

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.

Current challenges and Ongoing Reform with regard to Role Development and Will: DPKO and R2P in UN Peacekeeping Operations

Historically, the DPKO has been ambivalent about the relevance of R2P to field missions, believing there are practical limits to the relevance of R2P in peacekeeping. It has largely avoided getting into a position where its missions are meant to respond to R2P situations. This is seen to be essentially a matter of limited resources and capacity to respond to mass atrocity crimes. To date, personnel involved in peacekeeping missions are not trained how to respond to genocide. However, the DPKO's recent *Framework for Drafting Comprehensive POC Strategies in UN Peacekeeping Operations* expressly recognises that in instances where the government is unable or unwilling to fulfil its responsibility to protect civilians, Security Council mandates give missions the authority to act independently to protect civilians. This may include the use of force against any party, including government forces, where those elements are engaged in physical violence against civilians. In the extreme situations where peacekeepers are called upon to prevent or to respond to mass atrocities the distinction between POC and R2P breaks down. Thus, the greatest operational challenges for the DPKO/DFS are:

1. To send the appropriate mission to the country, given its situation, and;
2. To develop clear guidance and protocols for shifting, when necessary, from a *Mixed POC Operation* to a *Primary POC Operation*, and perhaps even – in the worst of cases – managing the drawing down of a PKO and the explicit change in authorization and formation required if Host State consent is withdrawn, and the Security Council decides to respond under R2P Pillar Three and its mandate and powers under Chapter VII of the UN Charter.

Independent Study on POC in UN Peacekeeping Operations

“As seen in Rwanda, the Balkans, Sierra Leone, Haiti, DRC and Darfur, among others, peacekeeping operations that are ill-prepared to address large-scale violence directed against civilians will falter and may even collapse.”

Current challenges with regard to Role Development and Will: R2P, POC and resource allocation for PKOs

In the November 2011 Security Council Open Debate on POC, the Permanent Representative from India commented:

We find several Member States all too willing to expend considerable resources for regime change in the name of protection of civilians. However, they are unwilling to provide minimal resources, like military helicopters, to the United Nations peacekeeping missions, which are mandated to protect civilians and designed to strengthen capacity of State institutions as well.¹⁷⁰

Western governments regularly appear agitated and even outraged about atrocity when it occurs within an unrepentant and intransigent State unwilling to allow UN peacekeepers or human rights monitors entry. However, they can seem largely disinterested in investing any military resources in atrocity-prevention as soon as the State allows peacekeepers to deploy. While the Indian representative's comments above imply the source of this seeming paradox may be the desire to perform regime change, it is arguable that the problem's source lies in the very mechanics of R2P itself.

R2P relies on international pressure on States to stop them performing atrocities – pressure often driven by the awareness of ordinary civilians and civil

society organizations in other (especially Western) countries. When a State is unrepentantly slaughtering its civilians, and hiding behind its sovereignty and sheltering behind its allies on the Security Council, the events fall into a recognizable and understandable dramatic structure (brave civilians being crushed by evil dictator), and that story is daily news. But when civilians are being systematically assaulted by scattered militia in complex and internecine conflicts away from the world's traditional and social media, there is no simple story to tell, and even the grim regularity of such events tells against their newsworthiness. In 2012, the DRC and South Sudan are clearly less newsworthy than Syria, and so the focus of less international attention. Yet in both these African countries the international community has the opportunity to deploy resources *with* the consent of the State, rather than against it. The result, as the Permanent Representative from India suggests (India being the single greatest contributor of troops to UN peacekeeping operations), is that Western investment in preventing atrocities appears to vary inversely with willingness of host states to prevent atrocities; potentially inverting the prioritization of R2P's consensual Pillar Two over its coercive Pillar Three.

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¹⁷⁰ UNSC, Nov 2011 POC Meeting, S/PV.6650, p. 18.