

§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

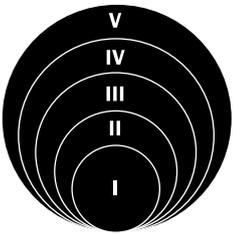
R2P's First Pillar places the primary responsibility for the protection of populations onto the apparatus of the State – including the executive and, where applicable, the parliament. Additionally however, the State is implicated in Pillar Two and Pillar Three. The "International Community" is very much 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 IHRL 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.

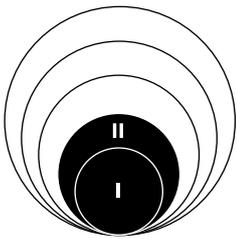
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 152 See Sampford, “Sovereignty and Intervention.”

- » 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.

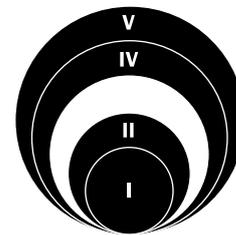
As well as these negative prohibitions on action, a State's armed forces, of course, have a major R2P Pillar One responsibility to directly defend their own civilians from other armed groups.

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-