

### 3.3

## Conclusion and Summary

This section has illustrated the applicability of a wide array of legal and normative frameworks to the twin principles of R2P and POC.

**POC:** While POC's legal core is constituted by IHL, a variety of other instruments contribute to the complete picture of POC's normative base, including the UN Charter, the Rome Statute, UN Security Council Resolutions and UN General Assembly Resolutions. Additionally, International Human Rights Law, Refugee Law and the Genocide Convention carry implications for POC.

**R2P:** The legal and normative position of R2P is more complex. While R2P gains substantial political support from WSOD 2005 and General Assembly and Security Council Resolutions, its relationship to international law is subtle, as different parts of R2P find support in different legal instruments. *Simplifying greatly:*

- » **R2P Pillar One is Hard Law:** A State's performing or failing to attempt to prevent atrocity crimes regarding its own citizens constitutes a straightforward violation of a wide array of international legal instruments.
- » **R2P Pillar Two is a mixture of Soft Law and Political Obligation:** Different parts of international law have implications for certain international duties of atrocity prevention, but such implications are in various contexts unclear, or the area of law is in flux. Other aspects of Pillar Two, such as a responsibility to contribute to peacekeeping operations, for example, fall entirely outside the operation of even soft law, and are purely political obligations.
- » **R2P Pillar Three is a Political Obligation:** an array of international legal instruments implies international action should occur through UN processes in response to atrocities, but the instruments themselves do not amount to a determination of legal duties.

The following table – *Table 5 Legal Instruments Applicable to R2P Atrocity Crimes* – provides a finer-grained account of which legal instruments are potentially implicated in which types of R2P duties. Note that all the categorizations within Table 5 are to some extent controversial, as reasonable debate surrounds the interpretation of each legal instrument, and the determination of where hard law ends and soft law begins is contentious. The purpose of the table, however, is to provide a basic overview of the overlapping web of legal duties that provide for R2P's legal framework.

ATROCITY CRIME	LAW/LEGAL INSTRUMENT	FORMS PART OF R2P WITH RESPECT TO THAT ATROCITY CRIME						
		R2P PILLAR ONE		R2P PILLAR TWO			R2P PILLAR THREE	
		NEGATIVE	POSITIVE	INFLUENCE	PEACEKEEPER	CAPACITY	PEACEFUL	FORCE
<b>Genocide*</b>	Genocide Convention (esp. Art's. 1, 8).	Hard Law	Hard Law	Hard Law	Soft Law	Political	Soft Law	Political
	IHRL, including human rights provisions in the UN Charter: Art. 1(3), Art. 55(c), Art. 56.	Hard Law	Hard Law	Soft Law	Soft Law	Political	Political	Political
	Rome Statute (Art. 6).	Hard Law	Hard Law					
<b>War Crimes</b>	Geneva Convention Com. Art. 1 and Additional Protocol 1, Art. 89.	Hard Law	Hard Law	Soft Law	Soft Law	Political	Political	Political
	Geneva Convention Com. Art. 3 and Additional Protocol 2.	Hard Law	Hard Law					
	Rome Statute (Art. 8).	Hard Law	Hard Law					
	Geneva Convention IV, Art. 16, and Additional Protocol 1 Art. 58.	Hard Law	Hard Law	Soft Law	Soft Law			
<b>Crimes Against Humanity</b>	Rome Statute (Art. 7).	Hard Law	Hard Law					
	Slavery Convention (covering slavery only).	Hard Law	Hard Law			Political		
	Convention Against Torture (covering torture only).	Hard Law	Hard Law	Soft Law	Soft Law			
	IHRL.	Hard Law	Hard Law	Soft Law	Political	Political	Political	Political
	Occupation Law (controlled areas only).	Hard Law	Hard Law		Soft Law			
	International Law Commission (ILC) Draft Articles on State Responsibility.	Hard Law	Hard Law	Soft Law		Political	Soft Law	Political
	IHL (applicable in cases where rebel forces have military command and occupy territory; or where international forces are involved in fighting).	<b>War Crimes</b> instruments above apply.						
<b>Ethnic Cleansing</b>	Ethnic Cleansing is a subset of <i>Crimes against Humanity</i> (Persecution, Deportation or Forcible Transfer).	<b>Crimes against Humanity</b> instruments above apply.						

**Table 5:** Legal Instruments Applicable to R2P Atrocity Crimes

\* Instruments noted for *War Crimes* apply all the more to genocide in war. Instruments noted for *Crimes against Humanity* apply all the more to genocide in non-war contexts. (One thus cannot commit genocide without committing either war crimes or crimes against humanity.) Thus the duties regarding genocide have strictly the widest and strongest legal coverage.

**Explanation of Terms in Table 5: Legal Instruments Applicable to R2P Atrocity Crimes**

**R2P Pillar One:** *Prevention and protection responsibilities of a State to its own people.* This includes:

- » **Negative:** Negative duties not to itself commit the crime.
- » **Positive:** Positive duties to protect all persons in the State's territory from third parties and to take structural and operational measures to prevent atrocity crimes and violations.

**R2P Pillar Two:** *Responsibilities of States in the international community to help consenting States to protect their populations.* This includes:

- » **Capacity:** Positive duties to help other consenting States build capacity, or to be involved in early warning and threat assessment.
- » **Influence:** Positive duties to use influence to prevent the crime being performed by allied States, state-supported actors or non-state actors.
- » **Peacekeeper:** Positive duties on peacekeepers (once deployed) to prevent/react to the crime, within their capacities and knowledge.

**R2P Pillar Three:** *Responsibilities of the international community to protect populations when States are manifestly failing to do so.* Includes:

- » **Non-military:** Non-military measures through UNSC: targeted sanctions, arms embargoes, travel bans and referrals to the ICC.
- » **Force:** Forceful, military measures through UNSC.

**“Hard Law”:** *There is a strong case that the legal instrument imposes at least some of the R2P duties in question, or that the R2P duties are a plausible specification of the legal instrument's duties, as applied to that atrocity crime.*

**“Soft Law”:** Either:

- A) *It is at least arguable that the legal instrument imposes some of the R2P*

duties in question, or that the R2P duties are a plausible specification of the legal instrument's duties, as applied to that atrocity crime. Soft Law may signal areas of potential future growth for hard law.

- B) it is not controversial that the instrument applies in this case, but *there are queries over its strict legality, its determinateness, or whether there are institutions that can enforce it.*

**“Political”:** Implies the presence of political obligations – that is, duties that it is accepted States should perform, given the instruction of the law in question, but with the proviso that States are *not* legally bound to do so. Political duties can progress towards law (as occurred with the ICJ Genocide Judgment in 2007, where the duty to use one's influence to prevent atrocities was determined to be a determinate legal one, and not a mere political duty).

### §3.3.a The “Legal Concept”/“Political Concept” Dichotomy

During the course of the research for this Policy Guide – both in the literature and during interviews and seminars – it quickly became clear that there is a marked lack of clarity about the broad and the precise relationship between the two key concepts of POC and R2P. The conceptual confusion and incoherence can be found in two recent reports of the Secretary-General, no doubt reflecting different drafting teams and different institutional perspectives.

In the special report on POC in May 2012, the Secretary-General declared that:

21. I am concerned about the continuing and inaccurate conflation of the concepts of the protection of civilians and the responsibility to protect. While the two concepts share some common elements, particularly with regard to prevention and support to national authorities in discharging their responsibilities towards civilians, there are fundamental differences.

First, the protection of civilians is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept, set out in the 2005 World Summit Outcome (see General Assembly resolution 60/1). Second, there are important differences in their scope. The protection of civilians relates to violations of international humanitarian and human rights law in situations of armed conflict. The responsibility to protect is limited to violations that constitute war crimes or crimes against humanity or that would be considered acts of genocide or ethnic cleansing. Crimes against humanity, genocide and ethnic cleansing may occur in situations that do not meet the threshold of armed conflict. I urge the Security Council and Member States to be mindful of these distinctions.<sup>100</sup>

The key claims here that POC is a legal

100 UN Secretary-General, *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, S/2012/376, 22 May 2012, ¶21. Notably, the assertion is made on the heels of the Secretary-General's discussion of action in Libya (¶19) and on Brazil's Concept Note on “Responsibility while Protecting” (¶20). In both these cases the Secretary-General mentions only POC, and not R2P, yet each of them – especially Brazil's Concept Note – explicitly invoke R2P. The Secretary-General's own discussion, therefore, appears to implicate exactly the conflation he warns against. It is also worth noting that the “legal/political” dichotomy is not made anywhere else in the rest of the 2012 POC Report. If POC is a “legal concept”, however, then it is perplexing why its legal status and ramifications are not discussed in the context of peacekeeper's mandates to protect civilians, or why reference should be made to the Human Rights Council's Independent Inquiries into the Syrian Arab Republic over the previous 18 months, since the reports of November 2011 (A/HRC/17/2/Add.1) and February 2012 (A/HRC/19/69) explicitly state that they are not applying IHL because the situation cannot be ascertained to be an “armed conflict” in the legal sense of that phrase. To the contrary, however, is precisely because *Broad POC* is *not* a legal concept that the protective actions of peacekeepers and the legally murky situation of the early Syrian crisis can be discussed under its banner.

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.”<sup>101</sup>

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.<sup>102</sup> 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.