

**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.<sup>169</sup> 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.