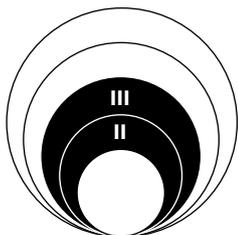


of peacekeeping operations, and decisions over how that funding will be allocated amongst UN Member States.¹⁰⁷ This issue is germane to POC aspects of peacekeeping missions, as these are notoriously reliant on key assets and resources.

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. "

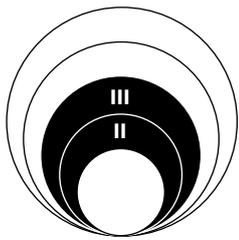
atrocities should not be thought of purely in terms of the immediate lives saved. Each time the Council shows its willingness to respond, it contributes to a larger context whereby States and armed actors learn that flagrant violations of Council demands regarding atrocity crimes may culminate in robust 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

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

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

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

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

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 Cote 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

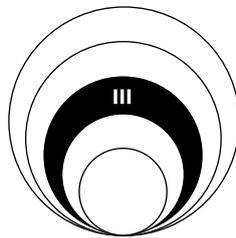
112 Secretary-General, 1999 POC Report, ¶ 67.

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:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. 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*