

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