are required to give effect to the basic guarantees provided by IHL. Turning to Broad POC, this larger principle will also include the domestic application of instruments such as international refugee law and IHRL. Humanitarian actors and NGOs will play a role in exhorting States and non-state actors to ratify all the instruments of IHL and to adopt measures to implement them.

The development of local, regional and international capacities – UN, state-based and NGO – for matters such as early-warning and conflict resolution are important peacetime POC activities. UN and regional bodies need to ensure that there are appropriate lines of communication between institutions with early warning capacities and executive decision-makers at all levels. Such decision-makers, for example the Security Council and Secretariat, can play a role prior to conflict by reminding parties to the conflict of their legal obligations under international law, and the possible consequences – legal and otherwise – of breaches of such laws.

In times of peace, able States need to train their forces in the challenging and often unfamiliar task of civilian protection, in order for them to play this role as peacekeepers in the future. Likewise, the UN Secretariat, DPKO and DFS need to continue building doctrine and institutions that expand the effectiveness of peacekeeping operations' capacities to protect civilians.

Peacekeeping operations can make vital

pre-violence contributions to POC. Prior to conflict, peacekeepers can be placed in preventive deployments (as occurred in Macedonia in 1993), or deployed to monitor a ceasefire. The DPKO/DFS three tiered concept note on POC delineates *Tier 1* as, "protection through the political process". This commitment to promoting the implementation of a peace agreement, or an existing political process, often will be the primary concern of peacekeepers deployed before conflict has started. At this early stage, peacekeepers will also need to reassure local populations about the protection they can offer, but also will need to work to constrain unrealistic expectations local populations may have about protection.³⁵

POC During violence against civilians

Once armed conflict proper has begun, the full application of *Narrow POC* will occur. IHL will impose on combatants and their commanders legal duties of distinction, proportionality and limitation, and the full suite of applicable international treaty obligations and the obligations of customary international law.³⁶

The role of peacekeeping operations may shift – and their mandate may be changed – once violence against civilians begins. Pursuant to the DPKO/DFS *Tier Two*, peacekeepers may be able to quell such violence through liaising with parties to the conflict, through their presence and patrolling, and other peaceful measures. Additionally, however, peacekeepers may now be called upon – subject to various constraints, including their capacities and other force priorities – to use direct, robust force to protect civilians from violence. At this juncture, humanitarian operators will begin to factor civilian protection into their own strategies, ensuring that their peaceful humanitarian

work (presence, providing food and shelter, digging wells, advocating for and informing civilian groups and so on) contributes to – or at least does not harm – POC. Coordination between diverse POC actors becomes more necessary as the amount and degree of involvement of POC actors expands. The UN protection cluster system has developed precisely to fill this need, coordinating protection activities amongst a multitude of humanitarian actors.

If the violence against civilians is sufficiently large-scale and systematic, then the Security Council will begin to take measures to protect civilians. These measures may include mandating new peacekeeping operations, or expanding and prioritising POC in existing peacekeeping mandates. A host of other ways of exhorting, pressuring and compelling parties to respect IHL is available to the Security Council. These measures include statements of concern, demand and condemnation, sanctions, arms embargoes, separation of civilians and combatants, ensuring access for humanitarian aid, establishing safe zones, protection of refugees, monitoring and reporting, counteracting hate media, support for the civilian population's protective strategies, and facilitating engagement with non-state actors. At last resort, the Council may consider military action under Ch. VII in order to protect populations under imminent risk of large-scale violence. At such a point, the agendas of POC and R2P will, for the Security Council, coincide.

POC After violence against civilians

Once violence to civilians is over, the task of POC actors will be to turn to measures to ensure the local environment has been sufficiently changed such that there is no swift return to violence. For peacekeeping operations, this action is encapsulated in the DPKO/DFS *Tier Three* regarding the establishment of a protective environment. Tasks here include the promotion of legal protection, support to national institutions, security sector reform, disarmament,

35 This is Tier Two: Phase 1. DPKO/DFS, 2010 *Draft Operational Concept on POC*.

36 See Jean-Marie Henckaerts and Louise Doswald-Becks, *International Committee of the Red Cross: Customary International Humanitarian Law* (New York: Cambridge University Press, 2005).

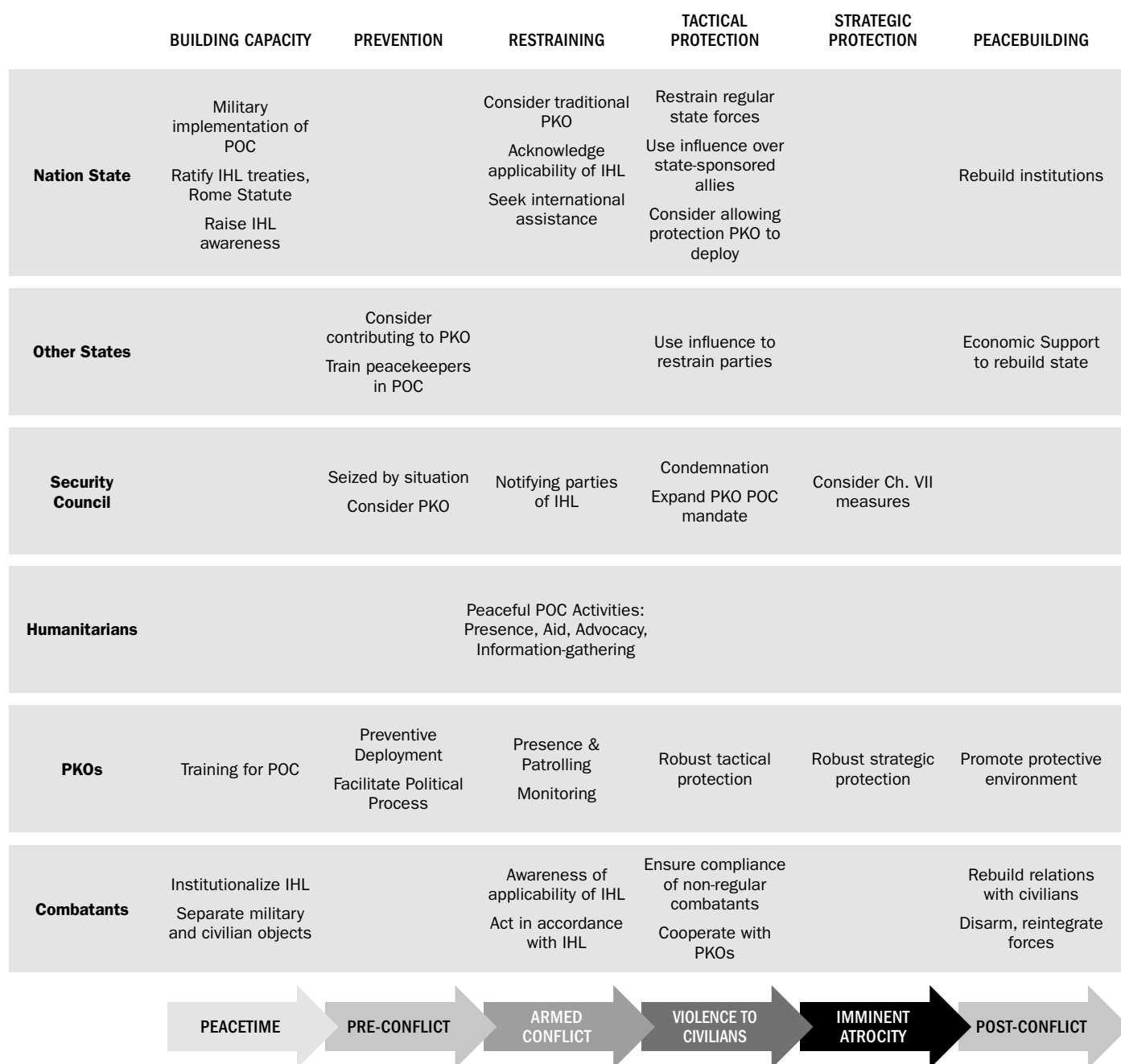


Figure 4: Timeline of Main Protective Responsibilities for POC

Explanatory Text Figure 4: Timeline of Main Protective Responsibilities for POC

» The timeline is not strictly sequential: in particular, *Violence to Civilians* and *Atrocity* can occur before (and indeed precipitate) *Armed Conflict*.

» Earlier activities are *not* superseded by later ones. For example, even when Robust Strategic Protection is required by PKOs, tasks like facilitating the political process do not dissolve. To the contrary, they acquire an even greater significance.

» Different aspects of the Timeline will be appropriate in some situations but not others. As always, a pivotal question is the involvement of the State in the threats against civilians. For example, if the State is directly committing attacks through its regular military forces, then peacekeeping will not be an option.

demobilization and reintegration of combatants, and may even extend to promoting economic development and capacity-building more generally. A further objective will be the safe return, including to appropriate property entitlements, of refugees and IDPs who fled the conflict. Additionally, attention may again have to be placed on measures involving the promotion of the political process (*Tier One*).

At a higher executive level, the Security Council will need to remain seized of the situation, and alert to the usefulness of various measures at its disposal to encourage security. Other international bodies and UN organs may be needed to promote economic development, and member States may need to support these politically and monetarily.

Legally, POC will require the pursuit of war criminals, whether by domestic courts or international tribunals (either the ICC or an ad hoc tribunal created by Security Council resolution). Politically, institutions such as truth and reconciliation commissions may be important steps towards a peaceful, secure society.

§2.4.c Main points of convergence regarding the “when” and “how” of POC and R2P

The parallels between R2P and POC are considerable. Both R2P and POC have duties of preparation and capacity-building in peacetime, and both have further (increasingly robust) responses that are triggered when violence occurs. Both principles impact on peacekeeping operations and Security Council Resolutions, and in each case, there is a broadening and increasingly robust suite of measures that may be adopted as movement occurs from peacetime to armed conflict to violence against civilians and entire populations – and then to post-violence situations.

§2.4.d Main points of divergence regarding the “when” and “how” of POC and R2P

R2P’s legal framework is always in effect. Whether in times of peace or war, States may not commit or support the commission of atrocity crimes. While the legal core of POC does impose peacetime duties, especially upon States, its full application awaits situations of armed conflict. On the other hand, R2P’s threshold for acting in response to atrocity crimes is much higher than POC – as “armed conflict” has a far larger compass than the comparatively rarer atrocity crimes. This legal situation is, to an extent, paralleled by the soft laws and political duties of R2P and POC. That is, R2P arguably has a deeper preventive agenda than POC. Because atrocity crimes are far graver and rarer than armed conflicts in general, different and more substantial preventive measures may be tenable in a way that would not be workable in response to every potential armed conflict. Thus, in both legal and political arenas, the *prevention* duties of R2P *before* atrocities occur run comparatively deeper and more consistently. These will usually be the first commitments that start to mobilize action, analysis, dialogue and concern. On the other hand, the *response* obligations of POC *during* armed conflicts often will be triggered before the response commitments in R2P, as armed conflict usually (but not always) precedes atrocities.

Furthermore, in response to an occurring atrocity crime, R2P provides much more detail on the process that can lead, through Security Council invocation of its Chapter VII powers, to military intervention for protective purposes.

The significance of humanitarian actors during POC’s armed conflicts, without having a similar presence during R2P’s atrocity crimes, is understandable inasmuch as peaceful measures become of less efficacy when the destruction of populations is a settled policy of powerful armed actors. At such a point, humanitarian measures will be subject to

Impartiality consists of the unbiased application of objective standards.

Neutrality consists of refraining from taking sides in a dispute.

Subjective impartiality or neutrality refers to the perception of a given actor that the operation is adequately impartial or neutral, and not a ‘fifth column’.

systematic disruption and humanitarians themselves are in grave danger. As such, their ability to impact on atrocity crimes is much less than their ability to improve civilian protection in more permissive environments.

Neutrality and Impartiality in R2P and POC

It is sometimes asserted that POC, as compared with R2P is impartial and neutral, and that it does not controversially impinge on state sovereignty. At a very general level of analysis it is correct that POC is more neutral and respectful of sovereignty than R2P. R2P is more overtly confronting of sovereignty – and so less neutral – than POC, as the presence of atrocities automatically implies a perpetrator that may need to be challenged. For its part, some elements of POC are exemplars of impartiality, neutrality and respectful of sovereignty – the long-standing action and policies of the ICRC with respect to POC are a prime example.

At a finer-grained level of analysis however, the picture becomes more complex. First, IHL can carry implications for absolutist sovereignty. For example, since Additional Protocol II of 1977 applies to non-international armed conflicts, IHL constrains the way States may confront and punish rebellions inside their own borders. Second, *Peacekeeping POC* always requires the impartial pursuit of the PKO’s mandate and respect for international law. Doing so, however, can require acting decisively against

perpetrators (in violation of neutrality), especially in *Primary POC PKOs*. The Brahimi Report was explicit on this point: “Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles.”³⁷ (*Peacekeeping POC* is always respectful of State sovereignty, in the sense of requiring formal consent for deployments.) Third, while respect for sovereignty is a vital element of international peace, in extreme situations *Security Council POC* can authorize the (non-neutral) use of coercive measures to protect or help protect civilians from perpetrators.

2.5 Conclusion and Summation

In conclusion, for some actors and organizations, there is little effective difference between R2P and POC. Actors like the UN Security Council and States (in their domestic protection activities) will perceive R2P simply as the limit case of POC – as a progression of their existing POC activities as they apply to the specific case of atrocity crimes.

Other actors may need to distinguish between R2P and POC on a strategic or operational level – for instance, peacekeeping operations may need to adopt different doctrines and strategies to prevent atrocity crimes.

Actors may also need to differentiate between POC perspectives. Peacekeepers may wish to differentiate between *Peacekeeping POC* – which always requires State consent – and *Security Council POC* – which can adopt coercive measures under Ch. VII in extreme cases. So too, combatants will need to differentiate their larger *Broad POC* tasks to protect specific populations from the perennial legal constraints on the methods and means of war (*Narrow POC*).

Finally, some institutions will have an exclusive focus on either R2P or POC. For instance, humanitarian actors may adopt a variety of protection tools that are effective for POC, but would be unapt in situations of atrocity.

³⁷ Brahimi, *Brahimi Report*, p. 9.

PART 3.

R2P POC

NORMATIVE

FRAMEWORKS

3.1

Overview

There are a wide variety of legal and quasi-legal normative frameworks that have implications for R2P and POC responsibilities. As this section describes, the protection international law provides to vulnerable persons is made up of a large and overlapping array of legal instruments, with different instruments supporting and filling the gaps in various areas of protection left by the others.

NORMATIVE FRAMEWORKS	R2P	POC
UN Charter	✓	✓
1948 Genocide Convention	✓	
International Humanitarian Law: 1949 Geneva Conventions and 1977 Additional Protocols	✓	✓
1951 Convention relating to the Status of Refugees	✓	✓
International human rights law	✓	
1998 Rome Statute of the International Criminal Court	✓	✓
2005 World Summit Document, paragraphs 138-140	✓	
UN Security Council resolutions	✓	✓
UNGA Resolutions	✓	✓

§3.1.a Common Ethical Roots of R2P and PoC

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

38 Sampford, "A Tale of Two Norms."

3.2 Commentary

§3.2.a UN Charter

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

UN Charter: R2P

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

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

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

Charter differs from prior international instruments such as the Covenant of the League of Nations.⁴⁰

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

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

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

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

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

United Nations Charter Art. 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Art. 2(7): Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

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

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

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

UN Charter: POC

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

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

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

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

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

44 S/1999/957, ¶67.

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

46 Brahimi, *Brahimi Report* p. 9.

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

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

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

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

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

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

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

§3.2.b 1948 Genocide Convention

1948 Genocide Convention: R2P

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

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

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

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

51 Scheffer, "Atrocity Crimes."

Genocide Convention:

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

...

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

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

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

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

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

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

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

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

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

together with genocide the other three atrocity crimes – war crimes, crimes against humanity and ethnic cleansing. Combined with the international instruments of IHRL, legal commentators have argued that – in line with R2P – all four atrocity crimes have acquired preventive duties similar to those the Convention attaches to genocide.⁵⁶ Other legal commentators have noted the more basic point that these atrocity crimes are often triggers for genocide, and therefore that preventive duties pertaining to the latter must apply equally to the former.⁵⁷ As such, the relationship between R2P and the Genocide Convention is very tight: the Convention supplies the legal framework that R2P specifies and makes operational.

1948 Genocide Convention: POC

POC does not have the same intimate connection with the Genocide Convention as R2P. The Convention is not included, for instance, under the rubric of International Humanitarian Law, which forms Narrow POC.⁵⁸ The Convention, after all, explicitly makes room for genocide during peacetime while IHL is a law designed for situations of armed conflict. Additionally, the Convention's narrow focus on this one most egregious atrocity crime parallels the narrow atrocity-crime-focused principle of R2P rather than the much broader set of prohibitions that are POC's concern.

Still, the Genocide Convention may be fruitfully thought of as informing at least an aspect of POC. Operations and institutions that have a POC mandate – or at least the member States that contribute to them – may be legally required to abide by the Convention. While the legal status of UN peacekeepers in regard to such instruments is complex, it is arguable that in at least some

International Humanitarian

Law (IHL) consists of a range of international treaties and customary laws. Its major instruments are the *Geneva Conventions* of 1949 and the *Additional Protocols* of 1977. IHL protects civilians and soldiers *hors de combat*, civilian objects like hospitals and places of worship, and limits the types of weapons and tactics used in conflicts.

cases they will have Convention-based obligations to try to prevent genocides, or to arrest or detain genocidaires.⁵⁹ Similarly, the UN Security Council and the Secretariat place their concern for atrocity crimes similar to genocide under the rubric of (Broad) POC, so it would be misleading to splice off entirely from POC the duties required by the Genocide Convention.

§3.2.c International Humanitarian Law (IHL)

International Humanitarian Law: R2P

R2P's Pillar One negative requirements not to commit atrocities are hard legal duties. In situations of armed conflict, these requirements will be constituted by the prohibitions of the Geneva Conventions. Of particular note is *Article Three*, common to the four conventions, providing that those outside the combat be treated humanely. Since atrocity crimes committed in armed conflict will always involve the inhumane treatment of non-combatants, they must, at minimum, involve the violation of Com. Art. 3.⁶⁰ In this way IHL helps to form a legal core for some of R2P's Pillar One duties (as regards war crimes and other atrocities committed in armed conflicts) as well as POC.

Common Article Three of the Geneva Conventions of 1949: "... each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction..."

Equally though, R2P may be seen as a specification and clarification of some of the more open-ended of IHL's positive duties. Two instances in particular are worth noting. First, Article One common to the four Geneva Conventions of 1949 provides that: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The requirement to "ensure respect" is widely taken to imply some form of pro-active protection against third-parties. Various R2P Pillar Two duties may thus be understood as specifications of this open-ended duty to ensure respect for the Convention – for instance, duties of peacekeepers to protect those within their care.⁶¹ Indeed, Common Art. One may even provide legal impetus for certain Pillar Three activities – but only inasmuch as such action is taken fully within the bounds of UN institutions and UN Charter constraints.⁶²

56 Rosenberg, "A Framework for Prevention," pp. 461–66.

57 Edward Luck, *The United Nations and the Responsibility to Protect* (Muscantine, IA: The Stanley Foundation, 2008), p. 3.

58 See, e.g., Australian Red Cross, *Promoting Respect for International Humanitarian Law: Handbook for Parliamentarians*; Sassöli, Bouvier, and Quintin, *How Does Law Protect in War?* §13.15.

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

60 Ekkehard Strauss, "A Bird in the Hand Is Worth Two in the Bush: On the Assumed Legal Nature of the Responsibility to Protect," *Global Responsibility to Protect* 1.3 (2009): 291–323; Dieter Fleck, "International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law," *Journal of Conflict and Security Law* 11.2 (2006): 179–99.

61 Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (Oxford: Oxford University Press, 2009) pp. 100–108; Helen Durham and Phoebe Wynn-Pope, "IHL, War Crimes & R2P," in C. Sampford, et al. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (Geneva: United Nations University, 2012).

62 Note the ICRC position: Anne Ryniker, "The ICRC's Position on 'Humanitarian Intervention,'" *International Review of the Red Cross* 482 (2001): 527–32. See similarly Siobhán Wills, "Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations," *Journal of Conflict and Security Law* 9.3 (2004): 387–418.

Additional Protocol 1, Art. 89: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.”

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

International Humanitarian Law (IHL): POC

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

63 ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Geneva: International Committee of the Red Cross, 1977).

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

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

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

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

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

§3.2.d International Human Rights Law (IHRL)

International Human Rights Law: R2P

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

The emerging universal reach of human

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

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

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

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

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

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

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

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

International Human Rights Law: POC

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

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

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

ICRC: Protection, “encompasses all activities aimed at obtaining **full respect for the rights of the individual** in accordance with the letter and the spirit of the relevant bodies of law (i.e., human rights, humanitarian and refugee law).”

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

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

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

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

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

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

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

72 See Rosenberg, “A Framework for Prevention.”

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

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

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

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

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

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

Rome Statute of the ICC: R2P

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

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

The *ICTY Statute* similarly gives

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

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

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

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

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

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

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

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

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

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

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

SECRETARY-GENERAL 2009 R2P REPORT:

“It would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 and 139 of the Summit Outcome. Those provisions represent a remarkably good outcome, which will well serve the ultimate purpose of the responsibility to protect: to save lives by preventing the most egregious mass violations of human rights, while reinforcing the letter and spirit of the Charter and the abiding principles of responsible sovereignty.”

§3.2.f 2005 World Summit Outcome Document: R2P

The 2005 *World Summit Outcome Document* (WSOD) constitutes the authoritative statement of R2P and is the most direct source on the nature and importance of R2P⁸¹. Recent work by the Office of the Secretary-General on the obligations and institutions required by R2P consists of filling out, but not in revisiting, the responsibilities described in these key paragraphs.

Four points regarding the WSOD formulation of R2P are important:

1. **The WSOD specified the scope of R2P to the four atrocity crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.** Other types of humanitarian crises must be dealt with outside the aegis of the R2P
2. **The WSOD placed the United Nations Security Council as the exclusive arbiter of when the international community should respond coercively to atrocity crimes.** While regional organizations and individual nations contribute to R2P in important ways, the principle does not entertain unilateral or multilateral action occurring outside the authority of the United Nations. In particular, ¶139 provides that the UN Security Council is the exclusive arbiter on the use of military force.⁸²

81 A/RES/60/1. It was the WSOD version of R2P that was affirmed by the Security Council in S/RES/1674 (see below).

82 It is not clear whether the WSOD rules out an alternative route for ensuring that actions to protect populations in other States via, for example, the ICJ. Sampford argued that, where the UNSC was unable or unwilling to act, a state or states that believed a humanitarian disaster in another state justified intervention without the agreement of the latter state could take a “sue me” approach. They could accept the compulsory jurisdiction of the ICJ for all issues related to that particular action (including both the intervention and the prior actions by the state subject to the intervention) and invite any other country which disagreed (particularly the state in which the intervention occurred) to accept

While the core of R2P was laid down in paragraphs 138-140 of the WSOD, **other aspects of R2P can be found elsewhere in the Document**, including in the sections on *Peacekeeping* (¶¶92-93), *Rule of Law* (¶¶119-120, 134), *Refugees* (¶133) and the *Peacebuilding Commission* (¶¶97-105).

3. **The WSOD determined the threshold for international Pillar Three action to a State’s “manifestly failing” to protect its population.**
4. **The WSOD did not lay down criteria for the UN Security Council to utilize in determining whether forcible Ch. VII intervention should occur.** Earlier, the ICISS had advanced six criteria for the authorization of military intervention: right authority, just cause, right intention, last resort, proportional means and reasonable prospects. Refraining from such a declaration, the WSOD allowed the Security Council greater discretion in when and how it would act to prevent atrocity.

The WSOD’s normative significance arises in a variety of ways.⁸³ The WSOD is first

.....
similar jurisdiction. Where the claims of the intervening countries about the legality of their action were genuinely held and soundly based (e.g. in a re-run of Rwanda which was then of such great concern), they would have little to worry about. The risk would be for the state which had been abusing its citizens contrary to international law. The WSOD would be relevant to the ICJ’s deliberations and may make it less likely to find in favour of states acting without UNSC approval. Nonetheless, the alternative route would still be available and might be useful if there were doubts about a pre-existing UNSC mandate. Charles Sampford, “Sovereignty and Intervention,” in T. Campbell and B. M. Leiser (eds.), *Human Rights in Theory and Practice* (London: Ashgate, 2001). Sampford’s position here could be seen as a contribution to what the 2011 Brazilian concept paper has recently spoken of as “Responsibility while Protecting”: Brazil, *Responsibility While Protecting*.

83 Its significance as a General Assembly Resolution will be discussed below.

Resolution 1265: The Security Council... “Expresses its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council’s disposal in accordance with the Charter of the United Nations...”

and foremost a profoundly important political document. Arising out of the unanimous agreement of the largest ever gathering of world leaders, R2P can claim to represent a truly shared concern for the victims of atrocities and the moral need to protect vulnerable people.

§3.2.g UN Security Council Resolutions

UN Security Council Resolutions: R2P

Security Council Resolutions form a central part of the normative framework of R2P. Their significance in contributing to the principle begins very early in R2P’s development, preceding not only the WSOD, but even the initial ICISS report of 2001, which itself drew upon *prior* Council practice in support of the emerging principle of R2P⁸⁴. Drawing on the Council’s action with respect to Somalia in Res. 794, ICISS observed that Council Resolutions allowed that responses to atrocity crimes could be justified in the pursuit of international peace, and were for this reason within the ambit of Security Council action. Thus, crucial parts of R2P’s *Pillar Three* were already to be found in on-going Council practice.

Language highly resonant of aspects of R2P’s *Pillar One* and *Pillar Two* can also be found in resolutions prior to the ICISS report. For instance, in Resolution 1270

84 ICISS, *The Responsibility to Protect*, ¶¶2.24-2.27.

(1999), in deciding the UN mission to Sierra Leone (UNAMSIL) should afford protection to civilians under imminent threat of physical violence, the Council observed that UNAMSIL needed to take into account the *responsibilities* of the Government of Sierra Leone in this regard; it urged the Government to develop its own “professional and accountable” police and armed forces, and it emphasized the importance of the international community’s support and assistance in this regard.⁸⁵

Notwithstanding the significance of these early practices and statements suggestive of elements of R2P it was only with the explicit endorsement of the Security Council in Resolution 1674 (2006) that the Council placed its authority behind the R2P principle. In Operative Paragraph 4 of that historic resolution, the Council affirmed R2P in the form detailed in the 2005 WSOD paragraphs. Significantly, this was a thematic resolution on the *Protection of Civilians in Armed Conflict*, allowing R2P to be supported by and included within the Council’s prior concern for and active stance on POC. Later that year in Resolution 1706, the Council for the first time invoked R2P in application to a specific conflict – the region of Darfur in the Sudan. It was some years before the Council returned explicitly to R2P in the preamble of Resolution 1894 (2009) – again a thematic resolution on POC. More generally though, affirmation that each State has the primary responsibility for the protection of its population occurs regularly in the context of the Council’s dealings with particular States at risk of atrocity.⁸⁶

The normative relationship between R2P and SC Resolutions should also be viewed through the lens of international law. As previous sections have described, R2P is, in some respects, a specification of a larger legal framework, incorporating

⁸⁵ S/RES/1270 (1999), ¶14, ¶23.

⁸⁶ E.g. S/RES/1973; S/RES/1975.

UNSC Resolution 1674 (2006): ¶4
“The Security Council... Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”

key articles of IHL, IHRL and the Genocide Convention. To the extent, then, that Security Council Resolutions should be interpreted as according with international law (as many commentators have argued),⁸⁷ their Resolutions can be seen as conforming with the positive requirements of the Genocide Convention.

Council Resolutions should also be seen as providing a new source of legal obligations for particular States to abide by their R2P duties under international law. The Security Council has the authority under the UN Charter to impose binding duties on States. Use of terms such as “demands”, “requires” and “decides” are indicative of the Council’s imposition of binding duties on States.⁸⁸ Thus Council Resolutions can be understood as both an *implementation* of existing R2P legal instruments, and as a *secondary source* of legal status for State’s R2P commitments. This nexus between the legal force of Security Council resolutions and R2P instruments arose in the context of the International Court of Justice’s judgment that Serbia had failed its legal duty to prevent genocide in Bosnia-Herzegovina. In a separate opinion, two of the concurring judges argued that the

judgment erred in relying solely on the Genocide Convention, and that it:

could have been more legally secure if anchored on the relevant Chapter VII Security Council resolutions that identified several clear missed moments of opportunity for the FRY leadership to have acted with respect to the imminent and serious humanitarian risk posed by any advance of Bosnian Serb paramilitary units on Srebrenica and its surroundings.

⁸⁷ E.g. Alexander Orakelashvili, “The Acts of the Security Council: Meaning and Standards of Review,” *Max Planck Yearbook of United Nations Law* 11 (2007): 143-95; Michael C. Wood, “The Interpretation of Security Council Resolutions,” *Max Planck Yearbook of United Nations Law* 2 (1998): 73-95.

⁸⁸ Noting that binding obligations can be created in the absence of sanctions.

Early precursors of R2P Concepts in UNSC Resolutions

S/RES/	YEAR	CONTEXT	INITIATIVE/DEVELOPMENT
788	1991	Liberia	Commending ECOWAS military operation (ECOMOG) in Liberia for its protection of life, property and stability, taken to be <i>ex post</i> authorization of intervention under the UN Charter.
1270	1999	Sierra Leone	Implicitly invoking State responsibilities to protect civilians by requiring UNAMSIL to take account of State responsibilities with respect to civilian protection.
1393	2002	Georgia	Invoking responsibility of a party to the conflict to protect returnee refugees.
1547/1556/1574	2004	Sudan (Darfur)	Endorsing and working with the AU mission in Darfur taken to be Council authorization for this regional POC mission.
1564	2004	Sudan	Recalling that “the Sudanese Government bears the primary responsibility to protect its population within its territory”.

Evolution of R2P in UNSC Resolutions

S/RES/	YEAR	CONTEXT	INITIATIVE/DEVELOPMENT
1674	2006	POC	Affirming R2P; Establishes link between R2P and UNSC concern with POC.
1706	2006	Sudan (Darfur)	Invoking R2P in context of a specific case (aiming to deploy peacekeepers to Darfur).
1923	2010	Chad/Central African Republic	Drawing down UN PKO (MINURCAT) only after governments made the commitment – including specific benchmarks – to assume the responsibility to protect their civilians.
1970	2011	Libya	Invoking R2P (Pillar One) in sanctioning a State authority with asset freezes, arms embargo, travel bans and referral to the ICC. Considering that widespread and systematic attacks taking place in the Libyan Arab Jamahiriya may amount to crimes against humanity.
1973	2011	Libya	Authorizing military force under Ch. VII to protect civilians against the express will of a functioning State.

Table 3: R2P in UN Security Council Resolutions

Other Security Council Resolutions where R2P is implicated include:

- » S/RES/1814 (2008) Somalia;
- » S/RES/1870 (2009) Sudan;
- » S/RES/1894 (2009) Thematic POC Resolution.

UN Security Council Resolutions: POC

UN Security Council Resolutions have developed as a key normative framework

for POC. In Resolution 688 (1991) concerning Iraq and Resolution 794 (1992) concerning Somalia, the Council made the historic determinations that humanitarian crises of sufficient magnitude could – at least in specific situations – constitute a threat to international peace and security. With this determination, the Council moved the protection of civilians squarely into its ambit under the Chapters V to VII of the UN Charter. However, these resolutions

were not endorsements of a general principle – with Resolution 794 explicitly emphasizing the “unique character” of the situation in Somalia. Such a general endorsement did not occur until 1999 with Resolution 1265, and then with Resolution 1296 in 2000.

UN Security Council Resolution 1296 (2000): The Council... “Notes that the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security, and, in this regard, *reaffirms* its readiness to consider such situations and, where necessary, to adopt appropriate steps...”

Beginning in 1999, the Security Council has issued thematic resolutions on POC.⁸⁹ The first of these resolutions expressed in general terms the willingness of the Council to respond to situations of armed conflict where civilians were being targeted, while the second underlined in broad terms of general principle the SC’s willingness to determine POC situations as threats to international peace. The most recent *Aide Memoire on POC* opens with the telling assertion that:

“Enhancing the protection of civilians in armed conflict is at the core of the work of the United Nations Security Council for the maintenance of peace and security.”⁹⁰

As well as its first thematic POC

89 S/RES/1265 (1999); S/RES/1296 (2000); S/RES/1674 (2006); S/RES/1738 (2006); S/RES/1894 (2009). Note also the resolutions on *Women and Peace and Security*: S/RES/1325 (2000); S/RES/1820 (2008); S/RES/1888 (2009); S/RES/1889 (2009) and on *Children and Armed Conflict*: S/RES/1314 (2000); S/RES/1379 (2001); S/RES/1612 (2005); S/RES/1882 (2009).

90 OCHA, *Aide Memoire: For the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict*, 4th ed. (New York: United Nations, 2011).

UN Security Council Resolution 1856 (2008): “The Council... *Emphasizes* that the protection of civilians, as described in paragraph 3, subparagraphs (a) to (e), must be given priority in decisions about the use of available capacity and resources...”

resolution, 1999 also saw the first Security Council resolution (Res. 1270), where the Council, acting under Ch. VII of the Charter, charged a peacekeeping operation with the mandate “to afford protection to civilians under imminent threat of physical violence”, a now-regular occurrence in peacekeeping mandates. Since these early resolutions, the Council has steadily increased the scope and primacy of its POC directives to UN peacekeeping operations, and expanded the authority it gives to them for the use of force to effect such protection. For instance, Resolution 1856 (2008) expanded and underlined the importance the Council ascribed to MONUC’s role in the protection of civilians. POC is explicitly prioritized over all other force objectives in no less than three separate places in this one resolution (Operative paragraphs 2, 3 and 6). The Council remains a key influence on the way POC is understood by peacekeepers, with the recent DPKO/DFS *Draft Operational Concept on POC* following the tracks laid down in thematic and mission-specific Council resolutions.

As noted above with respect to R2P, UN Security Council Resolutions should be interpreted through the lens of international law. This is especially the case with respect to POC, where the link with international law and IHL is tight. There are several reasons for reading Security Council Resolutions as supporting and according with

international law.⁹¹ First, the core of IHL is made up of *jus cogens* (non-derogable) international obligations that pre-date the Charter. As States cannot derogate from such obligations, they likewise cannot form by treaty an institution (the UN Security Council) that allows them to do so. Second, the requirement to conform to and promote both international law and human rights is itself part of the UN Charter, provided for in the Preamble and Articles 1 and 13. Third, Security Council resolutions themselves consistently invoke the importance of IHL, both thematically and in regard to specific situations. As such, the relationship of the Security Council with POC and IHL is mutually supporting, with the Council action to protect civilians both legally supported by and providing additional legal support for the requirements of IHL.

91 Orakhelashvili, A. (2007). “The Acts of the Security Council: Meaning and Standards of Review.” *Max Planck Yearbook of United Nations Law* 11: 143–195, pp. 177–190. There is (as a fourth reason) the separate normative status of IHRL and IHL through treaties and customary law (some pre-dating the Charter), though it is possible that Art. 103 of the Charter gives precedence to SC resolutions over these, as Kolb holds, for example: Kolb, *Law of the United Nations*, p. 139. Contrast, however, Orakhelashvili, “Acts of the Security Council,” pp. 187–190, where it is argued that the status of humanitarian treaties as instantiating prior norms, and of providing (non bilateral) fundamental guarantees, makes Art. 103 inapplicable in this context.

S/RES/	YEAR	CONTEXT	MAJOR INITIATIVE/DEVELOPMENT
688	1991	Iraq	Acknowledges humanitarian crises in specific cases can constitute threats to international peace and security.
794	1992	Somalia	Authorizes PKO in the absence of a functioning State's consent, to "use all necessary means to establish ... a secure environment for humanitarian relief operations".
836	1993	Bosnia Herzegovina	Under a Ch. VII mandate , authorizes the use of force to defend safe areas from bombardment or incursion.
918	1994	Rwanda	Mandates PKO to "contribute to the security and protection of displaced persons, refugees and civilians at risk... "
929	1994	Rwanda	Authorizes under Ch. VII a military operation to contribute "to the security and protection of displaced persons, refugees and civilians at risk... " by "all necessary means" .
1265	1999	Thematic POC Resolution	First thematic resolution on POC, asserts the need to ensure compliance with IHL, address impunity, improve access for humanitarians and prevent conflicts and expresses willingness to respond to situations of armed conflict where civilians are being targeted.
1270	1999	Sierra Leone (UNAMSIL)	Establishes under Ch. VII of the UN Charter, a PKO "to afford protection to civilians under imminent threat of physical violence" .
1296	2000	Thematic POC Resolution	Allows – as a general matter – that deliberate, flagrant and systematic targeting of civilians may constitute a threat to international peace and security and reaffirms Council readiness to take appropriate steps in such cases. Affirms intention to give peacekeeping missions suitable mandates and adequate resources.
1502	2003	Thematic POC Resolution	Reinforcement of the importance of protecting UN and humanitarian personnel.
1556/ 1574	2004	Darfur (Sudan)	Endorsing and working with the AU mission in Darfur: taken to be Council <i>ex ante</i> or <i>ex post</i> authorization for this regional POC peacekeeping mission.
1612	2005	Children & Armed Conflict	Distinguishes that cases under its consideration may <i>or may not</i> be armed conflict in the legal sense of the Geneva Conventions and Additional Protocols.
1674	2006	Thematic POC Resolution	Affirms R2P under the broader POC rubric.
1856	2008	DRC	Prioritizes POC over all other PKO force objectives.
1870	2009	Sudan	Directs the PKO to "make full use of its current mandate and capabilities" to provide security to civilians.
1923	2010	Chad/Central African Republic	Draws down UN PKO (MINURCAT) only after governments make the commitment – including specific benchmarks – to assume the responsibility to protect their civilians.
1962	2011	Côte d'Ivoire	Recognizes a new State authority against the claims of the incumbent – shifting the actor with consent over the PKO's presence. Authorizes "all necessary means" and reiterates the importance of the POC mandate. In the event this (combined with Res. 1975) culminated in the decisive use of force against the incumbent.
1973	2011	Libya	Authorizes military force under Ch. VII to protect civilians against the express will of a functioning State, ultimately contributing to regime change.

Table 4: Overview: The Progressive Development of POC in UNSC Resolutions

General Assembly Resolution 63/308: The General Assembly, *Reaffirming* its respect for the principles and purposes of the Charter of the United Nations, *Recalling* the 2005 World Summit Outcome, especially paragraphs 138 and 139 thereof, *Takes note* of the report of the Secretary-General and of the timely and productive debate organized by the President of the General Assembly on the responsibility to protect, held on 21, 23, 24 and 28 July 2009, with full participation by Member States. *Decides* to continue its consideration of the responsibility to protect.

§3.2.h UN General Assembly Resolutions

UN General Assembly Resolutions: R2P

The General Assembly, at the High-level Plenary Meeting of the Assembly in 2005, founded the authoritative formulation of R2P in its Resolution 60/1 (WSOD). This was not the first time the General Assembly had played a role in developing the international response to atrocities. In its very first years, the General Assembly declared the criminality of genocide, laying the groundwork for the Genocide Convention with its Resolution 96(I) of 1946.

While General Assembly Resolutions do not have the status of law, they can signal the future development, through treaty or custom, of international law, and they are in themselves evidence of the potential emergence of *opinio juris* on a matter (as the ICJ has noted). As such, the General Assembly affirmation of the WSOD impacts upon – though does not itself create – the status of R2P in international law.

The World Summit Outcome Document paragraphs on R2P declared an ongoing role for the General Assembly. Paragraph 139 stated:

“We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

Genocide Convention of 1948, Preamble: “The Contracting Parties, Having considered the declaration made by the General Assembly of the United Nations in its resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world...”

and its implications, bearing in mind the principles of the Charter and international law.”

The General Assembly Plenary Debate on R2P in 2009 reaffirmed the principle of R2P and was widely taken to be a success for R2P advocates in the face of some concerted opposition.⁹² Following from the debate was the General Assembly’s first resolution on R2P: GA/63/308.

UN General Assembly Resolutions: POC

The UN General Assembly plays a role in the normative support for POC, through its affirmations and promotions of POC in its resolutions. Two sorts of POC resolutions occur regularly.

IHL AND PALESTINE

Each year since 1999, and intermittently before that year, the Assembly has affirmed the applicability of IHL to the occupied territories in Palestine.⁹³ The Assembly notes this concern for POC and IHL is found within the UN Charter; Resolution 65/103 begins by noting the Charter Preamble’s decree that the promotion of international law is “is among the basic purposes and principles of the United Nations”. As well as reaffirming the applicability of the *Fourth Geneva Convention* to the occupied

92 Secretary-General, *Early Warning, Assessment and the Responsibility to Protect*; Edward Luck, “A Response,” *Global Responsibility to Protect 2* (2010): 178-83; International Coalition for the Responsibility to Protect ICRTOP, *Report on the General Assembly Plenary Debate on the Responsibility to Protect*, 15th September, 2009; Alex Bellamy, “The Responsibility to Protect - Five Years On,” *Ethics and International Affairs* 24.2 (2010): 143-69; Ramesh Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (London: Routledge, 2011), pp. 156–57.

93 See, e.g., A/RES/65/103.

territories, these General Assembly Resolutions affirm a wide reading of Art. 1 common to the four conventions: namely that High Contracting Parties are required to “exert all efforts to ensure respect” for the provisions of the conventions.

THE ADDITIONAL PROTOCOLS OF 1977

The General Assembly has, regularly since 1977, enacted resolutions on the status of the 1977 *Additional Protocols to the Geneva Convention*, emphasizing the Protocols’ humanitarian importance, their contribution to consolidating international humanitarian law, and encouraging and calling upon States to ratify these treaties.⁹⁴ This series of Resolutions in particular takes note of the significance of information gathering and fact-finding measures available to the international community and the Security Council and of ways of facilitating the submission of relevant information to the Secretariat.⁹⁵

These two abiding concerns do not exhaust the input of General Assembly resolutions on POC, as other resolutions focus on particular aspects of POC. These may focus on specific vulnerable groups such as children,⁹⁶ and even on specific groups in specific contexts, such as the Assembly’s 1995 resolution on the *Rape and abuse of women in the areas of armed conflict in the former Yugoslavia*.⁹⁷

UN Charter, Article 13(1):

“The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

94 A/RES/32/44, ¶4; A/RES/65/29, ¶2–3.

95 E.g. A/RES/65/29, PmbL., ¶13.

96 E.g. A/RES/42/209.

97 A/RES/49/205.

§3.2.i Women and Women's Rights

Women and women's rights issues are applicable to both R2P and POC. As well as the significance of the basic legal documents of IHL and IHRL, the importance of women's rights and empowerment with special respect to issues of peace, security, armed conflict and other situations of violence are reflected in:

- » Security Council Resolutions, including S/RES/1325 (2000); S/RES/1820 (2008); S/RES/1888 (2009); S/RES/1889.
- » The World Summit Outcome Document 2005, esp. paras 58-59, 116, 128.
- » General Assembly Resolutions; e.g. A/RES/49/205 (1995) on *Rape and abuse of women in the areas of armed conflict in the former Yugoslavia*.
- » The *Convention on the Elimination of All Forms of Discrimination against Women* of 1979 and the *Optional Protocol* of 1999.
- » The presence of sexual and sex-based crimes (including those of exclusive application to women, such as forced pregnancy) in the atrocity crimes listed by the *Rome Statute of the ICC* as War Crimes and Crimes against Humanity,⁹⁸ and of persecution on the basis of gender as a Crime against Humanity.⁹⁹

There are two broad (though inter-related) areas of significance arising from these documents.

Women as victims in situations of

violence: In situations of armed conflict and violence, with the breakdown of traditional indigenous institutions of protection, women are especially vulnerable to physical violence and sex-based crimes. Some of these threats are specifically directed at women, including forced pregnancy, social ostracism of raped women and human trafficking in women. These violations can occur in

different contexts to other violence in situations of unrest, and can persist after the cessation of hostilities. For this reason, such threats can require different approaches and solutions by local and international protection actors. Women are vulnerable to:

Violence and coercion from local actors – including not only enemy armed forces and militia, regular state military and opportunistic criminal elements, but also from within the local community itself – such as from fellow members of IDP or refugee camps.

Violence and coercion from international actors – including peacekeepers and international police units, as well as intervening forces from foreign states.

Women as agents of protection in

situations of violence: Women's engagement in civil society, political processes, peace initiatives and the development of peacebuilding capacities is increasingly recognised as vital not only for ensuring the proper protection of women and their rights, but also for the sustainable resolution of the larger conflict itself. Women play a key role as agents for change, stability, peace and development. Women are required both as:

Local agents. Experience has shown that the proper protection of women requires the involvement of those women. Effective long-term protection of rights and security cannot be grafted onto women who do not see themselves as rights-holders, and who do not play an active role in protection processes and institutions.

International agents: As well as offering their own perspectives and insights on matters on violence and peace, women peacekeepers and police officers are often better placed to engage with local women who are at risk or are already victims of sexual crimes.

UNSC Res. 1888 (2009)

“Welcoming the inclusion of women in peacekeeping missions in civil, military and police functions, and recognizing that women and children affected by armed conflict may feel more secure working with and reporting abuse to women in peacekeeping missions, and that the presence of women peacekeepers may encourage local women to participate in the national armed and security forces, thereby helping to build a security sector that is accessible and responsive to all, especially women...”

UNSC Res. 1889 (2009)

“Noting that women in situations of armed conflict and post-conflict situations continue to be often considered as victims and not as actors in addressing and resolving situations of armed conflict and stressing the need to focus not only on protection of women but also on their empowerment in peacebuilding...”

98 Art 7, 1(g); Art 8, 2(b)-2(e).

99 Art. 7, 1(h).

3.3

Conclusion and Summary

This section has illustrated the applicability of a wide array of legal and normative frameworks to the twin principles of R2P and POC.

POC: While POC's legal core is constituted by IHL, a variety of other instruments contribute to the complete picture of POC's normative base, including the UN Charter, the Rome Statute, UN Security Council Resolutions and UN General Assembly Resolutions. Additionally, International Human Rights Law, Refugee Law and the Genocide Convention carry implications for POC.

R2P: The legal and normative position of R2P is more complex. While R2P gains substantial political support from WSOD 2005 and General Assembly and Security Council Resolutions, its relationship to international law is subtle, as different parts of R2P find support in different legal instruments. *Simplifying greatly:*

- » **R2P Pillar One is Hard Law:** A State's performing or failing to attempt to prevent atrocity crimes regarding its own citizens constitutes a straightforward violation of a wide array of international legal instruments.
- » **R2P Pillar Two is a mixture of Soft Law and Political Obligation:** Different parts of international law have implications for certain international duties of atrocity prevention, but such implications are in various contexts unclear, or the area of law is in flux. Other aspects of Pillar Two, such as a responsibility to contribute to peacekeeping operations, for example, fall entirely outside the operation of even soft law, and are purely political obligations.
- » **R2P Pillar Three is a Political Obligation:** an array of international legal instruments implies international action should occur through UN processes in response to atrocities, but the instruments themselves do not amount to a determination of legal duties.

The following table – *Table 5 Legal Instruments Applicable to R2P Atrocity Crimes* – provides a finer-grained account of which legal instruments are potentially implicated in which types of R2P duties. Note that all the categorizations within Table 5 are to some extent controversial, as reasonable debate surrounds the interpretation of each legal instrument, and the determination of where hard law ends and soft law begins is contentious. The purpose of the table, however, is to provide a basic overview of the overlapping web of legal duties that provide for R2P's legal framework.

ATROCITY CRIME	LAW/LEGAL INSTRUMENT	FORMS PART OF R2P WITH RESPECT TO THAT ATROCITY CRIME						
		R2P PILLAR ONE		R2P PILLAR TWO			R2P PILLAR THREE	
		NEGATIVE	POSITIVE	INFLUENCE	PEACEKEEPER	CAPACITY	PEACEFUL	FORCE
Genocide*	Genocide Convention (esp. Art's. 1, 8).	Hard Law	Hard Law	Hard Law	Soft Law	Political	Soft Law	Political
	IHRL, including human rights provisions in the UN Charter: Art. 1(3), Art. 55(c), Art. 56.	Hard Law	Hard Law	Soft Law	Soft Law	Political	Political	Political
	Rome Statute (Art. 6).	Hard Law	Hard Law					
War Crimes	Geneva Convention Com. Art. 1 and Additional Protocol 1, Art. 89.	Hard Law	Hard Law	Soft Law	Soft Law	Political	Political	Political
	Geneva Convention Com. Art. 3 and Additional Protocol 2.	Hard Law	Hard Law					
	Rome Statute (Art. 8).	Hard Law	Hard Law					
	Geneva Convention IV, Art. 16, and Additional Protocol 1 Art. 58.	Hard Law	Hard Law	Soft Law	Soft Law			
Crimes Against Humanity	Rome Statute (Art. 7).	Hard Law	Hard Law					
	Slavery Convention (covering slavery only).	Hard Law	Hard Law			Political		
	Convention Against Torture (covering torture only).	Hard Law	Hard Law	Soft Law	Soft Law			
	IHRL.	Hard Law	Hard Law	Soft Law	Political	Political	Political	Political
	Occupation Law (controlled areas only).	Hard Law	Hard Law		Soft Law			
	International Law Commission (ILC) Draft Articles on State Responsibility.	Hard Law	Hard Law	Soft Law		Political	Soft Law	Political
	IHL (applicable in cases where rebel forces have military command and occupy territory; or where international forces are involved in fighting).	War Crimes instruments above apply.						
Ethnic Cleansing	Ethnic Cleansing is a subset of <i>Crimes against Humanity</i> (Persecution, Deportation or Forcible Transfer).	Crimes against Humanity instruments above apply.						

Table 5: Legal Instruments Applicable to R2P Atrocity Crimes

* Instruments noted for *War Crimes* apply all the more to genocide in war. Instruments noted for *Crimes against Humanity* apply all the more to genocide in non-war contexts. (One thus cannot commit genocide without committing either war crimes or crimes against humanity.) Thus the duties regarding genocide have strictly the widest and strongest legal coverage.

Explanation of Terms in Table 5: Legal Instruments Applicable to R2P Atrocity Crimes

R2P Pillar One: *Prevention and protection responsibilities of a State to its own people.* This includes:

- » **Negative:** Negative duties not to itself commit the crime.
- » **Positive:** Positive duties to protect all persons in the State's territory from third parties and to take structural and operational measures to prevent atrocity crimes and violations.

R2P Pillar Two: *Responsibilities of States in the international community to help consenting States to protect their populations.* This includes:

- » **Capacity:** Positive duties to help other consenting States build capacity, or to be involved in early warning and threat assessment.
- » **Influence:** Positive duties to use influence to prevent the crime being performed by allied States, state-supported actors or non-state actors.
- » **Peacekeeper:** Positive duties on peacekeepers (once deployed) to prevent/react to the crime, within their capacities and knowledge.

R2P Pillar Three: *Responsibilities of the international community to protect populations when States are manifestly failing to do so.* Includes:

- » **Non-military:** Non-military measures through UNSC: targeted sanctions, arms embargoes, travel bans and referrals to the ICC.
- » **Force:** Forceful, military measures through UNSC.

“Hard Law”: *There is a strong case that the legal instrument imposes at least some of the R2P duties in question, or that the R2P duties are a plausible specification of the legal instrument's duties, as applied to that atrocity crime.*

“Soft Law”: Either:

- A) *It is at least arguable that the legal instrument imposes some of the R2P*

duties in question, or that the R2P duties are a plausible specification of the legal instrument's duties, as applied to that atrocity crime. Soft Law may signal areas of potential future growth for hard law.

- B) it is not controversial that the instrument applies in this case, but *there are queries over its strict legality, its determinateness, or whether there are institutions that can enforce it.*

“Political”: Implies the presence of political obligations – that is, duties that it is accepted States should perform, given the instruction of the law in question, but with the proviso that States are *not* legally bound to do so. Political duties can progress towards law (as occurred with the ICJ Genocide Judgment in 2007, where the duty to use one's influence to prevent atrocities was determined to be a determinate legal one, and not a mere political duty).

§3.3.a The “Legal Concept”/“Political Concept” Dichotomy

During the course of the research for this Policy Guide – both in the literature and during interviews and seminars – it quickly became clear that there is a marked lack of clarity about the broad and the precise relationship between the two key concepts of POC and R2P. The conceptual confusion and incoherence can be found in two recent reports of the Secretary-General, no doubt reflecting different drafting teams and different institutional perspectives.

In the special report on POC in May 2012, the Secretary-General declared that:

21. I am concerned about the continuing and inaccurate conflation of the concepts of the protection of civilians and the responsibility to protect. While the two concepts share some common elements, particularly with regard to prevention and support to national authorities in discharging their responsibilities towards civilians, there are fundamental differences.

First, the protection of civilians is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept, set out in the 2005 World Summit Outcome (see General Assembly resolution 60/1). Second, there are important differences in their scope. The protection of civilians relates to violations of international humanitarian and human rights law in situations of armed conflict. The responsibility to protect is limited to violations that constitute war crimes or crimes against humanity or that would be considered acts of genocide or ethnic cleansing. Crimes against humanity, genocide and ethnic cleansing may occur in situations that do not meet the threshold of armed conflict. I urge the Security Council and Member States to be mindful of these distinctions.¹⁰⁰

The key claims here that POC is a legal

100 UN Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/2012/376, 22 May 2012, ¶21. Notably, the assertion is made on the heels of the Secretary-General's discussion of action in Libya (¶19) and on Brazil's Concept Note on “Responsibility while Protecting” (¶20). In both these cases the Secretary-General mentions only POC, and not R2P, yet each of them – especially Brazil's Concept Note – explicitly invoke R2P. The Secretary-General's own discussion, therefore, appears to implicate exactly the conflation he warns against. It is also worth noting that the “legal/political” dichotomy is not made anywhere else in the rest of the 2012 POC Report. If POC is a “legal concept”, however, then it is perplexing why its legal status and ramifications are not discussed in the context of peacekeeper's mandates to protect civilians, or why reference should be made to the Human Rights Council's Independent Inquiries into the Syrian Arab Republic over the previous 18 months, since the reports of November 2011 (A/HRC/17/2/Add.1) and February 2012 (A/HRC/19/69) explicitly state that they are not applying IHL because the situation cannot be ascertained to be an “armed conflict” in the legal sense of that phrase. To the contrary, however, is precisely because *Broad POC* is *not* a legal concept that the protective actions of peacekeepers and the legally murky situation of the early Syrian crisis can be discussed under its banner.

concept and that R2P is a political concept are novel. This wording has never been used before in any of the Secretary-General's previous reports on POC (back to their inception in 1999) or on R2P (back to their inception in 2009). Similarly, none of the Security Council thematic resolutions on POC – including those that mention R2P – make either of these claims.

Just two months after the 2012 POC Report, in his special report on R2P, the Secretary-General returned to a more traditional understanding of the normative groundings of R2P: “The responsibility to protect is a concept based on fundamental principles of international law as set out, in particular, in international humanitarian, refugee and human rights law.”¹⁰¹

The conclusions of our analysis are much more closely aligned to the Secretary-General's Special Report on R2P (and his prior POC and R2P reports, before 2012). Each has legal, political, institutional and policy-guiding aspects. Broadly speaking they can:

1. Provide guidance to those who are seeking to create international law via treaties or interpret it in international tribunals;
2. Influence views about what international law should be and during the process of signing and ratification, about what it should do;
3. Provide guidance for international actors in the absence of law.

.....
 101 S/2012/578, ¶9. The Secretary-General does use the new phrase of a “political framework” to refer to R2P (¶59), but this is immediately qualified as being “based on fundamental principles of international law for preventing and responding to genocide, war crimes, ethnic cleansing and crimes against humanity.” At times the Secretary-General deals explicitly with POC issues in this Report – for instance in his discussion of peacekeepers – but, again, he makes no mention of the putative legal-political dichotomy advanced in the 2012 POC Report.

It is true that POC, as compared to R2P, has a closer relationship to law, and that there is a version of POC – *Narrow POC* – that is a legal concept (or, more carefully, that signifies a large and nuanced body of law). Ultimately, however, both R2P and *Broad POC* have elements describing legal obligations, and they have elements guiding and informing policy, practice and institutional development.

§3.3.b Developing and Emerging International Norms/Principles

Both R2P and POC can be seen as international norms (or principles) in the process of development.¹⁰² They share common roots in:

- » the long standing claims by states to protect those who live within their borders and the fact that states are sometimes unable and/or unwilling to do so
- » the feelings of empathy most peoples feel for the sufferings of others and the duty to go to their aid found in most religions and cultures.
- » agreement (formally universal) that those people have human rights.

Reconciling these premises with the legal and pragmatic reasons for recognizing state sovereignty is not easy. R2P and POC are in the process of development to address these difficulties. As developing norms they influence both legal and political decisions – providing guides for conduct and reasons for action. And as they are applied in these ways, they gather support, attract critique, lay down precedents and accepted practice, and shift in nature.

.....
 102 See especially Sampford, “A Tale of Two Norms.”

A variety of actors and institutional structures contribute to the development and continuity of international norms. For R2P and POC, these include:

1. Influential actors – states and groups of states, and, increasingly, corporations and, in some cases, NGOs (especially ICRC);
2. Commissions and expert panels;
3. UN agencies who adopt such norms for their own guidance;
4. The General Assembly;
5. The United Nations Security Council;
6. International courts (especially the ICJ and ICC).

The relative rarity with which emerging norms secure support from UNSC, the ICJ or through ratification in Treaties suggests a different relationship between norms and laws in international law as opposed to domestic law. In domestic law, competing norms and competing versions of those norms may affect debate in legislatures and courts but those debates are largely resolved by statute or precedent. In international law, different norms and various versions of them will tend to wax and wane, becoming more or less influential. This protracted and frequently indeterminate process leads to a number of important dynamics:

1. Related but different norms may appear that cover similar material (R2P and PoC exemplify this);
2. During this process, different parts or different aspects of a norm may be emphasised by particular institutions (for example, in 2005 R2P was limited to the four major atrocity crimes, and subsequent debate and action since that date has concretized these important limits in R2P's scope);
3. Governments and other actors may emphasise different aspects, or interpretations, of the relevant norms.

This last process may be self-serving but can serve a vital purpose. Although many international norms are seen as universal, they emerge in particular times, places, contexts and cultures. These should not be simply exported to other cultures. Those within different cultures and contexts should not “import” those norms but look for supportive traditions within their own culture and consider how they may contribute to the development and refinement of the emerging norm. This process involves what Amitav Acharya refers to as “norm localisation” and “norm universalization”.¹⁰³ Looking for supportive traditions within local cultures and linking them to R2P and PoC provide an example of norm localisation. Such localisation provides a better foundation for the norm than a western import and heads off norm spoilers. For example, links have been noted between Islamic and Christian doctrines regarding rights and duties of military intervention for human protection purposes, and the Jewish case for R2P explicitly made with contributions from non-cosmopolitan writers. At the same time, by in bringing in the insights of other cultures, such work also contributes to the global debate and content of R2P and PoC – leading to norm universalisation.

Both norms are emerging – gathering support and changing as they are applied. They may well have different trajectories in which they merge, diverge, wax or wane. Local, regional and cultural engagement, refinement, adaptation and strengthening of norms are important parts of that process and affect the trajectories of these norms.

103 Amitav Acharya, “How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism,” *International Organization* 58.2 (2004): 239-75

PART 4

R2P POC

INSTITUTIONAL STRUCTURES

This Part outlines the relevance of the two protection principles to a range of different global, regional, and national organizations, and emphasizes the significance of *mainstreaming* R2P and POC in order for them to be effectively incorporated into these institutions. A division of labour is necessary, with each institution offering its own specialised expertise and capacities, as well as mutually supporting the overall object of enhancing the basic security of the vulnerable.

Part 4 describes the many institutions implicated in R2P and POC activities. Where appropriate, it uses the following template to help categorize the nature of the protection tasks and objectives utilized by a particular institution.

§4.0

Five Modes of Protection

There are five modes through which civilians' lives and dignity can be protected. In different ways, both R2P and POC draw on each of these modes. The five modes illustrate the ways protection can be understood as a *constraint* (Mode I), as an *action* (Mode II), or as a larger *objective* (Modes III, IV and V). These five modes may be set out graphically illustrating the proximity of each mode to the harms it seeks to prevent.

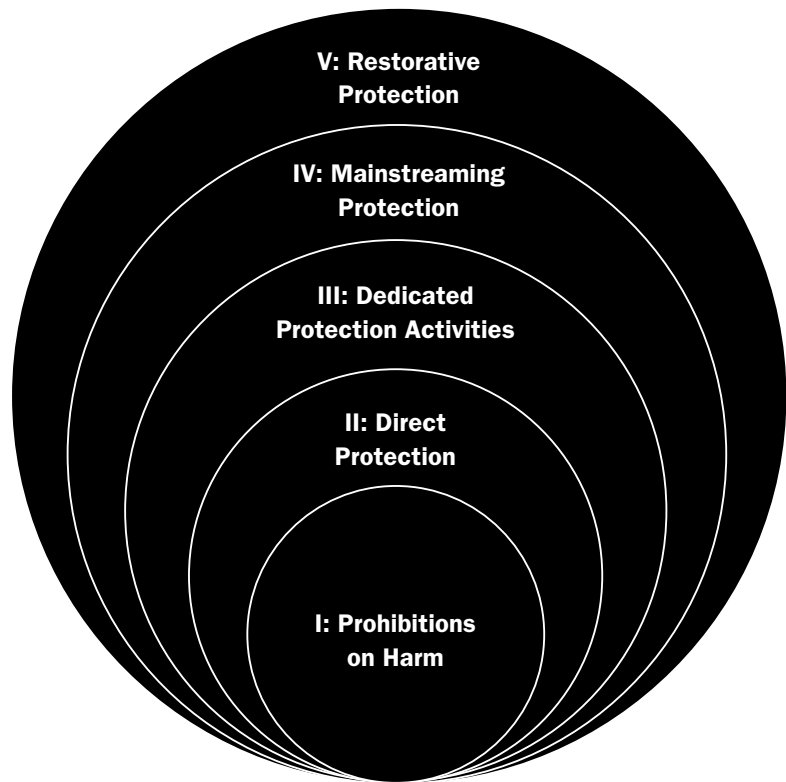


Figure 5: Five Modes of Protection

The five-mode model builds on and expands the “egg framework” familiar from humanitarian protection.¹⁰⁴

Mode I: Prohibitions on harm

Mode One prohibits actions that harm or risk harm to the lives, bodies or dignity of civilians, and the incitements to such acts. It can include laws prohibiting murder, rape, pillage, the use of certain weapons, the targeting of civilians and civilian objects, and enlisting children as combatants.

Mode II: Direct protection

This second mode involves the actor directly protecting civilians from third parties attempting to harm them. The activity is performed in order to protect the civilians and it aims to accomplish their protection directly (that is, without relying on other actors undertaking further complementary actions). Protecting civilians may include the use of a security presence, patrolling, escorts or the interposition of forces, and ultimately the threat or use of robust force against perpetrators.

104 See Slim and Bonwick, *Protection: ALNAP Guide*, pp. 42-3; IASC, *Growing the Sheltering Tree*, pp. 11-12. Oxfam use a slightly different categorization in terms of shields and safety-nets. Oxfam, *Protection into Practice* (Oxford: Oxfam, 2005), p. 3. See also: International Committee of the Red Cross ICRC, *The Concept of Protection: Towards a Mutual Understanding*, 12 December 2011, p. 3.

Mode III: Dedicated Protection Activities

In this third mode, actors undertake specific activities purely for the sake of achieving protection objectives, but the activities in question do not in themselves immediately protect civilians. Rather, in concert with other activities or choices made by an array of actors, these *dedicated protection activities contribute to the structural realisation of a larger protective environment, where threats to civilians are diminished*. Dedicated protection activities may include early warning and assessment, monitoring and reporting, advocacy, moving or hiding vulnerable civilians, the strategic use of unarmed presence and information dissemination (for instance through radio broadcasts).

Mode IV: Mainstreaming Protection

The fourth mode does not require protection actors to perform entirely new actions (as Modes II and III do). Instead, mainstreaming protection requires that protection actors alter the manner in which they perform, prioritize or resource their other activities in such a way as to improve – and never to impair – the larger protective environment. Such protection measures are important in peace-building programs to promote local capacity and enhance prospects for sustainable peace. The single most important element of Mode IV is to *do no harm* – to make sure that the way the operation or agency pursues its goals does not have downstream consequences exacerbating civilian vulnerability. More positively, mainstreaming protection can include the strategic placement and lighting of latrines and wells so as to reduce everyday civilian vulnerability, and facilitating political solutions and ceasefires in such a way as to ensure protective outcomes.

Mode V: Restorative Protection

Mode V comprises actions which remedy the situation of those persons who have previously been harmed (either civilians or combatants whose injuries have placed them *hors de combat*). Restorative protection can itself be divided into different modes of action, as it can include (for instance) *legal prohibitions* on attacking those helping the injured, *dedicated protection activities* to return displaced persons to their homes, and *mainstreaming protection* by including peace and reconciliation commissions in plans for long-term peace arrangements.

§4.1

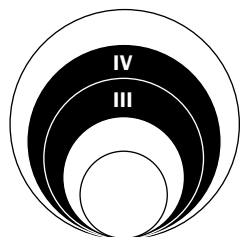
Global Institutions responsible for R2P or POC action

GLOBAL		
INSTITUTIONAL STRUCTURES	R2P	POC
UN General Assembly	✓	✓
UN Security Council	✓	✓
International Court of Justice	✓	
International Criminal Court (and ICTY and ICTR)	✓	✓
UN Peacebuilding Commission	✓	✓
DPKO and DFS	✓	✓
UNHCR	✓	✓
OHCHR	✓	✓
OCHA		✓
UN Secretary-General	✓	✓
Office of the UN Special Advisor on the Prevention of Genocide (Joint Office)	✓	

§4.2 Commentary: Global Institutions

§4.2.a UN General Assembly

UN General Assembly: R2P



Paragraph 139 of the World Summit Outcome Document declared an on-going role for the General Assembly:

We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.

General Assembly's R2P Pillar Two roles:

- I. **Dialogue:** As the principal deliberative organ of the United Nations, the Assembly has for each of the last four years hosted dialogues on the nature and requirements of R2P, discussing each of the Secretary-General's R2P reports.¹⁰⁵ The Assembly's role in filling out and concretizing the 2005 commitments of the World Summit Outcome Document is significant in this respect.
- II. **Institution-building:** In its capacity to decide internal matters of the United Nations, the General Assembly is a central organ in mainstreaming R2P Pillar Two capacity-building throughout the organization. In particular, the Assembly's role in allocating funds – and thus of building capacities, doctrine and institutional awareness – is pivotal. These are most important with respect to Pillar Two international capacities (as Pillar

Secretary-General 2009 R2P Report (A/66/874 - S/2012/578):

"If the General Assembly is to play a leading role in shaping a United Nations response, then all 192 Member States should share the responsibility to make it an effective instrument for advancing the principles relating to the responsibility to protect expressed so clearly in paragraphs 138 and 139 of the Summit Outcome."

Three action is primarily the domain of the UNSC, and those countries mandated to act under its authority in any given case.) The General Assembly continues deliberating the operational requirements for UN Secretariat assistance in the implementation of the responsibility to protect.

- III. **Peacekeeping:** UN Peacekeeping Operations with protection mandates play an important R2P Pillar Two role. The Assembly is a key facilitator of successful UN Peacekeeping civilian protection in two respects: First, it allocates funds and determines the sources of funding for UN Peacekeeping Operations, with consequences for civilian security. Second, through its *Special Committee on Peacekeeping* (C34 Committee) the Assembly has, in the last several years, substantially contributed to the development of doctrine at the DPKO and DFS.

General Assembly's R2P Pillar Three roles:

- I. **Political Support:** Action in Libya in 2011 illustrated the significance regional organizations can have in guiding Security Council decision-making with respect to R2P matters. While it is not the Assembly's role to dictate courses of action to the Security Council, its decisions on such matters can be reflective of the view of the international community generally on the nature of the situation. For example, the Assembly's suspension of Libya's membership on the Human Rights Council added its weight to the chorus of concern voiced by regional organizations such as the *League*

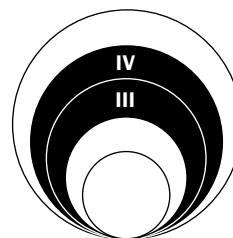
of Arab States and the Organization of Islamic Conference. Equally, in the face of Security Council deadlock on the matter of Syria in early 2012, the General Assembly adopted Resolution 66/253. As the Secretary-General observed in the following R2P Report, this Resolution, "provides an example of the role that the principal deliberative organ of the United Nations can play. This resolution strongly condemned "widespread and systematic" human rights violations in Syria and demanded that the Syrian Government put an end to all violence and protect its population."¹⁰⁶

- II. **Authorization:** In cases of Security Council paralysis, the General Assembly has the capacity to authorize international action under its *Uniting for Peace* resolution (Res 377 (V)). The original ICISS Report and subsequent Secretary-General Reports on R2P have noted this subsidiary responsibility that may be taken up by the Assembly – though the WSOD itself did not mention this possibility.

Summary

The General Assembly engages in *Dedicated Protection Activities* through its dialogic development of the R2P concept and its inclusion of R2P in its larger governance of internal UN matters. It also contributes to R2P *Mainstreaming* through measures such as its input into peacekeeping operations doctrine and its deliberations on situations at risk of atrocity.

UN General Assembly: POC



The General Assembly has two major institutional POC roles, paralleling its R2P Pillar Two roles.

- I. **Peacekeeping:** With its role in allocating UN funds, the General Assembly is in charge of the funding

¹⁰⁵ For summaries of the UN General Assembly debates on the Secretary-General reports see <http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop>.

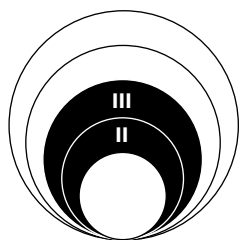
¹⁰⁶ Secretary-General, S/2012/578, ¶33.

of peacekeeping operations, and decisions over how that funding will be allocated amongst UN Member States.¹⁰⁷ This issue is germane to POC aspects of peacekeeping missions, as these are notoriously reliant on key assets and resources.

- II. Administrative Support:** The General Assembly has administrative powers over aspects of peacekeeping vital to POC. For instance, the Assembly supported the restructuring of the DPKO and the establishing of the *Department of Field Support* (DFS),¹⁰⁸ and added its call to overcoming the problems in the chain of command that were known to beset peacekeeping missions with robust POC mandates. The General Assembly's *Special Committee on Peacekeeping* (the "C34" Committee) has in recent years become one of the key drivers of institutional reform of POC for UN Peacekeeping.

§4.2.b UN Security Council

UN Security Council: R2P



The R2P principle places final authority for Pillar Three action into the hands of the Security Council. In doing so, it faithfully tracks the status of the Council under international law. The Security Council has authority under Article 42 of Chapter VII of the UN Charter to take such actions as it considers necessary to maintain or restore international peace and security. If the Council determines that an atrocity crime constitutes a threat

107 E.g. RES/55/235; RES/61/263.

108 RES/61/256; RES/61/279.

to international peace and security, then it has the authority and the mandate to use those measures at its disposal to respond to that situation. In accord with these articles, WSOD paragraph 139 declares the Council to be the ultimate arbiter on R2P *Pillar Three* action.

As an institution, the Council has a wide variety of capacities at its disposal for responding to potential and actual atrocity crimes. These include:

Mode II: Direct Protection

- » Authorizing peacekeeping missions with mandates and capacities to prevent or respond to atrocity crimes;
- » Authorizing military force, including protective measures such as no-fly zones and the defence of safe areas.

Mode III: Dedicated Protection Activities

- » Imposing sanctions, embargoes, asset freezes, travel bans and similar measures;
- » Reminding parties of their obligations under international law, and demanding they adhere to these;
- » Referring cases to the International Criminal Court (e.g. in Res. 1970); the presence of the ICC has made it less likely that the UNSC will need to create ad hoc international criminal tribunals (as occurred in the context of the former Yugoslavia in 1993 with Res. 827, and in Rwanda in 1994 with Res. 955);
- » Indicating the Council's willingness to respond to continuing atrocities in a region with increasingly severe sanctions and measures, with an aim to deterring those States from the use of force against civilians.

With these powers, the Security Council emerges as perhaps the single most important R2P institution. While the Council is central with regard to certain Pillar Two activities, such as its capacity to authorize robust peacekeeping operations, the domain of Pillar Three is almost exclusively the concern of the Council. Moreover, reaction to imminent

Article 42 of the UN Charter:

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations. "

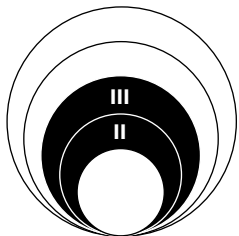
atrocities should not be thought of purely in terms of the immediate lives saved. Each time the Council shows its willingness to respond, it contributes to a larger context whereby States and armed actors learn that flagrant violations of Council demands regarding atrocity crimes may culminate in robust action. As such, States in the future are given reason to mitigate the measures they use to resolve their perceived domestic problems. In particular, States are incentivized to turn to consensual *Pillar Two* activities (such as the preventive deployment of UN forces or peacekeepers, or the involvement of regional organizations in conflict-resolution) to help resolve potential conflicts, and to demonstrate that *Pillar Three* action is not warranted in their case. Consistent and principled *Pillar Three* action undertaken by the Security Council thus contributes to R2P *Pillar One* and *Pillar Two* activities and institutions.

In affirming R2P the Security Council takes on the weighty responsibility to act in the required situations. The language of the WSOD in this respect is somewhat equivocal. On the one hand, it emphasizes the Council's discretion in allowing it to act on a "case-by-case basis". On the other hand, the WSOD pledges that the international community, through the Council, will be "prepared to take collective action, in a timely and decisive manner". Arguably, the Council has demonstrated a mixed success in achieving this commitment. In some

SC Representative from Lebanon on Res. 1973: “The Security Council must assume its responsibilities with regard to the situation in Libya, including taking the necessary measures to impose a no-fly zone; the establishment of safe areas...; and measures to ensure the protection of the Libyan people and all foreign citizens.” (S/PV.6498)

contexts – the Darfur region in the Sudan is a likely example – it is very doubtful the Council lived up to this commitment. In other cases, such as with the action in Libya in 2011, the Council respond in a timely and decisive manner to the risk of atrocity crimes being committed by the forces of Gaddafi in Benghazi. Other cases are less easy to judge; Syria in 2012 has seen the Council largely paralysed by vetoes from China and Russia – but in this case military intervention, at least, was unlikely to be practicable in any event.¹⁰⁹

UN Security Council: POC



The Security Council is authorized and mandated by the UN Charter to respond to threats to international peace and security. Wide discretion is vested with the Council to determine which situations constitute such threats, and in a series of resolutions the Council has recognized that large-scale threats to civilians can reach this threshold (S/RES/1296) and declared its willingness to respond to such situations (S/RES/1265).

As an institution, the Council has a wide variety of capacities at its disposal for

responding to POC situations. These parallel in many respects the Council's R2P toolkit. This is to be expected; while POC concerns can arise in discrete and even small-scale instances, the Council typically concerns itself directly with large-scale and systematic assaults on civilians. As such, its concern with POC will typically emerge when risks of atrocities are looming, and so often parallel its concern for R2P. Notwithstanding this potential for overlap, the Council's role in mandating peacekeeping operations often requires it to incorporate concerns for less large-scale threats to civilians, and for threats against specific vulnerable groups such as women, children and displaced persons.

UN SECURITY COUNCIL IN THE CONTEXT OF UN PEACEKEEPING OPERATIONS WITH POC MANDATES

The Council's (Mode II: Protecting Civilians) role in authorizing peacekeeping operations (PKOs) with POC mandates and capacities includes:¹¹⁰

- » Determining the extent of the POC mandate to be given to the PKO, and the prioritization of the POC tasks amidst other force objectives, in order to ensure PKOs have the authority and direction to perform their POC tasks;
- » Ensuring that the authorised capacities of the PKO are sufficient for it to achieve its POC objectives;
- » Ensuring the PKO provides humanitarian access to vulnerable populations;
- » Mandating specific POC objectives such as enhancing security in refugee and IDP camps and establishing safe zones;
- » Determining the PKO's role in preventive POC operations, such as monitoring ceasefires and contributing to the political process.

UN SECURITY COUNCIL: GENERAL POC CAPACITIES

Outside the specific context of mandating

peacekeeping operations, the Council's POC activities include:

Mode II: Direct protection

- » Authorizing military force, including measures such as no-fly zones and the protection of safe areas under Ch. VII of the UN Charter.

Mode III: Dedicated Protection Activities

- » Reminding parties of their obligations under international law, especially IHL, and demanding they adhere to these;
- » Concern with small arms and mines;
- » Indicating the Council's willingness to respond to continuing atrocities in a region with increasing sanctions.
- » Referring cases to the *International Criminal Court* or creating ad hoc tribunals (as occurred in the context of Rwanda and Yugoslavia);
- » Imposing sanctions, embargoes, asset freezes, travel bans and similar measures.
- » Authorizing military force, including measures such as no-fly zones.

With respect to these last points, in extreme cases POC, paralleling R2P, can lead to the threat and use of military force. While Security Council 1973 concerning Libya should be seen as a R2P resolution, this resolution nevertheless falls primarily under the larger rubric of POC. Resolution 1973 provided the authorization to use “all necessary means” (excluding any foreign occupation force) for the purpose of protecting civilians, and explicitly placed this directive under a POC banner.¹¹¹ This subsuming of R2P under the POC rubric is consistent with earlier Council precedent, which has consistently placed R2P under the banner of POC – most centrally in its keystone affirmation of R2P in the thematic POC Resolution 1674. It is consistent also with the nature of the Security Council and Secretariat understanding of POC. Even in the first report to the Security Council on POC in 1999, Secretary-General Annan

¹⁰⁹ Gareth Evans, “Saving the Syrians,” *The Daily News Egypt*, March 25, 2012.

¹¹⁰ These are detailed at length in the most recent *Aide Memoire* 2012 prepared by OCHA.

¹¹¹ S/RES/1973 2011, ¶¶4–5.

Security Council Resolution 1973:

¶4 The Council... "Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory;"

explicitly made mention of the possibility of intervention under Ch. VII of the UN Charter:

In situations where the parties to the conflict commit systematic and widespread breaches of international humanitarian and human rights law, causing threats of genocide, crimes against humanity and war crimes, the Security Council should be prepared to intervene under Chapter VII of the Charter. The use of coercive action should be seen as a mechanism of last resort to protect the civilian population from immediate threats to their lives and to ensure the safe passage of humanitarian convoys.¹¹²

The use of robust force can also occur in POC contexts where R2P is not directly implicated. For instance, the powerful measures to protect civilians granted by the Council through its prior resolutions regarding UNOCI in Côte d'Ivoire empowered the Secretary-General to instruct the Mission, with French forces in support, to take direct military action against the heavy weapons of ex-President Gbagbo forces in order to ensure the protection of civilians.¹¹³

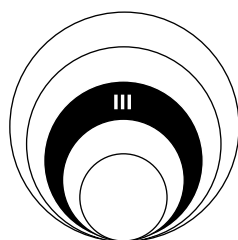
112 Secretary-General, 1999 POC Report, ¶ 67.

113 S/RES/1975 (2011); S/RES/1962 (2010);

The strategic toolkit at the disposal of the Security Council continues to expand. In his last two reports to the Council, Secretary-General Ban Ki-moon lists strategies including coordination with protective humanitarian actors, involvement with the civilian population's self-protective strategies (community-based POC), facilitating engagement with non-state actors, potential constraints on arms trading, improvements in and expansions of reporting, fact-finding and commissions of enquiry, protection within refugee and IDP camps and the safe return, including to appropriate property and land entitlements, of refugees and IDP's.¹¹⁴

§4.2.c International Court of Justice

International Court of Justice: R2P



The International Court of Justice (ICJ) is a standing international court established by the UN Charter. The highest judicial organ of the United Nations, it enjoys judicial independence from the larger institution. Unlike the ICC and ad hoc international criminal tribunals, the ICJ is not a criminal court prosecuting individuals. Rather, the Court's role is to assess State's conformity to their legal obligations in international law. As a corollary of its jurisdiction over the legal obligations of States, the ICJ does not impose criminal, penal penalties, but rather compensatory

UN Secretary-General, "Statement by the Secretary-General on the Situation in Côte D'Ivoire," 4th April, 2011 2011.

114 UN Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/2009/277, 29 May 2009; UN Secretary-General, *Report to the Security Council on the Protection of Civilians in Armed Conflict*, S/2010/579, 11 November 2010.

or reparatory sanctions. The Court has historically played a role in delineating important State responsibilities – for instance in the *Corfu Channel* case where it determined that a State may not knowingly allow its territory to be used for acts that are contrary to the rights of other States. As such, the ICJ was a potential vehicle for the institutionalization of key State responsibilities with respect to R2P. In 2007, the ICJ realized this potential. In so doing, it contributed to the weakening of impunity for atrocity crimes, and so to a larger protective environment.

Bosnian Genocide Case 2007

Application of the Convention on the Prevention and Punishment of the Crime

Statute of the ICJ: Art. 38(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognized by civilized nations;
- subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

In the wake of the atrocities performed in Bosnia-Herzegovina in the 1990s – in particular in the aftermath of the fall of Srebrenica in 1995 – and the criminal prosecutions brought by the *International Criminal Tribunal for the former Yugoslavia*

(ICTY), Bosnia-Herzegovina appealed to the ICJ, arguing that the State of Serbia had violated its international obligations regarding the prevention and punishment of genocide. **The representatives of Bosnia explicitly invoked R2P in their arguments regarding Serbia's obligations in respect of the Genocide Convention.**

In its judgment, the ICJ confined itself exclusively to those obligations provided for in the Genocide Convention, whose

1948 Convention on the Prevention and Punishment of the Crime of Genocide

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

Art. IX: Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, **shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.**

Art. IX specifically invokes the jurisdiction of the Court. The question of whether a more general legal duty of States and their actors to prevent genocide or other atrocities exists in other domains of international law, in IHRL or IHL for example, was not found to be part of the ICJ's purview. The Court distinguished clearly between the presence of a binding legal obligation and the existence or otherwise of a court with jurisdiction over the breach of that obligation.

In some respects the Court's judgment was conservative. The Crime of Genocide as found in the Genocide Convention is constrained on multiple dimensions: i) it requires not merely the deliberate

Genocide in law is narrowly defined in ways that depart from the ordinary use of the term. When laypeople invoke the term "genocide" they are often referring to actions that international law would characterize as **Crimes against Humanity**. With this in mind, some legal commentators have suggested the increased use of the term *Atrocity Crimes* so as to avoid falling into "definitional traps" raised by the law's narrow legal definition of genocide.

Additionally, since atrocity crimes often trigger full-scale genocide, a broad focus on atrocity is necessary for the prevention of crimes of genocide. As one commentator puts it: "the question is not whether a certain crisis constitutes genocide but whether it could evolve into genocide. There is a link and potential overlap between the duty to prevent genocide and the responsibility to protect." (Mennecke 2009 *Genocide Prevention and International Law*)

targeting of a group, but a *specific intent* to destroy the group as such; ii) the group must have particular positive characteristics (being simply "non-Serbian" was insufficient) and these must be defined along either national, ethnic, racial, or religious lines; iii) the intent must be at least to destroy a substantial (numerical and proportional) part of the group. In addition, the ICJ, noting the gravity of the crimes, applied an onerous requirement of proof: a "high level of certainty" for determination of the failure to prevent and punish genocide, and "fully conclusive" proof for the determination of the commission of genocide or complicity in genocide. The combination of these exacting standards of proof with the difficulty of proving specific intent was sufficient for Serbia to avoid judgments of committing genocide or being complicit in its commission. **While genocide had been**

committed in Bosnia-Herzegovina by the Bosnian Serbs, the State of Serbia could not be shown to have the required knowledge and control over the Bosnian Serbs to be guilty of genocide.

In one other way, however, the Court's judgment was progressive. Prior to the judgment, Art. 1 of the Genocide Convention had been widely envisaged only as a political and programmatic aspiration, and not a legal duty. The ICJ established that, on the basis of Art. I of the Genocide Convention, States have a transnational legal duty to prevent genocide – a duty, moreover, over which the ICJ has jurisdiction. Given the influence Serbia held over the Bosnian Serbs (not least through support and financial payments) and their close geographical proximity, the Court judged that Serbia was uniquely placed to take action to prevent the genocide in Srebrenica. Further, the Court held that Serbia should have been able to surmise that, in the context of the conflict in Bosnia-Herzegovina, the commission of genocide by the Bosnian Serbs was a genuine possibility. Though it had influence, proximity and presumptive knowledge of the risk of genocide, the Serbian authorities took no discernable action to prevent its commission. As such, the Court determined that the State of Serbia had failed in its legal obligation to prevent genocide.

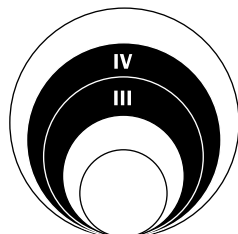
Overview of the International Criminal Court (ICC): The Statute of the ICC (the “Rome Statute”) was completed in 1998 and the Court itself began its work in 2002. The crimes within its purview include genocide, war crimes, crimes against humanity and the crime of aggression (this last has been recently formalized but is not yet in effect). The ICC serves as a *standing* court for these international crimes, as opposed to the similar but *ad hoc* institutions of the *International Criminal Tribunal for the former Yugoslavia (ICTY)* and the *International Criminal Tribunal for Rwanda (ICTR)*.

The ICC operates on a **principle of complementarity**, such that individual States bear the primary responsibility for the investigation and prosecution of atrocity crimes within their jurisdiction, and the ICC will only prosecute in cases where it judges national institutions are not fulfilling this responsibility.

Unlike the ICJ, the ICC is not an organ of the United Nations; it is treaty-based. **The Court does not have universal jurisdiction**, only exercising jurisdiction over cases performed by nationals of, or committed in the territory of, a state party to the court (of which there are 119 as of beginning 2012), or when referred to a situation by the Security Council.

§4.2.d International Criminal Court

International Criminal Court: R2P



There are important normative links between R2P and the ICC:¹¹⁵ most obviously, R2P’s atrocity crimes are given legal form in the Rome Statute of the ICC. Further, R2P as a principle and the ICC as an institution both aim to bulwark and extend the development and promotion of international law. While not a legal institution such as the ICC, the principle of R2P nevertheless reflects a tight connection with the rule of law through its use of stable, consistent processes to respond to atrocities, rather than *ad hoc* political ventures. More generally, both the ICC and R2P follow the structural logic of “sovereignty as responsibility,” with both locating primary responsibilities (for prosecution and protection respectively) in the State, and with this responsibility shifting to the international community only when the State demonstrates it is unable or unwilling to fulfill its responsibilities.¹¹⁶

The institution of the ICC plays a significant R2P role in several respects.

ICC AND R2P PILLAR ONE

The most important role of the Court is in ending impunity for those who commit

¹¹⁵ See Ramesh Thakur and Vesselin Popovski, “The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity,” in Giuliana Ziccardi Capaldo, ed., *The Global Community: Yearbook of International Law and Jurisprudence 2007*, Vol. 1 (New York: Oxford University Press, 2008), pp. 39–61.

¹¹⁶ Markus Benzing, “Sovereignty and the Responsibility to Protect in International Criminal Law,” in D. König, et al. (eds.), *International Law Today: New Challenges and the Need for Reform?* (Berlin: Springer, 2008), 17-50.

Secretary-General 2009 R2P Report (A/63/677):

¶18 “By seeking to end impunity, the *International Criminal Court* and the *United Nations-assisted tribunals* have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence.”

atrocity crimes, and in so doing creating a larger environment where State leaders and non-state actors have incentives not to engage in or sponsor the use of atrocity crimes. The threat of future ICC prosecution – perhaps through Security Council referral if the State is not itself a party to the Rome Statute – is aimed to impact upon the decision-making of key actors and provide legal and institutional force to State’s Pillar One responsibilities to their own populations. Through this mechanism of deterrence through accountability, the ICC is an institution of R2P structural prevention of atrocity crimes. The Court’s principle of complementarity may also provide motive for States to take increased responsibility for prosecuting atrocity crimes within their jurisdiction, and of building the capacity to do so, in order to obviate the need for the Court to intervene. This building of national capacities for accountability comports with R2P *Pillar One*.

ICC AND R2P PILLAR TWO

The Court as an institution provides one method by which States and actors can encourage other States to fulfil their *Pillar One* responsibilities – namely, by encouraging them to become parties to the Rome Statute. Also, the Court’s investigative processes may alert the international community to regions

where R2P atrocities require preventive action. However, it requires emphasis that international prevention activities should not wait upon such a determination: the ICC by its nature must focus on evidence of deliberate criminal actions by individuals, and these will usually not emerge until atrocities are occurring or at least imminent.

ICC AND R2P PILLAR THREE

It is at Pillar Three where the relationship between R2P and the ICC becomes both promising and challenging. On the one hand, **the Court has the capacity to make an authoritative legal determination that a situation is one where atrocity crimes are occurring**, or that there is great risk of imminent atrocity. It may be expected that such a determination would imply, or at least create political pressure for, Security Council consideration of the matter through an R2P *Pillar Three* lens (keeping in mind that such a determination does not necessarily imply the Council should authorize military force). While the ICC has not yet satisfactorily developed fully consistent criteria with regard to such determinations and cannot be thought to be entirely apolitical, its process are formal and legal, and promise more automaticity than the flexible and political approach used by many other R2P actors. As such, the Court's determination carries weight.

Equally, it may be expected that Security Council determination of the need for action in the face of imminent atrocities would, in most cases, imply a referral of the situation to the ICC. If atrocities are occurring to the extent that international military intervention for protective

Luis Moreno-Ocampo Chief Prosecutor, International Criminal Court, 2006: "The International Criminal Court could add legitimacy to the Security Council's decision to apply the Responsibility to Protect concept."

Resolution 1970. The UN Security Council: ...*Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court...*

purposes is required, then international judicial intervention in the form of ICC jurisdiction seems a milder and for this reason requisite response. The situation in Libya in 2011 reflected this, with the Council referring the situation to the ICC in *Resolution 1970* and only later – with the situation deteriorating – authorized military action in *Resolution 1973*.

Rome Statute: Article 8(1): War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

International Criminal Court: POC

The ICC plays an important POC role. It is the only standing international court that can prosecute individual criminals for serious breaches of IHL and hence

violations of *Narrow POC*, as well as atrocity crimes that can happen in the most extreme cases covered by *Broad POC*.

The ICC's jurisdiction is wide, though not universal. As well as having jurisdiction over its 119 States Parties, it can through Security Council referral prosecute crimes performed in or by States that are not signatories of the Rome Statute. As such, it is the premier international institution for the implementation of the legal core of POC and for creating accountability for violations of IHL. This ending of impunity for criminal violations of POC was one of the **five core challenges** for POC described by Secretary-General Ban Ki-moon in his 2009 POC Report.

The ICC's definition of War Crimes, as provided in Art. 8 of the Rome Statute, closely tracks IHL, following its distinction between international and non-international armed conflicts, with the more comprehensive list of crimes accruing to the former. Art. 8 does have a substantiality requirement, responding only to "grave breaches" of IHL, particularly when committed deliberately and as a part of a larger policy. Thus, the Court's scope is more restrained than the overall ambit of POC situations and the Geneva Conventions, which can, in principle, apply to isolated actions by particular individuals.

Secretary-General 2009 POC Report:

"Member States should..."

- (c) Ratify the statute of the *International Criminal Court* without delay;
- (d) Cooperate fully with the *International Criminal Court* and similar mechanisms."

§4.2.e Department of Peacekeeping Operations (DPKO)/ Department of Field Support (DFS)

DPKO/DFS: R2P

The DPKO/DFS play an important role in R2P, but it is important not to over-inflate – or on the other hand to underestimate – their capacities in this regard. As Table 6 below describes, contemporary Peacekeeping Operations (PKOs) can play a variety of roles in different contexts – with very different ambitions and potentials for the protection of civilians and the prevention of atrocities.

	SITUATION AS REGARDS CIVILIAN VIOLENCE	OPERATION'S PRIMARY MANDATE	OPERATION'S POC OBJECTIVES	OPERATION'S AUTHORITY & NEUTRALITY	OPERATION'S USE OF FORCE
Traditional PKO (Incidental POC Mission)	Organized violence against civilians is not anticipated.	Monitor ceasefires, facilitate peace process or elections, ensure humanitarian aid; etc.	Provide ad hoc protection against any isolated violence peacekeepers witness.	Host-state consent; Ch. VI authorization; perceived neutrality essential.	Force used only reactively against isolated actors in urgent situations.
Mixed POC Mission	Substantial violence anticipated as a symptom of the conflict.	Protect civilians alongside other force objectives.	POC mainstreamed throughout all activities: POC important at a tactical level.	Host-state consent; Ch. VII authorization for POC actions; perceived neutrality important.	Robust force against determined (usually non-state) parties.
Primary POC Mission:	Atrocity crimes anticipated as war strategy or geopolitical goal.	Protection of populations is the <i>raison d'être</i> of mission.	Pro-active, system-wide preventive action and planning at a strategic level.	Host-state consent; Ch. VII authorization for mission.	Robust force against all parties (except perhaps State regular troops).

Table 6: POC and R2P Peace Operations

All of these operations are distinct from an R2P Pillar Three Military Operation, such as occurred in Libya in 2011. As the following row illustrates, such missions diverge materially from peacekeeping in each and every one of the dimensions listed:

R2P Pillar Three Military Operation	Imminent atrocity crimes as State's settled war strategy or objective.	Protect civilians, including by forcefully demobilizing or neutralizing State military forces.	Achieve protection through military force against State actors.	No host-state consent. Ch. VII authorization vital.	Direct force against State armed forces (within constraints set by the Council).
--	--	--	---	---	--

**LIEUTENANT GENERAL JOHN SANDERSON,
COMMANDER OF UNTAC, THE UN MISSION
TO CAMBODIA.**

“One cannot go to war in bright blue berets and white trucks.”

Throughout most of the Cold War, a variety of structural features of the geopolitical landscape meant that the role of PKOs was usually confined to monitoring the peace at the mutual consent of the parties to the conflict. These **Traditional PKOs** could, on occasion, protect civilians from violence in an ad hoc fashion if an isolated incident arose and the peacekeepers found themselves well-placed to respond to it. At most, and usually informally, such PKOs could protect civilians as an incidental and adjunct activity to their primary force priorities. Increasingly throughout the 1990s however, PKOs were deployed into less permissive environments where substantial violence against civilians was being perpetrated. In response, with stronger mandates for the use of robust force and greater capacity and will to use such force, **Mixed POC PKOs** became common. Yet in situations where assaults on civilians were not merely a symptom of the larger conflict, but a settled strategy for prosecuting war aims – or even a war objective itself – a more pro-active and strategic-level response was necessary. In these situations, atrocity crimes are a real possibility. **Primary POC PKOs** respond to such situations by having civilian protection as their overriding mission priority, and they are mandated to use robust force to achieve their objectives.

Use of robust force by a PKO however, cannot be effective against the full military might of a functioning government. Hence PKOs do not play any role in R2P Pillar Three non-consensual interventions against a State with a functioning government and military; neither UN nor regional peacekeeping operations are equipped to wage war against determined and well-equipped national armed forces. Such **R2P Pillar Three Operations** require traditional war-fighting resources, personnel and strategies.

An ongoing challenge for the UN Security Council, the DPKO and the DFS is to ensure that the mission that is mandated, resourced and deployed matches the situation on the ground, as shifting quickly

from one operation (such as a *Mixed POC PKO*) to another (such as a *Primary POC PKO*) is often extremely difficult. In cases where substantial violence to civilians is anticipated, the DPKO/DFS will need to deploy at least a *Mixed POC PKO* rather than a *Traditional PKO*; in cases where violence is systemic and an integral part of the methods and objectives of one or more of the parties to the conflict, then a *Primary POC PKO* will be required.

Collective security is about combined military action against an aggressor: all against one. Traditional peacekeeping used neutral soldiers to separate rival forces: us between enemy armies. Peace enforcement operations authorized UN units to use force when challenged: us between civil war factions and against spoilers.

Intervention to protect civilian victims of atrocities is us between victims and perpetrators. As such it requires different guidelines and rules of engagement, as well as relationship to civil authorities and humanitarian actors, compared to other types of military operations. These differences need to be identified, articulated and incorporated into officer training manuals and courses.

– ICISS Commissioner Ramesh Thakur¹¹⁷

It is sometimes suggested that, because PKOs cannot operate without Host State consent and cannot engage in warfighting, they cannot be R2P actors – that is, they cannot be engaged in atrocity-prevention except insofar as their normal POC activities contribute to this end. To the contrary however, *Primary POC PKOs* can be deployed into situations where atrocities have occurred or are believed to be continuing to occur – Darfur and the DRC are recent examples – and the intention of the Council is plainly that the PKO is, within its operational and legal

**DPKO/DFS Draft Operational
Concept on PKO POC:**

“Peacekeeping operations can only execute the protection of civilians mandate insofar as the host government continues to provide its strategic consent. If that consent is withdrawn, a peacekeeping environment no longer pertains, and action at the strategic level, including by the Security Council, must be considered.” (¶8)

constraints, tasked with reducing the likelihood or severity of such atrocities. That PKOs can perform such a role is reflected in the *Analysis Framework* developed by the *Office of the Special Advisor for the Prevention of Genocide* (OSAPG), which notes the presence of UN operations as one factor protecting civilians from the risk of genocide.

While PKOs cannot act against regular State armies, atrocities are usually not performed by such forces, but rather by non-State actors that are clandestinely supported (or unleashed) by the State, or by irregular non-State forces. *Primary POC PKOs* may well have sufficient wherewithal to respond to these types of perpetrators. This can be particularly true in the early stages of an atrocity, where small-scale “trial massacres” are often performed in order to gauge local and international response. A *Primary POC PKO* may have the resources and mandate to respond to such a situation, and in doing so to nip the looming atrocity in the bud. As a result, the DPKO is both a POC and an *R2P Pillar Two* actor. Indeed, atrocity-prevention tasks may not require any use of force at all. For instance, responding to hate-speech broadcast on radio stations may involve reminding broadcasters of their potential culpability in international (and possibly domestic) law for fomenting or being complicit in genocide. Or it may involve producing new broadcasts that combat the spread of disinformation.

The important aspect that R2P adds to PKO activities is the use of an “atrocity

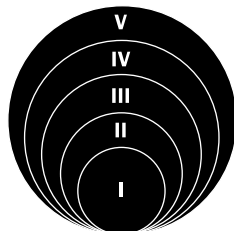
¹¹⁷ Ramesh Thakur, *The People vs. the State: Reflections on UN Authority, US Power and the Responsibility to Protect* (Tokyo: United Nations University Press, 2011), pp. 173–74.

prevention lens” to focus attention on the specific triggers of atrocities – including hate speech, identity politics and “trial massacres”. These can be quite distinct factors from those implicated in a more general suppression of conflict, and can require different measures to those aimed at ensuring civilians are protected from the violence arising in regular armed conflicts between professional armies.¹¹⁸ Responding to the presence of such factors may thus require the performance or prioritization of specific actions that are not required by POC more generally.

Peacekeepers have a unique role to play in supporting national authorities in exercising their responsibility to protect civilians.

UN Secretary General Ban Ki-Moon
2009 (A/64/573).

That PKOs should be R2P Pillar Two actors does not in any way efface the fact that conceptually, legally and operationally a PKO cannot be an R2P Pillar Three operation, engaging in warfighting against regular State forces and against the consent of the formal State executive. If a shift in the nature and objectives of the international operation needs to be made – as perhaps was what may ideally have happened in Rwanda in 1994 – then it must be explicit that the peacekeeping operation is no longer in effect, and a military operation with a new mandate, authority and rules of engagement is taking over.



DPKO/DFS: POC

For more than a decade, the UN Security Council has charged UN Peacekeeping Operations (PKOs) with the protection of civilians. Yet it has not been easy for this mandate to be concretized into identifiable tasks. Ambiguity regarding the potential meaning of POC mandates has bedevilled PKOs at least since the catastrophes of Rwanda and Srebrenica in the 1990s. An array of authoritative reports have posited answers: from the *Brahimi Report* in 2000, to the *Independent Study on POC* in 2009, to the important 2010 *DPKO/DFS Draft Operational Concept on the Protection of Civilians in UN Peacekeeping Operations* and *Lessons Learned Note on POC*.¹¹⁹

In terms of scope, like other POC actors, the key instruments of IHL, particularly Com. Art. 3, describe the types of summary violence from which peacekeepers aim to protect civilians. However, the proximate source of a PKO's protection mandate comes directly from the relevant resolutions of the Security Council, who have since 1999¹²⁰ been requiring peacekeepers, within their capabilities and areas of deployment,

119 Brahimi, *Brahimi Report*; Victoria Holt, Glyn Taylor, and Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (New York: DPKO, UNOCHA, 2009); DPKO/DFS, *2010 Draft Operational Concept on POC*; DPKO/DFS, *Lessons Learned Note on the Protection of Civilians in United Nations Peacekeeping Operations: Dilemmas, Emerging Practices and Lessons*, 2010. The AU's draft POC Guidelines for peace support operations pre-date the DPKO/DFS's *Operational Concept*. The AU Guidelines develop a similar though four-tier approach: Tier 1: Protection as part of the political process; Tier 1: Protection from physical security; Tier 3: Rights-based protection; Tier 4: Establishment of a secure environment.

120 The phrase was first used in S/RES/1270 (1999) establishing UNAMSIL in Sierra Leone.

“India has contributed more troops to peacekeeping operations than any other Member State. Our troops and police officers have been at the forefront of turning this Council's word into deed. They were protecting civilians long before the term became common usage in the Council. More than five decades ago, Indian soldiers defended the civilians of the Congo as part of the United Nations mission.” Representative from India, UN Security Council POC Meeting, S/PV.6531.

and taking into account the primary responsibilities of the Host State, to afford protection to civilians under imminent threat of violence.

At its broadest, the POC agenda of UN peacekeeping operations can require of them that they themselves protect civilians (protection as an *activity*) and that they promote protection of civilians by facilitating and building the capacity and efficacy of other parties (protection as an *objective*). The *Operational Concept* places the many activities PKOs can perform to improve civilian protection under a *Three Tier* categorization:

First Tier: Implementation of the political process and peace agreement.

Second Tier: Protecting civilians from physical violence.

Third Tier: Establishing a protective environment.

Here the many activities are placed under the five-mode protection taxonomy previously described. (Recall that the different modes (and the *Operational Concept's* Tiers) are not organized in order of strict priority or temporal sequence. In a given context, a PKO may well focus in the first instance on mainstreaming protection (Mode IV) by facilitating political solutions, rather than on (Mode II) directly protecting civilians.)

118 Alex Bellamy, *Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Protect*, Policy Analysis Brief (Muscantine: The Stanley Foundation, 2011).

Mode I. Prohibitions on Harm

While the application of IHL to UN Peacekeepers, and the presence of courts capable of adjudicating on breaches of IHL by UN Peacekeepers, is not a straightforward matter, it is uncontroversial that at least as a matter of best practice peacekeepers are bound by the rules and standards of IHL with respect to its prohibitions on harming civilians.¹²¹

Mode II. Direct Protection

Includes:

- » Increased and targeted deployment of forces and military resources (e.g. to interposition between a population and hostile elements) and increased visibility of those forces (e.g. increased patrolling) in vulnerable areas.
- » The direct use, or credible threat, of force to protect civilians from imminent violence. This particularly involves the protection of civilians in safe-areas created by the PKO, and (where possible) of civilians that gather in the immediate vicinity of a PKO for protective purposes.
- » The pro-active use of military force to deter or weaken the capacity of spoilers to harm civilians (this may include raiding weapons caches, pursuing spoilers after they have harmed civilians, reducing their capacity to mount attacks, and so on).

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

¹²¹ Oswald, Durham, and Bates, *Documents on the Law of UN Peace Operations*.

Mode III. Dedicated Protection Activities

Includes:

- » Monitoring and early warning of potential POC tensions and flashpoints, gathering intelligence and informational assets, and assessing the intent of parties to the conflict in relation to local civilians.
- » Reporting, recording and gathering evidence of violations of human rights.
- » Reassuring and informing local civilians on what POC measures the PKO can take, and liaising with citizens on how best to improve the PKO’s capacity to provide security to them.
- » Using political pressure and communication of the reach and ambit of international law (IHL, IHRL) to deter potential spoilers.

Mode IV. Mainstreaming Protection

Includes:

- » Ensuring that any State armed forces being supported by PKOs abide by IHL and IHRL (a “conditionality policy” or “human rights due diligence policy”¹²²).
- » Promoting and monitoring peace agreements.
- » Facilitating dialogue amongst parties to the conflict.
- » Encouraging political solutions that themselves protect civilians – with particular respect for the protection of women in new arrangements.
- » Re-establishing ties between civilians and governance structures, especially local police forces.
- » Aiding security sector reform and promoting legal protection for civilians through trustworthy state institutions.
- » Facilitating the disarmament, demobilization and reintegration of armed elements.

¹²² This policy emerged in the context of PKOs (MONUC and later MONUSCO) operative in the DRC. S/RES/1906, ¶¶22-23; S/2010/512, ¶¶46-50; S/2011/656, ¶¶21, 52.

- » Assisting in the development of other State capacities that in the longer term stabilize the area and in so doing prevent dangers to civilians from civil conflict. These include the development of:
 - » Democratic processes and institutions;
 - » Economic development;
 - » Human rights implementation: particularly with respect to vulnerable groups such as returning refugees and IDPs.
- » Facilitating self-protection capabilities of local civilian populations and, at minimum, ensuring the PKO does not diminish such self-protection capacities as may be present or developing.¹²³

The way these Mode IV mainstreaming activities are performed, and the priorities that are attached to different activities in different contexts, needs to be attuned to POC if they are to be understood as POC activities. While an effective peace process and reliable state institutions are, ultimately, the only long-term solution to assuage civilian vulnerability, it is also true that the pursuit of a political process and negative peace at any cost can distract attention away from necessary civilian protection tasks, and even exacerbate short-term civilian vulnerabilities.¹²⁴ While the DPKO/DFS *Operational Concept* helpfully calls attention to the decisive ways peacekeepers can contribute to the structural realisation of civilian protection, effective protection does require the explicit mainstreaming and prioritization of protection objectives into these more traditional peacekeeping activities, a point that pervades (as its title suggests) the DPKO/DFS’s *Framework for Drafting Comprehensive POC Strategies*.

¹²³ Secretary-General, S/2010/579, ¶40. See Frédéric Mégret, “Beyond the ‘Salvation’ Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself,” *Security Dialogue* 40.6 (2009): 575-95.

¹²⁴ Bellamy, *Mass Atrocities and Armed Conflict*.

Mode V. Restorative Protection

Includes:

- » Ensuring through the use of presence, patrolling and force an environment where humanitarian assistance to vulnerable populations can occur (such assistance can aid protection both directly and indirectly).
- » Ensuring a suitable environment for the safe return of refugees and IDPs, ideally to their homes and properties.
- » Directly protecting, and ensuring the protection of, agents tasked primarily with restorative protection (especially humanitarian actors).

Within this comprehensive five-mode concept of *Peacekeeping POC*, the Council itself often means to prioritize Modes II and III, namely, *Dedicated Protection Activities* and directly *Protecting Civilians*:

“In its simplest form, the Council intends the instruction to ‘protect civilians’ to ensure that peacekeepers help prevent and halt acts of extreme violence.”

Independent Report on POC.¹²⁵

This prioritization is especially evident in the distinction the Council occasionally draws between ‘protection of civilians’ activities on the one hand and security sector reform and disarmament, demobilization and reintegration of armed groups on the other¹²⁶ (rather than holding, as the DPKO/DFS *Operational Concept* can seem to suggest, that such reforms and institution-building occur *within* POC). This prioritization is reflective of the perceived POC failures of PKOs in the 1990s, especially in regard to Rwanda and Srebrenica, where there was not sufficient will, authority and capacity for the PKOs to robustly protect civilians from systematic and deliberate attacks. It is reflective also of the challenges that this sort of robust protection presents to a PKO, where a single discrete use of lethal force to

protect civilians can carry system-wide ramifications, for instance, that the PKO becomes treated by one or both parties to the conflict as a third belligerent. Hence, while Modes II and III are critical tools in the peacekeepers’ protective armoury, history has shown that without strategic focus from the very beginning of mission planning regarding how the PKO can robustly protect civilians, when the need later arises, such protection may be unfeasible or even counter-productive.

“A number of senior mission leaders, mission personnel and troop and police contributors now feel that the absence of a clear, operationally-focused and practical concept for protection of civilians by United Nations peacekeeping operations has contributed to the disconnect between expectations and resources.” **DPKO/DFS Draft Operational Concept on POC in UN PKOs.**

Analysis: Different Levels of Consent in POC PKOs

A PKO is most effective when it enjoys the consent of the key stakeholders around it. There are several different types of consent, from different actors, that a PKO may require in performing its role.

1. Strategic Consent: *Strategic consent* is the formal, executive-level state consent to the operation, especially as it appears in the legally binding *Status of Forces Agreement* between the United Nations and the Host State. *Strategic consent* is a necessary condition of UN and regional peacekeeping for two reasons:

- i. It ensures that the presence of the PKO is not in violation of international law on non-intervention (particularly Articles 2 and 51 of the UN Charter), and;
- ii. It ensures that the PKO will not be overtly attacked by the State’s regular military forces as if it were a foreign invading force (as a ‘third belligerent’). Even apart from issues of legality, the fundamental nature of PKOs makes them entirely unfit for war fighting against regular forces of the State.

3. Operational Consent: *Operational consent* ensures there is no executive-level mandated and systematically organized obstruction of the PKO’s deployment, action and mobility by State institutions. It is possible to have *Formal Consent* without *Operational Consent*, as a State may formally acquiesce to the presence of a PKO due to international pressure, but still wish to see the PKO fail in its protective role.

- » **Operational Alliance:** *Operational alliance* is a stronger commitment to the PKO than *Operational Consent*. With *Operational Alliance* the State institutions will work positively to facilitate PKO protection objectives.

¹²⁵ Holt, Taylor, and Kelly, *UN Peacekeeping Operations*, p. 6.

¹²⁶ E.g. S/RES/1906 (2009).

4. **Tactical Consent (regular State military):** A mission has *Tactical Consent* from the local regular State military if those forces, either because they are following executive orders or for their own local reasons, will not threaten or undermine the PKO's mandated objectives.

- » **Tactical Alliance:** *Tactical Alliance* (State military) exists when local State regular military forces will act in alliance with PKO, facilitating the PKO's objectives wherever possible.

5. **Tactical Consent (pro-State irregular forces):** A PKO has *Tactical Consent* from pro-State irregular forces if militia, loosely organized mobs, and local *de facto* security actors, either because they are following executive orders or for their own reasons, will not attack, threaten or undermine the PKO's mandated objectives.

- » **Tactical alliance:** Irregular forces work with the PKO to facilitate its mandated protection objectives.

6. **Tactical Consent (non-State regular and irregular forces):** A PKO has *Tactical Consent* from non-State forces where rebels and insurgents, whether following their leader's orders or for their own local reasons, will not attack, threaten or undermine the PKO's mandated objectives.

- » **Tactical alliance:** non-State forces will work with PKO to facilitate its mandated protection objectives.

7. **Community Consent:** A PKO has community consent when local civilian populations, whether sympathetic to state or insurgents, or just victims of the conflict, will not undermine the PKO's activities.

- » **Community Alliance:** the local communities have a positive view of the PKO, and will work to support, inform and complement its workings.

All PKOs must have *Strategic Consent* (at least in cases where there is, in fact, a functioning state). *Strategic Consent* will usually mean that peacekeepers will receive at least an adequate level of *Tactical (State military) Consent*, meaning that *Primary POC PKOs* pursuing their mandate will not be faced with direct attack from regular State military forces. Despite the importance of *Strategic Consent*, however, such consent does not guarantee that the PKO will have the other types of consent, and certainly not any of the types of alliance. It can seem common sense that an executive authority would not accede to the deployment of a PKO when that authority itself is, or key elements of it are, supporting the commission of attacks on civilians. But in fact the situation is complex. In both Rwanda and Darfur, for example, executive consent was given to peacekeeping operations even as elements of the State (in Rwanda) and state-sponsored actors (in Darfur) set about performing atrocity crimes. In such a case actual conditions on the ground are hostile to the PKO's deployment and directly opposed to its POC objectives (and, if applicable, its R2P atrocity-prevention objectives). Ultimately, the PKOs in Rwanda and Darfur did not receive *Tactical Consent* from irregular State-sponsored forces, and in key respects also did not have *Operational Consent*; of which the systematic obstructionism by the Government of Sudan is a prime example. In that case, through the use of visas, taxes, regulations and suchlike, the Government of Sudan hamstrung the PKO in the Darfur region.¹²⁷ *Tactical Consent* from non-State forces was effectively missing in Bosnia-Herzegovina, and at different points in the conflict in the DRC *Tactical Consent* has been missing from State, State-sponsored and non-State actors.

Broadly, in States involved in situations of violence and armed conflict, diplomatic avenues and chains of command may be less than straightforward, allowing local actors to thwart PKO protection activities even though there is formal consent to those activities at the higher level. It is for this reason that the DPKO/DFS *Framework for Drafting Comprehensive POC Strategies* anticipates the possibility of action even against State forces:

Bearing in mind that missions operate within the principles of peacekeeping and in accordance with the mandate, missions are authorized to use force against any party, including elements of government forces, where such elements are themselves engaged in physical violence against civilians.¹²⁸

Community consent and alliance also cannot be taken for granted, even by the very community that is the target of the PKO's protective activities. The deployment of a PKO alters the geopolitical landscape and military theatre in a variety of ways, impacting on the power, political importance, perceived legitimacy and available resources of different elements of all parties to the conflict. Such shifts may make elements of the community resistant to the deployment of the PKO or the success of its POC objectives. Other factors may also impact upon community consent and alliance, such as when one local community is antagonistic towards a PKO's protective stance with respect to another community (of a different ethnicity, for example), when traditional leaders of a community feel threatened by the PKO's attempts to include local women in protective decision-making, or when there is a perception that the PKO legitimizes or bulwarks State authority or neglect.

¹²⁷ Holt, Taylor, and Kelly, *UN Peacekeeping Operations*, pp. 356-57.

¹²⁸ DPKO/DFS, *Framework for Drafting Comprehensive Protection of Civilians Strategies in UN Peacekeeping Operations*, 20 Jan, 2011, ¶5.

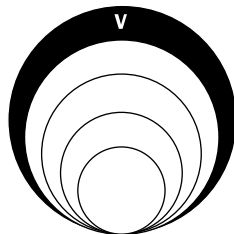
Training for POC

One crucial aspect of POC in the context of peacekeeping missions is the proper training of military and police forces for unfamiliar and challenging POC tasks. Traditional military doctrine and training often does not equip forces to deal with the complex and ambiguous situations that must be managed in order to effectively protect civilians. The DPKO is responding to this need for specialized training with the development of its POC training modules, aiming to establish a common understanding of protection, of planning and implementation standards, and of the different roles and responsibilities of protection actors, as well as improving awareness of civilian threats and vulnerabilities.

Former Force Commander for MINURCAT, General Kandji: ***“Peacekeepers will behave the way they are trained”***. (POC Documentary “Mandated to Protect”)

In summary, *Peacekeeping POC* consists of a wide selection of traditional peacekeeping activities, through which POC objectives are comprehensively mainstreamed, and of specific dedicated protection activities. While direct protection of civilians through the use or threat of robust force will always be at once the most visible and the most challenging aspect of *Peacekeeping POC*, the close proximity of peacekeepers to populations allows a wide arsenal of protective strategies to be pursued.

Peacekeeping POC is distinct not only from R2P Pillar Three, but also from various other perspectives on POC. In particular, constraints that are axiomatic with respect to *Peacekeeping POC* – such as Host State consent – are not necessarily parts of *Security Council POC* (as Libya in 2011 showed).



§4.2.f UN High Commissioner for Refugees (UNHCR): R2P and POC

It is clear refugees fall within the scope of R2P and POC. While the Outcome Document does not expressly refer to refugees, the word “populations” in paragraphs 138 and 139 should be read in light of paragraph 133, whereby States commit themselves to safeguard “the principle of refugee protection” and “to upholding [their] responsibility in resolving the plight of refugees”. This reading is supported by Security Council Resolution 1674 (2006), which reaffirms paragraph 138 and 139 of the Outcome Document, and also recalls:

the particular impact which armed conflict has on women and children, including as refugees and internally displaced persons, as well as on other civilians who may have specific vulnerabilities, and stress[es] the protection and assistance needs of all affected civilian populations.¹²⁹

UNHCR is charged with supervising the implementation of the 1951 Refugee Convention (“the Convention”).¹³⁰ The Statute of the Office of the UN High Commissioner for Refugees, annexed to GA resolution 428(V) of 14 December 1950, specifies that UNHCR shall provide for the protection of refugees falling under the competence of the Office by, among other things, “promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application

and proposing amendments thereto”.¹³¹ States have recognized and accepted this function in Article 35 of the Convention and Article 2 of the 1967 Protocol,¹³² which obligate Contracting States to facilitate UNHCR’s duty of supervising the application of the Convention.¹³³ In the case of countries which have not acceded to the Convention, the legal basis for UNHCR’s supervisory role is its Statute and those norms of customary international law applying to States.

The Executive Committee of the United Nations High Commissioner’s Programme (ExCom) was established in 1958 and functions as a subsidiary organ of the General Assembly. Its terms of reference found in UNGA Resol 1166(XII) include advising the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office (para. b). This provision has been interpreted as giving the ExCom an advisory role and since the 1970s ExCom has directed its conclusions on international protection to states in the form of guidance or standard-setting.¹³⁴

131 Statute of the Office of UNHCR, G.A. Res. 428 (V), U.N. GAOR, 5th Sess., 325th mtg., U.N. Doc. A/Res/428 (1950), ¶8.

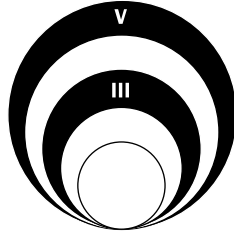
132 1967 Protocol relating to the Status of Refugees, opened for signature January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

133 ExCom has reminded states of this obligation on a number of occasions: ExCom Conclusion No. 52 (XXXIX), *International Solidarity and Refugee Protection*, U.N. GAOR, 43d Sess., at (1) (1988); ExCom Conclusion No. 57 (XL), *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. GAOR, 44th Sess. (1989). States parties to the Convention also reaffirmed this obligation in the 2001 Declaration of States Parties. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Dec. 13, 2001, paragraphs 8 and 9, U.N. Doc. HCR/MMSP/2001/09 (2001).

134 Bryan Deschamp, *Review of the Use of UNHCR Executive Committee Conclusions on International Protection*, 9 June 2008, paras 18-19.

129 UNSC S/RES/1674 (2006): Preamble, ¶4. [emphasis added]

130 1951 Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).



“Effective monitoring requires monitors on the ground.” Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights, 2011. S/PV.6531.

UNHCR’s mandate has extended considerably over time through a process of interpretation and from directives from the General Assembly, the Economic and Social Council, and ExCom.¹³⁵ From a small agency focused on the legal protection of refugees, as defined by the Convention, UNHCR has become the largest humanitarian organization in the world with an annual budget of USD 3 billion, an overall population of concern of over 34 million, and more than 6,800 staff in 259 offices in 118 countries. UNHCR’s mandate today encompasses refugees broadly defined, asylum seekers, stateless persons, returnees, internally displaced persons, and persons threatened with displacement or otherwise at risk, and includes legal protection, relief distribution, emergency preparedness, special humanitarian activities, and broader development work.¹³⁶

As such, the humanitarian activities and advocacy of the UNHCR will be present in both R2P and POC situations.

§4.2.g Office of the High Commissioner for Human Rights (OHCHR): R2P and POC

The primary R2P- and POC-related role of the OHCHR – and other human rights commissions on a regional and local level – is to monitor and report violations of human rights (Mode III and Mode V). This may be done through independent human rights assessment missions sent to specific countries, or through human rights components of deployed peacekeeping missions. In the latter case, human rights monitoring can be vital in exposing gaps in peacekeeping operations’ protection coverage: the mass rape uncovered in Walikale in the DRC in August 2010 is a case in point. Monitoring and reporting can themselves diminish risks of atrocities – the mere presence of international observers can in some cases deter spoilers from attacking local civilians, and can motivate governments to respond more circumspectly to perceived threats to its rule. More importantly again, accurate and comprehensive monitoring and reporting of human rights violations allows informed action by other organs of the United Nations, including the Secretariat, the Security Council, and Force Commanders of peacekeeping operations. The importance of monitoring was emphasized in the Syrian conflict of 2012, where starkly conflicting accounts of the local situation were presented by those for and against international condemnation and sanction. Resolutions 2042 and 2043 in April 2012 established a Supervision Mission to Syria to monitor the cessation of violence and the implementation of Special Envoy Kofi Annan’s plan.

To be sure, the purview of human rights – defined *inter alia* by the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* – has a far broader scope than the narrow concerns of R2P and even POC. A State may violate important human rights, such as free speech and freedom of religion, without thereby exposing its population to the ‘situations of violence’ that are the focus of *Broad POC*, much less to atrocity crimes (Graph 1 in §2.2 distinguished “Institutional repression” from the widespread, lawless “Situations of violence”). While the scope of human rights will therefore include much that is not directly within the concerns of R2P and POC, in cases where direct violence is occurring, human rights monitoring will naturally focus on the violation of basic and non-derogable rights of bodily security. Human rights monitoring and reporting can also contribute to early warning of future atrocities: for instance, persecution of minorities through the mechanism of the law or public policy is a key indicator for risk of future genocide.

135 Marjoleine Zieck, “Vanishing Points of the Refugee Law Regime” (2005) 20 *Ohio State Journal on Dispute Resolution* 217, 246; Volker Turk and Elizabeth Eyster, “Strengthening Accountability in UNHCR,” (2010) 22 *International Journal of Refugee Law* 159-172, 163; Volker Turk, “The role of UNHCR in the development of international refugee law,” in Frances Nicholson and Patrick M. Twomey, *Refugee rights and realities: evolving international concepts and regimes* (Cambridge: Cambridge University Press, 1999), p. 154.

136 Volker Turk, “The role of UNHCR in the development of international refugee law,” in Frances Nicholson and Patrick M. Twomey, *Refugee rights and realities: evolving international concepts and regimes* (Cambridge: Cambridge University Press, 1999), p. 155.

§4.2.h Office of the UN Secretary-General:

Office of the UN Secretary-General: R2P

The Secretary-General of the United Nations is, in many respects, the face of the United Nations. On the one hand, the Secretary-General has considerable power to implement reform, alter policy and in general act as an advocate for the overall direction and principles of the United Nations. He acts as a “norm entrepreneur”. On the other hand, the Secretary-General’s status as a distinct entity encourages the perception that he is more responsible for the ultimate failures of the United Nations than other organs – and the presence of preventable atrocities is one of the most visible ways the United Nations as a whole can be seen to fail.

“The Secretary-General is the window and the motor of the organization symbolizing the UN like no other person. He is able to seize the organization as an entity distinct from States members; he or she is a subject endowed with its own personality and following its own particular policy.” (Kolb, 2010)

For both these reasons, the Secretary-General is perhaps the world’s single most important R2P actor. Even before the conceptualization of R2P in 2001, Secretary-General Kofi Annan had been calling for a refiguring of sovereignty that did not paralyse the United Nations in the face of the grave atrocities like those that occurred in Rwanda and Srebrenica. In 2004 Annan created the position of the *Special Advisor on the Prevention of Genocide*. The following year Annan’s advocacy proved instrumental – particularly through his 2005 report *In Larger Freedom* – in placing R2P onto the world stage. In the face of resistance from a variety of different directions, Annan succeeded in having R2P endorsed at the 2005 World Summit.

Secretary-General 2010 POC Report, A/64/864.

¶18 “When the Special Advisers, based largely on information provided by, and in consultation with, other United Nations entities, conclude that a situation could result in genocide, war crimes, ethnic cleansing or crimes against humanity, they provide early warning to me and, through me, to the Security Council... If the situation persists, and if national authorities are manifestly failing to protect their populations from these crimes... I will ask the Special Advisers to convene an urgent meeting of key Under-Secretaries-General to identify a range of multilateral policy options, whether by the United Nations or by Chapter VIII regional arrangements, for preventing such mass crimes and for protecting populations...”

Secretary-General Ban Ki-moon has continued and developed this advocacy and institutional reform. In 2007–08, he created the position of the *Special Advisor with a focus on the Responsibility to Protect* and in 2009–2010 oversaw the amalgamation of this position with the *Special Advisor on the Prevention of Genocide* to create a Joint Office. In 2009 Ban presented the first Secretary-General Report to the Security Council and General Assembly on R2P – *Implementing the Responsibility to Protect* – and followed this up over the next three years with R2P reports focusing on – in 2010 – *Early Warning, Assessment and the Responsibility to Protect* (A/64/864), – in 2011 – *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect* (A/65/877–S/2011/393), – and in 2012 – *Responsibility to Protect: Timely and Decisive Response* (A/66/874 - S/2012/578). Ban has additionally used R2P in his diplomatic activities: notably in response to the post-election violence

in Kenya in 2008. In 2011 he explicitly declared Security Council Res. 1973 concerning military action in Libya as an instance of the international community acting on its responsibility to protect.

The R2P role of the Secretary-General involves:

- » Advocating for the principle, both externally to States and their peoples, and internally within the United Nations;
- » Developing institutions – such as the Joint Office – which build R2P capacity, doctrine and action, and mainstreaming R2P throughout other relevant UN organs, departments, agencies, funds and programs;
- » In cases where atrocity crimes are a genuine risk, using the principle and the legal framework behind it in diplomatic dealings with relevant State and non-state actors in order to encourage them to quell conflicts, restrain the use of violence against populations, accept the deployment of PKOs with protection mandates, and so on;

Secretary-General 2012 R2P Report (A/66/874 - S/2012/578)

¶20 ... In terms of the overall strategy, five lessons stand out from experience to date, as follows:

- One. Each situation is distinct. ...
- Two. Such distinctions may lead to charges of double standards and selectivity. Perceptions matter. ...
- Three. ... Experience has shown the need for a more integrated and nuanced understanding of how the three pillars relate to and reinforce each other. ...
- Four. An effective and integrated strategy is likely to involve elements of both prevention and response...
- Five. ... Experience has proven the simple fact that prevention and response are most effective when the United Nations works in tandem with its regional partners.

- » Calling upon international actors and organs of the United Nations itself to live up to their (*Pillar Two* and *Pillar Three*) responsibilities.

Office of the UN Secretary-General: POC

Since the 1990s the Office of the UN Secretary-General has emerged as a crucial advocate and agent with respect to POC. One of the most important roles the Secretary-General has played since 1999 is his regular thematic reports on POC to the Security Council. This role allows the Secretary-General to frame and develop the perspective on POC that guides Council decision-making, and to urge Council action on POC matters.

The perspective on POC developed by the Secretaries-General and OCHA (the main drafters of the reports) is both wide and deep. It is wide inasmuch as the scope of Broad POC is extensive – in particular it is not limited to “armed conflict” narrowly construed, but any cases where civilian’s lives are subject to large-scale armed assault. Vulnerable groups such as IDPs, refugees, women and children are earmarked for special concern. So too, the range of threats to civilians targeted by the Reports is wide: the Secretary-General’s recent reports discuss the increasing threats posed by improvised explosive devices, drones, and private military and security companies, and highlighted further areas of human concern – such as housing, land and property issues.

The perspective on POC is deep inasmuch as it includes a wide array of responses open to the Security Council: statements of concern, demand and condemnation, sanctions, arms embargoes, separation of civilians and combatants, ensuring access for humanitarian aid, establishing safe zones, protection of refugees, monitoring and reporting, counteracting hate media and more.

Secretary-General 1999 POC Report (S/1999/957)

¶2 “Hardly a day goes by where we are not presented with evidence of the intimidation, brutalization, torture and killing of helpless civilians in situations of armed conflict. Whether it is mutilations in Sierra Leone, genocide in Rwanda, ethnic cleansing in the Balkans or disappearances in Latin America, the parties to conflicts have acted with deliberate indifference to those conventions.”

A further major role of the Secretary-General is as an advocate and diplomat for POC. The Secretary-General brings cases to the attention of UN organs – especially the Security Council – and to the attention of the international community more generally. He advocates for action on behalf of vulnerable civilians, including by direct negotiation and diplomacy with Heads of State.

The POC role of the Secretary-General thus includes:

- » Framing and developing the perspective taken on POC by the Security Council;
- » Bringing cases where civilian life is endangered by large-scale threats to the attention of the international community, and to the Security Council more specifically;
- » Raising awareness of POC, and mainstreaming it throughout the United Nations;
- » Engaging through negotiation and diplomacy with Heads of State for the cessation and amelioration of attacks on civilians.

Perhaps most importantly, the Secretary-General is a key driver of institutional and practical reform to further the POC objective. For example, his “five core

challenges” – first laid out in his 2009 POC Report – have helped to direct and frame further POC efforts. The five challenges are:

1. Enhancing compliance of IHL by parties to the conflict,
2. Enhancing compliance by non-State armed groups,
3. Enhancing protection by UN peacekeeping and other relevant missions,
4. Enhancing humanitarian access,
5. Enhancing accountability for violations of the law.

His most recent Report investigates and calls attention to long-standing POC issues, including arms-trading and accountability, while also drawing attention to increasingly worrisome practices such as the use of explosive weapons in populated areas, and to developing strategies to aid civilian protection, such as civilian casualty reporting.¹³⁷

§4.2.i Office of the UN Special Advisor on the Prevention of Genocide: R2P

The *Office of the Special Advisor on the Prevention of Genocide* (OSAPG) was formed by Secretary-General Annan in 2004. In 2007 with the appointment of Francis Deng as Special Advisor, the position was expanded and raised to the level of Under-Secretary-General. Over 2007–8, the post of *Special Advisor to the Secretary-General with a focus on the Responsibility to Protect* was created, and subsequently filled by Edward Luck. Over 2009–2010, a *Joint Office* was established under the OSAPG head.

The OSAPG has developed an *Analysis Framework* consisting of eight categories of factors that cumulatively determine a risk of genocide in a given situation. The OSAPG uses the *Analysis Framework* to conduct its risk assessments on specific regions. These assessments are used by the UN Secretariat internally. Through the Secretary-General, the assessments of the Joint Office are provided to the

137 Secretary-General, S/2012/376.

Security Council. Additionally, the Joint Office can release press statements when it judges public release of its assessments necessary in a specific instance.

The Analysis Framework shows that human rights actors (especially Human Rights Commissions on the global, regional and national levels) can play an indispensable role in gathering relevant information. However, the indicia of risks of genocide also include specific elements that prioritize the significance of certain rights (e.g. discriminatory laws against an ethnic group) and that include factors outside the normal scope of concern of human rights actors or conventional conflict resolution mechanisms.¹³⁸ As such, the OSAPG plays a role in early warning and analysis for genocide that is distinct from the roles played by human rights organizations more generally.

The OSAPG's existing methodologies for genocide-prevention – of which the Analysis Framework is one example – can play a role in the larger prevention of all four atrocity crimes. The Secretary-General in his 2010 Report described how the OSAPG could function as a key node in the UN in terms of early warning and risk assessment for atrocities. Similarly, the OSAPG can recommend courses of action to the Secretary-General, and through him to the Security Council, on crises that are already or could develop towards atrocity and genocide. On a broader structural level, the OSAPG can liaise with other UN organs on specific activities and capacities that contribute to atrocity-prevention, and the mainstreaming of atrocity-prevention concerns through those organs. One final role of the OSAPG is drafting the Secretary-General Reports on R2P, which comprise a key mode of development of the principle, and informs and frames General Assembly debates on it.

138 Payam Akhavan, "Preventing Genocide: Measuring Success by What Does Not Happen," *Criminal Law Forum* 22 (2011): 1-33. Payam Akhavan, "Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide," *Human Rights Quarterly* 28.4 (2006): 1043-70.

The OSAPG Analysis Framework describes Eight Factors jointly indicative of a risk of genocide:

1. Inter-group relations that include a record of discrimination and/or other human rights violations committed against a group;
2. Circumstances that affect the capacity to prevent genocide;
3. Presence of illegal arms and armed elements;
4. Motivation of leading actors in the State/region, and acts which serve to encourage divisions between national, racial, ethnic, and religious groups;
5. Circumstances that facilitate the perpetration of genocide;
6. Genocidal acts;
7. Evidence of intent "to destroy in whole or in part ..."
8. Triggering factors.

§4.2.j Office for the Coordination of Humanitarian Affairs (OCHA): POC

The UN Office for the Coordination of Humanitarian Affairs (OCHA) is the key global organization for the coordination of international action in the face of humanitarian crises. OCHA serves as the Secretariat for the *Inter-Agency Standing Committee*, which develops policy and allocates focal responsibilities amongst UN and non-UN humanitarian actors such as the Red Cross and Red Crescent Societies.

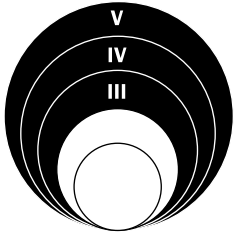
Humanitarian crises can be caused by violence against civilians (for instance, if civilians are forced off their land by attacks, and lose their means of subsistence) and can be the cause of violence against civilians (given the increased vulnerability of civilians during such crises and their aftermaths, particularly if they are displaced). As such,

OCHA plays a significant role in POC on a variety of inter-connected levels. OCHA's roles include:

- » Coordinating between different protection actors – in particular with respect to the role that humanitarian actors can play in promoting civilian protection in crisis situations;
- » Drafting the biennial reports of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict: these reports in turn help frame Security Council resolutions on POC;
- » Publishing the *Aide Memoire: For the consideration of issues pertaining to the protection of civilians in armed conflict* (most recent edition in 2011), outlining in detail the Security Council's past responses and resolutions with respect to all aspects of its POC agenda;
- » Developing doctrine and policy regarding POC in situations of humanitarian crisis, and commissioning studies to evaluate current capacities, gaps and challenges – for instance the important 2009 independent report: *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*.¹³⁹

139 Holt, Taylor, and Kelly, *UN Peacekeeping Operations*.

§4.2.k Humanitarian Agencies



Humanitarian POC is the perspective on protection taken by humanitarian actors – including mandated organizations like the ICRC, UN agencies, and non-mandated agencies like Amnesty International and Oxfam. The humanitarian understanding of POC is one of the most flexible POC perspectives, reflective in particular of the different types of constraints regarding neutrality and impartiality the specific organization upholds.

Humanitarian POC has been in flux over the last decade, undergoing considerable and on-going development.¹⁴⁰ Throughout most of the latter half of the Twentieth Century, humanitarian protection was understood in two ways. First, “traditional protection” involved – through persuasion, reporting and sometimes (and more controversially) denunciation – advocating on behalf of vulnerable persons, aiding the development of legal instruments and protective policies, and getting states to ratify and act upon such instruments. Second, “relief-protection” provided sustenance to those in need of it, protecting people’s rights to these necessities of life, and by doing so making them less vulnerable to coercion and exploitation by others. Recently however, for some organizations the humanitarian understanding of POC has expanded. Confronted with such cases as the placard around the neck of an Iraqi child in 1991 – reading “We don’t need food.

140 On all the points raised in this paragraph, see David P. Forsythe, “Humanitarian Protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees,” *International Review of the Red Cross*, 843 (2001): 675-97; SORCHA O’CALLAGHAN and Sara Pantuliano, *Protective Action: Incorporating Civilian Protection into Humanitarian Response*, HPG Report 26, December 2007; Andrew Bonwick, “Who Really Protects Civilians?” *Development in Practice* 16.3 (2006): 270-77; O’CALLAGHAN and Pantuliano, *Protective Action*.

We need safety” – and the “well-fed dead” of Bosnia, many humanitarian actors have sought to expand and prioritize their protection activities.

Mode III. Dedicated Protection Activities

These include:

- » advocacy and persuasion,
- » visitation,
- » humanitarian diplomacy, engaging with all parties to the conflict, at all levels of authority, aiming to persuade actors to temper violence against civilians and to locate and empower those individuals most amenable to doing so;
- » mobilizing third party pressure on violators,
- » condemnation and denunciation,
- » the creation and dissemination of *information*, especially regarding early warning, areas of safety or danger, conditions for return of refugees and IDPs, location of necessary resources, and so on;
- » the use of unarmed presence, including accompanying and housing vulnerable civilians; and,
- » hiding, moving or sheltering vulnerable civilians.

Mode IV. Mainstreaming Protection

This mode includes:

- » Prioritizing the rule of “First, do no harm” – ensuring actions do not increase long term civilian vulnerability, for example by paying armed groups for “protection,” by publicly asking particular civilians about threats such that they can be identified for reprisal or silencing, or by legitimizing State policy towards a disenfranchised population.
- » Positively contributing to a protective environment by strategically distributing aid, designing camps so as to reduce everyday civilian vulnerabilities, well-digging, providing fuel-efficient stoves and so on.

Effective humanitarian protection activities are all, “based upon concepts that have been applied elsewhere: international presence, clear-eyed analysis of the perpetrators’ *modus operandi*, anticipation of vulnerability to abuse, issuance of clear instructions and guidelines, and education of vulnerable populations in self-protection and risk avoidance.”

Mark Frohardt, Diane Paul, and Larry Minear. *Protecting Human Rights: The Challenge to Humanitarian Organizations*, Occasional Papers 35. Providence: The Watson Institute, 1999.

Mode V. Restorative Protection

This mode includes:

- » providing information to refugees and Internally Displaced Persons (IDPs) about conditions for safe return,
- » providing humanitarian aid to the dispossessed, refugees and IDPs,
- » giving medical care and support to the injured or sick.

All actions undertaken by humanitarian actors, (a) require the consent of all parties to the conflict; (b) must be nonviolent; (c) must avoid superseding State protection activities; and, (d) must remain neutral and impartial (though different humanitarian agencies interpret the requirements of neutrality and impartiality differently).

Current operational challenges involve present limitations on knowledge (and knowledge sharing) regarding the best strategies for nonviolent civilian protection, the best approaches to the use of controversial measures like condemnation and calls for international action, and for coordination and complementarity among agencies who have (and should retain) a diversity of POC objectives and capacities.

§4.3 Regional Organizations

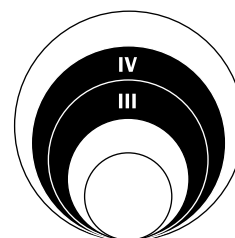
REGIONAL SOUTH EAST ASIA		
INSTITUTIONAL STRUCTURES	R2P	POC
ASEAN	✓	✓
ARF	✓	✓
AICHR	✓	✓
ADMM	✓	✓
ASEAN Committee on Women		✓
AHRC	✓	✓
AFRICA		
ECOWAS	✓	✓
AU	✓	✓
OSCE	✓	✓
LATIN AMERICA		
OAS	✓	✓
Inter-American Commission on Human Rights	✓	✓
CARICOM	✓	✓

§4.4 Commentary: Regional Organizations

Regional Organizations: R2P

Regional Organizations play their key roles in protection through Mode III Dedicated Protection Activities and Mode IV Mainstreaming Protection. In each of these Modes both operational protection and structural prevention is pursued.

§1 REGIONAL ORGANIZATIONS' NORMATIVE ROLE IN ADVANCING R2P



Regional Organizations played a significant role in setting the normative groundwork for the development of the R2P principle. Oft-noted in the gradual shift of the international climate from one of non-intervention to one of non-indifference is the 2000 Constitutive Act of the African Union. Responding in part to the meagre international effort to prevent the genocide in Rwanda (though regional concerns for gross domestic violations of human rights had been in evidence in Africa at least since the 1991 *Kampala Document*), the Union's Article 4(h), provides for "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect to grave circumstances, namely: war crimes, genocide, and crimes against humanity". Article 4(h) is important both in regard to the importance of regional organizations to the development of R2P and to the non-Western roots of the principle. Recently, the Secretary-General observed that bodies such as the *Economic Community of West African States* (ECOWAS), the *African Union*, and the *Organization for Security and Cooperation in Europe* (OSCE), "were in the vanguard of international efforts to develop both the principles of protection and the practical tools

UN Secretary-General's 2011 R2P Report: R2P's implementation

"should respect institutional and cultural differences from region to region. Each region will operationalize this principle at its own pace and in its own way... But make no mistake: each region must move forward, step by step, to ensure that populations are more protected and that the risk of mass atrocity crimes recedes with each passing year."

for achieving them. The United Nations followed their lead."¹⁴¹

On a normative level, the work of regional organizations with respect to R2P is ongoing. To draw an analogy to POC, while the origins of the Geneva Conventions may be traced to Switzerland in the 19th Century, the idea that there are moral limits on what may be done in war is neither a particularly modern nor particularly Western idea. Almost all cultures have developed principles of protection for civilians during war, and have cultivated their own ways of understanding and motivating those principles – through human rights, honour, chivalry, religion, taboos and so on. So too, the principle that States should be run for the wellbeing of the citizenry may be found in countless cultures across the globe. But each region will fashion this universal idea in different ways, according to its own beliefs and traditions. As well as the more tangible roles described below, regional organizations need to play their part in developing local ownership of R2P, and in mediating between the universal global principle and local traditions and moral frameworks.

141 Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect* ¶4. Indeed, African regional organizations have over a long period of time been sufficiently interventionist with respect to deploying peacekeepers (and more direct military action in some cases) that it is arguable they have effectively become the primary institutions for maintaining peace in their regions. See Suyash Paliwal, "The Primacy of Regional Organizations in International Peacekeeping: The African Example," *Virginia Journal of International Law* 51.1 (2010): 185-230.

§2 THE R2P PILLAR TWO ROLE OF REGIONAL ORGANIZATIONS IN ENCOURAGING STATE'S PILLAR ONE DUTIES.

Reflecting the pre-eminent place of sovereign States in international relations and law, R2P's Pillar One places the primary responsibility for protection onto States themselves. Regional organizations (or their sub-organs, such as regional human rights commissions) can undertake a variety of activities in order to encourage States to live up to these Pillar One responsibilities to their citizens. These include:

- » Encouraging member-state ratification of treaties on human rights and international humanitarian law – especially the Genocide Convention;
- » Encouraging States to become signatories to the International Criminal Court, which then would in future have jurisdiction to respond legally to atrocity crimes;
- » Engaging in regional education activities and exchanges, and raising awareness of human rights, international humanitarian law, and R2P itself;
- » Recommending tangible and appropriate reform proposals to member States, especially security sector reform;
- » Motivating R2P compliance by assessing the status of member States with respect to R2P-related triggers within that State – for instance, the State's compliance with human rights instruments, the presence of hate-speech, and so on;
- » Liaising with civil society organizations from each State, so vulnerable minorities have a voice;
- » Investigating specific situations that have the potential to become R2P flash-points;
- » Instituting policies whereby member-states can be suspended from the organization (or subsidiary organs of the organization) for being a party to atrocity crimes.

§3 THE R2P PILLAR TWO ROLE OF REGIONAL ORGANIZATIONS IN OPERATIONAL PREVENTION

The significance of regional organizations in terms of operational prevention is well-known. Regional organizations provide forums for conflict resolution, broker peace talks and encourage diplomatic solutions. As the UN Secretary-General recently observed: "For the United Nations, the global-regional-sub-regional partnerships on operational prevention are forged week after week, in crisis after crisis."¹⁴² At the behest of States, regional organizations can engage in preventive deployment through peacekeeping operations; key African regional organizations in particular have treaties that authorize (and have in fact been grounds for deploying) local peacekeeping operations.¹⁴³ They can mediate between the State and other, global, organizations such as the United Nations. Regional organizations are often well placed to perform these tasks because, in many cases, they have enough distance from a conflict to be considered by both parties to that conflict to be impartial and trustworthy, and yet are close enough to it to have awareness of its nature, the capacity to act, and the motivation to stabilize the region.

142 Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, ¶21.

143 Paliwal, "The Primacy of Regional Organizations."

§4 THE R2P PILLAR TWO ROLE OF REGIONAL ORGANIZATIONS IN STRUCTURAL PREVENTION

In his 2011 R2P Report on the role of regional and sub-regional organizations, the Secretary-General emphasized the role that such organizations can play in structural prevention, and the subsequent General Assembly debate expanded on this theme.¹⁴⁴ Structural prevention R2P activities of regional organizations may include:

1. The development and support of regional principles, standards, institutions and civil society organizations that promote tolerance, transparency, accountability, diplomacy and the constructive management of diversity;
2. Preparedness and contingency planning for humanitarian action in future emergency situations;
3. Strategies for confronting transnational problems that are known to foment internal conflicts, such as armed groups, arms dealing, terrorism, drug cartels and organized crime;
4. Preventive deployments of peacekeeping operations at the invitation of the host State;
5. Providing a forum for dialogue and conflict resolution between – for instance – majority and minority groups in States.
6. Providing a space for dialogue within and amongst regional organizations on lessons learned and best practices (for instance, on development of early warning structures).

§5 REGIONAL ORGANIZATION ROLES IN DEVELOPING EARLY WARNING CAPACITY AND MECHANISMS

In both its Pillar Two and Pillar Three, R2P requires early warning capacities – that is, the ability to acquire and analyze information from around the globe in order to know where R2P atrocity crimes may be at risk of erupting. Ideally, such knowledge will be acquired sufficiently early that preventive actions can be set in train – rather than the more coercive Pillar Three activities that may be necessary when atrocities are imminent. The more effective the early warning capacity, the more R2P will be able to concern itself with Pillars One and Two, rather than Pillar Three. Many regional organizations (AU, ECOWAS, SADC, OSCE, EU) already have early warning mechanisms with respect to conflict prevention more generally, and these are well-placed to include atrocity crimes within their ambit.

Regional organizations have the capacity to act as a conduit between local affairs and global organizations – especially the United Nations. Such organizations, especially if they are in contact with civil society organizations or have subsidiary human rights commissions, will usually be aware of a potential flashpoint long before it has caught the attention of international organizations or global media. Regional organizations can thus play a key role in gathering, analyzing and transmitting such knowledge to other R2P actors.

§6 THE ROLE OF REGIONAL ORGANIZATIONS IN PILLAR THREE SITUATIONS

Both the UN Charter and the World Summit Outcome Document deal explicitly with the role that regional organizations should play when situations within their purview escalate into threats of atrocity crimes and threats to international peace.

In recent history, perhaps the most important and certainly the most visible role that Regional Organizations have played with respect to R2P Pillar Three

UN Charter, Art. 52(1): Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Art. 53(1): The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...

is in contributing to Security Council decision-making by calling for or arguing against certain responses. It was in this application that the WSOD expressly envisaged regional input.

There are four ways regional organizations play an R2P role in Pillar Three situations:

1. **Providing accurate information and analysis:** paralleling their role in early warning systems, regional organizations can be well-placed to communicate to global audiences – and to the UN Secretariat and Security Council in particular – the state of affairs on the ground in member-states, the nature of the conflict in question, and the likelihood of atrocity. Regional organizations can also serve as a counterpoint to the orthodox presentation of a conflict in the global media, which may only reflect the priorities and agendas of Western governments.
2. **Advocating particular solutions:** regional organizations are an important, in some respects almost authoritative, source of strategic advice with respect to viable

144 UN Department of Public Information (DPI), *Sixty-Fifth GA Informal Thematic Debate, GA/11112*, 12 July 2011.

WSOD, Para. 139: We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and **in cooperation with relevant regional organizations as appropriate**, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

responses to a particular incident. More significant again, the voice of regional organizations has come to be respected as an integral part of the view of the “international community”, and for this reason as conferring greater legitimacy on certain courses of action. [See Example Case box in §5.3.a below on Libya.] The Security Council’s composition, as is oft-noted, is not representative of the membership of the United Nations. When the Security Council’s decision takes into account, and ultimately aligns with, calls for action by the major regional organizations in the area, then the R2P vision of a truly international community acting in unison to stop atrocities is approached. Regional organizations are coming to have what one commentator goes so far as to term a “gatekeeper” role in terms of the authorization of Pillar Three action by the Security Council.¹⁴⁵ With the Council increasingly looking to regional organizations for their judgments in specific cases, the degree of consensus among and between such organizations, and any perceptions of bias (for instance on sectarian lines) in their decisions, become material.

These factors help account for the very different international responses to Libya in 2011 as compared with Syria in 2012.

3. Material and political support for

Pillar Three action: When the Security Council decides to undertake Pillar Three R2P action under Ch. VII of the UN Charter, the political and tangible support of regional organizations can be crucial. This is so not only with respect to direct military action – such as conducted by NATO in Libya in 2011 – but also with respect to measures that do not involve the use of military force. In particular, the success of travel bans, targeted sanctions and arms embargoes is highly dependent on the support of neighbouring nations, and regional organizations can be lynchpin in mobilizing this support.

4. Executive Decision-making:

A small number of regional organizations have a mandate allowing for the organization to itself authorize and deploy forces to protect populations in member-states – the African Union’s Art. 4(h) noted above is a prime example of this. In this Mode II Direct protection action, the position and responsibilities of such regional organizations emulate those of the Security Council itself, albeit at a lower level of authority. With the multiplying of responsibilities at this level however, a new obligation emerges between the Security Council and the regional authority to ensure that whoever takes responsibility for a crisis only does so when they have the means and will to genuinely impact upon it. In the context of the Darfur region of the Sudan, it is arguable that both executives failed in this respect.

With respect to items (1) and (2), the credibility and impartiality of the regional organization is crucial. As the Secretary-General recently observed, it cannot simply be assumed that calls made by regional organizations are always right:

Secretary-General, 2011 R2P Report (S/2011/393):

“Politically, it has become increasingly evident that the views of neighbouring States and regional bodies may be taken into account by members of the Security Council when determining which course of action to take in particular situations. This is as it should be. States and civil society groups that are closer to the events on the ground may have access to more detailed information, may have a more nuanced understanding of the history and culture, may be more directly affected by the consequences of action taken or not taken, and may be critical to the implementation of decisions taken in New York.”

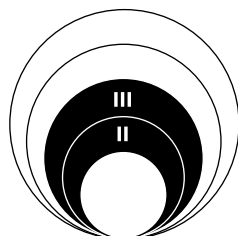
Sometimes more distant observers have a broader or more balanced perspective. Politics, profits, and national interests come into play at the regional and sub-regional levels, just as they do in the deliberations of inter-governmental bodies at the United Nations. It is, most often, through the interplay of ideas, perspectives, and preferences among local, national, and international stakeholders that the best policies and most sustainable strategies are identified.¹⁴⁶

In this connection, regional organizations need to be aware that the stance they take, the factual claims they make, and the strategies they recommend on a particular issue will impact on the weight their views are accorded in future cases. For instance, a regional organization’s confident assertions in one situation that atrocities are not occurring – assertions that are later found to be false and

¹⁴⁵ Alex Bellamy and Paul Williams, “The New Politics of Protection? Côte D’Ivoire, Libya and the Responsibility to Protect,” *International Affairs* 87.4 (2011): 825-50.

¹⁴⁶ Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, ¶24.

Regional Organizations: POC



perhaps even deliberately deceitful – will make it easier in future cases for global media, States and organizations to side-line that organizations' claims and recommendations. Conversely, the Security Council may find it politically very costly to act in direct contradiction of the clear position of a regional organization with a record for impartiality and truthfulness.

It is possible that regional organizations could themselves come to formalize their responses to regional crises. Participants at a 2011 regional workshop on R2P and POC in South-East Asia raised the question of whether it would be appropriate for a regional organization – such as ASEAN – to come up with their own legitimacy criteria for intervention, perhaps along the lines suggested by the original ICISS report to guide the Security Council's decision-making in such contexts, rather than having decisions about local interventions being made without their input.¹⁴⁷

In several ways the role of Regional Organizations with respect to POC parallels that of the Security Council. Similar to the Council, Regional Organizations can mandate peacekeeping missions – including those with a directive to protect civilians. Similarly too, Regional Organizations have other resources to contribute **structurally** and **operationally** to POC.

The Security Council: “Recognizes the increasingly valuable role that regional organizations and other intergovernmental institutions play in the protection of civilians, and encourages the Secretary-General and the heads of regional and other intergovernmental organizations to continue their efforts to strengthen their partnership in this regard.” (S/RES/1674 (2006)).

DEDICATED PROTECTION ACTIVITIES (MODE III): STRUCTURAL POC

Regional organizations are important actors in building an environment conducive to the protection of civilians. Their tasks include:

- » Encouraging State members to ratify IHL treaties, and to enact the peacetime requirements of them. IHL may also be explicitly incorporated into the Organization's Charter (as, e.g. ASEAN);
- » Prioritizing human-centered-ness and human rights mainstreaming in their own constitutions and organs, rather than State-centeredness;

- » Developing regional Human Rights Instruments and Treaties, such as the European Convention on Human Rights (ECHR) (and its modality: the European Court of Human Rights) and the ASEAN Intergovernmental Commission on Human Rights (AICHR);
- » Enacting measures to enhance judicial and rule of law capacity in member-states;
- » Incorporating institutions, instruments and principles for the protection of women and children with POC institutions and instruments, and vice versa;
- » Gathering lessons learned on POC – be they regarding the protection activities of peacekeeping operations, successful acts of self-protection by local actors, or from other sources;
- » Controlling the proliferation of weapons, especially small arms, drug and human trafficking, and the illegal exploitation of a State's natural resources.

Working in partnership with the UN on such matters as structural and operational protection is desirable. The ideal result – spelled out by the UN Secretary-General in his 2006 Report on the Regional-Global Security Partnership – would be “a consultative network with interested partner organizations to identify options for a common framework on protection of civilians in armed conflict, based on agreed core policies and legal elements”.¹⁴⁸

¹⁴⁷ Angus Francis, *Summary Report: Capacity Building Workshops on the R2P and POC: Manila, Kuala Lumpur, Jakarta*, June 2011. (Document on file with authors).

¹⁴⁸ UN Secretary-General, *A Regional-Global Security Partnership: Challenges and Opportunities Report of the Secretary-General*,

Historically, the major role of Regional Organizations in POC has been conflict prevention at the operational, rather than the structural level. This role is pursued centrally through dialogue and mediation.

DEDICATED PROTECTION ACTIVITIES (MODE III): OPERATIONAL POC

Operational prevention activities of regional organizations include:

- » Condemning violation of IHL by parties to a regional conflict;
- » Facilitating diplomatic efforts, conflict resolution and brokering peace agreements designed (inter alia) to further POC;
- » Playing a mediating role between a higher (e.g. UN) level and the nation-state in question. The Regional Organization may be more trusted by the State in question, and more aware of their specific situation and needs, making it a key conduit between global humanitarian concerns and the State's sovereignty sensitivities.

DIRECT PROTECTION (MODE II): POC THROUGH REGIONAL PEACEKEEPING

The most visible contribution regional organizations can make to POC is through the authorization and creation of regional peacekeeping operations with conflict-prevention and humanitarian objectives – often including explicit POC mandates. So active have key African regional organizations in Africa been in this regard – with the AU in Darfur, Burundi and Somalia and ECOWAS in Côte d'Ivoire, Guinea, Liberia and Sierra Leone – they have effectively

become the first-instance institutions for responding to peace, security and humanitarian crises in their regions. Regional organization peacekeeping can offer decisive advantages over Security Council-mandated missions: they often have greater proximity to and knowledge of local conflicts, and a capacity to act more quickly. While legally the Security Council remains the exclusive authority for legitimizing the use of transnational military force, past practice, *opinion juris*, post hoc Council approval, and the treaty-based constitutions of, for example, the AU and ECOWAS (which both explicitly allow for intervention in cases of atrocity crimes) combine to legitimize the deployment of robust peacekeeping operations by regional organizations.¹⁴⁹ As well as intermittently approving the authorization and deployment of particular peacekeeping missions in Africa by these regional organizations, as a more general matter, the Security Council has approvingly noted the increasing significance and the desire of heads of State for the further expansion of regional organizations in peacekeeping and POC roles.¹⁵⁰

As well as acting on their own to authorize and deploy PKOs into troubled areas within their region, it is also common for Regional Organizations to play a role in contributing to or partnering with UN organs and UN PKOs. Regional and UN PKOs can operate separately and side-by-side (e.g. Kosovo, DRC). There may be a transition from a regional organization PKO to a joint or UN operation (e.g. Liberia).

Alternatively the regional organization or the UN may provide key personnel or resources to a mission led by the other (e.g. DRC, Haiti, Darfur).

Operational POC measures taken by Regional Organizations through Peacekeeping Operations can also include:

- » Ensuring member states undertake in peacetime the specialized training of troops and police, and the development of POC military doctrine, required for security actors to fulfill POC tasks as part of a PKO mission;
- » Mandating PKOs with protection capacities and authority, and preventive deployments that have POC objectives;
- » Developing peacekeeping policies and modalities;
- » Promoting the inter-operability of PKOs – allowing them to be deployed either independently or as part of larger missions;
- » Negotiating with member-states embroiled in a conflict for humanitarian access or other measures designed to help protect civilians (such as the placement of a PKO mandated to create safe-zones).

149 See Paliwal, "The Primacy of Regional Organizations."

150 E.g. S/RES/1631; S/RES/1674.

§4.5 National Institutions

NATIONAL		
INSTITUTIONAL STRUCTURES	R2P	POC
National human rights institutions	✓	✓
Armed forces	✓	✓
Police	✓	✓
Parliaments	✓	✓
Executive	✓	✓
Judiciary	✓	✓

Secretary-General's 2011 R2P

Report: "Preventing mass atrocity crimes is the legal responsibility of the State. Meeting this responsibility, however, requires partnering with civil society, such as women's and civic groups, clerics, the private sector, academia, and the media, among others.

Parliamentarians can give voice to the moral imperative."

§4.6 Commentary: National Institutions

§4.6.a Parliaments and Executives

Parliaments and Executives: R2P

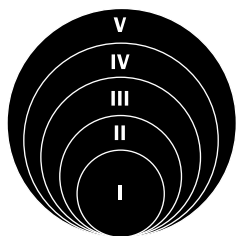
R2P's First Pillar places the primary responsibility for the protection of populations onto the apparatus of the State – including the executive and, where applicable, the parliament. Additionally however, the State is implicated in Pillar Two and Pillar Three. The "International Community" is very much the sum of its parts – and its parts are sovereign States. *When atrocity occurs, it is easy to think that the United Nations has failed – but it is often more accurate to say that the nations of the world failed the United Nations.* Without determined action and supporting institutions within States themselves, R2P Pillar Two and Pillar Three can never be more than paper tigers.

The tripartite structure of R2P can make its implementation by States a challenge, and such implementation is always context-dependent. In respect of Pillar One, National R2P tasks will focus on such realms as domestic legislation, State human rights commissions and internal rule-of-law institutions. In respect to Pillars Two and Three, National R2P policy will be operationalized through foreign policy institutions, atrocity-prevention commissions and through playing a judicious role in regional and global organizations. In this way it can be difficult for one institution or role to cover both the internal and external requirements of R2P. The local legal and political context is also significant in delineating which State department or institution should assume R2P tasks.

In general, when responsibilities are imposed on States, it is usually the executive and the parliament that inherit the obligation to see these responsibilities fulfilled. The following points are thus germane to both national executives and parliaments. However, there is often a division of labour between the two.

Executives are most important in terms of leadership, diplomacy and global and domestic awareness-raising: they supply the *political will* without which effective protection cannot occur.

Parliament's central role is with institutional change and development, the alteration of mandates of existing institutions (e.g. intelligence and human rights institutions), and the provision of necessary funding for new initiatives.



NATION STATES' PILLAR ONE RESPONSIBILITIES

The most fundamental Pillar One duty of any State – and hence of its executive in particular – is not to commit atrocities on its population, and to directly protect that population from non-state actors that aim to visit atrocities upon it. Reflective of the primary nature of its responsibilities, and the vast array of capacities at its disposal, State's duties involve all five modes of protection.

If a State is unable to provide appropriate protection, it should invite international (*Pillar Two*) assistance – including, if appropriate, a peacekeeping operation with a mandate for civilian protection.

Further national Pillar One Responsibilities include:

- » Becoming a signatory to the major IHL and IHL treaties, and ideally to the Rome Statute of the ICC;
- » Implementing human rights commitments and developing national human rights commissions;
- » Developing democratic institutions;
- » Promoting the Rule of Law. This includes in particular the development of an independent judiciary and professional military and police forces.

- » Adopt national legislation for the prosecution of those suspected of genocide, crimes against humanity and war crimes on the basis of “universal jurisdiction” for these crimes. The Philippines R.A. No. 9851 is an excellent example.¹⁵¹
- » Facilitating civil society organizations – especially those connected with human rights and justice issues.

NATION STATES' PILLAR TWO RESPONSIBILITIES

Pillar Two Responsibilities include:

- » Developing intelligence on potential atrocities and – as appropriate and necessary – sharing that intelligence with regional and global R2P actors;
- » Making atrocity prevention a factor (if not a priority) in international affairs: in particular in respect of lobbying, voting and vetoing in regional organizations and United Nations forums.
 - » The past history of the Security Council – for instance in respect of Rwanda – shows that nations who were unwilling to contribute to peacekeeping operations can try to save face by *dissuading* other nations from contributing. Such narrowly self-interested motives may be appropriate in other international fora, but not in the context of atrocity prevention;
 - » Mediating between the wider global community and allied or neighbouring States that are at risk of atrocity crimes, in order to peacefully resolve crises;
 - » Developing and expanding State capacity to contribute to peacekeeping operations with protection mandates, and ensuring that domestic law, regulations and policy do not hamstring the capacity of the nation's peacekeepers to protect vulnerable populations;

¹⁵¹ See Soliman M. Santos, R.A. No. 9851 *Breakthrough Law for IHL Enforcement in the Philippines* (Quezon City: Civil Society Initiatives for International Humanitarian Law, 2010).

- » Endorsing R2P officially as government policy and advocating for it in forums such as the UN General Assembly;

NATION STATES' PILLAR THREE RESPONSIBILITIES

Pillar Three Responsibilities include:

- » Using one's influence over allied countries to dissuade them from performing atrocities;
- » Voting, vetoing, condemning and calling for action – through regional and global forums – with the fundamental objective of preventing atrocity, rather than on the basis of narrow economic or geopolitical considerations, or on the basis of ideological or religious affiliation with the State in question;
- » Contributing to the implementation of Security Council Resolutions – including with regard to arms embargoes and targeted sanctions.
- » Ensuring that their own actions in POC and R2P peacekeeping and military missions are subject to international law, and accepting the jurisdiction of the ICJ and ICC for those actions (even if for no others). This will help legitimate the action and address the concerns that POC or R2P will be abused. Adherence to the international rule of law is important in making the mission more effective as well as more legitimate.

Parliaments and Executives: POC

In his 2009 and 2010 Reports on POC, the Secretary-General presented five core challenges to civilian protection. Each of these carries implications for the role of States, and so their executives and parliaments.

One: Enhancing compliance to Narrow POC

- » States should ratify all current IHL treaties, including the most recent.
- » States should create implementing legislation regarding its treaty obligations to ensure that individuals within the nation's jurisdiction are bound by the rules of IHL.

- » Executives and parliamentarians should raise awareness of IHL both in State organs and in the population more generally;
- » States should ensure their armed forces are trained in IHL. Armed forces may never be ordered by the executive to undertake any action that is a breach of IHL.
- » States should abide by the peacetime requirements of IHL – in particular by not placing civilian objects near military targets.
- » States should implement Security Council resolutions against other States and individuals who breach IHL: in particular pursuant to travel bans and assets freezes.
- » States should aim, so far as possible, to protect journalists in conflict zones, who are often a key source of information on violations of IHL.

In his 2009 and 2010 POC reports, the Secretary-General urged member states to ratify, in particular, the following IHL international conventions:

- » 1999 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*;
- » 2003 *Protocol V to the Convention on Certain Conventional Weapons* (Explosive remnants of war);
- » 2010 *Convention on Cluster Munitions*;
- » 2010 *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel*.

Two: Enhancing compliance to Narrow POC by non-State armed groups:

- » States should admit the presence of “armed conflict” when it occurs domestically, in order to ensure that IHL (through the Second Protocol of 1977 regarding non-international conflicts) applies to both sides of the conflict.
- » Strict State adherence to IHL increases the inducement to non-state actors to abide by the Conventions.
- » States should ensure their laws do not dissolve incentives for non-state actors to abide by the Conventions. For instance, willingness to grant amnesty for mere participation in armed conflict, but not for breaches of IHL, gives non-State actors an incentive not to commit war crimes.

Three: Broad POC. Facilitating UN peacekeeping and other relevant missions

- » States at risk of civilian harm should consent to peacekeeping operations, and ensure they do not impede such operations – for instance by the use of conditions on the mobility and scope of operations, bureaucratic modalities, armed checkpoints, roadblocks, and so forth.
- » States should develop capacity to contribute to peacekeeping operations with protection mandates, including the training of police and soldiers for the challenging tasks that POC involves.
- » States should also ensure that their troops’ action as peacekeepers complies with the international rule of law.¹⁵²

Since the very beginning of POC, States have been granted the primary role in civilian protection.

It is States who are the signatories to the Geneva Conventions and Additional Protocols. And it is states who are the traditional target of official POC actors such as the *International Committee of the Red Cross*, in their efforts to ensure compliance with IHL in times of war and peace.

Four: Broad POC. Ensuring Humanitarian access

- » States at risk of humanitarian catastrophes (and the dangers to civilians that occur in their wake) should consent to the presence of humanitarian actors, and work to facilitate such operations – for instance by expedited visa processing and customs clearance for humanitarians and humanitarian objects.
- » States must undertake to protect humanitarian workers from attack.
- » In the aftermath of humanitarian crises, States should make every effort to re-integrate refugee and internally displaced populations, with particular focus on housing, land and property issues such populations face.

Five: Enhancing accountability for Narrow POC and IHL

- » States should create domestic courts to ensure that individuals within the nation’s jurisdiction are bound by the rules of IHL, and can be prosecuted for its breach.
- » States should prosecute or extradite persons guilty of such crimes.
- » States should ensure their armed forces are policed according to the standards of IHL and have, as appropriate, access to legal advisors capable of determining the applicability of IHL to specific situations.

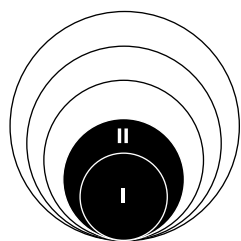
152 See Sampford, “Sovereignty and Intervention.”

- » States should ratify the Rome Statute of the ICC, and assist the ICC in its prosecutions.

There are further *Broad POC* initiatives that fall outside these five rubrics. For example, in some circumstances the most effective protector of local communities can be those communities themselves. In times of conflict therefore, States need to be aware of the possibly deleterious impact of their activities on local self-protection capacities.

§4.6.b National Armed Forces

National Armed Forces: R2P



R2P Pillar One: A nation-state's military forces play a variety of R2P roles, depending upon their capacities and context. Most centrally, R2P requires that military forces, whether in times of peace or war, do not use large-scale and lethal force against civilian populations. In an ideal world, security sector reform and institution-building would furnish a situation where the State's army does not play a direct role in domestic security at all – that is, where purely domestic matters are capable of being handled by the State's police forces. In many countries however, military forces are required for the purposes of domestic security (these will often be situations of internal tension or internal disturbance, as described above in §2.2). As such, the First Pillar of R2P becomes an important constraint on the methods by which State military forces can respond to civil unrest. Specifically, R2P and the legal framework in which it is housed prohibit *counter-*

insurgency by atrocity – for example by using armed forces to punish civilian populations for their perceived support of local insurgents, or by using violence to achieve the forced displacement of such populations. The refusal of Egypt's armed forces to use indiscriminate and lethal force against the civilian population in the revolution in February 2011 is an example of the type of restraint R2P seeks to impose on armed forces, even when they are under orders from executive powers. The development of human rights offices within armies – such as has occurred in the Armed Forces of the Philippines – is a less visible but equally important mechanism for ensuring militaries comport themselves to R2P Pillar One standards.

Armed forces are also required not to commit atrocities against foreign populations or on foreign soil – the attacks by the Rwandan military on Hutu and other populations in the DRC in the aftermath of the 1994 genocide is an example of a violation of R2P duties by a State's armed forces outside their own borders.

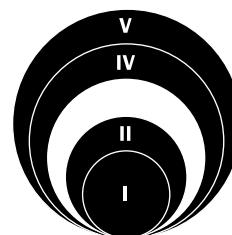
As well as these negative prohibitions on action, a State's armed forces, of course, have a major R2P Pillar One responsibility to directly defend their own civilians from other armed groups.

R2P Pillar Two: A State's armed forces must be sensitive to the actions of other (perhaps non-state) forces allied to it, especially those receiving its support or direction. As the ICJ ruling in the *Bosnian Genocide Case* confirmed, military and economic ties between forces may trigger a State's duties under the Genocide Convention to use their influence to prevent atrocities that the other force may be at risk of performing. Further R2P Pillar Two duties of the armed forces include:

1. Capacity-building and security sector reform, for instance by helping foreign States, through training, education and joint military exercises, in the professionalization of their armed forces, and;
2. Taking part in national, regional or international peacekeeping operations where there is a risk of atrocity crimes.

R2P Pillar Three: R2P can require armed forces to undertake largely traditional war-fighting operations, in order to demobilize or neutralize armed elements that constitute a standing danger to the population.

National Armed Forces: POC



The most direct application of POC to armed forces is through *Narrow POC* – in particular the Geneva Conventions and Additional Protocols of IHL. Armed forces are required by international law to constrain the tactics and weapons they use in war through the principles of distinction, proportionality and limitation. While these instruments apply most fully to cases of traditional international war, the basic protections they guarantee to civilians and soldiers *hors de combat* extend to internal contexts, to situations of occupation, and to other more marginal types of armed conflict.

The larger part of IHL as it applies to combatants imposes duties prohibiting the direct use of force against civilians and civilian objects (Mode I: Prohibitions on harm). However, other important duties include, for example, requiring combatants to identify themselves as combatants, rather than as representing themselves as civilians or other protected persons (such as humanitarian workers). This Mode IV task has become increasingly important to civilian protection, as it is regularly violated by both non-state and state-sponsored actors in contemporary civil-war conflicts, contributing to a larger environment inherently dangerous for civilians. Whether IHL imposes determinate legal duties for combatants to directly protect civilians from third-

Three core concepts of IHL: distinction, proportionality and limitation.

Distinction requires that combatants distinguish between combatants and civilians, and between military targets and civilian objects (such as infrastructure required for a city's water supplies).

Proportionality requires that combatants proportion the harm to civilians in relation to the direct military advantage secured by the action.

Limitation prohibits the use of certain sorts of weapons, particularly those that create indiscriminate damage and whose dangerous effects can outlast the conflict.

parties is a contentious question, but the spirit of Com. Art. 1 of the Geneva Conventions – with its requirement to not only respect but to *ensure respect* for the Conventions – suggests at least a *moral* prescription to do so.

POC is also significant to armed forces when they take part in peacekeeping operations that have civilian protection mandates. Experience over the last two decades has shown that civilian protection is a challenging task for military forces.¹⁵³ Soldiers and commanders need to be prepared for the difficult tasks and scenarios that confront contemporary peacekeeping protection missions, and national armed forces need to develop military doctrine and strategy to guide soldiers on the ground in such operations.

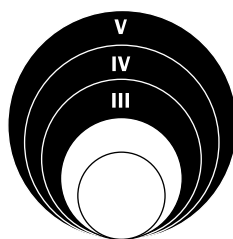
Finally, paralleling the same point made above with respect to R2P Pillar One, POC has a major role in determining the positive responsibilities of armed forces

153 Victoria Holt and Tobias Berkman, *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations* (Washington: The Henry L. Stimson Center, 2006).

to protect their civilians from other armed groups. The importance of State actors to the *Broad POC* agenda is regularly emphasized in UN Security Council Open Debates on POC, where Member State's consistently affirm that "States have the primary responsibility for the protection of their civilians".¹⁵⁴

"Civilian populations are what defence forces exist for."

- Colonel James Davey, Australian Defence Attaché to the African Union.



§4.6.c Civil Society: R2P and POC

Civil Society includes NGOs, civilian advocacy organizations, religious groups and institutions, support groups, women's groups, civil groups, neighbourhood and professional associations, labour unions, and any other voluntary associations that fall outside the market and state. Civil Society plays an indispensable role in the efficacy of POC and (especially) R2P. Its activities include:

Mode III: Dedicated Protection Activities

- » Early warning, monitoring and awareness raising:
 - » May be on a purely domestic level, alerting local actors, populations and authorities to local problems or gaps in protection, or advocating for victims and the vulnerable.

154 Over the last two years, almost every member of the Council has invoked this principle in the Open Debates. UNSC, *July 2010 Meeting: Protection of Civilians in Armed Conflict*, S/PV.6354, 7 July 2010; UNSC, *May 2011 Meeting: Protection of Civilians in Armed Conflict*, S/PV.6531, 10 May 2011; UNSC, *November 2011 Meeting: Protection of Civilians in Armed Conflict*, S/PV.6650, 9 November 2011.

- » May have an international audience, whether governmental or popular, calling regional or global attention to a local issue. The use of social media – facebook, twitter, youtube – has become a particularly important avenue for the release of information on a crisis (especially with respect to the Arab Spring).
- » Indigenous mediation capacity, promoting and facilitating dialogue between disputants;
- » Advocacy and local awareness-raising for protection principles and legal regimes like IHL, including by building local support and "ownership" of these principles through indigenous values and cultural practices;
- » Training and education.
- » Developing lessons learned from past history, feeding into forward preparedness and planning.
- » Contributing to and advocating for legal changes (this can even include drafting bills and acts, for instance on managing social conflict¹⁵⁵).

Secretary-General 2011 R2P Report

"States and civil society groups that are closer to the events on the ground may have access to more detailed information, may have a more nuanced understanding of the history and culture, may be more directly affected by the consequences of action taken or not taken, and may be critical to the implementation of decisions taken in New York."

155 As occurred in Indonesia: see Lina A. Alexandra, "Enhancing the Capacities of State and Regional Institution in Transforming Responsibility to Protect from Words to Deeds: Cases in Indonesia and ASEAN," in C. Sampford, et al. (eds.), *The Laws of Protection: Protection of Civilians and the Responsibility to Protect* (Geneva: United Nations University, 2012)

Mode IV: Mainstreaming

- » Holding local justice systems to account and scrutiny, especially with respect to discrimination in law; civil society mechanisms that contribute to good governance likewise contribute to R2P and POC;
- » Specifying particular local needs, conditions and circumstances that apply to building institutions and capacities to prevent atrocity crimes.

Mode V: Restorative Protection

- » Publicise and support those individuals who have stood against atrocities;
- » Victim's meetings and support.
- » Playing a role in peace and reconciliation processes.

§4.6.d Local communities

Both the R2P and POC frameworks have tended to view communities primarily as *objects* of protection, rather than *agents* of protection. But there is growing awareness that communities should be empowered to operationalize and contribute to their own protection. There are several ways communities can do so:

1. By building their capacity to organize and promote protection themselves through monitoring, reporting, and direct dialogue with State and non-state actors.
2. By aiding, advising and informing the work of external protection actors (peacekeepers, NGOs). This requires building avenues

"These norms are developed by the 'supply side' – they should be developed by the 'demand side'. This requires applying lessons learned on the ground, taking them upstairs. Get ideas from the 'demand side', i.e. the people being protected. What worked for them and what didn't?"

Participant, R2P-POC Capacity-Building Workshop, 2011.

of clear communication between peacekeepers and local communities. Greater community involvement can ensure more effective early warning, provide feedback or grievances to outside parties, and ensure that local communities have a voice in the implementation of R2P and POC principles (something that may entail taking on board lessons learned outside the UN aegis).

"Their [the local population's] perception on the security situation should be one of the most important indicators in defining the success of the mission's role in providing protection."
- DPKO/DFS *Framework for Drafting Comprehensive POC Strategies*.

By altering their behaviour, developing new capacities and adopting new practices so as to maximise the protection benefit they can gain from external actors like peacekeepers. For example, the building and use of efficient stoves in the Democratic Republic of Congo reduces the need for women to seek firewood, and so reduces risks of violence to these women.

3. Finally, the international community needs to be aware that its actions – such as enforcing an arms embargo, for instance in the context of Bosnia-Herzegovina in the 1990s – can undercut local self-protection efforts.

Not all self-protection activities by local communities should be supported, of course – some activities can fuel the larger conflict, or simply shift violence from one area to another. But efforts at self-protection are a factor that external actors must consider when crafting protection strategies.

The civilian protection model developed in the Mindanao peace process in the Philippines is just one example of a vastly different conception of protection to UN peacekeeping missions, where international personnel remain the primary agents of protection.

"The Whole of Nation approach is but a natural progression and enhancement of the previously enunciated 'whole of government' approach to internal security. While the latter only highlights the roles to be played by the various national government instrumentalities, the Whole of Nation approach presupposes that ordinary citizens and the entire Filipino nation are active contributors to internal peace and security."

Armed Forces of the Philippines, Internal Peace and Security Plan "Bayanihan".

§4.7 Conclusion

R2P and POC both draw on a wide range of institutional frameworks in order to effect protection of vulnerable persons. Mainstreaming R2P and POC throughout institutions is not merely a matter of imposing direct positive duties on organizations to protect the vulnerable, but also in ensuring that various institutions play their part in creating a larger environment where civilians and populations are protected. Coordinating between organizations, and ensuring that one institution is not hampering the protection efforts of others, is as important a task as developing capacities for direct protection.

PART 5. IMPLEMENTING R2P AND POC

§5.1 Overview

In order to become operational, both R2P and POC need to be specified and filled out at a country, regional and international level. Parts One to Four above highlighted points of convergence and divergence between the normative and institutional aspects of R2P and POC. This fifth part builds on this analysis by identifying progress and gaps in the existing operational context of R2P and POC.

For all the institutions discussed in Part Four, **four key questions** of implementation and operationalization arise:

1. **Role development:** How can an institution or actor be mobilized into the R2P or POC fold by developing or recognising protective tasks that it can or does fulfil?
2. **Efficacy:** How can the institution better or more adequately fulfil its specific role? What further capacity, authority and resources does it require to achieve genuine protection?
3. **Mutual Support:** How can the institution better cohere or coordinate with other protective institutions so as to contribute with them to a larger protective environment?
4. **Will:** How can the will of actors within the institution be mobilized to engage with protective goals? How can protection be placed on their agenda? How can clarification and specification of specific tasks occur, and benchmarks of success be developed? How can conflicting interests and responsibilities of actors be assimilated with their protection mandates?

These three questions can be asked with respect to:

- a. *Prior or ongoing reforms or initiatives* that improved or are improving the institution's protection;
- b. *Current limitations to and challenges faced* by the institution in achieving protection, and,
- c. *Proposals* to reform or improve the future protective functioning of the institution.

An exhaustive account of prior initiatives, current challenges and reform proposals, with respect to the efficacy, mutual support, will and role-development of each of the R2P and POC institutions and institutional actors (in each of their specific protection tasks) is beyond the scope of this Policy Guide. This Part, however, provides a sample of the main reforms, challenges and proposals with respect to the key institutions covered in Part Four.

ACTORS	PREVENTION		RESPONSE		REBUILDING	
	R2P	POC	R2P	POC	R2P	POC
Global						
UNGA	✓	✓			✓	✓
UNSC	✓	✓	✓	✓	✓	✓
ICC	✓	✓	✓		✓	✓
ICJ	✓	✓			✓	✓
DPKO and DFS	✓	✓	✓	✓	✓	✓
UN Secretary General	✓	✓	✓	✓	✓	✓
OSAPG	✓		✓		✓	
UNHCR	✓	✓	✓	✓	✓	✓
OHCHR	✓	✓			✓	✓
OCHA	✓	✓	✓	✓	✓	✓
UN Women	✓	✓			✓	✓
UN Peacebuilding Commission					✓	✓

§5.2 Global

§5.2.a UN General Assembly

Current limitations with regard to Will: The General Assembly and institutional support for mainstreaming R2P

Particularly during the years from 2007-2009 the General Assembly resisted in various ways – including financing – the institutionalization of R2P throughout the United Nations, largely from concerns of member States regarding the controversies of R2P Pillar Three. However, mainstreaming R2P capacities throughout the United Nations is material only with respect to the preventive aspects of R2P Pillar Two. Avoiding support for the Special Advisor with a focus on the responsibility to protect, as occurred in 2007 for example, impacted on the United Nations developing capacities for early warning and preventive diplomacy. It made little impact on R2P Pillar Three possibilities, as this domain is wholly subject to the discretionary powers of the Security Council. In anything, prior General Assembly resistance to R2P served only to curtail the development of preventive R2P Pillar Two capacities, ultimately making Pillar Three action more – rather than less – likely.

Prior Initiatives with regard to Mutual support: The General Assembly and R2P Pillar Three decision-making

Recent action in Libya in early 2011 highlighted the significance regional organizations can have in guiding Security Council decision-making with respect to R2P matters. While it is not the Assembly's role to dictate courses of action to the Security Council, its decisions on such matters can be reflective of the view of the international community generally on the nature of the situation. For example, the Assembly's suspension of Libya's membership on the Human Rights Council added its weight to the chorus of concern voiced

by regional organizations such as the *League of Arab States* and the *Organization of Islamic Conference*. Later in 2011, General Assembly resolutions, and those of its Human Rights Committee, reflected international concern for the ongoing crackdown in Syria at that time.

Ongoing Reform with regard to Efficacy: General Assembly and POC in UN Peacekeeping

Reporting to the UN General Assembly each year is its *Special Committee on Peacekeeping* (the 'C34' Committee). In recent years the C34 has begun to take an active involvement in the development of doctrine and capacity regarding the protection of civilians by UN peacekeeping operations. In a testament to the institutional significance of the C34, its requests (along with other parallel peacekeeping reform initiatives) have borne real fruit, with the DPKO and the DFS since 2009 crafting a *Draft Operational Concept on POC*, a *Lessons Learned Note*, and a *Framework for Drafting Comprehensive POC Strategies for UN Peacekeeping Operations*. In 2011, the Secretary-General presented his report on the implementation of the C34's recommendations in this regard (A/64/573). Each of these documents is a significant advance in guiding policy that promises to improve many of the key difficulties confronting peacekeepers with civilian protection mandates. Nor is the process complete, with the recent C34 Report calling for further development of doctrine.

The Recent Evolution of POC in the General Assembly's Special Committee on Peacekeeping

Up to and including its 2008 Report, the protection of civilians in the General Assembly's *Special Committee on Peacekeeping* (C34) Reports was notable only for its absence. Not only was there no section on POC in the 2008 Report, there was no mention of the general issue of civilian protection whatsoever. Discussions of protection only occurred in the narrow context of particular groups such as women and children, and specific threats against them.

In 2009, all this changed. Not only did the C34 begin reporting explicitly on POC and stressing key gaps in current practice, it began to make pointed requests to the Secretariat. Its 2009 Report requested from the Secretary-General detailed information on such POC matters as lessons learned, the provision of resources and a POC concept of operations. In 2010 and again in 2011, these queries expanded to include, among others, direct requests to the *Department of Peacekeeping Operations* and the *Department of Field Support* for their POC resource and capability requirements, to peacekeeping missions to develop comprehensive protection strategies incorporated in overall mission plans, and to the Secretariat to develop a strategic framework guiding the production of such comprehensive strategies.

§5.2.b UN Security Council

Current limitations and ongoing reform with regard to Efficacy and Will: Ambiguity in UNSC R2P Resolutions

R2P's invocation by the Council in operational contexts has been inconsistent and ambiguous. Paradoxically, the 2006 Resolution invoking R2P in the context of Darfur (S/RES/1706) was one of the most circumspect resolutions of its kind. Doing no more than "inviting" the Government of Sudan to consent to the expansion in UNMIS, the resolution was effectively ignored by the State in question. Conversely, the more forceful 2007 resolution (S/RES/1769) that established the UN mission to Darfur did not reference R2P at all. At an operational level, it can thus seem unclear when the Council is undertaking R2P-actions and which of its resolutions are "R2P Resolutions".

In keeping with interpretation of Security Council Resolutions in other domains,¹⁵⁶ attention should be directed primarily to what the resolution demands, requires and authorizes, and the context and reasoning framing the resolutions, rather than on whether the Council explicitly invokes the principle of R2P in its preamble or operative paragraphs. This is the mode of interpretation that is commonly undertaken by commentators with respect to peacekeeping missions. In that context, "R2P mandates" are understood to be those that, placing the entire mission under a Chapter VII authorization, decree and prioritize civilian protection as the fundamental system-wide objective of the peacekeeping operation.¹⁵⁷ That is, in determining whether an "R2P Peacekeeping Mission" is being created, attention is not placed on whether the Council mentions R2P in the key Resolution, but rather on the authority, capacity and mandate it grants to the peacekeeping force.

156 SCR, *Council Action under Ch. VII*, pp. 17-27.

157 See Holt and Berkman, *The Impossible Mandate?*; Wills, *Protecting Civilians*.

UN Security Council Resolution

1970: *Considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity, *Recalling* the Libyan authorities' responsibility to protect its population... (Preamble)

The same point about operational interpretation is relevant outside the peacekeeping domain. Resolutions 1970 and 1973 (2011) regarding Libya comprise a clear case of R2P. In Resolution 1970 (2011) the Council affirmed the Libyan government's responsibility to protect its population and observed that attacks taking place against that population could amount to crimes against humanity. That resolution then set in train the gamut of non-military R2P Pillar Three measures, including arms embargoes, assets freezes, travel bans and so on. Subsequently, Resolution 1973 began by deploring the failure of the Libyan government to comply with its previous resolution – that is, deploring its failure to fulfil its responsibility to protect its population. With the lesser non-military measures of Resolution 1970 widely seen by Council members and regional organizations to be not working with sufficient rapidity to protect Libyan populations, especially the besieged population of Benghazi, resort was made to military measures – in particular, the enforced establishment of a no-fly zone in Libya. In all, at least up until the issuing of Res. 1973, in both effect and context there was a close following of the parameters set down by R2P. The Secretary General did not shy away from speaking of the Resolution in R2P terms:

The Security Council today has taken an historic decision. Resolution 1973 affirms, clearly and unequivocally, the international

Barack Obama, March 26, 2011:

"When innocent people are being brutalized; when someone like Qaddafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save many thousands of lives—then it's in our national interest to act. And it's our responsibility. This is one of those times... Because we acted quickly, a humanitarian catastrophe has been avoided and the lives of countless civilians—innocent men, women and children—have been saved... This is how the international community should work—more nations, not just the United States, bearing the responsibility and cost of upholding peace and security.

community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government.¹⁵⁸

Yet the Resolution's text confined itself to reiterating in the preamble the responsibility to protect of the Libyan authorities, and did not speak of the international community or the Council's R2P role. Nor did the Resolution's preamble recall the Council's affirmation of the R2P principle in Resolution 1674. The narrow and oblique reference to R2P likely reflects continuing Council nervousness about the principle and the precedents that might be set by explicit invocations of it (at least in applied resolutions where time is of the essence). Notwithstanding this anxiety about precedent-setting, in keeping with Security Council Resolution interpretation elsewhere, Resolution 1973 should be acknowledged on an operational level as an "R2P resolution".

158 UN Secretary-General, "Statement by the Secretary-General on Libya," (17 March 2011), <http://www.un.org/apps/sg/sgstats.asp?nid=5145>

Current limitations with regard to Efficacy: SRES1973 and “Responsibility while Protecting”

“The extent of the resulting air campaign attracted the disapproval of Council members who had not voted in favour of the resolution, who said it exceeded the resolution’s provisions and veered towards supporting regime change. Others objected that the campaign sidelined the African Union’s attempts to initiate dialogue.”

Security Council 2011 Round-Up: SC/10518, 12 January 2012.

Even as Regional Organizations and States act to implement Security Council R2P directives, they have duties of protection with respect to the methods they use to achieve the ends the Security Council has set down. In late 2011, concerned with the NATO action in Libya in terms of mission creep and civilian casualties, Brazil tabled an important concept note on *Responsibility while Protecting*, requiring *inter alia* that those implementing Council resolutions stay within the terms of the resolution and abide by IHL.¹⁵⁹ In the November 2011 Council Open Debate on POC, there was substantial concern with interpretation of the Council Resolution 1973 as authorizing “regime change” (especially by India, South Africa and China), with members arguing that overreach in the case of Libya had made future agreements on POC statements and resolutions less likely – and the lengthy paralysis with respect to Syria in late 2011 and early 2012 perhaps should be taken as an example of this.¹⁶⁰ In the May meeting, similar concerns had been raised with regard to the use of force by UNOCI in Côte d’Ivoire, with Brazil arguing that: “the

use of force by peacekeepers to protect civilians must be carried out with utmost restraint. This is necessary to ensure that blue helmets are not perceived as parties to the conflict.”¹⁶¹

Brazil’s Concept Note: Responsibility While Protecting: Elements for the Development and Promotion of a Concept, A/66/551; S/2011/701, 11 November 2011

... 11. As it exercises its responsibility to protect, the international community must show a great deal of responsibility while protecting. Both concepts should evolve together, based on an agreed set of fundamental principles, parameters and procedures, such as the following: ...

(d) The authorization for the use of force must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict;

(e) The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent; ...

(h) Enhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting;

With this in mind, it may be expected that future POC and R2P action authorized by the Security Council will contain additional constraints or specifications of what use of force, to what purposes, is being authorized.

Experience has shown that Security Council action to protect civilians requires serious and careful discussion. There should be strict provisions on the mandate, implementing parties and implementing conditions. If many questions remain to be clarified, the Security Council should not rush to take action until those questions are answered.¹⁶²

Even so, it will be a conceptual and strategic challenge – one that in the event will have to be undertaken in good faith by all members of the Council – to appropriately limit the actions and military objectives of intervening forces without hamstringing their capacity to offer genuine and timely protection to populations at risk. After all, any robust action taken by forces to enforce no-fly zones and to protect civilians and civilian safe-areas – including by deterring and demobilizing those forces mounting attacks – can have straightforward geopolitical and military consequences making regime change more likely. Indeed, such actions in themselves can even be a type of regime change. Critics of the Libya intervention and the action in Côte d’Ivoire sometimes speak as if the Council’s stated objectives could have been performed without substantial military force, or as if such force could be deployed in a “neutral” manner that did not impact upon the military theatre.¹⁶³ Concerns with mission creep and politically motivated regime change in this or any future case are reasonable and important, but they must not be detached from the reality of the military and geopolitical situation in question.

¹⁵⁹ Brazil, *Responsibility While Protecting*.

¹⁶⁰ UNSC, Nov 2011 POC Meeting, S/PV.6650.

¹⁶¹ UNSC, May 2011 POC Meeting, S/PV.6531, p. 11.

¹⁶² Chinese statement: UNSC, Nov 2011 POC Meeting, S/PV.6650, p. 25.

¹⁶³ See Breakey, “Game Change and Regime Change,” pp. 27-32.

Ultimately, if and when constraints on methods and objectives of future R2P-POC operations are being formulated, **it cannot be forgotten that the United Nations had peacekeeping forces on the ground in both Rwanda and Srebrenica, but that they were rendered toothless in the face of atrocity by conservative interpretations of ambiguous and ambivalent Council resolutions.** It is concerning that even as it invoked the context of Rwanda, the *Brazilian Concept Note* was only willing to concede that there may be situations where military action might be contemplated.¹⁶⁴ Reasonable concerns with mission creep must not be used as a pretext for returning protection to the dark days of the mid-1990s, where populations were unprotected and UN-authorized forces were set up for failure. At the General Assembly informal dialogue on the *Responsibility while Protecting*, the Brazilian Ambassador rightly declared, “The establishment of these procedures should not be perceived as a means to prevent or unduly delay authorization of military action in situations established in the 2005 Outcome Document.”¹⁶⁵

“No argument in favour of standing by while civilians are attacked can be sustained.” Nigerian statement in Security Council November 2011 Open Debate on POC: S/PV.6650.

While navigating this course between securing the protection of the population and guarding against less-noble force objectives will no doubt will be a challenge for the Security Council to face, it should not prove insurmountable. The Council's decision in Resolution 1973 – following regional input – to limit intervening forces from deploying ground forces appears

164 Brazil, *Responsibility While Protecting*, ¶18.

165 Statement by H. E. Ambassador Antonio de Aguiar Patriota, Informal discussion at the United Nations on the ‘Responsibility while Protecting’, 21 February 2012, <http://www.un.int/brazil/speech/12d-agp-RESPONSIBILITY-WHILE-PROTECTING.html>.

to have ensured that concerns with “occupation” and “neo-colonialism” were substantially diminished in Libya,¹⁶⁶ yet without stopping the forces from effecting real protection of populations. A similar solution may in the future be developed to allay concerns with force implications for regime change.

Reform Proposals with regard to Efficacy and Mutual support: Security Council and R2P early warning

At the pinnacle of international decision-making, the Security Council could make more extensive use of its broad authority under Article 34 of the UN Charter to “investigate any dispute, or any situation which might lead to international frictions or give rise to a dispute.” By undertaking several visits or missions each year to see how places of concern are faring, the Security Council has taken an important step in this direction. Thus far, the focus has been more on conflict prevention and resolution, rather than on the prevention of mass atrocity crimes. However, the Council's growing attention to protection issues in a peacekeeping context suggests that it would not be difficult to add these matters to the scope of its concerns, including in its messaging to government leaders and to the heads of armed groups during these missions.¹⁶⁷

Prior and ongoing reform with regard to Efficacy: The Security Council and POC in UN Peacekeeping Operations

The Security Council has altered several of its practices over the last decade in order to better protect civilians. In Resolution 1296 (2000), pursuant to concerns raised by the Reports on Rwanda and Srebrenica, the Council affirmed its intention to ensure peacekeeping missions were given suitable mandates and adequate resources to protect civilians. Later resolutions expanded the capacities of PKOs in relevant ways.

166 Concerns were instead raised in terms of “politically motivated regime change”.

167 Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, ¶32.

For instance, Resolution 1843 (2008) increased the UN peacekeeping force in the Democratic Republic of the Congo (MONUC) to develop a quick reaction capability to strengthen the protection of civilians. Moreover, the Council has also increasingly prioritized POC over other force objectives. Resolution 1906 on MONUC is a striking example, where the requirement to protect civilians is explicitly prioritized several times over all other force objectives, including the unequivocal statement that POC “must be given priority in decisions about the use of available capacity and resources, over any of the other tasks described”.¹⁶⁸

The Council has also been less ambiguous in its authorization of the use of robust force for POC purposes. Its early practice reflected a general assumption that that PKOs deployed with the consent of the host State – and often with the consent of all major parties to the dispute – would not need force to protect civilians from direct attack by those parties. Lessons from Rwanda and the former Yugoslavia, and more recently from the Democratic Republic of the Congo and Darfur, have shown this assumption – however common-sense it appears – is mistaken. Even when States are pressured into accepting the deployment of PKOs, the State, state-elements, or state-sponsored forces can nevertheless have systemic violence to civilians as a settled strategy or war objective. Hence, authorization under Chapter VII of the Charter to use force to protect civilians is vital even when consent is procured. Reflecting this hard-learned lesson, the Council now invokes Chapter VII in mandating its PKO protection missions.

§5.2.c ICC

Current challenges with regard to Mutual support: the ICC and R2P Pillar Three action

Recent practice shows that ICC referral (either self-referral or through the Security Council) will often accompany international

168 S/RES/1906 (2009), ¶7.

BRAHIMI REPORT 2000:

“When the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence with the ability and determination to defeat them.”

action in atrocity situations. However, such referrals can give rise to a larger problem existing between R2P and the ICC in the context of *Pillar Three* situations. Some commentators have argued – in the context of Sudan and Uganda in particular – that ICC referral and prosecution made conflict resolution more difficult because it removed the possibility of granting impunity for belligerents and State leaders who had already committed atrocity crimes. The prospect of prosecution from an international court appears to have meant that such leaders had little incentive to stop atrocities or to engage in a peace process, suggesting to some that use of the Security Council’s capacity to suspend ICC cases may be advisable as a mechanism for promoting the peaceful resolution of a conflict.

Unfortunately, in many contexts, it can seem as if international justice initially appears as a toothless tiger to local spoilers, who perform atrocities with expectations of impunity. Then, when an ICC referral is made, the prospect of international prosecution becomes more real, but with atrocities already performed, the spoilers have even less motive to restrain their behaviour or compromise for peace. The challenge in reconciling ICC prosecution and R2P *Pillar Three* action is in making the threat of ICC action real *before* leaders are implicated in performing atrocities. In this respect, it is important to remember that the prospect of sustained peace without justice can be illusory, and that the amnesties offered in the context of resolving one conflict contribute to the expectations of impunity held by a genocidaire in a later conflict.

Current challenges with regard to Mutual Support: The ICC, POC and the principle of complementarity

In terms of POC, the ICC must not be considered a replacement for national courts. Due to the ICC’s substantiality requirement, national courts can be more effective in prosecuting the full gamut of POC violations, including more discrete violations of IHL. Additionally, national courts can impose remedies of reparation

as well as criminal sentences, can have greater capacities to apprehend criminals, and can be more closely involved with truth and reconciliation commissions and their role in national peacebuilding.

The special operational significance offered by the ICC is its expanded jurisdiction and its corollary capacity to deter even criminals who feel that have nothing to fear from current and even future national courts. In this way, it promotes accountability for violations of POC across a wider range of actors. Even here, however, its principle of complementarity ensures that local legal institutions retain the primary responsibility for prosecuting those who commit atrocity crimes.

§5.2.d ICJ

Prior initiative with regard to Role Development: The ICJ Genocide Case and R2P

The legal implications of the ICJ’s historic 2007 judgment are still in the process of being worked out. While the Court explicitly sought to limit its judgment from applying to atrocity crimes outside the narrow scope of the Genocide Convention, legal commentators continue to debate whether the logic of the court will be ultimately found to be applicable to R2P crimes more generally, and thus give legal substance to key aspects of R2P Pillar Two commitments to prevent atrocity crimes. Some have even argued that the Security Council’s unique authority makes it a potential candidate for legal duties to prevent.¹⁶⁹ Whether or not this occurs, the ICJ’s use of the criteria of influence, geographical proximity and presumptive knowledge help to fill out the type of agents primarily responsible to prevent a given atrocity.

§5.2.e DPKO/DFS

Ongoing reform with regard to Mutual Support: DPKO, the Protection Cluster and POC peacekeeping

The DPKO consistently highlights the increasing relevance of POC to peacekeeping operations. POC is also highly relevant to UNHCR field missions because the UNHCR heads the protection cluster in the field, which engages OCHA and DPKO. Thus, the importance of inter-agency co-ordination is stronger than ever. In this regard, the emergence of POC has coincided with the reform of the UN humanitarian assistance system, initiated in 2005. The protection cluster approach and the principles and practices associated with POC are converging, as evident in the joint leadership of the protection cluster, granted to UNHCR and the UN’s peacekeeping mission in the Democratic Republic of Congo (MONUSCO), which also involves the participation of other international protection actors, such as UNICEF, OCHA, ICRC and international NGOs, alongside civil-military actors.

Overall, agencies such as OCHA, UNHCR and ICRC are keen for coordination with the UN peacekeeping missions to continue, but also for responsibilities to be clearly defined. They are happy to do their own specific protection work without heavy time-consuming coordination, as long as each agency understands POC in the same way. MONUSCO is a good example of humanitarian actors working together to formulate a common approach to POC. There was coordination of (otherwise overlapping) responsibilities between agencies through the “Joint Protection Matrices” identifying priority focus areas. This was seen as succeeding partly due to officers on all sides being willing to work together, but also due to the local circumstances that demanded people work together. MONUSCO showed how POC can be successfully done, if there is good will and determination to proactively interpret the mandate to include physical protection and robustly combat gender-based violence.

169 Arbour, “Duty of Care”; Martin Mennecke, “Genocide Prevention and International Law,” *Genocide Studies and Prevention* 4.2 (2009): 167-75; Though see: Carvin, “A Responsibility to Reality.”

Current challenges and Ongoing Reform with regard to Role Development and Will: DPKO and R2P in UN Peacekeeping Operations

Historically, the DPKO has been ambivalent about the relevance of R2P to field missions, believing there are practical limits to the relevance of R2P in peacekeeping. It has largely avoided getting into a position where its missions are meant to respond to R2P situations. This is seen to be essentially a matter of limited resources and capacity to respond to mass atrocity crimes. To date, personnel involved in peacekeeping missions are not trained how to respond to genocide. However, the DPKO's recent *Framework for Drafting Comprehensive POC Strategies in UN Peacekeeping Operations* expressly recognises that in instances where the government is unable or unwilling to fulfil its responsibility to protect civilians, Security Council mandates give missions the authority to act independently to protect civilians. This may include the use of force against any party, including government forces, where those elements are engaged in physical violence against civilians. In the extreme situations where peacekeepers are called upon to prevent or to respond to mass atrocities the distinction between POC and R2P breaks down. Thus, the greatest operational challenges for the DPKO/DFS are:

1. To send the appropriate mission to the country, given its situation, and;
2. To develop clear guidance and protocols for shifting, when necessary, from a *Mixed POC Operation* to a *Primary POC Operation*, and perhaps even – in the worst of cases – managing the drawing down of a PKO and the explicit change in authorization and formation required if Host State consent is withdrawn, and the Security Council decides to respond under R2P Pillar Three and its mandate and powers under Chapter VII of the UN Charter.

Independent Study on POC in UN Peacekeeping Operations

“As seen in Rwanda, the Balkans, Sierra Leone, Haiti, DRC and Darfur, among others, peacekeeping operations that are ill-prepared to address large-scale violence directed against civilians will falter and may even collapse.”

Current challenges with regard to Role Development and Will: R2P, POC and resource allocation for PKOs

In the November 2011 Security Council Open Debate on POC, the Permanent Representative from India commented:

We find several Member States all too willing to expend considerable resources for regime change in the name of protection of civilians. However, they are unwilling to provide minimal resources, like military helicopters, to the United Nations peacekeeping missions, which are mandated to protect civilians and designed to strengthen capacity of State institutions as well.¹⁷⁰

Western governments regularly appear agitated and even outraged about atrocity when it occurs within an unrepentant and intransigent State unwilling to allow UN peacekeepers or human rights monitors entry. However, they can seem largely disinterested in investing any military resources in atrocity-prevention as soon as the State allows peacekeepers to deploy. While the Indian representative's comments above imply the source of this seeming paradox may be the desire to perform regime change, it is arguable that the problem's source lies in the very mechanics of R2P itself.

R2P relies on international pressure on States to stop them performing atrocities – pressure often driven by the awareness of ordinary civilians and civil

society organizations in other (especially Western) countries. When a State is unrepentantly slaughtering its civilians, and hiding behind its sovereignty and sheltering behind its allies on the Security Council, the events fall into a recognizable and understandable dramatic structure (brave civilians being crushed by evil dictator), and that story is daily news. But when civilians are being systematically assaulted by scattered militia in complex and internecine conflicts away from the world's traditional and social media, there is no simple story to tell, and even the grim regularity of such events tells against their newsworthiness. In 2012, the DRC and South Sudan are clearly less newsworthy than Syria, and so the focus of less international attention. Yet in both these African countries the international community has the opportunity to deploy resources *with* the consent of the State, rather than against it. The result, as the Permanent Representative from India suggests (India being the single greatest contributor of troops to UN peacekeeping operations), is that Western investment in preventing atrocities appears to vary inversely with willingness of host states to prevent atrocities; potentially inverting the prioritization of R2P's consensual Pillar Two over its coercive Pillar Three.

.....
¹⁷⁰ UNSC, Nov 2011 POC Meeting, S/PV.6650, p. 18.

§5.2.f UN Women

Reform Proposal with regard to Enrolment and Mutual Support: UN Women and R2P

A key operational issue is how to mainstream the protection of women (and children) while maintaining the need to safeguard their particular vulnerabilities. There is growing consensus that more institutional activities and focus is needed on the protection of women. More thought should be given to how R2P might resonate with the training of women leaders and otherwise be incorporated into education in schools and universities, while also linking with peacekeeping and peacebuilding initiatives at the national levels.

§5.2.g UNHCR

Ongoing Reform with regard to Role Development and Mutual Support: UNHCR and R2P situations

Further guidance is needed on how R2P and POC address the plight of refugees, particularly where there is a dispute over borders. The Secretary-General's 2009 Report on the *Implementation of R2P* engages with refugee protection at a number of points. Firstly, it recognises the historical role played by asylum in protecting persons from mass atrocities.¹⁷¹ Secondly, it recognises that the R2P principle requires mainstreaming of refugee protection in the work of UN agencies. Thirdly, the report encourages ratification and implementation of the 1951 Refugee Convention.¹⁷² Finally, UNHCR is recognized for "obtaining grants of asylum and protecting refugees" and thereby serving "numerous potential victims of crimes and violations relating to the responsibility to protect".¹⁷³

Similarly, prominence has been given to the protection of refugees and IDPs in the Security Council's thematic resolutions on POC. Resolution 1265 of 1999 refers

171 Secretary-General, *Implementing the Responsibility to Protect* (S/2009/677), ¶35.

172 Ibid., ¶17.

173 Ibid., ¶35.

to the vulnerability of refugees and IDPs during armed conflict and reaffirms the "primary responsibility of States to ensure their protection." Resolution 1296 of 2000 specifically requests the Secretary-General to bring to its attention situations where refugees and IDPs in conflict situations are vulnerable to the threat of harassment or where their camps are vulnerable to infiltration by armed elements.¹⁷⁴ Resolution 1674 of 2006 expresses the Security Council's commitment to ensure peacekeeping mandates contain clear guidelines regarding protection of civilians and "the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons".¹⁷⁵ Resolution 1894 of 2009 requests the Secretary-General to provide more detailed information on the protection needs of refugees and IDPs in his reports on country-specific situations.¹⁷⁶

Despite these exhortations, the Libyan intervention shows more needs to be done to protect those fleeing mass atrocity crimes. The insistence on a high-altitude, low casualty air war shifted the burden of risk and harm to the civilians who the intervention was meant to protect, as evidenced by the fact that displacement escalated after the commencement of air strikes.¹⁷⁷ And while Resolution 1973 praises the generous response of Egypt and Tunisia to those fleeing the conflict in Libya, the response of European countries to the direct arrival of refugees, especially the lack of solidarity and burden-sharing extended by other European countries to the frontline States such as Malta and Italy, was disappointing.¹⁷⁸

174 S/RES/1296 (2000), ¶14.

175 S/RES/1674 (2005), ¶16.

176 S/RES/1894, ¶32.

177 UN High Commissioner for Refugees, *Increased displacement in eastern Libya*, 25 March 2011. Available at: <http://www.unhcr.org/refworld/docid/4d8c959a2.html> [accessed: 1 April 2011].

178 UN High Commissioner for Refugees, *Italy*,

§5.2.h Humanitarian agencies

Ongoing Reform with regard to Mutual Support: Humanitarian agencies, POC, R2P and coordination and monitoring.

While it is widely accepted that the successful operationalization of R2P and POC requires complementarity amongst diverse actors – as typified in "Whole of Government" and "Whole of Nation" approaches – such complementarity itself comes as a cost. Attempts to achieve synergy amongst diverse actors can lead to extra layers of bureaucracy and the needs of coordination can create extra burdens of information sharing, such as reading and writing reports. For humanitarians especially, though also for other protection actors like peacekeepers, time spent in meetings and writing reports may be time lost from engaging in protective activities. More knowledge is needed regarding when complementarity requires active and on-going coordination between actors (rather than merely awareness of each other's mandates and activities), and how finite resources can be most efficiently allocated between primary and complementary tasks.

Malta receive first boats from Libya, stretching asylum capacity, 29 March 2011. Available at: <http://www.unhcr.org/refworld/docid/4d92e7bc2.html> [accessed: 1 April 2011].

§5.3

Regional and sub-regional

ACTORS	PREVENTION		RESPONSE		REBUILDING	
REGIONAL AND SUB-REGIONAL	R2P	POC	R2P	POC	R2P	POC
SOUTH EAST ASIA						
ASEAN	✓	✓				✓
ARF	✓	✓	✓	✓	✓	✓
AICHR	✓	✓				✓
ADMM	✓	✓	✓	✓	✓	✓
ASEAN Committee on Women	✓	✓				✓
AHCR	✓	✓				✓
AFRICA						
ECOWAS	✓	✓	✓	✓	✓	✓
SADC	✓	✓	✓	✓	✓	✓
Arab League	✓	✓	✓	✓	✓	✓
OIC	✓	✓	✓	✓	✓	✓
AU	✓	✓	✓	✓	✓	✓
EUROPEAN UNION						
OSCE	✓	✓	✓	✓	✓	✓
EUROPE AND THE UNITED STATES						
NATO	✓	✓	✓	✓	✓	✓
LATIN AMERICA						
Inter-American Commission on Human Rights	✓	✓		✓		✓
CARICOM	✓	✓				
OAS	✓	✓		✓		✓

§5.3.a

Regional Organizations: R2P

Reform Proposals with regard to Efficacy and will: Regional Organizations implementing R2P.

For States not open to R2P measures at this point, it may be that regional engagement in other humanitarian issues can lay the groundwork for a larger normative shift conducive to R2P. Arguably, this nascent shift may have occurred in ASEAN after its – ultimately effective – role in acting as a conduit between global institutions and Myanmar in the aftermath of Cyclone Nargis in May 2008.¹⁷⁹ While humanitarian disasters are *not* included in R2P's four atrocity crimes, the awareness that ASEAN had the capacity to act successfully on humanitarian issues by engaging (and not threatening) a member State seemed to have softened the stance of several of ASEAN's member-states towards R2P; the Philippines, Indonesia and Singapore all evinced greater acceptance of R2P in 2009 than previously. In short, it is possible that non-R2P humanitarian engagement can help shift a Regional Organization from a State-centered stance to a people-centered stance – or more accurately, and in line in particular with R2P Pillar Two, to a State-*for-people* stance.

Indeed, it is worth emphasis that regional engagement with R2P presupposes an effective, generally well-resourced Regional Organization that is mutually trusted by its member-states and forms a nexus and dialogue on shared interests. Further, modalities for regional security – such as voluntary early-warning mechanisms targeting regional security breakdowns – could be useful in future R2P contexts. As such, even increased significance in resolving and promoting purely narrow state-security issues may be an important staging post for a Regional Organization to acquire the critical mass that can make it an effective R2P institution.

Ongoing and prior reform with regard to Mutual Support: Regional Organizations and R2P Pillar Three

Case Study: The Role of Regional Organizations in the response to the crisis in Libya

In Resolution 1973, the Security Council did something it had never done before: it authorized a military intervention to protect civilians into a State with a functioning government, but in opposition to the express position of that government. This Resolution, and the statements of the Security Council members that accompanied it, amply demonstrate how important regional organizations are to determinations of Pillar Three action in the contemporary environment.¹⁸⁰ In the lead-up to the Resolution, numerous regional organizations – including the *Peace and Security Council of the African Union*, the *League of Arab States*, the *Gulf Cooperation Council* and the *Organization of the Islamic Conference* – condemned the actions of the Gaddafi regime. Not only did several of these organizations call for international action to be taken under the authority of the UN Security Council, they specified the measures they thought appropriate: primarily the establishment of a no-fly zone over Libyan airspace. They further specified the measures that would not be acceptable, primarily the deploying of foreign ground troops into Libya. Consistent with R2P themes, the regional organizations fashioned a response that

could realistically protect the population, while at the same time rejecting the type of military intervention-cum-occupation that may have been envisaged under a “right of humanitarian intervention”.

The constrained response recommended by these organizations proved impossible for the Security Council to deny. In their statements, those Council members in favor of Resolution 1973 explicitly emphasized that they were responding to the calls for action by regional organizations, particularly by the *League of Arab States*. Equally, some States – most significantly China – chose to abstain rather than to veto the Resolution out of respect for the calls of regional organizations (this is broadly consistent with China's standing policy on such matters, where it defers heavily to regional assessment). On the other side of the coin, nations such as Brazil and the Russian Federation abstained from the Resolution out of concern that the resolution went beyond what was called for by the *League of Arab States*. For all Security Council members, then, the statements of key regional organizations impacted profoundly on the position they adopted on Res. 1973. In a similar fashion, the input of regional organizations into Security Council decision-making was also pivotal with respect to the situation in Côte d'Ivoire in 2010 and 2011.¹⁸¹

Statement by the Colombian Security Council Representative on Res. 1973: “We have effectively responded to an express request made by a regional organization, the Arab League, which, to its great credit, instead of acting on its own went to the Council to call for it to discharge the functions assigned to it by the Charter.” (S/PV.6498)

179 See Seng Tan, “Towards a ‘Responsibility to Provide’: Cultivating an Ethic of Responsible Sovereignty in Southeast Asia,” in C. Sampford, et al. (eds.), *The Laws of Protection: Protection of Civilians and the Responsibility to Protect* (Geneva: United Nations University, 2012).

180 UNSC, *The Situation in Libya*, S/PV.6498, 17 March, 2011.

181 Bellamy and Williams, “The New Politics of Protection.”

§5.3.b

Regional Organizations: POC

Reform Proposal with regard to Efficacy: Regional Organizations implementing POC in peacekeeping.

A consistent problem for POC is the lack of capacity to deploy quickly and robustly into regions where civilians are at imminent risk. After a POC operation has been mandated by the executive (be it regional or UN) and agreed to by the host State, it can take a substantial period of time before it deploys, and before it builds to its full strength and acquires all its necessary resources. Unfortunately, attacks on civilians can be prosecuted rapidly throughout this interim period. Belligerents may also “test the waters” on the military strength and will of the PKO to protect civilians in these early stages, and tepid responses can encourage future attacks on both civilians and the PKO. The obvious solution to these problems would be to have a standing “ready reaction” force available to deploy rapidly and with strength into an area and to assume protection responsibilities for this initial period.

Development of ready response capacity at a UN level is a possibility in this regard: the UN Emergency Peace Service (UNEPS) is one such ambitious reform proposal.¹⁸² However, it is at the regional level where such capacity is closest to reality, or at least where there is an existing policy trajectory for its development. NATO with its Response Force, the European Union with its “Battlegroups” and the African Union with its nascent African Standby Force are all examples – this last specifically related to empowering the AU Peace and Security Council to perform its responsibilities with regard to Art 4(h) of the AU Constitution, providing for responses to atrocity crimes. While the development of genuine ready response capacity and its utilization in PKOs is still

in its early days, it has the potential to be one of the most visible contributions regional organizations can make to civilian protection. Alongside the development of military and lift capacity, training and the creation of military doctrine on POC will be required, and modalities to ensure political will is present to deploy the force when POC flashpoints arise and host-state consent (and even request) is forthcoming.

§5.3.c

Case study: South-East Asia

Different regions show different emphases, nuances and meanings attached to R2P and POC. ASEAN countries have agreed to R2P at the international level, and one of the core values of ASEAN is human rights. But the question for the ASEAN region is what next? How does the region operationalize R2P and POC? There is seen to be greater opportunity for “selling” R2P among ASEAN States by emphasising the R2P preventive approach. The ASEAN Intergovernmental Commission on Human Rights (AICHR) in particular, is seen as interested in a rights-based preventive approach. There may be an opportunity to present R2P's preventive agenda during the training of ASEAN officials in human rights. There is also more scope for emphasizing the relevance of existing ASEAN norm engagement with R2P and POC, including: the commitment in the ASEAN Charter to upholding international humanitarian law, thereby creating a logical link to POC; the creation by ADMM+ 3 of a working group on peacekeeping; and the CSCAP study on R2P that included a number of useful recommendations on the implementation of R2P in the region.

182 Annie Herro, Wendy Lambourne, and David Penklis, “Peacekeeping and Peace Enforcement in Africa: The Potential Contribution of a UN Emergency Peace Service,” *African Security Review* 18.1 (2009): 49-62.

ATTY. ZAINUDIN S. MALANG, EXECUTIVE DIRECTOR MINHRAC.

"Ignorance is more dangerous than bias. You can triangulate information from multiple sources to eliminate bias. You can't triangulate ignorance."

§5.4 National

ACTORS	PREVENTION		RESPONSE		REBUILDING	
	R2P	POC	R2P	POC	R2P	POC
Community/civil society	✓	✓			✓	✓
Executive	✓	✓	✓	✓	✓	✓
Parliament	✓	✓	✓	✓	✓	✓
Military		✓	✓	✓		✓
Police	✓	✓				✓
Judiciary	✓	✓				✓
Human rights commissions	✓	✓			✓	✓

§5.4.a Local communities

Ongoing initiatives with regard to

Role Development and Efficacy:

Local communities as decentralized information sources

In the network set up by the *Mindanao Human Rights Action Centre* (MinHRAC), local communities and IDPs are themselves the primary protection monitors. With high mobile phone coverage throughout the Philippines, local communities use text messages to communicate to MinHRAC real time protection developments or threats, and to confirm the arrival and distribution of relief.

§5.4.b Civil society

Ongoing reform with regard to Mutual

Support and Role development: Civil society as R2P actors

More work needs to be done to understand the role of NGOs and other civil society groups in protecting populations from mass atrocity crimes. The need to develop response strategies and protocols for when early warning is given by NGOs is vital.

Other areas requiring operational guidance include:

- » information sharing between protection actors;
- » the design of risk management systems to protect information and sources of information;
- » providing community preparedness for the outbreak of mass violence;
- » engaging with international, regional, national and local actors to better protect vulnerable populations, and;
- » greater awareness and familiarisation with international legal issues and the obligations and risks associated with bearing witness to the ICC.¹⁸³

183 Oxfam Australia, NGOs and the Prevention of Mass Atrocity Crimes: A Practical Workshop for NGOs to develop and share strategies to implement the Responsibility to Protect in the Asia Pacific region, 23-24 November 2009 (available at: <http://www.oxfam.org.au/site-media/pdf/OAus-NGOsAndPreventionOfAtrocityCrimes.pdf>)

§5.4.c Executive and Parliament

Reform proposals with regard to Role development and Will: Executives and Parliaments as POC and R2P actors.

There is a need to identify a lead agency at the national level on R2P and POC. There is also call for greater Ministerial coordination in engaging with R2P and POC. While national military and police forces, in conjunction with DPKO, regional bodies and foreign affairs departments, are emerging as the preferred agencies for the promulgation and infusion of POC doctrine at the national level, the broad operational context of the R2P principle lends itself to a lead agency to co-ordinate the cross-section of actors at the national level as well as act as an authoritative voice in regional and international dialogue on R2P-related matters as they arise domestically and in other jurisdictions (as well as regional and international developments).

“Preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States. Our security is affected when masses of civilians are slaughtered, refugees flow across borders, and murderers wreak havoc on regional stability and livelihoods. America’s reputation suffers, and our ability to bring about change is constrained, when we are perceived as idle in the face of mass atrocities and genocide. Unfortunately, history has taught us that our pursuit of a world where states do not systematically slaughter civilians will not come to fruition without concerted and coordinated effort.”

US Presidential Study Directive 10, August 4, 2011.

One example of the development of doctrine on the capacities of executives and parliaments in supporting a State’s Pillar Two responsibilities began in the United States with the 2008 report of the US Genocide Prevention Task Force: *Preventing Genocide: A Blueprint for US*

Polymakers.¹⁸⁴ The Report included such recommendations as:

1-3. The president should create a standing interagency mechanism for analysis of threats of genocide and mass atrocities and consideration of appropriate preventive action.

2-5. The national security advisor should make warning of genocide or mass atrocities an “automatic trigger” of policy review.

3-3. Early prevention strategies should aim to strengthen civil society in high-risk States by supporting economic and legal empowerment, citizen groups, and a free and responsible media.

From this point of departure, in August 2011 US President Obama issued a Presidential Study Directive (PSD-10) mandating the creation of a standing inter-agency Atrocities Prevention Board (APB) and directing the National Security Advisor to assess the United States government’s capabilities to address atrocity threats. In April 2012,¹⁸⁵ following the recommendations of the assessment, President Obama directed that:

- » Following a whole-of-government approach, the APB will include representatives from a wide array of government departments, including those dealing with security, intelligence, human rights and development areas, as well as the Office of the Vice President and the US Mission to the UN. The APB is as much a process as an institution; after its first six months it will develop draft doctrine regarding its structure, functions, priorities and direction in order to prevent and respond to threats of atrocity.

184 Madeleine K. Albright and William S. Cohen, *Preventing Genocide: A Blueprint for U.S. Policymakers* (Albright-Cohen Report).

185 Office of the US Press Secretary, “Atrocities Prevention Board Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities,” (Washington: 2012). Note also Christine Evans, David Scheffer, and Rachel Gerber, *Structuring the US Government to Prevent Atrocities: Considerations for an Atrocities Prevention Board, Policy Dialogue Brief* (Muscantine: The Stanley Foundation, 2011).

- » The APB will work with the intelligence community to increase and improve the collection, analysis, sharing and reporting of information on atrocity threats, including by monitoring the National Intelligence Council’s preparation of the National Intelligence Estimate on the global risk of mass atrocities.

“Effectively linking mass atrocities to national interest, however, fails to resolve the more complex problem of competing interests, which presents perhaps the greatest obstacle to effective policy development in every area of US global engagement.” *Structuring the US Government to Prevent Atrocities: Considerations for an Atrocities Prevention Board, Stanley Foundation Policy Brief, 2011.*

Prior initiatives with respect to mutual support and will: R2P Focal Points

UN Secretary-General 2011 R2P

Report: “It would be helpful to our work at the United Nations, including that of the Joint Office of the two Special Advisers, if the focal points could undertake a mapping exercise of the capacities that various Member States have that could help to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity. Parallel networks of focal points in civil society and parliaments could be developed as well.”

R2P Focal Points are senior officials mandated to mobilize efforts on a national level to prevent and respond to atrocity crimes. On a domestic level their role is to progressively and incrementally implement and facilitate R2P capacities and doctrine throughout all relevant government policies, ministries and organs, keeping in mind the specific circumstances and

NIGERIAN STATEMENT IN SECURITY COUNCIL POC MEETING, MAY 2011: S/PV.6531.

“A thoughtful approach to understanding the specific vulnerabilities of all civilians in a conflict situation would lead us to the right combination of these strategies, one reflecting the socio-economic context of the conflict.”

needs of the state in question. The Focal Point works as a “hub” for analysis and policy input.¹⁸⁶

On a larger view, each Focal Point is one part of a larger Global Network, allowing mutual support and sharing of lessons learned and best practices, as well as intergovernmental coordination and assistance where appropriate.

Current challenges with regard to Efficacy and Mutual support: Executives and Parliaments mainstreaming R2P Pillar Two throughout foreign and trade policy.

Perhaps the single most difficult challenge to nations – and so to executives and parliaments – is to contribute to large-scale structural prevention of atrocities through mainstreaming R2P *throughout institutions not normally perceived as implicated in atrocities*. One instance here is arms-dealing, particularly of the small arms used by irregular forces – who typically pose the greatest danger to populations. It is all too possible for States to view such international dealings purely through a business perspective.

A more difficult case again is the question of economic development: Does structural atrocity prevention include – as the original ICISS Report suggested – concern for the economic development of poorer States, so as to mitigate the economic factors that play a role in precipitating atrocities? Even if the link between economic aid or the dissolution of trade barriers on the one hand, and R2P atrocity-prevention on the other, is too tenuous to inform direct policy initiatives, there are tighter links between certain types of economic activity and atrocity. To

take one example: *Blood diamonds* are just one well-known instance of the larger problem of the *resource curse*.

Case Example: The Resource Curse and the Challenge of mainstreaming R2P's Structural Prevention

One of the largest risk factors for civil war and despotism is the presence of reserves of oil and mineral wealth – the so-called “Resource Curse”. Rather than such natural wealth being exploited for the common good, the wealth these resources offer furnishes a standing incentive for the brutal takeover of vulnerable States by armed actors. Once a successful takeover occurs, the massive and on-going income the oil and mineral resources provide allows despots to cement their rule by indefinitely repressing the population. The resource curse is thus directly implicated in the two major contexts where genocide and atrocity crimes occur: civil war and despotic State repression. Yet this income is not created by the resources themselves, but by the willingness of other States to trade in what are effectively stolen goods: stolen from the population for whose good such natural wealth by rights should be exploited. A variety of policy-initiatives, both unilateral and multilateral, have been developed to combat this problem – such as the Kimberley Process Certification Scheme for rough diamonds. However, the disconnect between atrocity-prevention, foreign policy and international business has so far meant that genocide prevention has focused on setting up discrete organs of genocide prevention rather than through mainstreaming R2P by altering national policy in other domains.

§5.4.d Military and Police

Ongoing reform with regard to Efficacy: Military and Police training in the context of POC peacekeeping operations

Many national military and police forces do not currently have operational guidelines or doctrine to enable them to contribute with assurance to the implementation of POC. UN concepts and frameworks are more advanced,

and UN training modules for POC are currently being developed. Greater effort is required by countries to ensure their military and police contingents are adequately trained for POC, and that POC doctrine and training is consistent with UN developments and the requirements of international humanitarian law.

Thought must also be given to ways in which relevant aspects of R2P can be introduced into POC training, for example, the preventive role of peacekeepers in the face of potential outbreaks of mass atrocities.

§5.4.e

Human rights commissions: R2P

Reform Proposal with regard to Role development and Mutual support: Human Rights Commissions and R2P early warning and advocacy.

National human rights commissions could play a greater role in monitoring State compliance with R2P – although in some jurisdictions the commissions themselves would need protecting. Of course, many human rights commissions are actively involved in UN meetings and seek greater engagement with international human rights law and international humanitarian law. Thus, they play a role in ensuring compliance with R2P through identifying gaps in protection and recommending and advocating for the necessary legal and political reforms. Such monitoring, assessment and recommendation should be informed by knowledge of the risk factors for genocide and atrocity crimes, as detailed by the OSAPG.¹⁸⁷ On the other hand, in jurisdictions where human rights are overly politicised, associating the human rights commission with R2P could be detrimental to the State's willingness to engage with those principles, and for that reason might need to be avoided.

Romeo Dallaire (2003), Commander of the UN PKO in

Rwanda: Major Brent Beardsley, “asked a Belgian officer what it felt like to be risking his life in Rwanda while his nation dealt arms that could be used to kill him. The officer replied that peacekeeping was peacekeeping, and business was business, and the business of Belgium was arms.”

¹⁸⁶ See Rachel Gerber and Pawnday Savita, “Policy Memo: Preparatory Workshop for the Second Meeting of the R2P Focal Points Network,” (New York: Stanley Foundation; GCR2P, 2012.)

¹⁸⁷ Office of the UN Special Adviser on the Prevention of Genocide OSAPG, “Analysis Framework,” United Nations, http://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf.

PART 6.

CONCLUSION

§6.1 R2P and POC

Perceptions and Realities

I. “R2P has a narrower scope than POC, applying only to the four atrocity crimes.”

AGREE

Applying in law (Narrow POC) to all situations of armed conflict proper, and as a practice (Broad POC) also to other situations of mass violence, POC is broader in scope than R2P. *Broad POC* parallels R2P in this respect—both have a wide arsenal of tools to enable civilian protection.

However, R2P is deep in terms of its preventive dimension: the modes of protection utilized to prevent atrocities. Though the crimes it seeks to prevent are very specific, R2P’s preventive duties apply in many contexts.

II. “POC is strictly limited to situations of armed conflict, as defined by IHL.”

DISAGREE

While IHL and *Narrow POC* are (for the greater part) limited in application to contexts that contain two military forces directly engaging one another, the consistent usage of *Broad POC* – in the hands of the UN Security Council, the Secretary-General, peacekeepers and humanitarians – also applies to internal disturbances when they reach a threshold of widespread, grave, lawless violence against civilians.

However, it is arguable that outside armed conflict proper, a term such as “protection of civilians in situations of mass violence” could be developed to mark this change in the field of application. Even so, an ordinary lay understanding of “armed conflict” in the context of civilian protection will include the systematic use of lethal force by military forces against civilians, meaning that the present term is still apt.

III. “POC is impartial and neutral, and – unlike R2P – it does not impact on State sovereignty.”

IT DEPENDS

- » *Humanitarian POC* – especially as understood by the ICRC – is indeed fully respecting of impartiality, neutrality and State authority.
- » *Narrow POC* can carry implications for absolutist sovereignty. For example, since Additional Protocol II of 1977 applies to non-international armed conflicts, IHL constrains the way States may confront and punish rebellions inside their own borders.
- » *Peacekeeping POC* always requires the impartial pursuit of the PKO's mandate and respect for international law. Doing so, however, can require acting decisively against perpetrators (in violation of neutrality), especially in *Primary POC PKOs*. As the Brahimi Report in 2000 stated, “Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles.” However, *Peacekeeping POC* always respects State sovereignty by requiring formal consent for its deployment.
- » While respect for sovereignty is a vital element of international peace, in extreme situations *Security Council POC* can impel the (non-neutral) use of coercive measures to protect or help protect civilians from perpetrators.

However, R2P as a whole is potentially more confronting of sovereignty than POC, as the presence of atrocities automatically implies a perpetrator that may need to be challenged. If the perpetrator that must be confronted is a State itself, then the Pillar III use of force to protect populations may well carry implications for regime change—a geopolitical outcome that some parties may desire for reasons that have little to do with the protection of populations. For these reasons R2P in general will usually be more politicized and controversial than POC.

IV. “POC is a legal concept; R2P is a political concept.”

DISAGREE

The above dichotomy was asserted by the Secretary-General in his 2012 POC Report (S/2012/376). However, it is hard to align this view with the traditional understanding of R2P as a framework drawing on international law, or with the policies and institutions of *Broad POC*. None of the Secretary-General's prior POC or R2P reports, or the thematic Security Council Resolutions that followed them, have ever used this language, and in the Secretary-General's later 2012 R2P Report (S/2012/578) he eschewed such formulations and returned to the traditional understanding of the normative groundings of R2P: “The responsibility to protect is a concept based on fundamental principles of international law as set out, in particular, in international humanitarian, refugee and human rights law.”

Our analysis is aligned to this more traditional position. R2P and *Broad POC* both have elements comprising international law and elements going beyond the law's strict requirements.

R2P's affinities with law include:

- » R2P's Pillar One responsibilities for States to protect — and not to slaughter — their populations are firmly based in law, as the Secretary-General has often emphasized and as is apparent in the language the WSOD used to mark this primary responsibility. The four atrocity crimes have strict legal definitions, provided in the Rome Statute and the Genocide Convention. The WSOD did not redundantly create a “new” *political* obligation for what was already widely accepted to be a *legal* duty. Rather, the 2005 WSOD R2P principle

realigned human protection as a political norm in ICISS' formulation to existing categories of international legal crimes.

- » Some R2P Pillar Two duties — namely those prohibiting complicity in genocide occurring in other countries — are found in international law, as the *International Court of Justice* has determined in the Bosnian Genocide Case.
- » By recourse to the UN Security Council, R2P Pillar Three aims to impel interventions that are consistent with international law (as distinct from Kosovo-style unilateralism).

Furthermore, *Broad POC* has major elements that are not specified by international law, which make confining it to a “legal concept” difficult. For example:

- » The positive duties of peacekeepers to protect and contribute to the protection of civilians are not dictated by international law (indeed, the practice of peacekeeping receives little doctrinal support from the UN Charter itself).
- » The Security Council has great discretion over the coercive measures it may utilize to protect civilians, and the situations it may employ them in, over which there is no legal oversight.
- » Many of the positive and pro-active strategies of humanitarians to improve protection are not determined by law (though IHL does give a legal mandate to the traditional protection activities of the ICRC).

The view here is that R2P and Broad POC are developing norms (or principles) with common roots in the longstanding claims by states to protect those who live within their borders, the empathy for the sufferings of others found in most cultures, and the acceptance that individuals as well as states have rights.¹⁸⁸ As developing norms R2P and POC can influence both legal and political decisions — providing guides for conduct and reasons for action. As developing norms they gather support, attract critique, and shift in nature as they are applied.

Both because of their different origins and through their ongoing application, these two norms will have different trajectories, in which they may converge, diverge, wax or wane. It is possible that they might finally be distinguished in the dichotomous way suggested in the Secretary-General's 2012 POC Report. However, it is hard to agree that we have reached this stage or that this is the distinction the international community will ultimately want to adopt.

Nevertheless, *Narrow POC* — IHL — is strict international law, based both on universally signed treaties and customary international law. In this respect *Narrow POC* must be sharply distinguished from both R2P and *Broad POC*.

188 See Sampford, “A Tale of Two Norms.”

V. “Ground-level atrocity-prevention (R2P) always requires war-fighting against states (and so cannot be a task for peacekeepers).”

DISAGREE

- » Capacity and credible will to use robust force can often be sufficient insurance against having to fight wars.
- » Atrocities can be committed by non-state forces, and peacekeepers may have the wherewithal to confront these.
- » Even those atrocities precipitated by (elements of) the state are usually not performed by regular military forces, but instead by clandestinely state-supported (or state-unleashed) militia, as was the case with INTERFET in East Timor. Peacekeepers may have the wherewithal to confront these.
- » Atrocities often begin with smaller “trial massacres” to test the waters on international response. Early responses to these might be possible for peacekeepers, nipping violence in the bud.
- » Atrocity-prevention does not inevitably require the robust use of force. An atrocity-prevention lens used by peacekeepers may focus attention on hate-speech from local radios, for example, warning broadcasters of their potential legal culpability may be sufficient to suppress this problem.

However, any time atrocity-protection requires acting without formal state consent, or such that peacekeepers will be confronted by state forces as a “third belligerent”, peacekeeping operations cannot be asked to protect civilians.

Peacekeeping operations – even those with explicit atrocity-prevention agendas

– are never R2P Pillar Three operations, and a switch from one operation to the other (as perhaps should have occurred in Rwanda in 1994) requires an explicit change in mandate and operation.

**VI. "Peacekeeping
Operations — and even
some Humanitarian
and Human Rights
actors – may perform
specific atrocity-
prevention activities,
but it is better not to
speak of these as R2P
activities."**

IT DEPENDS

- » In many situations, it may needlessly add to controversy, and even invoke hostility and suspicion, to refer to atrocity-prevention activities as "R2P" actions or operations. In such cases, "R2P language" may be avoided. Even so, in situations where widespread dangers to civilians are present, the need for dedicated atrocity-prevention activities, threat-assessment and mainstreaming cannot be diminished.
- » While R2P Pillar Two language may be avoided because protection actors wish to dissociate their activities from the controversies in R2P Pillar Three, the *systematic* avoidance of R2P language by protection actors would result in R2P only being spoken about in Pillar Three situations – thus giving rise to a self-fulfilling prophecy where R2P comes to be automatically understood as Pillar Three coercive action (thus justifying the continued avoidance of R2P Pillar Two language by protection actors).
- » Many states – both Host States and Troop and Police Contributing Countries – are well aware of the potential links between R2P and POC, especially as these emerge in Secretary-General Reports and Security Council Resolutions. Indeed, in the Council's open debates on POC, States regularly display a sophisticated understanding of the three pillars of R2P and of the nature and scope of POC. In such cases categorical assertions that POC and R2P are unrelated are likely to be met with scepticism. It may be more persuasive – as well as more accurate

– to emphasize the strong distinctions *within* these groupings: for instance, the irremovable significance of Host State consent in R2P Pillar Two and *Peacekeeping POC*, as compared with the coercive elements that may be found in *Security Council POC* and R2P Pillar Three.

- » In some cases, clarity of language, purpose and resolve may contribute to atrocity prevention, for instance by signalling to potential perpetrators that the operation is willing and able to defend local populations against atrocities.
- » Ultimately, the surest way for any institution to assuage State concerns about infractions on its sovereignty does not lie in its strategic use of rhetoric, but rather — as the ICRC has shown for many years — about building genuine trust through long-term, consistent and institutionalized policies.
- » Additionally, the more R2P Pillar Two language is used in such cases, the more States will become familiar with it—allowing R2P's preventive agenda to be increasingly normalized.

It is widely agreed that, in the context of dealing with atrocities, prevention is better than cure. But if the international community and the UN Secretary-General aim to prioritize Pillar Two atrocity-prevention, then the very actors who are well-placed to engage in Pillar Two action cannot be going out of their way, for fear of being perceived as R2P Pillar Three fifth columns, to hold that atrocity-prevention does not fall within their

mandate. **The result of such a policy, when widely pursued by many protection actors – is that the most important and uncontroversial aspects of R2P are those that are not explicitly and pro-actively pursued, and mainstreaming and complementary approaches are not developed.** Far from *complementing* other protection actors, a stance of *agreeing* that R2P is hopelessly politicized and must be kept distinct from all other humanitarian activities will only sideline Pillar Two atrocity prevention possibilities, as well as cementing the views of many States who consider R2P as being all about intervention.

Ultimately, without explicit vocal support and complementary recognition from other humanitarian, protection and human rights actors – both within and outside the United Nations – atrocity prevention will not occur. The ideal approach for agencies and actors that need to avoid any association with coercive military action is to explicitly distance their activities from all aspects of R2P Pillar Three, but to nevertheless firmly declare that, in accord with the view of the overwhelming majority of Member States, it is important to assist willing states to develop atrocity-prevention capabilities.

§6.2 Concluding Remarks

All protection actors need to understand the R2P and POC norms to enable them to contribute fully in efforts to enhance protection.

“R2P and POC have powerful synergies and mutually reinforcing applications.”

- » They are both international principles that protect vulnerable people in situations of violence.
- » They are both closely intertwined with a range of instruments of international law, including strong legal prohibitions on violence against the unarmed.
- » They both exhort a diverse group of actors to positive protective and preventive action, putting in place backup and failsafe obligations in cases where the initial legal duties are unfulfilled or ineffective.
- » In the worst of cases, when conflicts descend into atrocities that threaten international peace and security, both sets of principles converge in looking to the Security Council for decisive action.

R2P and POC are distinct norms, but share common goals – namely, the saving of civilian lives from conflict and mass violence — and common applications. Neither POC nor R2P should function without awareness of the normative, institutional and operational requirements of the other. Protecting vulnerable people requires that protection actors – whether R2P or POC – work in mutually supportive roles, and not at cross-purposes.

Yet despite these important similarities, and notwithstanding the specific cases where the two principles will overlap in scope and content, the differences between the two principles must not be dissolved.

“POC and R2P should not be conflated. They are and must remain distinct principles.”

POC aims to protect a broad range of the human rights of civilians in armed conflicts and other situations of mass violence.

- » Individual indiscretions by individual combatants, and the mistreatment of civilians and soldiers *hors de combat*, should be prevented, even if these do not rise to the pitch of atrocity crimes.
- » Strategies and types of engagement – for instance by peacekeepers and humanitarians – can improve civilian protection in these cases, even if these methods would not be productive (or even possible) in the extreme cases of atrocities.

The visible and urgent status of R2P crimes that “shock the conscience of humanity” should not distract from the more prevalent and everyday abuses of civilians in the situations of violence that POC polices

R2P aims to protect the most basic rights of security for populations that are targeted for deliberate, systematic, mass violence.

- » Because of its narrow scope – covering only the four atrocity crimes – R2P has a deeper and more tractable preventive agenda; preventing armed conflict in general is impossible, but the prevention of atrocity crimes through early warning and timely action presents as a challenging, but potentially worthwhile, undertaking.
- » R2P’s narrow focus also makes its capacity to respond to violations greater. Because atrocity crimes are accepted by every international actor as “beyond the pale” of what is acceptable, defences based on sovereignty and non-intervention in domestic affairs are increasingly inadmissible.
- » **Atrocity crimes present very specific normative, institutional and operational challenges, and POC methods that work in lesser conflicts may be ineffective. However, the urgency and moral gravity of atrocity crimes allows new responses to become possible. These factors make R2P indispensable for the protection of vulnerable persons.**

Appendix 1 Resources and Links for Further Reading

UN GUIDANCE DOCUMENTS

DPKO and DFS, *Framework for Drafting Comprehensive Protection of Civilians Strategies in UN Peacekeeping Operations*, 2011.

Office of the UN Special Adviser on the Prevention of Genocide, *Analysis Framework*, available at: http://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf

UNDAW/DESA and UNODC, *Handbook and Supplement for legislation on violence against women*, 2009, available at: <http://www.un.org/womenwatch/daw/vaw/v-handbook.htm>

UNHCR, *Handbook for the Protection of Women and Girls*, 2006, available at: <http://www.unhcr.org/47cfa9fe2.html>

Global Protection Cluster Working Group, *Handbook for the Protection of IDPs*, 2010, available at:

<http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Protection/Protection%20Handbook/introduction.pdf>

Victoria Holt, Glyn Taylor, and Max Kelly. *Independent Report. Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*. New York: DPKO, UNOCHA, 2009.

Security Council Report, *Cross-Cutting Report on Protection of Civilians in Armed Conflict*, Reports 1-5, 2008-2012.

NON-UN GUIDANCE DOCUMENTS

Overseas Development Institute, *Protection – An ALNAP guide for humanitarian agencies*, 2005, available at: <http://www.alnap.org/resources/guides/protection.aspx>

ICRC, *Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence*, 2008, available at: <http://www.icrc.org/eng/resources/documents/publication/p0956.htm>

Australian Red Cross, *Promoting respect for international humanitarian law: Handbook for parliamentarians*, available at: <http://www.redcross.org.au/ihl/Australia-IHL-Parliamentarians-handbook.htm>

Centre for Humanitarian Dialogue, *Proactive Presence: Field Strategies for Civilian Protection*, 2006, available at: <http://www.hdcentre.org/files/Proactive%20Presence.pdf>

Centre for Humanitarian Dialogue, *Humanitarian Negotiation handbook*, available at: <http://www.hdcentre.org/files/HNN.pdf>

ICRC, *Professional Standards for Protection Work*, 2009, available at: <http://www.icrc.org/eng/resources/documents/publication/p0999.htm>

Appendix 2

Author Details

Dr Hugh Breakey.

Hugh is a Postdoctoral Fellow at the *Institute for Ethics, Governance and Law* and the *Key Centre for Ethics, Law, Justice and Governance* at Griffith University. His PhD work in political philosophy at the University of Queensland researched the ways natural rights limit intellectual property. His research focuses on philosophical issues in international relations, international law and the protection of civilians, as well as continuing research on the nature of rights, especially security, intellectual and property rights, as well as various topics in applied ethics. His first book, *Intellectual Liberty: Natural Rights and Intellectual Property*, was published in 2012 by Ashgate. His 2009-2012 publications include articles in top law, philosophy, ethics and international policy journals, including *The Modern Law Review*, *The Philosophical Quarterly*, *Social Theory and Practice* and *Global Responsibility to Protect*, as well as three chapters in *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (United Nations University Press, 2012). He is vice-president of the *Australian Association for Professional and Applied Ethics*.

Dr Angus Francis

Dr Angus Francis is an adjunct associate professor at the Queensland University of Technology Faculty of Law where he specialises in international human rights and refugee law. Previously he convened the Human Rights and Governance Research Programme within the Law and Justice Research Centre before moving back into practice as the Principal Solicitor of the Refugee and Immigration Legal Service. He has published widely in international journals and edited collections and has been a Visiting Fellow at the Refugee Studies Centre, Oxford University (1996–1997, 2003). He has consulted to the United Nations High Commissioner for Refugees, parliamentarians and various NGOs on issues relating to refugee law and policy.

Dr Vesselin Popovski

Dr Vesselin Popovski is Senior Academic Programme Officer, Head of “Peace and Security” Section at the UNU Institute for Sustainability and Peace (UNU-ISP) in Tokyo. He is a former diplomat, UN desk officer at the Bulgarian Foreign Ministry and first secretary at the Bulgarian Embassy in London. He holds two Master's degrees in international relations from the Moscow Institute of International Affairs and from the London School of Economics. His PhD from King's College, London was on the methodology of analysis of UN Security Council resolutions. Other positions include: research fellowship at NATO Academic Program “Democratic Institutions”; lecturer and programme director at the Centre for European Studies, Exeter University, UK; visiting lecturer at King's College, London; as well as work at the Centre for the Study of Democracy, Westminster University and Huron University (USA). He is a contributor to the ICISS Report *Responsibility to Protect* (2001) and co-author of the *Princeton Principles of Universal Jurisdiction* (2001). From 2002 to 2004, he worked in Moscow, implementing the European Union Project “Legal Protection of Individual Rights in Russia.” His recent publications include “*Legality and Legitimacy in Global Affairs*” with Richard Falk (Oxford University Press 2012); “*Norms of Protection: Responsibility to Protect and Protection of Civilians and their Interaction*” with Angus Francis and Charles Sampford (2012); “*After Oppression: Transitional Justice in Latin America and Eastern Europe*” with Monica Serrano (2012); “*Blood and Borders: Responsibility to Protect Minorities and Role of Kin State*” with Ramesh Thakur and Walter Kemp (2011); a trilogy “*Building Trust in Government*”, “*Engaging Civil Society*” and “*Cross-Border Governance in Asia*” with Shabbir Cheema (2010-11). He co-edited also “*Democracy in the South*” with Brendan Howe (2010) “*Human Rights Regimes in the Americas*” with Monica Serrano (2010) “*World Religions and Norms of War*” with Greg Reichberg (2009).

Professor Charles Sampford

Professor Charles Sampford gained his DPhil in Law at Oxford in 1986 and, after working in Law and Philosophy at Melbourne and being promoted to Principal Research Fellow, was invited to apply for the Foundation Deanship of Law at Griffith University in January 1991. In 1999, he became Foundation Director of the *Key Centre for Ethics, Law, Justice and Governance* (the only Australian centre in law or governance to receive centre funding from the Australian Research Council). In September 2004, he became the Director of the *Institute for Ethics, Governance and Law*, a joint initiative of the United Nations University, Griffith, QUT, ANU and the Center of Asian Integrity. Since then, he has been Convenor of the ARC Governance Research Network. Professor Sampford has written over eighty articles and chapters in Australian and foreign journals and collections and has completed twenty-one books and edited collections for international publishers including OUP, Blackwell and Routledge. Foreign fellowships include the Visiting Senior Research Fellow at St John's College Oxford (1997) and a Fulbright Senior Award to Harvard University (2000). From 2002–2003, he was a member of a task force on responding to threats to democracy co-chaired by Madeleine Albright. In 2003–2004, he led a Soros funded series of dialogues on governance values involving western and Islamic scholars. He has led a range of projects bringing in a total of around \$15m. In the last decade, his writing has dealt extensively with interventions, global values and the rule of law in both domestic and international affairs. In June 2008, his work was recognised by the peak Australian Research funding body (the Australian Research Council) who invited the 20 researchers across all disciplines who had most clearly “made a difference” to the Graeme Clarke Outcomes Forum at Parliament House Canberra.

Major General Michael G. Smith AO (Retd)

Major General Michael G. Smith AO (Retd) is currently the Director, Security Sector Advisory and Coordination Division, UNSMIL (United Nations Support Mission in Libya), assisting the Special Representative of the Secretary-General. He was the founding Executive Director of the Australian Civil-Military Centre, established by the Australian Government in 2008 to improve Australia's inter-agency and international coordination for conflict and disaster management. From 2002–2008, he was CEO of Austcare (now Action Aid Australia), an independent non-government aid and development agency. He served as an Army Officer in the Australian Defence Force for 34 years, retiring in 2002, following his last military assignment as Deputy Force Commander for the UN Transitional Administration in East Timor (UNTAET). He had previous overseas experience in Papua New Guinea, Kashmir and Cambodia. Mike holds a BA in History (UNSW) and an MA in International Relations (ANU). He is an Adjunct Professor at the Key Centre for Ethics, Law, Justice and Governance at Griffith University, and a Visiting Fellow and Member of the International Advisory Board of the Asia-Pacific College of Diplomacy at the Australian National University. Since 2002, Mike has published 6 major articles/chapters on national and human security, peace operations, refugees and displacement, and a book titled *Peacekeeping in East Timor: the Path to Independence* (Lynne Rienner, 2003). He has worked closely with the United Nations on peacemaking, peacekeeping and peacebuilding initiatives, and has given keynote addresses at a number of domestic and international forums on these subjects. In December 2008, he led a UN needs assessment mission to support the United Nations Mission in Nepal (UNMIN).

Professor Ramesh Thakur

Professor Ramesh Thakur is Director of the Centre for Nuclear Non-proliferation and Disarmament (CNND) in the Crawford School, Australian National University and Adjunct Professor in the Institute of Ethics, Governance and Law at Griffith University. He was Vice Rector and Senior Vice Rector of the United Nations University (and Assistant Secretary-General of the United Nations) from 1998–2007. Educated in India and Canada, he was a Professor of International Relations at the University of Otago in New Zealand and Professor and Head of the Peace Research Centre at the Australian National University, during which time he was also a consultant/adviser to the Australian and New Zealand governments on arms control, disarmament and international security issues. He was a Commissioner and one of the principal authors of *The Responsibility to Protect* (2001), and Senior Adviser on Reforms and Principal Writer of the United Nations Secretary-General's second reform report (2002). He was a Professor of Political Science at the University of Waterloo (2007–11), Distinguished Fellow of the Centre for International Governance

Innovation (2007–10) and Foundation Director of the Balsillie School of International affairs in Waterloo, Ontario. The author or editor of over thirty books and 300 articles and book chapters, he also writes regularly for quality national and international newspapers around the world. He serves on the international advisory boards of institutes in Africa, Asia, Europe and North America. His most recent books include *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2006); *Global Governance and the UN: An Unfinished Journey*, co-written with Thomas G. Weiss (Indiana University Press, 2010); *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (London: Routledge, 2011); and *The People vs. the State: Reflections on UN Authority, US Power and the Responsibility to Protect* (Tokyo: United Nations University Press, 2011). His next major project is *The Oxford Handbook of Modern Diplomacy* co-edited with Andrew F. Cooper and Jorge Heine (Oxford: Oxford University Press, forthcoming).



