

PRESIDENT OF THE GENERAL ASSEMBLY, H.E. MR. JOSEPH DEISS (2011):

“The adoption of Security Council resolutions 1970 and 1973 this year had made the international community think about the relationship between the protection of civilians in armed conflict and its own responsibility to protect.”

involve backup duties that are in place to deal with the possibility that other actors may fail to provide the required level of protection. Both motivate action by actors such as military and police commanders, state institutions, peacekeepers and UN organs. Both POC and R2P represent a continuum of responses. For R2P this is characterized in the form of the “three pillars”. But POC, in its own way, has a similar division of labour and continuum of response: its own “pillars”. At different stages it calls upon different actors – particularly Combatants, Humanitarians, Peacekeepers and UN organs – and imposes different obligations upon them.¹⁴

Third, both R2P and POC have a close relationship to international law. With POC, the relationship with IHL is very tight; this can be expressed by saying that POC has a *legal core* in the provisions of IHL and that POC in general aims to *promote* IHL. That is, IHL puts forward a widely accepted and determinate set of legal duties, and POC actors aim, through the various means at their disposal, to promote the observation of these duties.

Turning to R2P, the negative duties of R2P Pillar One – that States may not commit atrocities on their populations – are founded on hard international law, including IHL, International Human Rights Law (IHRL), customary international law and the Genocide Convention. However, the relationship of R2P’s *positive* duties of protection in international law is more subtle. The afore-noted legal instruments (of IHL, IHRL and the Genocide Convention) do require some positive duties of direct protection against atrocities and of indirect contribution to build protective environments. However, these duties are not like those found in the negative (“thou shalt not”) rules of IHL that make up POC’s legal core. There

is not a lengthy list of specific, clear and determinate rules. Rather, these legal instruments contain provisions requiring the prevention of atrocity crimes, but without clear indications of what exactly is being mandated. The principle of R2P can be understood as *one way of interpreting – of giving specific substance to – those previously amorphous and aspirational duties*. Rather than saying R2P has a legal core which it aims to promote (as occurs in POC), it is better to think of R2P as having a *legal framework* that it *specifies* that provides the enabling authority for international actors to engage in preventing and halting potential and actually occurring atrocity crimes. On this approach, R2P clarifies and makes more concrete the (previously indeterminate) duties of protection from atrocities provided by the Genocide Convention, IHRL and IHL.

Shared Origins of R2P and Broad POC

The extent of this overlap between R2P and POC (especially Broad POC) should not be surprising. While R2P was created directly in response to failures in Rwanda and the former Yugoslavia in the 1990s, the shadow of these atrocities also played a major role in framing the contemporary concerns of *Broad POC*. As the 1990s drew to a close, many humanitarian actors began to develop explicit protective strategies in response to the phenomenon of the “well-fed dead” of Bosnia. Equally, the United Nations’ POC agenda emerging at this time was back-dropped by a series of reports analysing the failures of (inter alia) UN organs to halt attacks on civilians in Rwanda and Srebrenica.¹⁵ The significance of these two genocides to the emerging protection of civilians agenda

is apparent in the two landmark POC documents of this period: the Secretary-General’s first report to the Security Council on the protection of civilians in armed conflict,¹⁶ and the Report of the Panel on UN Peace Operations (*Brahimi Report*¹⁷). Even before the affirmation of R2P in 2005, therefore, the POC agenda was beginning to confront deliberate and widespread attacks on civilian populations, as well as more limited violations of IHL.

§2.1.d Basic Divergence of R2P and POC

The pivotal difference between the two principles is that R2P has a narrower focus in terms of the crimes it policies: it applies only to the four atrocity crimes of genocide, ethnic cleansing, crimes against humanity and war crimes. A defining feature of atrocity crimes is that they are large-scale and systematic: atrocity crimes thus must meet what is legally termed a “substantiality test”.¹⁸ If an atrocity crime is to take place, then there must be huge numbers of people at risk of imminent, systematic and intentional violence, usually by a State or state-sponsored actors. POC, on the other hand, can apply more broadly to any discrete act – even one performed by a lone combatant against a single civilian.

Two further differences between the two principles are worth note, but caution needs to be exercised with regard to both.

The first apparent difference is that R2P directly confronts the controversial question of military intervention for protective purposes. R2P explicitly allows, after other non-military options have been exhausted and further conditions have been met, for the UN Security Council to authorise the use of military force to protect populations. As noted above, the recent NATO military action in Libya,

14 See Sampford, “A Tale of Two Norms”; Hugh Breakey, “The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast,” in C. Sampford, et al. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction* (Geneva: United Nations University, 2012).

15 UN, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN Doc S/1999/1257/Annex, 16 December, 1999; International Panel, *Rwanda: The Preventable Genocide: Special Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events*, July 7, 2000; UN Secretary-General, *Report of the Secretary General Pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica A/54/549*, 15 November 1999.

16 UN Secretary-General, *Report to the Security Council on the Protection of Civilians in Armed Conflict*, S/1999/957, 8 September 1999.

17 Lakhdar Brahimi, *Report of the Panel on UN Peace Operations*, A/44/305-S/2000/809, 21 August 2000.

18 Scheffer, “Atrocity Crimes,” pp. 86–92.

R2P and POC Convergence and Controversy: Libya in 2011

R2P: The international response to state violence against unarmed populations in Libya was in many respects a clear case of R2P action. By February 2011 it had become clear that the Gaddafi regime was committing widespread violence against civilian populations – possibly to the point of committing crimes against humanity, and unquestionably failing its *Pillar One R2P* obligations. Widespread *R2P Pillar Two* attempts at peaceful, consensual resolution of the situation, including by several regional organizations as well as the United Nations, were unsuccessful. On February 26 the UN Security Council passed Resolution 1970, recalling the Libyan authority's responsibility to protect its population, condemning the continuing violence, and imposing a range of non-military sanctions, including arms embargoes, asset freezes and travel bans on the Gaddafi regime. When it became clear that such measures were not protecting the Libyan people, and with Gaddafi's forces threatening the population of Benghazi, on 17 March the Security Council moved from *Pillar Three R2P coercive measures not involving the use of force* to *Third Pillar military*

action. Resolution 1973 authorized the use of international force to impose a no-fly zone and protect civilians. Reflective of concerns with foreign occupation and the views of key regional organizations, the Resolution precluded foreign ground troops on Libyan soil. Secretary-General Ban Ki-moon declared the resolution to be the international community acting on its responsibility to protect, and several Security Council members' statements clearly invoked R2P's idea of *sovereignty as responsibility*.

POC: The operative paragraphs of Res. 1973 did not invoke R2P, however, and the authorization of force occurred under the express rubric of protection of civilians and for that explicit objective. This determination is arguably consistent with the Council's on-going Broad POC agenda, and its earlier declarations that large-scale violations of IHL can amount to threats to international peace and security and so can warrant response under Ch. VII of the UN Charter (S/RES/1265; S/RES/1296). This invocation of POC followed a change in the Security Council's characterization of the situation, where by mid-March the Council spoke of it in terms of "armed conflict". Res. 1970, in contrast, had spoken only of "widespread and systematic attacks".

Convergence: The ambiguous nature of the resolution – R2P in substance and POC in name, as it might be put – has caused no little confusion among commentators. But in fact *Res. 1970 and Res. 1973 are both R2P and POC*. While R2P and POC are separate principles, and need to be treated differently in many respects, in certain cases and for certain actors, the principles will effectively converge. So it was with Res. 1973. With its prior determination that mass violence against civilians can threaten international peace, and with mounting evidence of violations of the laws of war by Gaddafi's regime, the Security Council's action was grounded in and consistent with its POC agenda. With Gaddafi's regime having committed crimes against humanity and threatening further assaults on its own civilians, its claims to sovereignty were forfeit, and the Security Council's action was grounded in and consistent with the R2P obligations set down in the World Summit Outcome Document and accepted by the Council in Resolution 1674.

for instance, is a clear case of military intervention envisaged and endorsed by the R2P principle. However, while POC does not confront this question of military intervention as a matter of explicit doctrine, it is difficult to maintain that it avoids it in practice. So far as the Office of the Secretary-General and the Security Council are concerned, non-consensual military action has always been considered to be an option of last resort for POC. Res. 1296 of 2000 linked large-scale violations of international

and human rights law with threats to international peace and security. As was observed with respect to Resolution 1973 on Libya, the operative part of the resolution was phrased in terms of the protection of civilians.¹⁹ Similarly, the decisive international use of force in 2011 in Côte d'Ivoire – authorized by the Secretary-General pursuant to Security Council Resolutions 1962 and 1975 – occurred under a POC aegis. While R2P

19 S/RES/1973 2011, ¶¶4-5.

and POC may at times differ in the precise contexts where they will declare a need for coercive force, both have historically proven capable of authorizing such force. As such, this alleged difference between R2P and POC is more a matter of perception than reality – a question of explicit emphasis rather than actual substance.

The second difference is the different scope of each principle – that is, the types of situations in which they apply. The next section explores this issue in some depth.