

§5.2.b UN Security Council

Current limitations and ongoing reform with regard to Efficacy and Will: Ambiguity in UNSC R2P Resolutions

R2P's invocation by the Council in operational contexts has been inconsistent and ambiguous. Paradoxically, the 2006 Resolution invoking R2P in the context of Darfur (S/RES/1706) was one of the most circumspect resolutions of its kind. Doing no more than "inviting" the Government of Sudan to consent to the expansion in UNMIS, the resolution was effectively ignored by the State in question. Conversely, the more forceful 2007 resolution (S/RES/1769) that established the UN mission to Darfur did not reference R2P at all. At an operational level, it can thus seem unclear when the Council is undertaking R2P-actions and which of its resolutions are "R2P Resolutions".

In keeping with interpretation of Security Council Resolutions in other domains,¹⁵⁶ attention should be directed primarily to what the resolution demands, requires and authorizes, and the context and reasoning framing the resolutions, rather than on whether the Council explicitly invokes the principle of R2P in its preamble or operative paragraphs. This is the mode of interpretation that is commonly undertaken by commentators with respect to peacekeeping missions. In that context, "R2P mandates" are understood to be those that, placing the entire mission under a Chapter VII authorization, decree and prioritize civilian protection as the fundamental system-wide objective of the peacekeeping operation.¹⁵⁷ That is, in determining whether an "R2P Peacekeeping Mission" is being created, attention is not placed on whether the Council mentions R2P in the key Resolution, but rather on the authority, capacity and mandate it grants to the peacekeeping force.

156 SCR, *Council Action under Ch. VII*, pp. 17-27.

157 See Holt and Berkman, *The Impossible Mandate?*; Wills, *Protecting Civilians*.

UN Security Council Resolution

1970: *Considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity, *Recalling* the Libyan authorities' responsibility to protect its population... (Preamble)

The same point about operational interpretation is relevant outside the peacekeeping domain. Resolutions 1970 and 1973 (2011) regarding Libya comprise a clear case of R2P. In Resolution 1970 (2011) the Council affirmed the Libyan government's responsibility to protect its population and observed that attacks taking place against that population could amount to crimes against humanity. That resolution then set in train the gamut of non-military R2P Pillar Three measures, including arms embargoes, assets freezes, travel bans and so on. Subsequently, Resolution 1973 began by deploring the failure of the Libyan government to comply with its previous resolution – that is, deploring its failure to fulfil its responsibility to protect its population. With the lesser non-military measures of Resolution 1970 widely seen by Council members and regional organizations to be not working with sufficient rapidity to protect Libyan populations, especially the besieged population of Benghazi, resort was made to military measures – in particular, the enforced establishment of a no-fly zone in Libya. In all, at least up until the issuing of Res. 1973, in both effect and context there was a close following of the parameters set down by R2P. The Secretary General did not shy away from speaking of the Resolution in R2P terms:

The Security Council today has taken an historic decision. Resolution 1973 affirms, clearly and unequivocally, the international

Barack Obama, March 26, 2011:

"When innocent people are being brutalized; when someone like Qaddafi threatens a bloodbath that could destabilize an entire region; and when the international community is prepared to come together to save many thousands of lives—then it's in our national interest to act. And it's our responsibility. This is one of those times... Because we acted quickly, a humanitarian catastrophe has been avoided and the lives of countless civilians—innocent men, women and children—have been saved... This is how the international community should work—more nations, not just the United States, bearing the responsibility and cost of upholding peace and security.

community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government.¹⁵⁸

Yet the Resolution's text confined itself to reiterating in the preamble the responsibility to protect of the Libyan authorities, and did not speak of the international community or the Council's R2P role. Nor did the Resolution's preamble recall the Council's affirmation of the R2P principle in Resolution 1674. The narrow and oblique reference to R2P likely reflects continuing Council nervousness about the principle and the precedents that might be set by explicit invocations of it (at least in applied resolutions where time is of the essence). Notwithstanding this anxiety about precedent-setting, in keeping with Security Council Resolution interpretation elsewhere, Resolution 1973 should be acknowledged on an operational level as an "R2P resolution".

158 UN Secretary-General, "Statement by the Secretary-General on Libya," (17 March 2011), <http://www.un.org/apps/sg/sgstats.asp?nid=5145>

Current limitations with regard to Efficacy: SRES1973 and “Responsibility while Protecting”

“The extent of the resulting air campaign attracted the disapproval of Council members who had not voted in favour of the resolution, who said it exceeded the resolution’s provisions and veered towards supporting regime change. Others objected that the campaign sidelined the African Union’s attempts to initiate dialogue.”

Security Council 2011 Round-Up: SC/10518, 12 January 2012.

Even as Regional Organizations and States act to implement Security Council R2P directives, they have duties of protection with respect to the methods they use to achieve the ends the Security Council has set down. In late 2011, concerned with the NATO action in Libya in terms of mission creep and civilian casualties, Brazil tabled an important concept note on *Responsibility while Protecting*, requiring *inter alia* that those implementing Council resolutions stay within the terms of the resolution and abide by IHL.¹⁵⁹ In the November 2011 Council Open Debate on POC, there was substantial concern with interpretation of the Council Resolution 1973 as authorizing “regime change” (especially by India, South Africa and China), with members arguing that overreach in the case of Libya had made future agreements on POC statements and resolutions less likely – and the lengthy paralysis with respect to Syria in late 2011 and early 2012 perhaps should be taken as an example of this.¹⁶⁰ In the May meeting, similar concerns had been raised with regard to the use of force by UNOCI in Côte d’Ivoire, with Brazil arguing that: “the

159 Brazil, *Responsibility While Protecting*.

160 UNSC, *Nov 2011 POC Meeting*, S/PV.6650.

use of force by peacekeepers to protect civilians must be carried out with utmost restraint. This is necessary to ensure that blue helmets are not perceived as parties to the conflict.”¹⁶¹

Brazil’s Concept Note: Responsibility While Protecting: Elements for the Development and Promotion of a Concept, A/66/551; S/2011/701, 11 November 2011

... 11. As it exercises its responsibility to protect, the international community must show a great deal of responsibility while protecting. Both concepts should evolve together, based on an agreed set of fundamental principles, parameters and procedures, such as the following: ...

(d) The authorization for the use of force must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict;

(e) The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent; ...

(h) Enhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting;

161 UNSC, *May 2011 POC Meeting*, S/PV.6531, p. 11.

With this in mind, it may be expected that future POC and R2P action authorized by the Security Council will contain additional constraints or specifications of what use of force, to what purposes, is being authorized.

Experience has shown that Security Council action to protect civilians requires serious and careful discussion. There should be strict provisions on the mandate, implementing parties and implementing conditions. If many questions remain to be clarified, the Security Council should not rush to take action until those questions are answered.¹⁶²

Even so, it will be a conceptual and strategic challenge – one that in the event will have to be undertaken in good faith by all members of the Council – to appropriately limit the actions and military objectives of intervening forces without hamstringing their capacity to offer genuine and timely protection to populations at risk. After all, any robust action taken by forces to enforce no-fly zones and to protect civilians and civilian safe-areas – including by deterring and demobilizing those forces mounting attacks – can have straightforward geopolitical and military consequences making regime change more likely. Indeed, such actions in themselves can even be a type of regime change. Critics of the Libya intervention and the action in Côte d’Ivoire sometimes speak as if the Council’s stated objectives could have been performed without substantial military force, or as if such force could be deployed in a “neutral” manner that did not impact upon the military theatre.¹⁶³ Concerns with mission creep and politically motivated regime change in this or any future case are reasonable and important, but they must not be detached from the reality of the military and geopolitical situation in question.

162 Chinese statement: UNSC, *Nov 2011 POC Meeting*, S/PV.6650, p. 25.

163 See Breakey, “Game Change and Regime Change,” pp. 27-32.

Ultimately, if and when constraints on methods and objectives of future R2P-POC operations are being formulated, **it cannot be forgotten that the United Nations had peacekeeping forces on the ground in both Rwanda and Srebrenica, but that they were rendered toothless in the face of atrocity by conservative interpretations of ambiguous and ambivalent Council resolutions.** It is concerning that even as it invoked the context of Rwanda, the *Brazilian Concept Note* was only willing to concede that there may be situations where military action might be contemplated.¹⁶⁴ Reasonable concerns with mission creep must not be used as a pretext for returning protection to the dark days of the mid-1990s, where populations were unprotected and UN-authorized forces were set up for failure. At the General Assembly informal dialogue on the *Responsibility while Protecting*, the Brazilian Ambassador rightly declared, “The establishment of these procedures should not be perceived as a means to prevent or unduly delay authorization of military action in situations established in the 2005 Outcome Document.”¹⁶⁵

“No argument in favour of standing by while civilians are attacked can be sustained.” Nigerian statement in Security Council November 2011 Open Debate on POC: S/PV.6650.

While navigating this course between securing the protection of the population and guarding against less-noble force objectives will no doubt will be a challenge for the Security Council to face, it should not prove insurmountable. The Council's decision in Resolution 1973 – following regional input – to limit intervening forces from deploying ground forces appears

164 Brazil, *Responsibility While Protecting*, ¶18.

165 Statement by H. E. Ambassador Antonio de Aguiar Patriota, Informal discussion at the United Nations on the ‘Responsibility while Protecting’, 21 February 2012, <http://www.un.int/brazil/speech/12d-agp-RESPONSIBILITY-WHILE-PROTECTING.html>.

to have ensured that concerns with “occupation” and “neo-colonialism” were substantially diminished in Libya,¹⁶⁶ yet without stopping the forces from effecting real protection of populations. A similar solution may in the future be developed to allay concerns with force implications for regime change.

Reform Proposals with regard to Efficacy and Mutual support: Security Council and R2P early warning

At the pinnacle of international decision-making, the Security Council could make more extensive use of its broad authority under Article 34 of the UN Charter to “investigate any dispute, or any situation which might lead to international frictions or give rise to a dispute.” By undertaking several visits or missions each year to see how places of concern are faring, the Security Council has taken an important step in this direction. Thus far, the focus has been more on conflict prevention and resolution, rather than on the prevention of mass atrocity crimes. However, the Council's growing attention to protection issues in a peacekeeping context suggests that it would not be difficult to add these matters to the scope of its concerns, including in its messaging to government leaders and to the heads of armed groups during these missions.¹⁶⁷

Prior and ongoing reform with regard to Efficacy: The Security Council and POC in UN Peacekeeping Operations

The Security Council has altered several of its practices over the last decade in order to better protect civilians. In Resolution 1296 (2000), pursuant to concerns raised by the Reports on Rwanda and Srebrenica, the Council affirmed its intention to ensure peacekeeping missions were given suitable mandates and adequate resources to protect civilians. Later resolutions expanded the capacities of PKOs in relevant ways.

166 Concerns were instead raised in terms of “politically motivated regime change”.

167 Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, ¶32.

For instance, Resolution 1843 (2008) increased the UN peacekeeping force in the Democratic Republic of the Congo (MONUC) to develop a quick reaction capability to strengthen the protection of civilians. Moreover, the Council has also increasingly prioritized POC over other force objectives. Resolution 1906 on MONUC is a striking example, where the requirement to protect civilians is explicitly prioritized several times over all other force objectives, including the unequivocal statement that POC “must be given priority in decisions about the use of available capacity and resources, over any of the other tasks described”.¹⁶⁸

The Council has also been less ambiguous in its authorization of the use of robust force for POC purposes. Its early practice reflected a general assumption that that PKOs deployed with the consent of the host State – and often with the consent of all major parties to the dispute – would not need force to protect civilians from direct attack by those parties. Lessons from Rwanda and the former Yugoslavia, and more recently from the Democratic Republic of the Congo and Darfur, have shown this assumption – however common-sense it appears – is mistaken. Even when States are pressured into accepting the deployment of PKOs, the State, state-elements, or state-sponsored forces can nevertheless have systemic violence to civilians as a settled strategy or war objective. Hence, authorization under Chapter VII of the Charter to use force to protect civilians is vital even when consent is procured. Reflecting this hard-learned lesson, the Council now invokes Chapter VII in mandating its PKO protection missions.

§5.2.c ICC

Current challenges with regard to Mutual support: the ICC and R2P Pillar Three action

Recent practice shows that ICC referral (either self-referral or through the Security Council) will often accompany international

168 S/RES/1906 (2009), ¶7.