

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.

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.”

§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.