

Olena Sihvo

**The Responsibility to Protect and Protection of
Civilians: Enhancing the Protection Capacity through
Interaction**

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Supervisor: Catarina Krause
Department of Law
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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
API	Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts
APII	Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
DDR	Disarmament, Demobilization and Reintegration
DFS	Department of Field Support
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRY	Federal Republic of Yugoslavia
GA	United Nations General Assembly
GCI	Geneva Convention I for the Amelioration of the Condition of the Wounded in Armies in the Field
GCII	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea
GCIII	Geneva Convention III Relative to the Treatment of Prisoners of War
GCIV	Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War

GCR2P	Global Centre for the Responsibility to Protect
HRCm	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
LAS	League of Arab States
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINUSTAH	United Nations Stabilization Mission in Haiti
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	UN Organization Stabilization Mission in the Democratic Republic of Congo
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
LRA	Lord's Resistance Army
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
OSAPG	Office of the Special Adviser on the Prevention of Genocide
P-5	Five Permanent Members of the United Nations Security Council
PKO	Peacekeeping Operation
POC	Protection of Civilians

R2P	Responsibility to Protect
R2Provide	Responsibility to Provide
SC	United Nations Security Council
S-G	United Nations Secretary-General
TCN	Troop Contributing Nation
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMID	United Nations African Union Mission in Darfur
UNAMSIL	United Nations Mission in Sierra Leone
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Fund for Women
UNMIL	United Nations Mission in Liberia
UNMISS	United Nations Mission to the Republic of South Sudan
UNOCI	United Nations Operation in Côte d'Ivoire
WFP	World Food Programme
WSOD	World Summit Outcome Document

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1. Introduction

Our common humanity demands an acceptance of a duty of care by all of us who live in safety towards those who are trapped in zones of danger. In the vacuum of responsibility for the safety and security of the marginalized, stigmatized and dehumanized out-groups at risk of mass atrocities, both POC and R2P provide points of entry [...] for the international community to take up the moral, political, institutional and military slack.¹

Our age has confronted no greater ethical, political and institutional challenge than securing the protection of civilian populations, as victims of both armed conflict and of mass atrocity crimes.² Over the second half of the twentieth century civilian populations became increasingly subject to the horrors of “civil wars, insurgencies, state repression and state collapse”.³ Inter-state conflicts between uniformed armies⁴ gave way to “civilian-based civil wars”⁵ between rival armed groups.⁶ The slaughter of civilians in internal wars across the globe has emerged as an established goal of military actors - whether as a strategy for the accomplishment of further war objectives or as a war objective *per se*.⁷ Both in peacetime and war, torture, rape, extrajudicial killings, starvation, forced displacement, expulsion or persecution of men, women and children, for no other reason than their race, ethnicity, religion, nationality, class or ideology, has been a recurring stain on the world’s collective conscience.⁸ A considerable number of communist and newly-decolonised countries commit grave violations of human rights on a daily basis as a matter of internal policy, and the principal victims of this violence are their own people.⁹

The major armed conflicts in the last two decades, including Liberia, Somalia, Iraq, Afghanistan, Burundi, Timor Leste, the Democratic Republic of Congo (DRC), Sierra Leon, Kosovo, Darfur, Syria as well as humanitarian disasters of Rwanda and Srebrenica, and the failure of the

¹ Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. xiv, 2012.

² Evans, G., "Responding to Atrocities: The New Geopolitics of Intervention", in *SIPRI Yearbook*, p. 16, 2012.

³ *The Responsibility to Protect*, ICISS, p. 1, 2001.

⁴ Orchard, P., "The Perils of Humanitarianism: Refugee and IDP Protection in Situations of Regime-Induced Displacement", in *Refugee Survey Quarterly*, vol. 29, p. 40, 2010.

⁵ Ferris, E., *The Politics of Protection*, p. xv, 2011.

⁶ Thakur, R., "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism", in *Security Challenges*, vol. 7, p. 14, 2011.

⁷ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 4.

⁸ Evans, G., "Responding to Atrocities: The New Geopolitics of Intervention", in *SIPRI Yearbook*, p. 16, 2012.

⁹ Thakur, R., "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism", in *Security Challenges*, vol. 7, p. 14, 2011.

international community to respond effectively to these tragedies resulted in two major innovative international initiatives aimed at improving the protection of civilians.¹⁰

On the one hand, the responsibility to protect (R2P) evolved as a solution to the long-standing political debates surrounding humanitarian intervention and spoke eloquently to the need to change the UN's normative framework in line with the changed reality of threats and victims¹¹. It represents a re-conceptualization of the relationship between state sovereignty and human rights¹² and takes its focus at atrocity crimes - the large-scale and systematic use of violence against populations both in times of peace and war, which include genocide, war crimes, ethnic cleansing and crimes against humanity. Simply put, the R2P includes three concurrent and mutually-reinforcing responsibilities, or "pillars": 1) the primary responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity; 2) the residual responsibility of the international community to assist states in their protection efforts; 3) the international responsibility to take collective action, should host states manifestly fail to shoulder its protection mission.¹³

On the other hand, the human rights scourges of the 1990s paved the way for the further development of a much older protection paradigm: the Protection of Civilians in Armed Conflict (POC) spearheaded by the UN Security Council (SC).¹⁴ Before the R2P norm even emerged, the SC in 1999 began mandating peacekeeping missions to protect civilians from the threat of violence. Since that time the Council has included POC as a central task in more than 10 UN peacekeeping operations (PKOs).¹⁵ The contemporary conceptual framework of POC, thus, includes four inter-related perspectives: *combatant POC* (or *narrow POC*), *peacekeeping POC*, *Security Council POC*

¹⁰ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. iv.

¹¹ For an account of the UN's transformation since 1945, see Thakur R., *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, 2006.

¹² Thakur, R., *United Nations, Peace and Security*, p. 245, 2006.

¹³ For detailed overview, see *Implementing the Responsibility to Protect*, UNSG, 12 January 2009.

¹⁴ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 4.

¹⁵ Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. vi, 2012. These operations include, *inter alia*, UNOCI in Cote d'Ivoire, MONUSCO in the DRC, MINUSTAH in Haiti, UNIFIL in Lebanon, UNMIL in Liberia, UNMISS in South Sudan, UNISFA in Abyei, UNMIS in Sudan and UNAMID in Darfur. Smith, M.; Whalan, J.; Thomson, P., "The Protection of Civilians in UN Peacekeeping Operations: Recent Developments", in *Security Challenges*, Vol. 7, p. 32, 2011.

and *humanitarian POC* (these four perspectives constitute altogether *broad POC*).¹⁶

POC pre-dates R2P, but since the embracement of R2P in the World Summit Outcome Document (WSOD) of 2005, the question of the interaction between these two norms has arisen.¹⁷ Both principles are concerned with ameliorating human suffering from large-scale violence, have overlapping institutional structures and share similar legal frameworks and operational challenges. Their points of convergence were manifested in a number of the SC's thematic POC resolutions including the landmark Resolution 1973.¹⁸ Where mass human rights scourges - defined for R2P purposes as "genocide, war crimes, ethnic cleansing and crimes against humanity" - are occurring during armed conflict or peacekeeping operation, the overlap is complete and undeniable.¹⁹

However, since R2P and POC have evolved separately in the UN over the last decade without sufficient cross-references and mutual learning of lessons, the relationship between these two protection regimes has been considered by many as ambiguous and there are complexities and sensitivities involved in comprehending the substantial and practical peculiarities of the twin principles and their distinct functions.²⁰ Thus, understanding the cross-cutting inter-relations between POC and R2P is crucial for both avoiding misinterpretation²¹ and gaps in responsibilities, and enhancing the potential capacity and mutual reinforcement of both doctrines. The gaps in protection created by the lack of knowledge and failure to complement the work of R2P and POC actors can undermine the protection of civilians²² and even lead to the commission of more human rights crimes. The history of peacekeeping operations over the last decades is one context where controversies over the civilian protection mandates have cost lives.²³ Moreover, clarity is needed for international stakeholders to predict whether particular conflict situations will be approached via the prism of R2P or POC paradigm, and how the situation can shift from one to another, or embrace

¹⁶ The terminology of narrow and broad POC is borrowed from the policy guide "Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts".

¹⁷ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 4.

¹⁸ UNSC Res. 1973, S/RES/1973, 17 March 2011.

¹⁹ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. iv.

²⁰ *Ibid.*

²¹ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, pp. 1-2, 2011.

²² Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. v.

²³ Herro, A.; Suthanthiraraj, K., Framing a Protection Service, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 153-154, 2012.

both, as occurred in Libya in 2011.²⁴

Although the two concepts have co-existed for more than a decade, there is only a very limited literature on their comparative analysis and interaction.²⁵ The SC Resolutions 1970 and 1973 on Libya referred to both protection norms and gave an impetus for a more substantial research in this area. Such a convergence of the two norms, albeit generating the fullest scope of protection of civilian populations in Libya, was not without implications and controversies and added even more amplitude to already existing misunderstandings and tensions relating to R2P and POC and their possible misuse. With roots in international humanitarian law (IHL), international human rights law (IHRL), and refugee law, and based on empathy for the weak and vulnerable that is common to all cultures, both POC and R2P can meet concerns about abuses and misappropriations.²⁶ But in order to do so, they must be thoroughly studied and properly understood.

The present paper seeks to provide for the comparative analysis of the two regimes in terms of their origin, evolution, legal basis, structural components and applicability to various situations and clarify the normative, institutional and operational inter-relations between R2P and POC. That being said, the paper examines ways in which R2P can add practical, legal and normative value to the POC agenda and *vice versa*. By doing so, the paper lays out a normative framework of how to strengthen the protection capability of both concepts from gross mass atrocity crimes. The research question will be predominantly approached through the prism of comparative legal methodology. That will allow to scrutinize similarities and distinctions between R2P and POC as well as to tackle the possible ways of interplay and “cross-contamination” between the separate components of the two protection norms.

The analysis is focused on legal issues and is, therefore, only part of a much wider debate about the ethic, moral, practical, political and other problems the international community faces in cases of mass egregious human rights violations. Moreover, the paper places its focus on the most important issues of normative interaction between R2P and POC and does not seek to provide for a

²⁴ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 4.

²⁵ See, *inter alia*, The Relationship between the Responsibility to Protect and the Protection of Civilians in Armed Conflict, Policy Brief, GCR2P, 9 May 2011; Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts; Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, 2012.

²⁶ Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. xiii, 2012.

comprehensive overview of all possible ways of synergy and mutual reinforcement between the two principles.

The present legal inquiry is based on the interpretation of the existing legal framework, namely, the UN Charter, SC and General Assembly (GA) resolutions, international human rights conventions, other treaties, international case law, customary international law and general principles of law. Moreover, the paper examines the relevant legal writings of the prominent international scholars dealing with the issues of human protection as well as the related reports of the key international and regional actors to clarify the meaning of the primary legal sources.

The paper proceeds in five chapters. Chapters 1 (introduction) and 2 shed light on how R2P and POC emerged and evolved and provides for the definition and structural framework of both norms: in case of R2P, the paper explores the interpretations of the key international bodies that shaped the content and limits of the doctrine with particular emphasis on the three-pillar structure of R2P; turning to POC, a special attention is given to the different roles of pivotal POC actors: combatants, peacekeepers, UN actors and humanitarians and how their perspectives formed four different but mutually reinforcing protection norms.

Chapter 3 defines the points of overlap and contrast between R2P and POC in terms of their origin, evolution, scope, legal sources and actors involved. In addition, it investigates the case of Libya as a real test of the parallel application of the “sister” concepts, and outlines the controversies and fears that followed the invocation of these norms during the Libyan crisis. The chapter also charts the future of R2P and POC in light of the recent Syrian experience.

Chapter 4 traces the links between R2P and POC and how these links might contribute to the overall protection of civilians in volatile situations. Separate sections of this chapter deal with the issues of mutual reinforcement between *peacekeeping POC* and R2P, where R2P provides for a universally endorsed call to states and non-state actors to act in the face of mass atrocity crimes, and peacekeeping operations with a POC mandate are viewed as facilitating the process of operationalizing the R2P principle in practice; and the interplay between *combatant POC* and R2P, where POC, as the pre-eminent norm in the international legal regime, provides for the legal credibility to the whole spectrum of measures envisaged by the R2P doctrine, and R2P is understood as adding political consensus for furthering this overarching POC agenda. The final section of Chapter 4 spells out possible ways of cross-fertilization between R2P and the protection

of civilian populations caught in natural disasters as part of *humanitarian POC*. The key idea is that R2P can provide for a wider range of measures exercised by the international community in cases where host states commit crimes against humanity given their failure to respond appropriately to natural disasters, as happened in Myanmar in 2008.

Ultimately, Chapter 5 contains conclusions drawn from the whole inquiry which stipulate that, regardless all the controversies and fears circulating around the two norms of protection, the benefit of their interaction is much higher than any possible implications of such an interaction. Additionally, the final chapter contains recommendations for strengthening the positive part of the interplay between R2P and POC.

2. R2P and POC: Evolution and the Conceptual Framework

This chapter sheds light on how the doctrines of R2P and POC originated and evolved as well as provides for the definition, scope and legal framework of the two concepts.

2.1. R2P

2.1.1. Background: From “The Right to Intervene” to “The Responsibility to Protect”

If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?²⁷

Following the Cold War and the revitalization of the UN collective security framework, the concerns relating to the legality and legitimacy of humanitarian intervention gained new momentum. Fierce debate was fuelled by the failure of the SC to authorize intervention to prevent genocide of Tutsis in Rwanda in 1994²⁸ and mass massacres of Bosnian Muslims in Srebrenica in 1995²⁹ as well as the destabilizing impact of the unilateral intervention of NATO in Kosovo in 1999.³⁰ By the end of the twentieth century, the world was fragmented into two opposite camps:

²⁷ Kofi Annan, Millennium Report of the United Nations Secretary-General, p. 48, 2000.

²⁸ See Moghalu, K., *Rwanda's Genocide: The Politics of Global Justice*, 2005.

²⁹ See Rohde, D., *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II*, 2012.

³⁰ See Schnabel, A.; Thakur, R., *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, 2000. For a more comprehensive overview of the events that triggered the emergence of R2P, see Stockburger, P., "The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking?" in *Intercultural Human Rights Law Review*, vol. 5, pp. 3-4, 2010. Engstrom, P.; Pegram, T., "Responsibility to Protect and the Coercive Enforcement of Human Rights", International Studies Association Annual Conference, pp. 4-6, 2011.

those who believed humanitarian intervention (“the right to intervene” or *droit d’ingérence* in Bernard Kouchner’s influential formulation³¹) to be the only effective means to address massive human rights violations and those who regarded humanitarian intervention as an apologetic euphemism for imperialism and neo-colonialism³². The notion of “R2P” was born to solve this controversy. In short, the R2P doctrine operates on the following principle: where a state fails to protect its people from the most horrendous of atrocities, the residual responsibility falls on the international community. Intervention within this context, thus, is based on a responsibility to protect rather than on a right to intervene.³³

The emergence of R2P is commonly associated with the report of the International Commission on Intervention and State Sovereignty (ICISS)³⁴ that was established by Canadian government, in response to a challenge³⁵ identified by the Secretary-General (S-G) Kofi Annan at the UN Millennium Summit in 2000, with the task to find a new common ground in the cases of mass atrocities.³⁶

However, the biggest achievement in terms of the formal adoption of R2P came with the UN Sixtieth Anniversary World Summit in September 2005 and with the two related major peace and security reports: *A More Secure World: Our Shared Responsibility* by the UN S-G’s High-Level Panel on Threats, Challenges and Change³⁷ and the 2005 S-G’s own report to the summit known as *In Larger Freedom: Towards Development, Security and Human Rights for All*³⁸. Ultimately, the doctrine of R2P came to be recognized as concept or principle in somewhat shortened and modified form in the WSOD in September 2005.³⁹ This final stage is the most authoritative method of endorsement of R2P since it gave the Outcome Document the status of a GA resolution.⁴⁰

³¹ Bettati, M.; Kouchner, B., *Le devoir d’ingérence : peut-on les mourir ?*, p. 300, 1987.

³² Payandeh, M., "With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking", in *Yale Journal of International Law*, Vol. 35, p. 470, 2010.

³³ Stockburger, P., "The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking?", in *Intercultural Human Rights Law Review*, vol. 5, p. 2, 2010.

³⁴ *The Responsibility to Protect*, ICISS, December 2001.

³⁵ Annan referred to two political and moral disasters of the preceding decade: the 1994 Rwandan genocide and the slaughter of civilians in a UN “safe heaven” in Srebrenica in Bosnia in 1995. He observed the strength of the concept of state sovereignty as a major barrier to action.

³⁶ Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 38, 2008.

³⁷ *A More Secured World: Our Shared Responsibility*: report of the UNSG High-Level Panel on Threats, Challenges and Change, February 2005.

³⁸ *In Larger Freedom: Towards Development, Security and Human Rights for All*, UNSG, 21 March 2005.

³⁹ See on the negotiation history of the Summit Outcome Bellamy, A.; Davies, S.; Glanville, L., *The Responsibility to Protect and International Law*, pp. 27-33, 2010.

⁴⁰ Amneus, D., *Responsibility to Protect and the Prevention of Genocide. A Right to Humanitarian Intervention?*, p. 13.

Since the 2005 World Summit, the SC has shown its support of the concept in its resolutions explicitly referring to R2P including resolutions 1674 (POC), 1706 (Darfur), 1894 (POC), 1970 (Libya), 1973 (Libya), 1975 (Cote d'Ivoire), 1996 (South Sudan), 2014 (Yemen), 2016 (Libya), 2040 (Libya), 2085 (Mali), 2100 (Mali).⁴¹

More importantly, R2P reaffirmed its position in the international diplomatic agenda when the S-G Ban Ki-moon confronted the UN membership with the challenge of translating its 2005 commitment from “words to deeds”.⁴²

2.1.2. Defining the Concept of R2P: Interpretations of the Key International Bodies

The concept of R2P is treated differently in various documents associated with its genesis and evolution. For the purpose of the present paper, special attention is given to three crucial documents, namely, the 2001 ICISS report, the Outcome Document of the 2005 World Summit and the 2009 Report of the S-G.

2.1.2.1. R2P in the ICISS Report

What is at stake here is not making the world safe for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.⁴³

The most comprehensive outline of the scope of the R2P doctrine was provided in the ICISS report. Its main goal was to look into the legal, moral, operational and political questions in the debate on humanitarian intervention.⁴⁴ The ICISS tried to distinguish the idea of R2P from the concept of humanitarian intervention⁴⁵ and made four main contributions in this respect. The first, and the

⁴¹ UNSC Res. 1674, S/RES/1674, 28 April 2006; UNSC Res. 1706, S/RES/1706, 31 August 2006; UNSC Res. 1894, S/RES/1894, 11 November 2009; UNSC Res. 1970, S/RES/1970, 26 February 2011; UNSC Res. 1973, S/RES/1973, 11 March 2011; UNSC Res. 1975, S/RES/1975, 30 March 2011; UNSC Res. 1996, S/RES/1996, 8 July 2011; UNSC Res. 2014, S/RES/2014, 21 October 2011; UNSC Res. 2016, S/RES/2016, 27 October 2011; UNSC Res. 2040, S/RES/2040, 12 March 2012; UNSC Res. 2085, S/RES/2085, 19 December 2012; and UNSC Res. 2100, S/RES/2100, 25 April 2013. For a more substantial overview of these resolutions, visit UN Security Council Resolutions Referencing R2P, available at <http://www.globalr2p.org/resources/335> (last visited 16 July 2013).

⁴² *Implementing the Responsibility to Protect*, UNSG, 12 January 2009.

⁴³ *The Responsibility to Protect*, ICISS, p. 11, 2001.

⁴⁴ The Commission was critical of the notion of "humanitarian intervention". It believed that the "humanitarian argument" could be used to disguise motives for an intervention. The Commission also abandoned the term in response to opposition by humanitarian agencies and organizations to the "militarization" of the word "humanitarian", which they argued could not be ascribed to any kind of military action. See Chesterman, S., *Just War or Just Peace: Humanitarian Intervention and International Law*, pp. 220-224. 2001.

⁴⁵ See also Stahn, C., "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", in *American Journal of*

most valuable politically, was introducing a new way of talking about “humanitarian intervention”, namely, the shift from “the right to intervene” to “the responsibility to protect” people at grave risk⁴⁶ as was demanded by “our common humanity”.⁴⁷

The second significant conceptual contribution of the ICISS commissioners was to insist upon a new way of talking about sovereignty itself. The central premise is that the Westphalian conception of state sovereignty⁴⁸ as unhindered control over a particular territory should give way to a conception of sovereignty as responsibility.⁴⁹ Where state fails to shoulder its protection task, through either incapacity or ill will, this responsibility shifts to the international community.⁵⁰

Third, the Commission extended the conceptual parameters of the notion of intervention through development of a multi-layered doctrine of responsibility, based on a distinction between the responsibility to prevent,⁵¹ react and rebuild.⁵² This means that an effective response to mass atrocities requires not only reaction but continuing commitment to prevent conflict and rebuild after the event.⁵³

Ultimately, the fourth conceptual innovation of the Commission was to address the most sensitive question of when military intervention would be appropriate.⁵⁴ In order to identify such extraordinary cases, the Commission came up with a set of “just war” criteria.⁵⁵ A “just cause

International Law, Vol. 101, pp. 102-103, 2007.

⁴⁶ Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, pp. 39-42, 2008.

⁴⁷ *The Responsibility to Protect*, ICISS, pp. 2, 11, 2001.

⁴⁸ Stephen Krasner defines Westphalian sovereignty as non-interference in the internal affairs of other states. Krasner, S., “Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law”, in *Michigan Journal of International Law*, Vol. 25, pp. 1075-1077, 2004.

⁴⁹ Eaton, J., “Student Note an Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect”, in *Michigan Journal of International Law*, Vol. 32, p. 5, 2011. See also Jacobsen, T.; Sampford, C.; Thakur, R., *Re-envisioning Sovereignty: The End of Westphalia?*, pp. 33-50, 2008.

⁵⁰ Due to the emphasis on the state’s own responsibility to protect its own people, the formulation is politically convenient, both substantively and technically, and is a crucial aspect of R2P’s potential role as a bridge builder between North and South on mass atrocity issues. Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 42, 2008.

⁵¹ Prevention is the most important aspect of R2P. The best way to protect populations from mass atrocities is to ensure that they do not occur in the first instance. See Rosenberg, S., “Responsibility to Protect: A Framework for Prevention”, in *Global Responsibility to Protect*, Vol. 1, pp. 442-477, 2009.

⁵² *The Responsibility to Protect*, ICISS, pp. 19-44, 2001.

⁵³ Stahn, C., “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, in *American Journal of International Law*, Vol. 101, p. 103, 2007.

⁵⁴ These criteria relate to legitimacy of the SC action, not to its legality. Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 43, 2008.

⁵⁵ Interestingly, these criteria resemble that of Just War Theory, which achieved a significant moral salience. According to this theory, for example, war should be waged only for just cause, with right intention and with proportional means and only after all non-violent alternatives have been exhausted. See, for example, Kane, B., *Just War and the Common Good: Jus Ad Bellum Principles in Twentieth Century Papal Thought*, 1997.

threshold” must be met, involving the danger of a large-scale loss of life or large-scale ethnic cleansing. Furthermore, “four precautionary principles” must be fulfilled prior to resorting to forcible measures, which encompass a) a right intention, b) last resort, c) proportional means, and d) reasonable prospects of achieving the intended results.⁵⁶ Ultimately, the criteria for “right authority”⁵⁷ stipulates that the “Security Council should be the first port of call on any matter relating to military intervention for humanitarian purposes”,⁵⁸ but it did not categorically exclude the possibility that R2P might ultimately be discharged by the GA under the Uniting for Peace Resolution,⁵⁹ regional organizations⁶⁰ or coalitions of states if the SC fails to act.⁶¹ Additionally, to avoid Council paralysis, the ICISS report recommended that the five permanent members of the SC (P-5) agree to a “code of conduct” for the use of veto in relation to actions needed to stop or avert a significant humanitarian crisis.⁶²

2.1.2.2. R2P in the World Summit Outcome Document

The 2005 World Summit offered the opportunity to reconsider the proposals of the ICISS on how to bridge the gap between legality and legitimacy in situations of gross and systematic violations of human rights.⁶³ The final text of the Outcome Document is a political compromise aimed to reconcile the different positions⁶⁴ without a decisive interpretation.⁶⁵ As Edward Luck has argued, it is important to not confuse what we would like the R2P principle to be with what it actually is.⁶⁶

⁵⁶ *The Responsibility to Protect*, ICISS, pp. 32-33, 2001.

⁵⁷ *Ibid.*, pp. 32-39.

⁵⁸ *Ibid.*, p. 47.

⁵⁹ Adopted in response of the SC's incapability to act to support the Republic of Korea against military aggression from North Korea, this resolution constitutes an attempt to enlarge the role of the GA within the system of collective security. Uniting for Peace, UNGA Resolution 377, A/1775, 3 November 1950.

⁶⁰ However, the report highlights that according to the UN Charter, such action can only be taken with authorization of the SC.

⁶¹ Stahn, C., “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, in *American Journal of International Law*, Vol. 104, p. 103, 2007.

⁶² *The Responsibility to Protect*, ICISS, pp. XIII and 51, 2001.

⁶³ Strauss, E., A Bird in the hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect, in Bellamy, A.; Davies, S.; Glanville, L (eds.), *The Responsibility to Protect and International Law*, p. 28, 2011. Details of the methodology and procedure of the Commission are summarized in *The Responsibility to Protect. Research, Bibliography, Background*, ICISS, pp. 341-344, 2002.

⁶⁴ Stahn, C., “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, in *American Journal of International Law*, Vol. 108, p. 103, 2007. See also Bellamy, A., *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, pp. 35-36.

⁶⁵ Eaton, J., “Student Note an Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect”, in *Michigan Journal of International Law*, Vol. 32, p. 8, 2011.

⁶⁶ Luck, E., “The Responsible Sovereign and the Responsibility to Protect”, in *Annual Review of United Nations Affairs 2006/2007*, vol. 1, pp. xxxiii-xliv.

The “default” responsibility of each state to protect its population was reinforced in paragraph 138 of the Outcome Document, but the subsidiary external responsibility of the international community was also acknowledged and specified in paragraph 139 (see appendix). The language of these paragraphs differs from previous formulations of the ICISS. First, the description of the particular mass atrocity crimes of concern is slightly changed.⁶⁷ While the ICISS Report applied to “large-scale loss of life” or “large-scale ethnic cleansing”,⁶⁸ the paragraphs refer to already legally defined crimes in international law, such as genocide, ethnic cleansing, war crimes and crimes against humanity.⁶⁹ Second, the WSOD does not include the criteria or precautionary principles for intervention. Instead, it reaffirms the emphasis on the threshold responsibility of states to protect their people. Third, there is no explicit recognition of either specific responsibilities of the SC, or the possibility of unilateral or collective action with the authorization of the GA or outside of the UN framework.⁷⁰ Fourth, it is no longer the challenging framework of common humanity, which creates the moral responsibility, but rather the specific political commitment of states to act.⁷¹ Finally, when it comes to reaction, the main focus is placed on reactive measures falling short of military action, while the Chapter VII enforcement action is envisaged⁷² and has to be evaluated on a case-by-case basis.⁷³

Based on existing international law, agreed at the highest level and endorsed by both the GA and the SC, the provisions of paragraphs 138 and 139 of the Summit Outcome define the authoritative framework within which member states, regional arrangements and the UN system and its partners can seek to give a doctrinal, policy and instrumental life to R2P.⁷⁴

⁶⁷ See also Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 47, 2008.

⁶⁸ Payandeh, M., "With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking", in *Yale Journal of International Law*, Vol. 35, p. 476, 2010.

⁶⁹ See also Amneus, D., *Responsibility to Protect and the Prevention of Genocide. A Right to Humanitarian Intervention?*, p. 17. The approach most commonly adopted by the UN is to emphasize that R2P is based on well-established principles within existing international law. Bellamy, A.; Davies, S.; Glanville, L., *The Responsibility to Protect and International Law*, p. 9, 2011.

⁷⁰ Payandeh, M., "With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking", in *Yale Journal of International Law*, Vol. 35, p. 476, 2010.

⁷¹ Welsh, J.; Banda, M., International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, p. 131, 2010.

⁷² Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 48, 2008.

⁷³ See also Payandeh, M., "With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking", in *Yale Journal of International Law*, Vol. 35, p. 476, 2010.

⁷⁴ *Implementing the Responsibility to Protect*, UNSG, p. 4, 12 January 2009.

2.1.2.3. R2P in the 2009 Report of the Secretary-General

Since 2005 R2P has continued to evolve and gain traction. In his 2009 Report to the GA, the S-G Ban Ki-moon defined R2P as having three equally important and non-sequential pillars: 1) the enduring responsibility of a state to protect individuals under its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity and their incitement⁷⁵; 2) the international community's residual responsibility to assist states to fulfil their R2P⁷⁶; 3) the international responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the host state has manifestly failed to protect its population from the four crimes.⁷⁷ This three-pillar definition of R2P is now widely accepted over and above the ICISS's broader "prevent, react and rebuilt" approach of previous years.

2.1.3. The Legal Framework of R2P: Obligations of the Key Actors

The advancement of R2P as a widely acknowledged and much debated concept of international politics raises the question of its role in international law. While some academic and political circles argue that the R2P concept is firmly anchored in current IHRL and IHL and calls for implementation of existing commitments,⁷⁸ others claim that the combination of the R2P doctrine with the ICJ's ruling in 2007⁷⁹ and the recent ILC's works on responsibilities of states and international organizations create something approximating a new collective duty to intervene to put an end to the most grievous human rights scourges.

2.1.3.1. Pillar One Obligations

While R2P in some aspects may reinforce or reiterate existing law, its strength lies in the framework it establishes - unearthing, interpreting, and crystallising the obligation to

⁷⁵ *Ibid.*, pp. 8-9. It is a conceptualization of "sovereignty as responsibility" and an effort to distance R2P from the controversial notion of a "right" to humanitarian intervention.

⁷⁶ *Ibid.*, p. 9.

⁷⁷ *Ibid.*

⁷⁸ Notably, two UN Secretary-Generals, Kofi Annan and Ban Ki-moon, underscored in their reports that R2P does not add anything new to already established states' obligations under international law but rather reinforces existing duties. For a more detailed discussion, see Jones, B., Implementing the Secretary General's Report "In Larger Freedom", in Heinbecker P.; Goff, P. (eds.), *Irrelevant or Indispensable? The United Nations in the 21st Century*, pp. 33-40, 2005; Rosenberg, S., "Responsibility to Protect: A Framework for Prevention", in *Global Responsibility to Protect*, Vol. 1, pp. 442-447, 2009.

⁷⁹ *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ, Judgment of 26 February 2007.

act in the face of mass atrocity crimes.⁸⁰

The first pillar of R2P stems from well-established rules and principles of customary and treaty IHRL and IHL, and these are universally binding.⁸¹ Thus, the provisions in the WSOD constitute their reflection, not the source of the obligation. A review of the existing human rights framework contributes to a better understanding of the nature of R2P as a means of protection of persons based on universal human rights standards, and not on military doctrine aimed at justifying intervention.⁸²

One may draw a parallel between the terms “the responsibility to protect” and “the duty to protect” as a well-known concept in IHRL that provides, generally, that states have, apart from a negative duty not to encroach upon individuals’ human rights, a positive duty in certain circumstances to prevent private actors from infringing on the rights of other individuals (due diligence).⁸³ In essence, it requires states to prevent, punish, investigate and redress human rights violations.⁸⁴

IHRL is based on the responsibility of states as the main actors of international stage and bearers of human rights obligations under international law. IHRL applies both in times of peace and war.⁸⁵ The 1948 Universal Declaration of Human Rights (UDHR) and two Covenants of 1966 as well as a plethora of human rights treaties of more limited focus have been ratified by most countries of the world. They encompass provisions reflecting customary law and binding treaty obligations. The high number of ratifications of such instruments as the Covenants, the Genocide Convention, the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as well as the universal ratification of the 1949 Geneva Conventions signal about the growing awareness of states about their human rights obligations and the need for their effective implementation. If implemented “seriously and conscientiously”, those instruments could have

⁸⁰ Rosenberg, S., “Responsibility to Protect: A Framework for Prevention”, in *Global Responsibility to Protect*, Vol. 1, p. 448, 2009.

⁸¹ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 8, 2008. See also Glanville, L., “The Responsibility to Protect Beyond Borders”, in *Human Rights Law Review*, p. 3, 2012; Rosenberg, S., “Responsibility to Protect: A Framework for Prevention”, in *Global Responsibility to Protect*, Vol. 1, pp. 442-447, 2009.

⁸² Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 8, 2008.

⁸³ Buergenthal, T., “To Respect and to Ensure: State Obligations and Permissible Derogations” in Henkin, L. (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, pp. 72, 77-78, 1981.

⁸⁴ Rosenberg, S., “Responsibility to Protect: A Framework for Prevention”, in *Global Responsibility to Protect*, Vol. 1, p. 448, 2009.

⁸⁵ See *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion, 8 July 1996), ICJ; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion, 9 July 2004), ICJ, paras. 102-142.

prevented most of the committed atrocities.⁸⁶ In this context, Thakur and Weiss point out that R2P acts as an “umbrella concept” that strengthens existing legal instruments by filling gaps and encouraging their adoption and implementation.⁸⁷

State obligations under above-mentioned instruments are general and specific, the latter being focused on particular groups (women, children, IDPs, persons with disabilities), or crimes (genocide, torture, forced disappearances).⁸⁸ The UDHR spells out general state commitments to protect and promote human rights of all, without discrimination, including, *inter alia*, the right to life, liberty and security of person and expresses prohibition of torture, inhumane and degrading treatment and slavery.⁸⁹ The two Covenants have given a more precise definition of those commitments and couched them in terms of legal obligations.⁹⁰ For instance, the International Covenant on Civil and Political Rights (ICCPR) puts states under obligations to respect and ensure the rights “to all individuals within its territory and subject to its jurisdiction”; to adopt appropriate legislation; and ensure an effective remedy in cases of violations.⁹¹ Regional human rights instruments, such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Rights (ACHPR), set out even more elaborated human rights regimes in the regions.

Turning to special protection obligations, a number of international treaties address state obligations in relation to IDPs, children and women since they are disproportionately affected by conflicts and atrocities. The 1977 Guiding Principles on Internal Displacement articulate the primary state responsibility to protect IDPs within their territory from arbitrary displacement, genocide, murder, torture, summary executions, enforced disappearances, indiscriminate attacks, starvation, rape, mutilation, forced prostitution, slavery and the like.⁹² These crimes fall under the International Criminal Court’s (ICC) definitions of genocide, war crimes, ethnic cleansing and crimes against humanity.⁹³ The 1989 CRC contains state obligations to ensure the right to life, protection from sexual exploitation, abduction, traffic or sale of children, torture, ill-treatment, capital punishment

⁸⁶ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 10, 2008.

⁸⁷ Thakur, R.; Weiss, T., “R2P: from Idea to Norm – and Action?”, in *Global Responsibility to Protect*, vol. 1, p. 26, 2009.

⁸⁸ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 10, 2008.

⁸⁹ Universal Declaration on Human Rights, Articles 2-4, 1948; International Covenant on Civil and Political Rights, Articles 1-9, 1966.

⁹⁰ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 11, 2008.

⁹¹ ICCPR, Articles 2-3.

⁹² Guiding Principles on Internal Displacement, 11 February 1998, Principles 3, 6, 10, 11, 13.

or life sentence and recruitment into armed forces.⁹⁴ As regards women and girls, the most comprehensive is the 1993 Declaration on the Elimination of Violence against Women⁹⁵. It is the first international human rights instrument to be adopted by the UN that specifically recognizes women's fundamental human right to live free from violence and urges states to develop comprehensive legal, political, administrative and cultural programmes to prevent physical, sexual and psychological violence against women. Although the Declaration is not legally binding, some of its provisions constitute international customary law. Other instruments encompass the 1949 Geneva Conventions and the 1977 Additional Protocols; the 1951 Refugee Convention; the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1992 General Recommendation 19 on Violence against Women, and the 1999 Optional Protocol; the Rome Statute of the ICC; the SC Resolutions 1325 (2000) and 1820 (2008).⁹⁶

As regards separate crimes, genocide, torture and enforced disappearances are subject to specific international instruments: the 1948 Genocide Convention, the 1984 CAT, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CPED). These conventions impose precise obligations on states to prevent genocide, torture and enforced disappearances, criminalize them and provide redress for the victims. The Statute of the ICC includes these crimes too.⁹⁷ Most of their provisions have become a part of customary international law; they fall under universal jurisdiction and involve states' obligations to cooperate.⁹⁸

Crimes against humanity and ethnic cleansing do not have specialized conventions that clarify their scope and establish a duty to prevent them and punish the perpetrators. The Rome Statute provides the most definitive account of the crimes against humanity⁹⁹ and there is a broad consensus that these crimes are not only a part of customary international law but are also of *jus cogens* nature.¹⁰⁰ The crime of "ethnic cleansing"¹⁰¹ does not have its own standing in international law but the acts

⁹³ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 11, 2008.

⁹⁴ CRC, Articles 6, 34, 35, 37, 39, 1989. See also Optional Protocol on the Involvement of Children in Armed Conflict, 2000 and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000.

⁹⁵ Declaration on the Elimination of Violence against Women, 20 December 1993.

⁹⁶ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, pp. 11-12, 2008.

⁹⁷ Rome Statute of the International Criminal Court, Article 8, 17 July 1998.

⁹⁸ See, among others, the Genocide Convention, Article 1; the 1949 Geneva Conventions, common article 1; API, article 89; the CAT, article 9; the CPED, Articles 14, 15.

⁹⁹ Rome Statute of the International Criminal Court, Article 7, 17 July 1998.

¹⁰⁰ Luck, E., *The United Nations and Responsibility to Protect*, The Stanley Foundation, p. 5, 2008.

¹⁰¹ For the origin of the term "ethnic cleansing", see Petrovic, D., *Ethnic Cleansing - An Attempt at Methodology*, in *European Journal of International Law*, Vol. 5, pp. 342-359, 1994.

associated with ethnic cleansing (forced displacement of civilians, persecutions) are prohibited as war crimes and crimes against humanity¹⁰².

The main human rights treaties have associated monitoring bodies (called committees in the UN system and commissions in regional systems) composed of independent experts to oversee their implementation. The nature of their work predisposes them to identify issues and patterns of violations for early-warning use, to prevent further deterioration of the situation, more than providing immediate intervention. With the adoption of the R2P clause, the treaty bodies could be encouraged to generate and analyse the relevant material systematically with the aim to identify threats and suggest preventive measures within their mandates.¹⁰³ Moreover, National Human Rights Institutions are core agents of R2P, especially in relation to pillar one.¹⁰⁴

Thus, while pillar one responsibility is firmly embedded in existing obligations under IHRL and IHL, ideas circulating around pillars two and three obligations are more contested and call for progressive approach, which is open to debate.

2.1.3.2. Pillar Two Obligations

Pillar two of R2P relates to assisting the state to fulfil its primary protection responsibilities. The case law and other authoritative interpretations of the ICCPR, ICESCR, ECHR, ACHR and CAT show that state's obligations under these treaties may in exceptional circumstances apply extraterritorially, that is, when a state is deemed to have "effective or overall control" over a territory¹⁰⁵ or actions of non-state actors.¹⁰⁶ At a minimum, this suggests that individual states

¹⁰² See, e.g., the ICTY Trial Chamber judgments in the cases of *Sikirica*, paras. 58, 89; *Jeliscic*, paras. 68, 79; *Krstic*, para. 553; *Stakic*, paras. 518, 519; and *Tadic*, para. 697; as well as the Appeals Chamber judgment in *Tadic*, para. 305.

¹⁰³ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, pp. 13-14, 2008.

¹⁰⁴ *Ibid.*, pp. 18-22.

¹⁰⁵ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, (Advisory Opinion, 9 July 2004), ICJ, paras. 107-113, 2004; HRCm, General Comment No. 31, para. 10, 2004; *Loizidou v Turkey*, ECtHR, Preliminary Objections, para. 62, 1995 (GC); *Loizidou v Turkey*, ECtHR, Merits, para. 52, 1996; *Cyprus v Turkey*, ECtHR, paras. 75-77, 2011 (GC); *Bankovic v. Belgium*, ECtHR, paras. 70, 75, 2001 (GC); *Issa v Turkey*, ECtHR, paras. 69-70, 2004; CmAT, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America, para. 15, 2006.

¹⁰⁶ See, e.g., General Comment No. 31, para. 10; *Lopez Burgos v Uruguay*, Appl. No. 052/1979, HRCm, para. 12.3, 1981; *M. v Denmark*, Appl. No. 17392/90, ECtHR, para. 93, 1982; *Bankovic v Belgium*, para. 75; *Nicaragua v. USA*, Judgment of 27 June 1986; *The Prosecutor v. Dusko Tadic*, Judgment of 15 July 1999, IT-94-1-A (AC); *The Prosecutor v. Predrag Banovic*, 28 October 2003, IT-02-65/1-S (TC); *Ocalan v. Turkey*, Appl. No. 46221/99, paras. 13-60, 2005; *X. v. Germany*, Appl. No. 1611/62, p. 168, 1965; *X v. United Kingdom*, Appl. No. 7547/76, 1977; *Drozdz and Janousek v. France and Germany*, Appl. No. 12747/87, 1992; Articles on State Responsibility, ILC, Arts. 16-18. See also Wilde, R., "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", in *Israel Law*

should take steps to ensure they do not contribute to mass atrocities outside of their borders and to prevent the acts they seek to prohibit.¹⁰⁷

The Genocide Convention and IHL in particular place a number of obligations on states to assist others to comply with the law.¹⁰⁸ The most clearly articulated legal obligation to take steps to prevent mass atrocities outside of one's own jurisdiction is the duty to prevent genocide established in the 1948 Genocide Convention.¹⁰⁹ To this end, the ICJ in its *Bosnia v. Serbia* ruling¹¹⁰ found that Article 1 of the Genocide Convention requires that states "employ all means which are reasonably available to them".¹¹¹ The Court argued that whilst states are not obliged to use coercive measures or to actually succeed in preventing genocide, they must be able to show that when supplied with influence and information they have taken the initiative and attempted to prevent genocide.¹¹² At the very least, therefore, the international community's pillar two responsibility to "encourage" states to fulfil their R2P includes a *legal* obligation to take positive action to prevent genocide on the part of those who have capacity to do so.¹¹³ This implies emerging jurisprudence defining the scope of a duty beyond a legal pillar one duty to prevent.¹¹⁴

Notably, the obligation, then, would appear to be borne by every state to a greater or lesser degree.¹¹⁵ This applies regardless of whether or not a state has ratified the Genocide Convention since the ICJ had earlier declared in the *Congo* case that the prohibition of genocide is a *jus cogens* norm and therefore applicable to all states.¹¹⁶ Thus, the responsibility invoked by the ICJ is

Review, Vol. 40, pp. 503-526, 2007; Costa, K., *The Extraterritorial Application of Selected Human Rights Treaties*, pp. 12-15, 42-89, 93-108, 255-273, 2012.

¹⁰⁷ Rosenberg, S., "Responsibility to Protect: A Framework for Prevention", in *Global Responsibility to Protect*, Vol. 1, pp. 448-449, 2009.

¹⁰⁸ Bellamy, A.; Reike, R., *The Responsibility to Protect and International Law*, in Bellamy, Alex J.; Davies, Sara E.; Glanville, Luke (eds.), *The Responsibility to Protect and International Law*, pp. 94-95, 2011.

¹⁰⁹ Rosenberg, S., "Responsibility to Protect: A Framework for Prevention", in *Global Responsibility to Protect*, Vol. 1, p. 461, 2009.

¹¹⁰ Until the 2007 ICJ's judgment, international law concerning the crime of genocide (and crimes against humanity) only addressed individual criminal responsibility and not state responsibility.

¹¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Indication of Provisional Measures, Order of 8 April 1993, ICJ Reports, p. 3, para. 52, A(1), 1993.

¹¹² Amneus, D., *Responsibility to Protect and the Prevention of Genocide. A Right to Humanitarian Intervention?*, p. 33.

¹¹³ Bellamy, A.; Reike, R., *The Responsibility to Protect and International Law*, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, p. 95, 2010. Welsh, J.; Banda, M., *International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities*, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, pp. 95, 129-130 2011.

¹¹⁴ Bellamy, A.; Reike, R., *The Responsibility to Protect and International Law*, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, p. 91, 2011.

¹¹⁵ See *Bosnia v Serbia*, para 161.

¹¹⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)*, para.

essentially one of due diligence (not control as in human rights treaties): Serbia, a state with intimate ties to the genocidal actors (Bosnian Serb Army), had not taken all measures that were reasonably available to it to prevent genocide.¹¹⁷ So too, presumably, might be a great power that possesses ability to persuade or compel perpetrators to refrain from committing crimes.¹¹⁸ This type of a due diligence obligation arising from Article 1 of the Genocide Convention seems to be similar in nature to the positive obligations of states to secure human rights to persons within their jurisdiction found in human rights treaties.¹¹⁹

If no links or “capacity to effectively influence” are present, the legal obligation to prevent genocide in another jurisdiction may not be grounded in the Genocide Convention but, arguably, on customary law, in the form of an *erga omnes* obligation.¹²⁰ The prohibition of genocide has the character of a *jus cogens* (peremptory norm) and the duty to prevent it - an *erga omnes* obligation. If a state violates a *jus cogens*, any state may invoke the responsibility of that state, since all states are considered as injured parties when an obligation owed to the international community as a whole is breached.¹²¹ Taking the ICJ’s decision further, it is possible to assume that Rwanda has hinted at the possibility of a future legal action against France for its alleged material support in 1994 to the radical Hutu regime found responsible for genocide.¹²² The same is true for China which has allegedly contributed diplomatically, economically and militarily to keeping the mass atrocities going in Darfur.¹²³

As regards other grave crimes, the Court in the same case acknowledged that states may be bound by obligations, other than the prevention of genocide, which “protect essential humanitarian values,

64, 2006. See also Glanville, L., “The Responsibility to Protect Beyond Borders”, in *Human Rights Law Review*, pp. 18-19, 2012.

¹¹⁷ Arbour, L., “The Responsibility to Protect as a Duty of Care in International Law”, in *Review of International Studies*, pp. 451-452, 2008.

¹¹⁸ Glanville, L., “The Responsibility to Protect Beyond Borders”, in *Human Rights Law Review*, p. 18, 2012.

¹¹⁹ Milanovic, M., “State Responsibility for Genocide”, in *European Journal of International Law*, Vol. 17, p. 600, 2006. The Human Rights Committee has articulated the due diligence standard in its General Comment on Article 2 of the ICCPR.

¹²⁰ Amneus, D., *Responsibility to Protect and the Prevention of Genocide. A Right to Humanitarian Intervention?*, pp. 35-37.

¹²¹ For more detailed discussion, see Toope, S., “Does International Law Impose a Legal Duty upon the UN to Prevent Genocide?”, in *McGill Law Journal*, Vol. 46, pp. 187-194, 2000.

¹²² Rosenberg, S., “Responsibility to Protect: A Framework for Prevention”, in *Global Responsibility to Protect*, Vol. 1, pp. 472-473, 2009. For an overview of the relationship between the French government and the Hutu regime during 1990s, see Prunier, G., *The Rwanda Crisis: History of a Genocide*, 1995.

¹²³ Reeves, E., “Beijing’s Propaganda Campaign Can’t Obscure Complicity in Darfur Genocide”, 5 March 2008, available at <http://www.sudanreeves.org/2008/03/05/beijings-propaganda-campaign-cant-obscure-complicity-in-darfur-genocide/> (last visited 12 October 2013).

and which may be owed *erga omnes*.”¹²⁴ Thus, it can be assumed that the other R2P crimes constitute breaches of *jus cogens* norms, and their prevention may be considered *erga omnes*.¹²⁵ While the rules prohibiting war crimes and crimes against humanity are not as clearly established as those prohibiting genocide, there is a “huge amount of evidence” illustrating their peremptory nature.¹²⁶ The same position is taken by the ILC¹²⁷.

Concerning IHL, the obligation of states to both abide by the law and to ensure that other do likewise is a core part of the Geneva Conventions. Article 1 of the four Geneva Conventions sets out duties “to respect and to ensure respect for the present Convention in all circumstances”. While the precise scope of this duty is unclear, legal commentators tend to argue that the Conventions established a duty of states to prevent and halt the commission of war crimes by non-military means, such as private and public diplomacy, state meetings, use of treaty committees and, arguably, more coercive measures, such as travel restrictions, sanctions and embargoes.¹²⁸ Additionally, it is reasonable to assume that the duty to respect and ensure in IHL could also include assistance to build capacity in form of training and education, cooperation and oversight in multinational operations.¹²⁹

It is also worth noting that the belief that preventing the most serious crimes is not only a responsibility of individual states but the international community as well underlays the establishment of the ICC. The Rome Statute affirms that perpetrators (including government officials) of genocide, war crimes and crimes against humanity must be held accountable.¹³⁰ If national jurisdictions are unable or unwilling to prosecute in good faith those guilty of such crimes, the ICC will step in.¹³¹

¹²⁴ *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ, para. 147, 2007.

¹²⁵ Glanville, L., “The Responsibility to Protect Beyond Borders”, in *Human Rights Law Review*, p. 26, 2012. See also Schabas, W., *Genocide in International Law*, p. 500, 2000.

¹²⁶ Tams, C., *Enforcing Obligations Erga Omnes in International Law*, pp. 144-145, 2005. The ICJ held, that the basic rules of IHL applicable in armed conflict are “intransgressible”, which seem to justify their being treated as peremptory. *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion, 8 July 1996), ICJ Reports 1996.

¹²⁷ Articles on Responsibility of States for Internationally Wrongful Acts, ILC, Articles 25, 85, 40, 113, 2001.

¹²⁸ Schindler, D., “International Humanitarian Law: Its Remarkable Development and its Persistent Violation”, in *Journal of the History of International Law*, Vol. 5, p. 175, 2003.

¹²⁹ Bellamy, A.; Davies, S.; Glanville, Luke, *The Responsibility to Protect and International Law*, p. 96, 2011.

¹³⁰ *Ibid.*, pp. 196-197.

¹³¹ However, under current law, the ICC has no role in determining when violation of the R2P principle has taken place. The Rome Statute limits the Court to the prosecution and punishment of those responsible for human rights violations. Determination that the R2P principle has been violated is assigned to the SC. See also Herman, E., *The Responsibility to protect, the International Criminal Court, and Foreign Policy in Focus: Subverting the UN Charter in the Name of Human Rights*, Monthly Review, available at <http://mrzine.monthlyreview.org/> (last visited 8 June 2013).

Furthermore, Welsh and Banda argue that extraterritorial responsibility could be derived through three fundamental concepts: *jus cogens*; obligations *erga omnes*; and universal jurisdiction (“universality principle”).¹³² To date, only a handful of international treaties impose a legal obligation on the member states to exercise universal jurisdiction.¹³³ No such treaty requirement exists with regard to genocide and crimes against humanity, but the universality principle is increasingly being embraced even in these cases as a matter of customary law or domestic legislation.¹³⁴

2.1.3.3. Pillar Three Obligations

If there is one thing as bad as using military force when we should not, it is not using military force when we should.¹³⁵

Pillar three is the most contested element of R2P since it implies resort to military action by the international community when a nation-state fails its own protection mission. As Bellamy warns, the R2P principle does not expand the rights of states to interfere coercively in the domestic affairs of other states.¹³⁶ The question here is whether the principle creates a *legal obligation* to take coercive measures on the part of those who have authority to do so (the SC). While traditional legal scholarship supports the view that no such duty exists,¹³⁷ some recent developments point in another direction.

¹³² Under universal jurisdiction, any state's court can prosecute and punish the most serious crimes irrespective of state sovereignty. Bellamy, A.; Davies, S.; Glanville, L., *The Responsibility to Protect and International Law*, pp. 125-127, 2011. See also Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, pp. 17-18, 2008.

¹³³ Examples include the 1949 Geneva Conventions, the CAT, the Inter-American Convention on Forced Disappearance of Persons. It is disputed whether the Genocide Convention can be interpreted more broadly to include universal jurisdiction.

¹³⁴ E.g. British House of Lords decision in 1998/9 to extradite General Pinochet and Belgium's conviction of Rwandan nuns in 2001 for complicity in genocide. Spanish courts undertook litigation and sentencing in Spain of an Argentinean citizen for crimes against humanity that had been committed in Argentina. Moreover, the case of Darfur was referred to the ICC by the SC, although Sudan is not a party to the ICC.

¹³⁵ Gareth E., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 130, 2008.

¹³⁶ Bellamy, A.; Reike, R., *The Responsibility to Protect and International Law*, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, p. 96, 2011.

¹³⁷ The consolidation of the independence of states and the gradual replacement of natural law with positive law from XVII to XIX century saw an increasing reluctance among legal scholars to impose obligations on states to protect those outside of their territories. Glanville, L., “The Responsibility to Protect Beyond Borders”, in *Human Rights Law Review*, p. 6, 2012. More recently, the former US ambassador to the UN, John Bolton, who argued that the responsibility of other countries in the international community is not of the same character as the responsibility of the host and that there is no obligation on the part of the UN (the SC) or individual states to intervene. See also Payandeh, M., “With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking”, in *Yale Journal of International Law*, Vol. 35, p. 482-484, 2010.

2.1.3.3.1. R2P as a Legal Obligation to Prevent Genocide

Louise Arbour has recently suggested that a combination of the R2P principle and the ICJ's ruling in *Bosnia v. Serbia* paves some way towards establishing a legal duty of the SC to authorize military intervention.¹³⁸

In Article 1 of the Genocide Convention, contracting parties declared genocide to be “a crime under international law which they undertake to prevent and punish”. Neither an ordinary reading of the text nor recourse to the *travaux préparatoires* provides a clear clue whether it amounted to a legal obligation to intervene to halt specific genocides.¹³⁹ On the one hand, the US in 1994 avoided characterizing the violence in Rwanda as “genocide” given to the possible obligations linked to that term,¹⁴⁰ and Malaysia claimed that the P-5 of the SC had violated their Genocide Convention obligations by not authorizing enforcement action against the harassments of Bosnia's Muslims.¹⁴¹ On the other hand, in 2004 the US argued that defining the crisis in Darfur as genocide triggered no specific legal obligations.¹⁴² However, it has been argued by the former UN Commissioner for Human Rights, Louise Arbour, that the 2007 *Bosnia v. Serbia* ruling when taken in conjunction with R2P imposes specific responsibilities on the members of the SC.¹⁴³ The SC has the legal authority to authorize armed intervention whenever it identifies a threat to international peace and security. Furthermore, the P-5 of the SC has the military capacity to intervene to halt genocide. Consequently, furnished with the authority and the capacity to intervene, the resort to force to halt genocide might fall well within the scope of “reasonably available” measures for the P-5 of the SC.¹⁴⁴ This leads to a conclusion that such a combination of R2P and the 2007 judgment indicates an emerging legal duty to intervene to avert and halt genocide.¹⁴⁵

Similarly, Stephan Toope claimed that the UN has specifically been granted a mandate to promote international human rights, and genocide is clearly one of the gravest violations of fundamental

¹³⁸ Arbour, L., “The Responsibility to Protect as a Duty of Care in International Law”, in *Review of International Studies*, pp. 445-458, 2008.

¹³⁹ Glanville, L., “The Responsibility to Protect Beyond Borders”, in *Human Rights Law Review*, p. 8, 2012.

¹⁴⁰ *Ibid.*, p. 3.

¹⁴¹ See Schabas, W., *Genocide in International Law: The Crime of Crimes*, pp. 492-495, 2000.

¹⁴² Williams, P.; Bellamy, A., “The Responsibility to Protect and the Crisis in Darfur”, in *Security Dialogue*, Vol. 40, p. 31, 2005.

¹⁴³ Arbour, L., “The Responsibility to Protect as a Duty of Care in International Law”, in *Review of International Studies*, pp. 445-458, 2008.

¹⁴⁴ Bellamy, A.; Reike, R., The Responsibility to Protect and International Law, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, pp. 98-99, 2011.

¹⁴⁵ *Ibid.*

human rights.¹⁴⁶ Under Article 1 of the UN Charter, the UN is tasked “to achieve international cooperation [...] in promoting and encouraging respect for human rights.” Likewise, Article 55 articulates that the UN “shall promote: [...] (c) universal respect for, and observance of, human rights and fundamental freedoms for all [...]” Arguably, halting genocide falls squarely within the goals of the UN. Yet, fundamental principles of the UN Charter such as sovereign equality, the non-use of force and non-intervention have been invoked to hamper any UN scrutiny, not to mention a more robust action. On the other hand, according to Toope’s position, such a state-centric view of the UN has been challenged by the UN practice over the last twenty five years.¹⁴⁷ Similarly concludes Kamminga by claiming that human rights violations are no more regarded as an exclusive domestic matter.¹⁴⁸

What is more, Toope suggested that the prevention of genocide must fall within the definition of an *erga omnes* obligation.¹⁴⁹ In its *Barcelona Traction* dictum, the ICJ ruled that all states are said to have “legal interest in the protection” of such “rights”¹⁵⁰. Consequently, in the Court’s view, *erga omnes* obligations presume a collective right to expect performance of these obligations. Individual states are, therefore, burdened with a duty under customary law to enforce such an obligation and cannot waive this through inaction.¹⁵¹ As Toope warned, this does not, however, give justification for unilateral intervention but have to be dealt with within the UN system.¹⁵²

2.1.3.3.2. State Responsibilities According to the ILC's Articles on State Responsibility

The ILC Articles on the Responsibility of States for Internationally Wrongful Acts¹⁵³ uphold the idea that certain breaches of international law may be so grave as to trigger not only a right, but also an obligation of states to foster compliance with law (through claims for the cessation of the

¹⁴⁶ Toope, S., “Does International Law Impose a Legal Duty upon the UN to Prevent Genocide?”, in *McGill Law Journal*, Vol. 46, pp. 187-194, 2000.

¹⁴⁷ *Ibid.*

¹⁴⁸ Kamminga, M., *Inter-State Accountability for Violations of Human Rights*, p. 2, 1992.

¹⁴⁹ Toope, S., “Does International Law Impose a Legal Duty upon the UN to Prevent Genocide?”, in *McGill Law Journal*, Vol. 46, pp. 187-194, 2000. See also Amneus, D., *Responsibility to Protect and the Prevention of Genocide. A Right to Humanitarian Intervention?*, pp. 35-37.

¹⁵⁰ The ICJ uses the term “right” as a synonym for obligation insisting that “responsibility is the necessary corollary of a right”. *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, p. 3, paras. 33, 34, 1970.

¹⁵¹ See also Resolution on obligations *erga omnes* in international law, *Institute de droit international*, 27 August 2005.

¹⁵² Toope, S., “Does International Law Impose a Legal Duty upon the UN to Prevent Genocide?”, in *McGill Law Journal*, Vol. 46, pp. 187-194, 2000.

¹⁵³ Articles on Responsibility of States for Internationally Wrongful Acts, ILC, 2001.

wrongful act, reparation or countermeasures¹⁵⁴). But the ILC restricted this principle to the violations designated as serious breaches of “a peremptory norm of general international law”.¹⁵⁵

Accordingly, the UN S-G’s Special Adviser, Edward Luck, claimed that the duty to ensure compliance with IHRL and IHL may be translated into a legal responsibility to take coercive measures by Article 41 of the ILC’s Articles on State Responsibility.¹⁵⁶ This article addresses the responsibility of states to halt violations of peremptory norms of international law. It insists that “States should cooperate to bring an end through lawful means any serious breach within the meaning of Article 40”. Since the prohibition of genocide, war crimes and crimes against humanity have the status of *jus cogens*, it seems that Article 41 applies to them. Nonetheless, it remains contested whether this article establishes a positive obligation of states to cooperate to end the perpetration of the mentioned crimes, including by authorization of force by the SC. To assume that such a duty exists would, according to Luck’s view, represent an extremely progressive and wide interpretation of international law.¹⁵⁷

Critically, Article 41 does not elaborate how cooperation should occur. In its commentary, the ILC observes the possibility of both cooperation under the auspices of the UN and non-institutionalized cooperation.¹⁵⁸ Neither does this article envisage concrete measures that states should take to stop a breach of peremptory rule. The commentary prescribes “a joint and coordinated effort by all States to counteract the effect of these breaches.”¹⁵⁹ It should be noted, that the ILC acknowledged that Article 41 may mirror the progressive development of international law and is not yet a well-established norm.¹⁶⁰

Stahn took this idea even further by noting that the WSOD taken together with the ILC’s Articles on State Responsibility creates positive obligation to “use diplomatic, humanitarian or other peaceful means” or collective security action to “help protect populations from atrocities”.¹⁶¹ This “maximalist” position is shared by Vanlandingham who views pillar three of R2P as a “legal

¹⁵⁴ *Ibid.*, Arts. 48(2)(a), (b); 49-53.

¹⁵⁵ *Ibid.*, Art. 40.

¹⁵⁶ Luck, E., *The United Nations and Responsibility to Protect*, The Stanley Foundation, p. 5, 2008.

¹⁵⁷ *Ibid.*

¹⁵⁸ Articles on Responsibility of States for Internationally Wrongful Acts, ILC, section 2 of commentary on Article 41, p. 114, 2001.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Stahn, C., “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?”, in *American Journal of International Law*, Vol. 101, p. 116, 2007.

requirement”, not a political commitment.¹⁶²

2.1.3.3.3. Responsibilities of International Organizations

Taking as a model its earlier work on state responsibilities, the ILC also commenced codifying draft articles on the responsibilities of international organizations.¹⁶³ In these articles, the Commission has suggested the collective obligation to prevent genocide.¹⁶⁴ Among those is draft Article 8 that regulates a violation of an international obligation. The third report on this issue argued that international organizations, similarly to states, should be held liable for international wrongful acts. Moreover, it claimed that if it was assumed that international law requires states and other entities to prevent genocide, and that the UN had been in position to prevent the Rwandan disaster, failure to act could be interpreted as a breach of the legal obligation.¹⁶⁵ It is well-known that the UN recognized its failure to prevent the Rwandan genocide. Consequently, according to the ILC draft articles, this failure may have been legal in nature, albeit one recognized international lawyer charged the ILC with making “huge leaps of judgment” which are not supported by behaviour of states or international entities¹⁶⁶ and labelled the ILC’s position as “absurdly premature and not likely to be affirmed by state practice”.¹⁶⁷

The ICJ seems to support the position of the ILC. The Court held that organizations are subjects of international law and, “as such, are bound by any obligation incumbent upon them under general rules of international law”.¹⁶⁸ In the same vein, Howland claimed that the economic and political resources available to international actors such as the SC may actually lead to a significant obligation to protect.¹⁶⁹ Likewise, Peters suggested that the SC is not completely free in assessing whether to qualify an R2P situation as a threat to the peace in terms of Chapter VII or not. It does enjoy a margin of appreciation, but this is within limits. An on-going genocide, for instance, must

¹⁶² Vanlandingham sees the third tenet of R2P as a customary rule based on *opinio juris*. The proof of the existence of such *opinio juris* she finds in the 2005 Summit Outcome and the numerous legal developments regarding human rights over the last half century. Vanlandingham, R., "Politics or Law? The Dual Nature of the Responsibility to Protect", in *Denver Journal of International Law and Policy*, Vol. 41, pp. 101-123, 2012.

¹⁶³ Draft Articles on the Responsibility of International Organizations, ILC, 2011.

¹⁶⁴ Glanville, L., “The Responsibility to Protect Beyond Borders”, in *Human Rights Law Review*, pp. 21-22, 2012.

¹⁶⁵ Third report on responsibility of international organizations, Giorgio Gaja, Special Rapporteur, para. 10, 2005.

¹⁶⁶ Alvarez, J., *International Organizations: Accountability or Responsibility?*, Annual Conference on Responsibility of Individuals, States and Organizations, p. 7, 2006.

¹⁶⁷ Alvarez, J., “The Schizophrenias of R2P”, in *American Society of International Law*, Vol. 23., p. 12, 2007.

¹⁶⁸ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 73, para. 37, 1980.

¹⁶⁹ Howland, T., "Evolving Practice in the Filed: Informing the International Legal Obligation to 'Protect'", in *Denver Journal of International Law and Policy*, Vol. 34, pp. 3-4, 2006.

be labelled as a threat to the peace by the SC, and failure to do so would trigger the international responsibility of the UN and the Council members.¹⁷⁰ This means that the concept of R2P could give rise to an obligation on the SC to intervene in R2P situations.

What adds to the complication is the persistent ambiguity on the possibility of the SC's decisions to be subject to judicial scrutiny.¹⁷¹ The ICJ has not yet pronounced on this issue directly.¹⁷² The ECtHR refused to engage in an analysis of the behaviour of the SC: scrutinizing the Council "would interfere with the fulfilment of the UN's key mission" in the area of peace and security.¹⁷³

Considering the complications in constructing a theory of accountability of the SC, a number of proponents of the R2P concept have focused on the potential legal responsibilities of the SC's member states and especially the P-5¹⁷⁴. Arbour, for instance, has speculated why the exercise of veto blocking an initiative to stop genocide would not constitute a violation of the P-5's duties under the Genocide Convention.¹⁷⁵ Similarly, Peters insisted that the resort to a veto "under special circumstances constitute an *abuse de droit* by a permanent member."¹⁷⁶ In response to such claims, some quarters of the international community argued that to suggest that the exercise of veto may in some cases be illegal is to misunderstand the political nature of the SC.¹⁷⁷ Nevertheless, it is important to bear in mind that although the P-5 are not required to justify their veto, this does not diminish their obligations under other treaties, such as the Genocide Convention.¹⁷⁸ Importantly, the ICJ in its advisory opinion of as early as 1948 insisted that "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter".¹⁷⁹ The

¹⁷⁰ Peters, A., "The Security Council's Responsibility to Protect", in *International Organizations Law Review*, vol. 8, pp.19-21, 2011.

¹⁷¹ For a detailed analysis of the responsibility of international organizations, see Klabbers, J., *International Institutional Law*, pp. 271-293, 2009.

¹⁷² Akande, D., "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?", in *International and Comparative Law Quarterly*, vol. 46, p. 309, 1997.

¹⁷³ *Behrami v. France and Saramati v. France and Others*, decision of 2 May 2007, para. 149, in 133 ILR 1.

¹⁷⁴ Glanville, L., "The Responsibility to Protect Beyond Borders", in *Human Rights Law Review*, p. 23, 2012.

¹⁷⁵ Arbour, L., "The Responsibility to Protect as a Duty of Care in International Law", in *Review of International Studies*, pp. 445-454, 2008.

¹⁷⁶ Peters, A., "Humanity as the A and Ω of Sovereignty", in *European Journal of International Law*, pp. 560-565, 2009.

¹⁷⁷ White, K., "Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters", in *European Journal of International Law*, vol. 20, p. 547, 2009.

¹⁷⁸ Glanville, L., "The Responsibility to Protect Beyond Borders", in *Human Rights Law Review*, p. 23, 2012.

¹⁷⁹ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, ICJ, Advisory Opinion, pp. 57-64, 1948.

ICTY confirmed this view in *Tadic* decision.¹⁸⁰ It is also worth mentioning the *M. & Co. v Germany* case, where the ECtHR ruled that the member states cannot, by transferring powers to an international institution, evade their own responsibility under the ECHR and their answerability towards the ECtHR.¹⁸¹

In conclusion, the concept of R2P has been characterized as the “most dramatic normative development of our time”¹⁸² and “the most significant adjustment to sovereignty in 360 years”.¹⁸³ Regardless its short lifespan, R2P has rapidly developed from a “conceptual embryo”¹⁸⁴ to a powerful norm in world politics.¹⁸⁵ Taking into account the pillar three possibility and, arguably, even duty of military force, this “securitization of human rights violations”¹⁸⁶ challenges principles of sovereignty and non-interference as the core paradigms of the UN Charter.

Notwithstanding these important developments, R2P remains a highly ambivalent doctrine due to its indeterminacy¹⁸⁷ and the lack of consensus as to the precise legal content of the concept. R2P’s three pillars have different legal qualities. Pillar one - primary state responsibility to protect its citizens from violence - is well-documented and firmly rooted in IHRL and IHL and, according to Bellamy and Reike, is a peremptory norm of international law. There is also an emerging consensus that pillar two - duty to assist states to fulfil their obligations - has also a solid basis in existing legal framework, though the precise scope of this duty is vague. Less clear remains the legal status of pillar three - the responsibility of the international community to assist states through coercive means. While the majority of the scholarly community denies such a wide-ranging duty, the recent developments spearheaded by the ILC and the ICJ may see the evolution of a legal duty to respond decisively to mass atrocities. In short, as Peters submitted, R2P is an established hard norm with regard to the host state, and an emerging legal norm with regard to other states and the UN.¹⁸⁸

¹⁸⁰ *Prosecutor v Dusko Tadic*, ICTY, Appeals Chamber, paras. 26-28, 1995.

¹⁸¹ *M. & Co. v. Federal Republic of Germany*, Decision of 9 February 1990.

¹⁸² Thakur, R.; Weiss, T., “R2P: From Idea to Norm - and Action?”, in *Global Responsibility to Protect*, Vol. 1, pp. 22-53, 2009.

¹⁸³ Gilbert, M., “The Terrible 20th Century”, in *Globe and Mail*, Toronto, 31 January 2007.

¹⁸⁴ Stockburger, P., “The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking?”, in *Intercultural Human Rights Law Review*, vol. 5, p. 3, 2010.

¹⁸⁵ Thomas Weiss notes that “with the possible exception of the prevention of genocide after World War II, no idea has moved faster or farther in the international normative arena than the Responsibility to Protect.” Weiss, T., “R2P after 9/11 and the World Summit”, in *Wisconsin International Law Journal*, Vol. 24, p. 741, 2006.

¹⁸⁶ Engstrom, P.; Pegram, T., *Responsibility to Protect and the Coercive Enforcement of Human Rights*, International Studies Association Annual Conference, p. 2, 2011.

¹⁸⁷ See Bellamy, A.; Davies, S.; Glanville, L., *The Responsibility to Protect and International Law*, p. 220, 2011.

¹⁸⁸ Peters, A., “The Security Council’s Responsibility to Protect”, in *International Organizations Law Review*, Vol. 8, p.

Thus, while it is too premature to discern any new legal duty of the international community, established by the R2P doctrine of itself, to employ robust measures in cases of genocide, war crimes, ethnic cleansing and crimes against humanity, it is consistent with evolving state practice since 1990s and accumulated weight of *opinio juris*, both from opponents and advocates of R2P, towards enhanced cooperation in such situations. For now, it is possible to acknowledge that the primary function of R2P is to remind all states of the obligations they owe both to their people and strangers.

2.2. POC

2.2.1. Background: From Narrow to Broad Perspective

Traditionally the concept of “protection” has been relatively straightforward¹⁸⁹ and rooted in the idea that even war must have limits - that civilians should be as far as possible spared from armed attacks. From this narrow perspective, POC is a very old concept that comes from the early religious texts¹⁹⁰ and the longstanding moral traditions on the conduct of war.¹⁹¹ The need to protect the life of civilians and other non-combatants in armed conflicts has been embedded in IHL and codified in the 1949 Geneva Conventions and the 1977 Additional Protocols¹⁹² (the latter extending the relevant protections to non-international armed conflicts). These instruments impose restrictions on methods and means of warfare and provide for the principles of distinction, proportionality and limitation in order to protect civilians. Many of the rules enshrined in these documents are not only

12, 2011.

¹⁸⁹ Gordon, S., "Protection of Civilians: An Evolving Paradigm?", in *Stability: International Journal of Security & Development*, vol. 2, p. 2, 2013.

¹⁹⁰ For a deeper overview, see Popovski, V.; Reichberg G.; Turner, N., *World Religions and Norms of War*, 2009. See also Khadduri M., *War and Peace in the Law of Islam*, p. 102, 1955.

¹⁹¹ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 8. For a more detailed overview of the idea of protecting certain categories of persons from the effects of armed conflict before the advent of modern IHL, see Sinha, M., "Hinduism and International Humanitarian Law", in *International Review of the Red Cross*, vol. 87, pp. 285-294, 2005; Tzu, S., *The Art of War*, in Solf, W. (ed.), *Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I*, 1986.

¹⁹² The major IHL treaties include: The GCI for the Amelioration of the Condition of the Wounded in Armies in the Field (1949): protects wounded and sick combatants; The GCII for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of the Armed Forces at Sea (1949): protects shipwrecked combatants; The GCIII Relative to the Treatment of Prisoners of War (1949): protects prisoners of war; The GCIV Relative to the Protection of Civilian Persons in Times of War (1949): protects civilians and those in occupied territories; Protocol I to the Geneva Conventions Relating to the protection of Victims of International Armed Conflicts (1977): broadens protection of civilians and limits the means and methods of war; Protocol II Relating to the protection of Victims of Non-International Armed Conflicts (1977): protects civilians and civilian objects in non-international armed conflicts.

applicable to the signatories but are generally binding by the virtue of their customary law nature.¹⁹³ The most significant instrument on the subject - the Fourth Geneva Convention (GCIV) - coined the term POC and grounded its international legal establishment.¹⁹⁴ The International Committee of the Red Cross (ICRC) has traditionally occupied a key role in application of this principle.¹⁹⁵ POC, therefore, emerged as relevant to situations of armed conflict only.

Later conceptualizations of “protection” have broadened to encompass elements of refugee law and IHRL¹⁹⁶ - with a wide range of human rights protection concerns in both war and peacetime, sometimes unrelated to violence - and have increasingly focused on “issues of civilian safety” and human dignity.¹⁹⁷ This erosion of nexus between POC and physical violence may be one of the reasons for differing perceptions of POC.¹⁹⁸ Consequently, the modern conception of POC is based on the larger understanding of “protection” that was developed in 2001 by the ICRC who suggested that “the concept of protection encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e., human rights, humanitarian and refugee law)”¹⁹⁹.

The definition has been embraced by the key international humanitarian policy body, the Inter-Agency Standing Committee (IASC), which is a pivotal forum for UN and non-UN humanitarian organizations.²⁰⁰ It is a broad definition of protection that is not restrained to protection in armed

¹⁹³ For a full account of customary international humanitarian law, see Henckaerts, J., "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", in *International Review of the Red Cross*, vol. 87, pp. 175-212, 2005; Henckaerts, J.; Doswald-Becks, L., *International Committee of the Red Cross: Customary International Humanitarian Law*, 2005.

¹⁹⁴ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 2, 2011. It is significant, however, that not all civilians are protected by the Fourth Geneva Convention, but only those who find themselves either in territory occupied by enemy, or in the territory of the enemy and in general only those who were in an international armed conflict. Wynn-Pope, P., "*Evolution of Protection of Civilians in Armed Conflict: United Nations Security Council, Department of Peacekeeping Operations and the Humanitarian Community*", OXFAM Australia, p. 5.

¹⁹⁵ Gordon, S., "Protection of Civilians: An Evolving Paradigm?", in *Stability: International Journal of Security & Development*, vol. 2, p. 2, 2013.

¹⁹⁶ *Ibid.*

¹⁹⁷ O'Callaghan, S.; Pantuliano, S., Protective Action: Incorporating Civilian Protection into Humanitarian Response, HPG Policy Brief 29, p. 2, December 2007. See also HPG, Annual Report 2011-2012, p. 2, September 2012.

¹⁹⁸ Wynn-Pope, P., "*Evolution of Protection of Civilians in Armed Conflict: United Nations Security Council, Department of Peacekeeping Operations and the Humanitarian Community*", OXFAM Australia, p. 3.

¹⁹⁹ ICRC, Third Workshop on Protection, Background Paper, 7 January 1999. See also Caverzasio, S.G., *Strengthening Protection in War: A Search for Professional Standards*, 2001; ICRC, "Professional Standards for Protection Work Carried Out by Humanitarian and Human Rights Actors in Armed Conflict and Other Situations of Violence", p. 7, 2013.

²⁰⁰ IASC, *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field*, 2002.

conflicts. Its meaning is shaped by international law, and the principle applies to a wide array of political actors, including humanitarian agencies,²⁰¹ regional organizations (such as NATO, AU, EU), peacekeepers²⁰² and UN bodies. This larger policy-orientated concept is known as *broad POC*.²⁰³ For example, the ICRC, some UN agencies with protection mandates, such as the Office for the Coordination of Humanitarian Affairs (OCHA), the Office of the High Commissioner for Human Rights (OHCHR), the Office of the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNICEF), the UN Fund for Women (UNIFEM), the World Food Programme (WFP) and some humanitarian NGOs adopted the concept of POC as one of their core activities and apply it in a more general sense, covering not only the period of armed hostilities, but also protecting civilians in post-conflict situations.²⁰⁴

The SC has engaged with human protection issues since the first report of the S-G on the subject in 1999²⁰⁵ and has developed a thematic civilian protection agenda related to but distinct from R2P.²⁰⁶ Since then POC has been endorsed in a series of further reports by the S-G to the SC²⁰⁷ and various SC resolutions specifically addressing POC, including resolutions 1265, 1296, 1674, 1738, 1788 and 1894.²⁰⁸ Thematic resolutions on women (1825),²⁰⁹ children (1612),²¹⁰ the protection of humanitarian workers (1502),²¹¹ conflict prevention (1625)²¹² and sexual exploitation (1820)²¹³

²⁰¹ For the evolving role of humanitarian organisations in delivering protection, see HPG, Annual Report 2011-2012, p. 2, September 2012.

²⁰² For a discussion on the development of the civilian protection norm during PKOs, see Holt, V.; Taylor, G.; and Kelly, M., "*Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*", 2009; Harald, J.; Sande L., "Responsibility to Protect: Protection of Civilians, the Responsibility to Protect and Peace Operations", NUPI Report No. 4, 2008.

²⁰³ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 8.

²⁰⁴ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 2, 2011.

²⁰⁵ Report to the Security Council on the Protection of Civilians in Armed Conflict, UNSG, S/1999/957, 8 September 1999. For a full list of all UNSC resolutions and Secretary-General Reports on POC, visit <http://www.securitycouncilreport.org/un-documents/protection-of-civilians/> (last visited 13 September 2013).

²⁰⁶ Bellamy, A.; Williams, P., "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, p. 827, 2001.

²⁰⁷ UNSG, S/2001/331, 30 March 2001; UNSG, S/2002/1300, 26 November 2002; UNSG, S/2004/431, 28 May 2004; UNSG, S/2005/740, 28 November 2005; UNSG, S/2007/643, 28 October 2007; UNSG, S/2009/277, 29 May 2009.

²⁰⁸ UNSC Res. 1265, 17 September 1999, S/RES/1265; UNSC Res. 1296, 19 April 2000, S/RES/1296; UNSC Res. 1674, 28 April 2006, S/RES/1674; UNSC Res. 1738, 23 December 2006, S/RES/1738; UNSC Res. 1788, 14 December 2007, S/RES/1788; UNSC Res. 1894, 11 November 2009, S/RES/1894.

²⁰⁹ UNSC Res. 1825, 23 July 2008, S/RES/1825.

²¹⁰ UNSC Res. 1612, 26 July 2005, S/RES/1612.

²¹¹ UNSC Res. 1502, 26 August 2003, S/RES/1502.

²¹² UNSC Res. 1625, 14 September 2005, S/RES/1625.

²¹³ UNSC Res. 1820, 19 June 2008, S/RES/1820.

also include civilian protection in conflicts. Moreover, numerous country-specific SC resolutions include measures aimed at protecting civilians. In 2004, the SC issued an *aide-memoire* on civilian protection, which was afterwards embraced and developed by the OCHA.²¹⁴ Additionally, a number of SC mandates have incorporated POC - Afghanistan (UNAMA), Central African Republic (MINURCAT), Cote d'Ivoire (UNOCI), Darfur (UNAMID), Democratic Republic of Congo (MONUC), Haiti (MINUSTAH), Liberia (UNMIL) and Sudan (UNMIS).²¹⁵

These and other UN documents include requirements for the enhanced protection of civilians in conflicts, such as: broadening the mandate of PKOs and their properly training and resourcing; protection of particularly vulnerable groups (women, children, refugees, IDPs and humanitarian workers); engaging more effectively with non-state armed groups to enhance compliance; closing gaps in existing international law; conflict-prevention; confidence-building; humanitarian access; targeted sanctions and accountability for violations of international law; emphasizing the multidisciplinary nature of peace building; cooperation with regional actors; separation of combatants and armed elements from civilians in IDP and refugee camps; disarmament, demobilization and reintegration (DDR); intervention in cases of genocide, crimes against humanity and war crimes.²¹⁶

Building on these foundations, the SC has frequently taken POC action in specific contexts, including calling on parties to conflict to observe IHL; imposing sanctions on perpetrators; creating special tribunals (notably, the ICTR and the ICTY); and appealing to the ICC to hold individuals accountable; as well as using Chapter VII of the Charter to authorize peace operations with a robust mandate to use force to protect civilians under imminent threat of violence.²¹⁷ Moreover, UN bodies have sought to embed POC in the obligations of parties under IHL, IHRL and refugee law and have repeatedly called upon states which are not parties to the major treaties to ratify those instruments. Once ratified, all states are urged to take steps to incorporate these treaties within their domestic

²¹⁴ OCHA Policy Development and Studies Branch, *Aide-memoire for the consideration of issues pertaining to the protection of civilians*, 2004. OCHA proposed a revised version in 2009, which was welcomed by the SC. See S/PV.6066, 14 January 2009.

²¹⁵ Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 2, 2012.

²¹⁶ UNSC Res. 1265/1999, 1296/2000, 1674/2006, 1738/2006; UNSG S/1999/957, S/2001/331, S/2004/431; UNSG Reports S/2009/277, S/2010/579; UNSC 6650th meeting, S/PV.6650, 9 November 2011; Security Council Report, *Protection of Civilians*, Cross-cutting Report No. 2, New York, 20 July 2011.

²¹⁷ Evans, G., "Responding to Atrocities: The New Geopolitics of Intervention", in *SIPRI Yearbook*, p. 20, 2012.

legal system through appropriate legislative, judicial and administrative measures.²¹⁸

Following these developments, one can certainly view POC to be a much broader concept today than in the 1949 GCIV. The responsibility for POC lies with parties to the conflict under IHL and with the states and the international community under IHL, IHRL and refugee law. However, Popovski warns against the undesirable expansion of POC - no need to equate it, for instance, with protection of citizens in time of peace, as this would overlap with the human rights protection regime that is much broader in its scope. POC is a norm with a specific application and should retain its focus on civilian victims of warfare or internal disturbances.²¹⁹

2.2.2. Defining POC: Four Concepts

This sub-chapter details the nature of POC in the contemporary context. It illustrates that while all POC actors share a basic understanding of the core concerns of the POC agenda - protection of civilians from the large-scale violence - the different perspectives, resources and powers retained by these actors make them to advance distinct POC concepts: *combatant POC*, *peacekeeping POC*, *Security Council POC* and *humanitarian POC*.²²⁰ The separateness of these POC versions should not, however, be overlapped. There will frequently be operational overlap and interaction among them. For example, the SC may decide, motivated by *Security Council POC* considerations, to establish a peace operation that will be subject to the positive *peacekeeping POC* obligations and longstanding constraints of *combatant POC*.²²¹ Equally though, the different protection agendas can work at cross-purposes. For instance, the more robust the use of force is resorted to for *peacekeeping POC* purposes, the more the neutrality and impartiality of relevant humanitarian actors can be compromised, undermining the prospects for *humanitarian POC*.²²² Given that multitude of operational concepts, a universal UN-wide definition of POC is not yet established.

2.2.2.1. Combatant POC

Combatant POC is the protection of civilians in armed conflict norm whose normative foundations

²¹⁸ Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 3, 2012.

²¹⁹ Popovski, V., Interaction of the Norms of Protection, in Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 270, 2012.

²²⁰ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 40-43, 2012.

²²¹ *Ibid.*, p. 41.

are based on ethical values shared by numerous cultures and religions.²²³ It derives from the *jus in bello* constraints of Just War²²⁴ and IHL - especially the GCIV of 1949 and the Additional Protocol II (APII) of 1977 - but extends to other instruments and institutions, including the decisions of the ICC and the Rome Statute.²²⁵ Simply put, *combatant POC* is a prohibition on directly targeting, disproportionately affecting or exposing to risk civilians and civilian objects. It is founded on the principles of distinction, proportionality and limitation.²²⁶

The core part of *combatant POC* is formed by negative duties that include prohibitions on directly targeting of civilians, murder, sexual assault and exploitation, forced displacement, the destruction and removal of cultural property and private property²²⁷, destroying civilian infrastructure (e.g. electricity and sanitation facilities) and blockading civilian supplies of food, medicines and humanitarian aid.²²⁸

Furthermore, *combatant POC* includes positive obligations such as requiring that state organs or arm force commanders educate and train their forces in their POC responsibilities and monitor their behaviour.²²⁹ Positive duties can also encompass securing space for humanitarian action, aid to the wounded, sick or shipwrecked in specific circumstances and provision of the proper care and education of children caught in conflict situations.²³⁰ In cases of occupation or detention, such positive duties become more solid.

Some of *combatant POC*'s duties does not correspond to the above-illustrated negative-positive dichotomy but fall into the so-called intermediate category.²³¹ They include obligations of combatants to distinguish themselves from civilians and to refrain from placing military objects

²²² Lie, J., *Protection of Civilians, the Responsibility to Protect and Peace Operations*, NUPI Report No. 4, 2008.

²²³ Durham, H., "The Laws of War and Traditional Cultures: A Case Study of the Pacific Region", in *Commonwealth Law Bulletin*, vol. 34, pp. 833-841, 2008. Popovski, V.; Reichberg G.; Turner, N., *World Religions and Norms of War*, pp. 11-12, 2009.

²²⁴ Walzer, M., *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, pp. 123-127, 2000.

²²⁵ Barbour, B.; Gorlick, B., "Embracing the 'Responsibility to Protect': A Repertoire of Measures Including Asylum for Potential Victims", in *International Journal of Refugee Law*, vol. 20, pp. 533-566, 2008. See also Slim, H., *Killing Civilians: Method, Madness and Morality in War*, p. 2, 2008.

²²⁶ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 43, 2012.

²²⁷ Henckaerts, J.; Doswald-Becks, L., *International Committee of the Red Cross: Customary International Humanitarian Law*, Rules 1-10, 38-41, 49-52, 87-105, 129-133, 2005.

²²⁸ *Ibid.*, pp. 203-204.

²²⁹ *Ibid.*, Rules 139-144, 158.

²³⁰ APII, Arts. 4, 8, 1977.

²³¹ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 45, 2012

alongside civilian ones²³²; obligations of states to investigate and prosecute for war crimes and to use their influence to put an end to violations.²³³

It remains debatable whether *combatant POC* encompasses positive duties to actively protect civilians in war from harm inflicted by third parties. There are suggestions that Article 1 common to the four Geneva Conventions imposed such a wide-ranging obligation since it prescribes that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.²³⁴ However, this “duty” to ensure respect is usually referred to combatants under a contracting party’s direction and control²³⁵ and it seems far-fetched to claim the existence of this duty in relation to third-party perpetrators.²³⁶ Considering the complication to find a solid legal ground for combatants’ obligation to actively protect civilians, some commentators have focused on the moral side of the Article 1²³⁷.

2.2.2.2. Peacekeeping POC

Peacekeeping was an innovation that developed after the adoption of the UN Charter in response to the inability of the P-5 of the SC to agree on collective measures, especially the use of military force, during the Cold War.²³⁸ Peacekeeping traditionally had little to do with protecting civilians. Its goal was, as its name indicates, to keep peace. Developed during the Cold War, traditional PKOs were deployed primarily to address inter-state conflicts. Designed to implement agreed conflict settlements, these operations were entrusted with monitoring ceasefires and buffer zones, in largely

²³² Henckaerts, J.; Doswald-Becks, L., *International Committee of the Red Cross: Customary International Humanitarian Law*, Rules 106, 23-24, 2005.

²³³ *Ibid.*, Rules 157-161, 144.

²³⁴ Breakey, H., *The Protection of Civilians in Armed Conflict: Four Concepts*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 45, 2012; Boisson L.; Condorelli, L., “Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests”, in *International Review of the Red Cross*, No. 837, p. 70, 2000; Gasser, H., *Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations*, in Fox, H.; Meyer M.A. (eds.), *Armed Conflict and the New Law: Volume II ‘Effecting Compliance’*, pp. 16, 24-25, 1993; Palwankar, U., “Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law”, in *International Review of the Red Cross*, No. 298, pp. 9-10, 1994; Sachariev, K., “States’ Entitlement to Take Action to Enforce Humanitarian Law”, in *International Review of the Red Cross*, No. 270, pp. 177, 186, 1989.

²³⁵ Henckaerts, J.; Doswald-Becks, L., *International Committee of the Red Cross: Customary International Humanitarian Law*, Rule 39, 2005.

²³⁶ Focarelli, C., “Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?”, in *European Journal of International Law*, vol. 21, pp. 125-171, 2010.

²³⁷ See Wills, S., “Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations”, in *Journal of Conflict and Security Law*, vol. 9, pp. 387-418, 2004; Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, pp. 100-106, 2009.

²³⁸ Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, p. 2, 2009.

consensual environments guarded by state militaries.²³⁹ To the extent that traditional peacekeeping missions helped to terminate conflict, they may have contributed to protecting civilians.²⁴⁰ Under no circumstances would a conventional peace operation have considered that it was bound to protect civilians, let alone to actively defend their human rights.²⁴¹

One of the significant factors in modifying peace operations in the post-Cold War era has been the redefinition of international peace and security as inherently linked to POC.²⁴² The earliest example is Iraq, where the SC recognized that repression of the civilians threatened the peace and security of the region.²⁴³ Further, the war in Bosnia was seen as a threat to peace because of its impact on civilian population, especially the incidence of ethnic cleansing.²⁴⁴ Ultimately, in Rwanda, genocide and other large-scale and systematic violations of IHL were viewed as breach of peace and security.²⁴⁵ In light of all these recent developments, *peacekeeping POC* can be defined as:

The physical protection of humanitarian personnel, as well as responsibilities such as facilitating the provision of humanitarian assistance, preventing sexual and gender-based violence, assisting in the creation of conditions conducive to the return of internally displaced persons and refugees, and addressing the special protection and assistance needs of children.²⁴⁶

Later this concept was broadened to include concerns regarding peace-building; DDR²⁴⁷; monitoring, reporting, assessments of risks and mine action²⁴⁸; robust “peace enforcement” operations²⁴⁹; and, arguably, the use of force to protect civilians²⁵⁰; and other related activities.²⁵¹

²³⁹ Smith, M.; Whalan, J.; Thomson, P., “The Protection of Civilians in UN Peacekeeping Operations: Recent Developments, in *Security Challenges*, Vol. 7, pp. 30-31, 2011.

²⁴⁰ *Ibid.*, p. 31.

²⁴¹ Megret, Frederic, "From Peacekeeping to R2P: The Protection of Civilians as the UN's New Raison d'être?", 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154968 (last visited 2 October 2013).

²⁴² *Ibid.*

²⁴³ UNSC Res. 688, S/RES/688, 5 April 1991.

²⁴⁴ UNSC Res. 941, S/RES/941, 23 September 1994.

²⁴⁵ UNSC Res. 955, S/RES/955, 8 November 1994.

²⁴⁶ Holt, V.; Taylor, G.; Kelly, M., *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, p. 19, 2009.

²⁴⁷ Brahimi, Lakhdar, Report of the Panel on UN Peace Operations, A/44/305-S/2000/809, pp. 8-9, 21 August 2000.

²⁴⁸ DPKO/DFS, Draft Operational Concept on the Protection of Civilians in United Nations Peacekeeping Operations, p. 13, 2010.

²⁴⁹ *Implementing the Responsibility to Protect*, UNSG, paras. 50-51, 12 January 2009.

²⁵⁰ DPKO/DFS, Lessons Learned Note on the Protection of Civilians in United Nations Peacekeeping Operations: Dilemmas, Emerging Practices and Lessons Learned, p. 9, 2010.

²⁵¹ Except for all the mentioned peacekeeping POC activities, there are myriad of military statements and context-specific factors for best achieving protection results. For more details, see Lie, J., *Protection of Civilians, the Responsibility to Protect and Peace Operations*, NUPI Report, No. 4, 2008.

The term, thus, is not limited to traditional peace operations but covers a plethora of multidimensional peacekeeping missions deployed in situations where there is scarcely any peace to keep. The Department of Peacekeeping Operations (DPKO) emphasized that “impartiality [...] does not mean inaction or overlooking violations” and instructed peacekeeping actors to “actively pursue the implementation of their mandate even if doing so means going against the wishes of one or more of the parties to the conflict”.²⁵² The UN’s doctrine for peacekeeping raised POC to one of the core responsibilities that peacekeepers are expected to fulfil, even when it is not explicitly in their mandate.²⁵³ The activities of peacekeepers are regulated by IHL, IHRL, domestic laws of the troop contributing nation (TCN), the host state and the principles of the UN Charter.²⁵⁴ The key normative framework of *peacekeeping POC* includes the UN and Independent Reports on Rwanda²⁵⁵ and Srebrenica,²⁵⁶ the Brahimi Report,²⁵⁷ the subsequent reports building on Brahimi²⁵⁸, the UN’s “Capstone Doctrine” for peacekeeping²⁵⁹ and the relevant doctrinal writings of scholars.²⁶⁰

Peacekeeping POC is a conditional obligation. It does not impose any duty on a state or the international community to establish peacekeeping operations. Rather it prescribes the body already engaged in such operations to perform them to a certain standard. For instance, a peacekeeping operation with a protection mandate is bound to ensure a certain level of basic security to local civilians.²⁶¹ This view is shared by Wills who argues that “the idea that states or international organizations that intervene on humanitarian grounds do have responsibilities is accepted by the

²⁵² Handbook on United Nations Multidimensional Peacekeeping Operations, DPKO, p. 56 2003.

²⁵³ Megret, Frederic, "From Peacekeeping to R2P: The Protection of Civilians as the UN's New Raison d'être?", 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154968 (last visited 2 October 2013).

²⁵⁴ Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, p. 87, 2009.

²⁵⁵ Rwanda: The Preventable Genocide: Special Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, 7 July 2000.

²⁵⁶ *The Fall of Srebrenica*: Report of the UNSG Pursuant to General Assembly Resolution 53/55, 15 November 1999.

²⁵⁷ Brahimi, Lakhdar, Report of the Panel on UN Peace Operations, 21 August 2000.

²⁵⁸ DPKO, *A New Partnership Agenda: Charting a New Horizon for UN Peacekeeping*, July, 2009; DPKO/DFS, *Framework for Drafting Comprehensive Protection of Civilians Strategies in UN Peacekeeping Operations*, 20 January 2011; Jones, B.; Gowan, R.; Sherman, J., *Building on Brahimi: Peacekeeping in an Era of Strategic Uncertainty*, 2009.

²⁵⁹ *United Nations Peacekeeping Operations: Principles and Guidelines*, DPKO/DFS, 2008.

²⁶⁰ See, *inter alia*, Holt, V.; Berkman, T., *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, 2006; Holt, V.; Taylor, G.; Kelly, M., *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, 2009; Wills, S., "Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations", in *Journal of Conflict and Security Law*, vol. 9, pp. 387-418, 2004; Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, 2009.

²⁶¹ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 46, 2012.

United Nations and Western powers".²⁶² Other commentators have similarly supported such a conditional duty²⁶³, including the S-G Kofi Annan²⁶⁴, former Foreign Minister of Algeria Lakhdar Brahimi in his influential report²⁶⁵ and the ICRC.²⁶⁶

The minimum requirements of protection that are prescribed for peacekeeping missions to meet are defined by three considerations. First, the protective organ must meet its mission mandate.²⁶⁷ Interestingly, Wills invokes R2P language to distinguish between two types of protective mandates: *basic R2P* and more *robust R2P*. While the former requires the PKO to achieve discrete mission goals and provide sufficient security to enable humanitarian organizations to operate effectively, the latter is primarily preoccupied with the physical protection of civilians and prescribes a more substantial approach to protection.²⁶⁸ In both cases carefully tailored caveats must be placed, since PKOs' capacities are limited and restrained by the need to respect the protection responsibilities of the host state.²⁶⁹

The second consideration to be taken into account is the natural expectations of local agents as to what counts as an appropriate level of protection, which is critical to the legitimacy and credibility of peacekeeping missions.²⁷⁰ Nonetheless, as Durch put it, there are limits as to how far such expectations can be managed.²⁷¹ UN PKOs do not and cannot 'own' the conception of protection. They bring international civilian, military and police skills and assets to operational fields in which other protection actors are present, including the host state, mandated UN humanitarian agencies,

²⁶² Wills, S., "Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations", in *Journal of Conflict and Security Law*, vol. 9, p. 418, 2004

²⁶³ Breau, S., "*The Impact of the Responsibility to Protect on Peacekeeping*", in *Journal of Conflict and Security Law*, vol. 11, pp. 429-464, 2007.

²⁶⁴ UNSG, S/2004/431, 28 May 2004.

²⁶⁵ Brahimi, Lakhdar, Report of the Panel on UN Peace Operations, p. 1, 21 August 2000.

²⁶⁶ Ryniker, A., "The ICRC's Position on 'Humanitarian Intervention'", in *International Review of the Red Cross*, No. 482, pp. 527-532, 2001.

²⁶⁷ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 47, 2012.

²⁶⁸ Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, pp. 80-81, 2009.

²⁶⁹ Holt, V.; Taylor, G.; Kelly, M., *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, p. 75, 2009.

²⁷⁰ *Ibid.* See also Wills, S., "Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations", in *Journal of Conflict and Security Law*, vol. 9, pp. 387-418, 2004; Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, pp. 267-268, 2009.

²⁷¹ Durch, W., "Cross-Cutting Issues in Protection of Civilians for UN Peace Operations", *Challenges of Protecting Civilians in Multidimensional Peace Operations*, p. 7, April, 2010.

NGOs and the ICRC.²⁷² The Brahimi Report noted in this regards as follows:

Peacekeepers - troops or police - who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles and [...] consistent with “the perception and the expectation of protection created by [the operation’s] very presence.”²⁷³

While the precise content of this basic standard is fuzzy, it is possible to argue that at a minimum it would require protection from mass violence in the immediate vicinity of the peacekeeping mission.²⁷⁴

The third minimum requirement is the most contentious since it seeks to establish positive duties of protection on states and actors who exercise control over a foreign territory. These duties derive from IHL and IHRL. Concerning IHRL, there is now a consensus that in certain circumstances a State’s obligation to respect and ensure human rights extends to acts or omissions outside its territorial boundaries. For instance, the ICCPR requires state parties “to respect and *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.²⁷⁵ The Human Rights Committee (HRCm) in its General Comment 31 linked the notion of jurisdiction to the power or effective control exercised by the state concerned or its forces irrespectively of the territory where they act.²⁷⁶ The Committee also stated that obligations under the ICCPR are equally applicable both to UN peacekeeping forces and to States engaged in unilateral actions.²⁷⁷ Other human rights instruments also use the similar language of “respect/ensure” and contain similar “jurisdiction” clauses.²⁷⁸ The obligation to ensure at a minimum entails positive obligations of states to protect individuals from the violations of third parties and to take all legislative, administrative, judicial and other measures to secure the

²⁷² Holt, V.; Taylor, G.; Kelly, M., *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, p. 3, 2009.

²⁷³ Brahimi, Lakhdar, Report of the Panel on UN Peace Operations, A/44/305-S/2000/809, p. 11, 21 August 2000.

²⁷⁴ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 48, 2012.

²⁷⁵ ICCPR, Art. 2 (1).

²⁷⁶ HRCm, General Comment No. 31 on the Nature of Legal Obligations, para. 10, 2004.

²⁷⁷ *Ibid.*, For example, it has held that the ICCPR was applicable to UNSOM II by virtue of the fact that it had de facto control over parts of Somalia. Concluding Observations of the Human Rights Committee: Belgium 19.11.1998, para. 14.

²⁷⁸ ICESCR, Art.2; CAT, Art. 2; CRC, Art. 2; ACHR, Art. 1. See also Wilde, R., "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", in *Israel Law Review*, Vol. 40, pp. 503-526, 2007.

implementation of human rights.²⁷⁹

As regards IHL, of particular importance is Article 1, common to the four Geneva Conventions which provides that the High Contracting Parties undertake to “respect and ensure respect” for the provisions of the Conventions “in all circumstances”. This obligation applies to both the contracting states and their troops.²⁸⁰ The ICRC Commentary to the Conventions suggests that Article 1 obliges the contracting State to make preparations during peacetime to ensure compliance with the Conventions and to supervise both civilian and military authorities to see that its orders in this regard are carried out.²⁸¹ What is more, the Commentary provides that the obligation also extends to ensuring that third parties comply with the Conventions.²⁸² Thus, peacekeeping forces, albeit are generally not party to the conflict, are obliged to ensure that the belligerents respect IHL. But the extent and nature of this obligation remains unclear.²⁸³ Wills argues that such an obligation would entail at an absolute minimum a duty to report war crimes immediately so that if the force itself is not in position to take action, the TCN and the international community can take steps to respond.²⁸⁴

Additionally, there are suggestions that the laws of occupation are applicable to peace operations.²⁸⁵ For instance, the ICRC takes view that:

A situation of occupation exists whenever a party to a conflict is exercising some level of authority or control over territory belonging to the enemy. So, for example, advancing troops could be considered an occupation, and thus bound by the law of occupation during the invasion phase of hostilities.²⁸⁶

The laws of occupation in the GCIV lay down basic levels of security to be provided by an occupying force for the local population and include negative duties, such as the duties to respect fundamental rights²⁸⁷, not to inflict harm to residents of the occupied territory and their property²⁸⁸,

²⁷⁹ Gibney, M.; Skogly, S., *Universal Human Rights and Extraterritorial Obligations*, pp. 11-12, 2010.

²⁸⁰ Roberts A.; Guelff R., *Documents on the Laws of War*, p. 19, 2000.

²⁸¹ Pictet, J., *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention*, Article 1, 1958.

²⁸² *Ibid.*, p. 16.

²⁸³ Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, p. 105, 2009.

²⁸⁴ *Ibid.*, p. 108.

²⁸⁵ See, *inter alia*, Pictet, J., *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention*, p. 60, 1958; Roberts, A., “What is Military Occupation?”, in *British Yearbook of International Law*, Vol. 55, pp. 249-277, 1984.

²⁸⁶ Thurer, D., ICRC Official Statement, « Current Challenges to the Law of Occupation », ICRC, 6th Bruges Colloquium, 20-21 October 2005, available at <http://www.icrc.org/eng/resources/documents/statement/occupation-statement-211105.htm> (last visited 17 October 2013).

²⁸⁷ GCIV, Article 27; API, Article 75.

not to punish for an offence he or she has not personally committed and not to take hostages²⁸⁹; as well as the duties of positive nature, including the duties of restoring law and order²⁹⁰, ensuring the food and medical supplies²⁹¹, and maintaining the medical and hospital establishments²⁹². These laws can be viewed as a third minimum standard and filling the gap in the content of UN mandates and civilian expectations left by the previous two levels.²⁹³

Hence, these three minimum standards dictated by the *peacekeeping POC* principle should be met if an operation seeks to fulfil its mandate. It deserves special mention that some literature treats *peacekeeping POC* as an instrumental concept, not a normative one as was elaborated above. On this footing, *peacekeeping POC* is reduced to a political advice without any burden of legal obligations. This position is aptly demonstrated in the *Building on Brahimi* report, which insists that “The paper is not normative or prescriptive. It sets out a series of politically charged challenges and choices, but aims to be as objective as possible in its assessments.”²⁹⁴

Taken together, there is not yet any legal obligation on the part of the international community or individual states to establish PKOs. However, peace operations that are already on the ground have to perform their activities in accordance with the provisions of IHL, IHRL, the laws of the TCN and the host state.

2.2.2.3. Security Council POC

The SC first addressed POC as a thematic issue in the 1999 Open Debate on the Protection of Civilians in Armed Conflict subsequent to particularly violent events in Bosnia, Rwanda, Sierra Leone and Liberia, where civilians were affected disproportionately. During the debate, the SC affirmed “the need for the international community to assist and protect civilian populations affected by armed conflict” and noted that it was willing to respond, in accordance with the UN Charter, to situations where civilians had been deliberately targeted, or where relief and aid had

²⁸⁸ *Ibid.*, Articles 13, 27, 33 (para. 3); API, Articles 20, 51 (para. 6).

²⁸⁹ GCIV, Article 33 (para. 1), 34. For a more detailed examination of the applicability of the laws of occupation to peacekeeping missions and obligations it imposes on peacekeepers, see Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, pp. 183-189, 2009.

²⁹⁰ Hague Regulations, Article 43.

²⁹¹ GCIV, Article 55.

²⁹² *Ibid.*, Article 56.

²⁹³ Breakey, H., *The Protection of Civilians in Armed Conflict: Four Concepts*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 48, 2012.

²⁹⁴ Jones, B.; Gowan, R.; Sherman, J., *Building on Brahimi: Peacekeeping in Era of Strategic Uncertainty*, p. 1, 2009.

been deliberately obstructed.²⁹⁵ Since then, ensuring the protection of civilian populations came to be seen by many as a key element of the SC's responsibility to maintain international peace and security²⁹⁶. The first Chapter VII intervention occurred in Somalia in 1992 in response to the violence that was hampering relief efforts in the face of famine.²⁹⁷ Against this backdrop, President Bush indicated that it was time for "a new world order" that would not tolerate the neglect or abuse of civilian populations".²⁹⁸ The same view was taken by the S-G Kofi Annan, who insisted that "protecting civilians in situations of conflict" was a "humanitarian imperative"²⁹⁹ and called for the attention of the SC.

That being said, *Security Council POC* is the protection principle that is found in S-G reports to the SC, and in the resolutions of the SC and derives from the SC authority under Chapter VII of the UN Charter. While *combatant POC* is mostly associated with negative duties and *peacekeeping POC* with conditional duties, *Security Council POC* focuses on positive action, that is, on applying diplomatic pressures, sanctions, accountability, monitoring and - ultimately - military force in order to protect civilians from large-scale and systematic violence.³⁰⁰ It has much in common with pillar three of R2P.

The principle of *Security Council POC* is grounded in the UN Charter, IHL and IHRL, especially in the context of the rights of women, children and other vulnerable groups.³⁰¹ The SC engagement in POC matters is justified through the reference to the Council's competence under the UN Charter: in Resolutions 1265 and 1296, the SC held that the targeting of civilians could threaten international peace and security, thus moving POC squarely within its mandate under Article 24 of the Charter.³⁰² Considering the UN's purpose to promote fundamental human rights and save successive generations from the scourge of war³⁰³, *Security Council POC* may well be affirmed as

²⁹⁵ Protection of Civilians in Armed Conflict, UNSC Open Debate, 3977th meeting, S/PV/3977, 12 February 1999.

²⁹⁶ Protection of Civilians in Armed Conflict, Security Council Report's fifth Cross-Cutting Report, 31 May 2012 p. 3.

²⁹⁷ Wynn-Pope, P., "Evolution of Protection of Civilians in Armed Conflict: United Nations Security Council, Department of Peacekeeping Operations and the Humanitarian Community", OXFAM Australia, p. 8.

²⁹⁸ In the words of the President George Bush, a "new world order" is based on "the principles of justice and fair play ... protect the weak against the strong ...". See President's Bush's speech to Congress, 6 March 1991, available at <http://www.al-bab.com/arab/docs/pal/pal10.htm> (last visited 11 October 2013).

²⁹⁹ UNSG, Report on the Causes of Conflict in Africa, S/1998/318, 13 April 1998.

³⁰⁰ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 51-52, 2012.

³⁰¹ OCHA, *Aide Memoire: For the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict*, pp. 25-32, 2011.

³⁰² UNSG, S/1999/957, para. 30, 8 September 1999.

³⁰³ Charter of the United Nations, Preamble.

one of the UN's *raison d'être*.

The SC's concerns are not limited to the situations of armed conflict violence, but include such issues as mutilations, genocide, ethnic cleansing, enforced disappearances etc.³⁰⁴ The S-G's reports broadened the scope of *Security Council POC* as new concerns arose, namely, explosive devices, drones and military and security companies and underlined further areas of human rights concern, such as housing, land and property issues.³⁰⁵

The SC can resort to a wide range of actions to halt a widespread violence against civilians that include prevention, peace-making, peacekeeping³⁰⁶ and peace-building, as well as intervention under Chapter VII of the UN Charter as the last option.³⁰⁷ Thus, the SC's mandate enables it to urge parties to comply with IHL (e.g. to observe *combatant POC*) and to ensure responsibility for violations by establishing *ad hoc* courts and referring cases to the ICC.³⁰⁸ Additional activities include urging member states to ratify and implement the relevant international treaties; to consider using enforcement measures in cases of violations; as well as to adopt legislation for the prosecution of individuals responsible for genocide, war crimes and crimes against humanity.³⁰⁹ Security POC responses may also include sanctions, arms embargoes, crafting relevant mandates for peace operations, separation of civilians and combatants, ensuring access to humanitarian assistance, creating safe zones, monitoring and reporting, protection of refugees and counteracting hate media.³¹⁰

Since 1999, the SC mandates for peace operations have increasingly progressed towards more robust ones entailing the use of force, as happened in Cote d'Ivoire in 2010.³¹¹ When peacekeeping operations are not possible, the SC can authorize more offensive force against regimes, as occurred in Libya in 2011.³¹² Importantly, the SC also underscores the significance of preventive measures, including dispute resolution, preventive military and civilian deployment and avenues for fact-

³⁰⁴ UNSG, S/1999/957, para. 30, 8 September 1999, para. 2.

³⁰⁵ UNSG, S/2010/579, paras. 9, 17, 28, 14, 11 November 2010.

³⁰⁶ While *peacekeeping POC* is concerned with the activities of the peacekeepers aimed to protect civilians in zones of danger, the SC's distinct role in peacekeeping is mostly limited to the authorization of peace enforcement operations.

³⁰⁷ UNSG, S/1999/957, paras. 33, 66 (k), 8 September 1999.

³⁰⁸ The SC set up *ad hoc* courts for the former Yugoslavia (1993) and Rwanda (1994). Referrals to the ICC have occurred, e.g. in Darfur (SC/RES/1593) and Libya (SC/RES/1970).

³⁰⁹ UNSG, S/1999/957, p. 35, 8 September 1999.

³¹⁰ *Ibid.*; UNSG, S/2001/331, paras. 9, 14-16, 19, 22, 28 and 39, 30 March 2001; UNSG, S/2004/431, paras. 37 and 39, 28 May 2004.

³¹¹ UNSC Res. 1933: The Situation in Cote d'Ivoire, S/RES/1933, 30 June 2010.

³¹² UNSC Res. 1973: The Situation in Libya, S/RES/1973, 17 March 2011.

finding.³¹³ The areas of involvement of the SC continue to expand with the predominant focus on preventive measures that include: coordination with humanitarian actors, facilitating engagement with non-state actors, potential constraints on arms trading, improvements in reporting, protection of refugees and IDPs, safe return etc.³¹⁴

Security Council POC can be considered as a facilitating principle, encompassing all the concerns of the remaining POC concepts. This relationship is illustrated in Ban Ki-moon's 2009 Report, which clearly demonstrates that the SC's role in protecting civilians from widespread abuses of their rights is not only limited to its own direct actions, but also includes facilitating the protection roles of peacekeepers, combatants and humanitarians.³¹⁵

2.2.2.4. Humanitarian POC

Humanitarian POC is the protection concept that appears in the work of mandated organizations, such as the ICRC and the UNHCR, and non-mandated NGOs and charities, such as Oxfam and Amnesty International. Mandated agencies function under the auspices of the UN and have more stable and less flexible arsenal.³¹⁶

Traditionally, humanitarian protection was understood in two ways. First, "conventional protection" implied advocating on behalf of vulnerable persons, supporting the development of legal instruments and protective policies and encouraging states to ratify and implement such instruments.³¹⁷ Second, "relief protection" presupposed the provision of nutrition to those in need, and by doing so making them less exposed to coercion and exploitation by others.³¹⁸

In this traditional sense *humanitarian POC* is firmly enshrined in IHL. The GCIV establishes explicitly that States have the obligation to provide humanitarian aid to the civilian population of the adverse party under their control, whether free or detained, non-nationals or the population of

³¹³ UNSC Res.1894, S/RES/1894, paras. 9-11, 11 November 2009.

³¹⁴ For more details see, UNSG, S/2009/277, paras. 16, 33 and 58, 29 May 2009; UNSG, S/2010/579, paras. 18, 21, 87-89, 11 November 2010.

³¹⁵ UNSG, S/2009/277, pp. 26-73, 29 May 2009.

³¹⁶ Breakey, H., *The Protection of Civilians in Armed Conflict: Four Concepts*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 54, 2012.

³¹⁷ Forsythe, D., "Humanitarian Protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees", in *International Review of the Red Cross*, vol. 83, pp. 675-697, 2001; O'Callaghan, S.; Pantuliano, S., *Protective Action: Incorporating Civilian Protection into Humanitarian Response*, HPG Report, 26 december 2007.

³¹⁸ Bonwick, A., "Who Really Protects Civilians?", in *Development in Practice*, vol. 16, pp. 270-277, 2006.

occupied territories³¹⁹, and if unable to do so, are bound to accept the offered assistance³²⁰. However, the duty of States to ensure humanitarian aid and to allow others to do so for their own citizens is not expressly envisaged in this instrument. Article 23 of the GCVI only refers to the free passage of aid destined for the civilian population in the territory of a third State. The rights of the nationals of neutral States to humanitarian relief are not laid down either, albeit it was later included in the ADI.³²¹ What is more, the GCIV sets up the duties of States and the rights of victims in relation to humanitarian assistance in international armed conflicts or in situations of occupation. In the case of internal conflicts, the existence of these duties and rights can be deduced from Article 3 common to the four Geneva Conventions, in particular from the prohibition of violence to life and person.³²² Moreover, Article 18 of the APII, applicable to non-international armed conflicts, establishes the right to humanitarian assistance and the obligation to allow for the provision of assistance essential to the survival of the population. It is also worth of mention that given the widely acknowledged applicability of IHRL during armed conflicts, the most fundamental rights belonging to all people not taking part in the hostilities cannot be derogated from in times of war. Consequently, considering the fact that humanitarian assistance is instrumental in guaranteeing the right to life, the parties to the conflict are obliged to guarantee the right to humanitarian aid to all persons *hors de combat*.³²³

Just as other POC perspectives, the understanding of *humanitarian POC* has broadened. Nowadays it includes “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, e.g. human rights law, international humanitarian law and refugee law”.³²⁴ Accordingly, rights to life, safety, dignity and integrity are invoked as the basis for humanitarian protection.³²⁵ For instance, the right to life gives rise to a corresponding state’s obligation to respect and ensure respect for the right to life of all individuals

³¹⁹ GCIV, Articles 55, 81.

³²⁰ *Ibid.*, Articles 38, 39, 23.

³²¹ API, Article 50.

³²² See Pictet, J., *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, p. 47, 1958.

³²³ See Stoffels, R., *Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps*, in *International Review of the Red Cross*, Vol. 86, p. 520, 2004.

³²⁴ Caverzasio, S., *Strengthening Protection in War: A Search for Professional Standards*, p. 19, 2001. See also O’Callaghan, S.; Pantuliano, S., *Protective Action: Incorporating Civilian Protection into Humanitarian Response*, HPG Report, pp. 7-8, 26 December 2007.

³²⁵ *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field*, IASC, Geneva: UNICEF, 2002.

within its territory and subject to its jurisdiction.³²⁶ The duty to ensure implies that states have a duty to safeguard that the population affected by a crisis is adequately supplied with goods and services essential for its survival, and if they are unable to do so or fail in their efforts, to allow third parties to provide the required relief supplies.³²⁷ Furthermore, as Stoffels put it, given that the right to humanitarian aid is directly derived from the fundamental norms of both IHL and IHRL and, as the ICJ has observed on several occasions³²⁸ that these two concepts form the hard core of obligations *erga omnes*, it can be concluded that the right to humanitarian assistance generates obligations *erga omnes* for all parties to a conflict.³²⁹

Humanitarian POC responds to large-scale violations of the mentioned rights occurring in situations of armed conflict, protracted social conflict, post-conflict, natural disasters and famine³³⁰ and is based on the principles of humanity, impartiality, independence and neutrality - principles deeply rooted in IHL.³³¹ Given the peaceful and non-military nature of the activities involved, *humanitarian POC* does not directly contribute to prevention or protection. The activities it places its focus at can be categorized with the help of the “egg framework” approach - where different spheres of action surround a common centre, but locate at different distances from it, thus resembling an egg.³³² The most central activity is responsive action aiming to prevent or alleviate threats and harm. Next is remedial action, aimed at assisting and supporting people after the violations of their rights. Ultimately, on the outermost layer, there is environment-building, where institutions are established to enhance civilian protection. Each of these three domains includes traditional activities of advocacy, persuasion, reporting and dissemination of information about IHL and IHRL and provision of vital aid.³³³ In addition, *humanitarian POC* incorporates other

³²⁶ UDHR, Preamble; ICCPR, Article 2; CRC, Article 6; ECHR, Article 14 ; ACHPR, Article 1 ; ACHR, Articles 1 and 2 ; ICESCR, Article 2.

³²⁷ Stoffels, R., *Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps*, in *International Review of the Red Cross*, Vol. 86, p. 518, 2004.

³²⁸ *Barcelona Traction Case*, para. 33, 1970; *Nicaragua v. United States of America*, para. 218, 1986; *Legality of the Threat or Use of Nuclear Weapons*, para. 79, 1996.

³²⁹ Stoffels, R., *Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps*, in *International Review of the Red Cross*, Vol. 86, p. 524, 2004.

³³⁰ ICRC, "ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law", in *International Review of the Red Cross*, vol. 28, pp. 9-37, 1988.

³³¹ GA Res. 46/182, 19 December 1991, Annex, para. 2.

³³² *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field*, IASC, pp. 11-12, 2002; Wynn-Pope, P., "Evolution of Protection of Civilians in Armed Conflict: United Nations Security Council, Department of Peacekeeping Operations and the Humanitarian Community", OXFAM Australia, p. 18.

³³³ *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field*, IASC, pp. 63-64, 2002; *Protection into Practice*, Oxfam, pp. 3, 6, 2005.

strategies: presence of humanitarian actors; empowerment of local populations; creation of safe areas; dissemination of information regarding early warning, areas of safety and danger, conditions for return of refugees and IDPs and so on; transportation or evacuation of civilians from threats; engagement with all parties to the conflict; design of aid facilities and programmes.³³⁴

The variation and flux within *humanitarian POC* differentiate it from more stable and determined principles such as *peacekeeping POC* and *combatant POC*. One reason for this fluctuation is the variety of constraints on action adopted by different humanitarian organizations, especially those that are not mandated in law and are able to determine their own role within accepted humanitarian principles and practice.³³⁵ While some humanitarian organizations stick to the principles of neutrality and impartiality and do not condemn parties to the conflict, others find the policy of straightforward and public condemnation more employing.³³⁶

Hence this chapter argued that while all four perspectives of POC have the same concern – the protection of basic rights of civilians from systematic and large-scale violence – each have different capacities, limitations and legal status. While *combatant POC* is the only perspective that has a firm legal basis, *peacekeeping POC* and *Security Council POC* are largely dependent on political considerations, and *humanitarian POC* is shaped by the constraints of neutrality and impartiality. As Breakey has pertinently summarized, the four concepts of POC consist of “the primary negative duties of *combatant POC*, the role-based responsibilities of *peacekeeping POC*, the aspirational and universal concerns of *Security Council POC*, and the ever-growing toolkit of pacific strategies at work in *humanitarian POC*”.³³⁷

3. R2P and POC: Overlap and Contrast

The precise nature of the relationship between R2P and POC is a source of on-going academic

³³⁴ For a more comprehensive list of strategies, see Bonwick, A., "Who Really Protects Civilians?", in *Development in Practice*, vol. 16, pp. 270-277, 2006; Frohard, M.; Paul, D.; Minear, L., *Protecting Human Rights: The Challenge to Humanitarian Organizations*, Occasional Papers 35, 1999; *Protection into Practice*, Oxfam, 2005; *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field*, IASC, 2002; Mahony, L., *Proactive Presence: Field Strategies for Civilian Protection*, 2006.

³³⁵ Wynn-Pope, P., "Evolution of Protection of Civilians in Armed Conflict: United Nations Security Council, Department of Peacekeeping Operations and the Humanitarian Community", OXFAM Australia, p. 17.

³³⁶ Breakey, H., *The Protection of Civilians in Armed Conflict: Four Concepts*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 57, 2012.

³³⁷ *Ibid.*

debates.³³⁸ It is generally agreed that the two principles “overlap but each extends beyond the other” in certain respects.³³⁹ This chapter examines the key points of overlap and contrast between R2P and POC as well as controversial aspects surrounding such a comparison. Moreover, the practical importance of drawing parallels between the two protection norms is highlighted in the case of Libya in 2011, which is a clear example of how the two concepts can effectively converge and thereby, advance the same agenda – protection of the most vulnerable. Before proceeding to the comparative analysis and in order to avoid misinterpretation, it is vital to be mindful of which pillar of R2P and which concept of POC is under consideration because of their different properties. For instance, R2P is widely seen as more controversial than POC. But this depends largely on which pillar of R2P is considered and to which concept of POC it is compared.

3.1. Substantive Comparison of R2P and POC

This section explores basic similarities and distinctions between POC in terms of their origin, evolution, legal basis, scope and structural components.

3.1.1. Basic Convergence

There is a close relationship between the two international protection principles. First, R2P and POC spring from the same ethical roots and are grounded in a principle of common humanity. Their fundamental concern is to protect people’s most basic rights of physical security from large-scale human-induced violence.³⁴⁰ Both norms impose negative obligations on states to refrain from inflicting any harm to their nationals and require some positive acts to provide protection from the activities of third parties and to promote a general protective environment³⁴¹ according to IHL, refugee law and IHRL. The three pillars of R2P can be mapped onto this structure, with R2P pillar one mostly concerned with prohibitions on harm (negative obligations), while pillars two and three

³³⁸ See, among others, Breakey, H., "Protection Norms and Human Rights: A Rights-Based Analysis of the Responsibility to Protect and the Protection of Civilians in Armed Conflict", in *Global Responsibility to Protect*, vol. 4, pp. 309-333, 2012; Holt, V.; Berkman, T., *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, p. 6, 2006; Strauss, E., A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect, in Bellamy, A; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, p. 40, 2011.

³³⁹ The Relationship between the Responsibility to Protect and Protection of Civilians in Armed Conflict, Policy Brief, p. 3, 12 June 2012.

³⁴⁰ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, pp. 1-2, 2011.

³⁴¹ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in

focus on institution-building and direct protection against third parties (positive obligations). In case of POC, while each of the four concepts has elements that function in each category of obligations, *combatant POC* is pivotally concerned with restraints on direct rights violations. *Humanitarian POC*, in turn, primarily focuses at indirect protection and environment-building. Both *peacekeeping POC* and *Security Council POC* place direct protection against third-party violations and structural protection through institution-building at the centre of their area of concern.³⁴² Furthermore, as provided in the 2007 S-G's report on the protection of civilians, in its "important affirmation of the primary responsibility of each state to protect its citizens and persons within its jurisdiction from genocide, war crimes, ethnic cleansing and crimes against humanity", R2P has advanced the "normative framework" of POC.³⁴³

Second, sticking to the above-mentioned correlations between positive/negative obligations and separate elements of R2P and POC, it is possible to draw some cross-cutting parallels between these elements. For instance, R2P pillar one and *combatant POC* have much in common in terms of the nature of the obligations they impose. Both centre on prohibitions on harming civilians, that is, negative obligations. Similarly, R2P pillar three and *Security Council POC* deal with the various SC options in response to widespread and systematic violence, including the use of military force as the last resort,³⁴⁴ and, according to Sampford, both are exceptions to the Westphalian principle of non-intervention.³⁴⁵ There are also strong links between R2P pillar two and *peacekeeping POC* and (and to some extent *humanitarian POC*), as these principles invoke positive obligations to protect civilians.³⁴⁶

Third, both R2P and POC include multi-layered protection in the sense that various actors are called upon to fulfil tasks tailored to their specific roles and capacities. In case when primary actors

Armed Conflicts, p. 9.

³⁴² Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 66-67, 2012.

³⁴³ UNSG, S/2007/643, p. 4, 28 October 2007.

³⁴⁴ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 67, 2012.

³⁴⁵ Sampford, C., A Tale of Two Norms, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 108, 2012.

³⁴⁶ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 67, 2012.

fail to discharge the required level of protection, backup duties lay with secondary actors.³⁴⁷ For R2P such a continuum of responses is represented in its three-pillar structure. Each of these three pillars focuses on the same narrow set of threats to human rights (the four atrocity crimes), but they each initiate the action of a particular actor in a particular situation with particular means and acting under particular constraints.³⁴⁸ POC, in turn, has a similar division of obligations to guarantee cohesion of responses in form of its own “pillars”, that is, protection discharged by different actors under different circumstances and with different means at their disposal.³⁴⁹

Importantly, the responsibilities that UN member states accepted in paragraph 139 of the WSOD can be understood as bringing greater clarity to the commitments made by the SC in earlier resolutions on POC, recognizing that such situations may constitute a threat to international peace and security and fall squarely within the SC’s competence.³⁵⁰ For instance, in Resolution 1265³⁵¹, the SC expressed “willingness to respond to situations of armed conflict where civilians are being targeted”. The SC Resolution 1296³⁵² went even further insisting that, “the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security” and reaffirmed its “readiness to consider such actions and, where necessary, to adopt appropriate steps.” The paragraph 139 of the WSOD, for its part, is even more explicit providing for member states’ commitment to take timely and decisive collective action through the SC in situations where national authorities manifestly fail to shoulder their default protection mission from the four atrocity crimes.³⁵³

Fourth, both concepts have a strong basis in international law generally and in IHRL particularly.

³⁴⁷ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 10; Sampford, C., A Tale of Two Norms, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 105-106, 2012.

³⁴⁸ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 41-42, 2012.

³⁴⁹ See Sampford, C., A Tale of Two Norms, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 106, 2012; Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 66-67, 2012.

³⁵⁰ The Relationship between the Responsibility to Protect and Protection of Civilians in Armed Conflict, Policy Brief, GCR2P, 12 June 2012.

³⁵¹ UNSC Res. 1265, S/RES/1265, 17 September 1999.

³⁵² UNSC Res. 1296, S/RES/1296, 19 April 2000.

³⁵³ The Relationship between the Responsibility to Protect and Protection of Civilians in Armed Conflict, Policy Brief, GCR2P, 12 June 2012.

The ICISS report underlined the central role human rights play in justifying R2P. In particular, defining “sovereignty as responsibility” denies the idea that sovereignty holds any inherent value in itself.³⁵⁴ Instead, sovereignty is viewed as a tool for the protection of the basic human rights.³⁵⁵ The 2005 WSOD followed the same track, placing R2P under the rubric of human rights rather than security.³⁵⁶ As to POC, the widely endorsed ICRC definition of protection places human rights at its centre, holding protection to be “all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law”.³⁵⁷ Likewise, S-G reports and SC resolutions on POC frequently appeal to IHRL, especially regarding women, children and other vulnerable groups.³⁵⁸ *Combatant POC*, in the meantime, developed primarily out of the Just War theory of natural law that set the groundwork for early natural rights.³⁵⁹

Fifth, R2P and *broad POC* have a considerable degree of overlap in terms of their origin and evolution. While R2P was created in response to two political and moral disasters of the 1994 Rwandan genocide and slaughter of civilians in UN safe heavens in Srebrenica in Bosnia in 1995, the shadow of these atrocities also played a major role in framing the contemporary scope of *broad POC* by the way of developing explicit protective strategies and issuing a series of reports analysing the fiasco of, *inter alia*, UN organs to halt attacks on civilians in Rwanda and Srebrenica.³⁶⁰ The importance of these two conscience-shocking events to the emerging POC agenda is obvious in two landmark POC documents of this period: the S-G’s first report to the SC on the protection of civilians in armed conflict,³⁶¹ and the Report of the Panel on UN Peace Operations (Brahimi Report).³⁶²

The last issue pertinent to this discussion is an architectural metaphor of a pyramid applicable to

³⁵⁴ *The Responsibility to Protect*, ICISS, p. 14, 2001.

³⁵⁵ For a complete account of the idea of sovereignty as responsibility, see Rothchild, D.; Deng, F.; Zartman, I.; Kimaro, S.; Lyons, T., *Sovereignty as Responsibility: Conflict Management in Africa*, 1996.

³⁵⁶ Breakey, H., *The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 66, 2012.

³⁵⁷ Caverzasio, S., *Strengthening Protection in War: A Search for Professional Standards*, p. 19, 2001.

³⁵⁸ UNSG, S/1999/957, 8 September 1999.

³⁵⁹ See Buckle, S., *Natural Law and the Theory of Property: Grotius to Hume*, chapter 3, 1991.

³⁶⁰ Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, 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*, 7 July 2000; UNSG, Report of the Secretary-General Pursuant to General Assembly Resolution 53/55: *The Fall of Srebrenica*, 15 November 1999.

³⁶¹ UNSG, S/1999/957, 8 September 1999.

³⁶² Report of the Panel on UN Peace Operations, Lakhdar Brahimi, 21 August 2000.

both R2P and POC proposed by Sampford. He argues that while the pillar structure of R2P and POC (the four distinct concepts here are understood as pillars) is a common one, its utility is under doubt. Pillars are seen as separate and of similar size and height, while in reality they interact and do not intend to be of equal nature. The less coercive versions of the norm will have the largest application - indicating the solid and broad base of the pyramid. The more interventionist and ultimate coercive measures are the higher and narrower steps on the pyramid. For instance, if R2P pillars two and three are called upon, the pillar one responsibility of states remains in force. International assistance does not intend to supplant that responsibility but rather to supplement it. The same is true of POC where *combatant POC* is primary, whereas humanitarian actors, peacekeepers and the SC have role in assisting.³⁶³

3.1.2. Basic Divergence

Although the two principles have numerous commonalities, the differences abound. First, due to their different origins, each principle is assessed rather differently. POC evolved as a part of the laws of war, formed both through treaty and customary law that aimed to protect non-combatants from the more egregious harms to which armed conflict exposes them. In this form POC is a matter of law and does not appear to depart from the core business of the UN.³⁶⁴ State and non-state insurgencies regularly violate the laws of war and target civilians but they almost always deny this. By doing so, they, in a sense, pay at least a lip service to the importance of the POC doctrine. Rejecting POC as a whole in current international context would be reputational suicide.³⁶⁵ However, POC increasingly involves more than a mere application of IHL. It has become a policy commitment by the SC and since 1999 - a positive call for peacekeepers to provide for a more robust protection for civilians from armed actors. These shifts in POC create controversy, because they introduce the possibility of the use of force against state and state-sponsored actors, and effectively lead to the changing mandate of peacekeeping forces from impartial mediators to a “third belligerents” in armed conflicts.³⁶⁶ R2P, for its part, is intrinsically controversial: it is

³⁶³ For more detailed discussion, see Sampford, C., A Tale of Two Norms, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 106-109, 2012.

³⁶⁴ *Ibid.*, p. 105.

³⁶⁵ R2P and POC in the UN Security Council, available at

<http://hughbreakey.blogspot.fi/2013/03/r2p-and-poc-in-un-security-council.html> (last visited 13 September 2013).

³⁶⁶ *Ibid.*

“confusing conceptually, contested normatively and ambiguous politically”.³⁶⁷ It directly confronts the notion of state sovereignty and allows for coercive force, should the host state fail to protect its population.³⁶⁸ After R2P’s adoption by the UN in the form of GA resolution, many nations became increasingly concerned about its capacity of being a vehicle for neo-colonialism and imposition of Western “double standards”.³⁶⁹ However, the proponents of the doctrine emphasized consensual aspects and preventive dimension of R2P and gradually shifted its status towards less contentious.³⁷⁰

The second distinction between the two norms is related to their scope (see Figure 1³⁷¹), that is types of situations to which they apply. R2P has a narrower focus and only applies to the four atrocity crimes, namely, genocide, war crimes, ethnic cleansing and crimes against humanity, particularly as they occur in the context of widespread violence and civil unrest³⁷² regardless of the characterization of the situation as armed conflict. These crimes must reach a certain threshold of severity (“substantiality test”³⁷³) characterized by their large-scale and systematic nature to fall under the protective scope of R2P. POC, on the other hand, can apply more broadly to any discrete act³⁷⁴ such as, for instance, targeting of civilians in war, sexual assault and exploitation, forced displacement, application of starvation strategies, the deliberate blocking of urgent humanitarian aid and more.³⁷⁵ *Combatant POC* is particularly broad in scope prohibiting any discrete actions performed by small groups and even individuals acting alone.³⁷⁶ At the same time, POC has traditionally been understood narrower in that it covers only armed conflict and post-conflict

³⁶⁷ Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. xiii, 2012.

³⁶⁸ R2P and POC in the UN Security Council, available at <http://hughbreakey.blogspot.fi/2013/03/r2p-and-poc-in-un-security-council.html> (last visited 13 September 2013).

³⁶⁹ Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 50, 2008; Bellamy, A.; Davies, S.; Glanville, L., *The Responsibility to Protect and International Law*, p. 8, 2011. See also Ayoob, M., "Third World Perspectives on Humanitarian Intervention and International Administration", in *Global Governance*, pp. 99-118, 2004.

³⁷⁰ R2P and POC in the UN Security Council, available at <http://hughbreakey.blogspot.fi/2013/03/r2p-and-poc-in-un-security-council.html> (last visited 13 September 2013).

³⁷¹ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. xi.

³⁷² Scheffer, D., Atrocity Crimes: Framing the Responsibility to Protect, in Cooper R.; Kohler J. (eds.) *Responsibility to Protect: The Global Moral Compact for the 21st Century*, pp. 77-98, 2009.

³⁷³ For a more comprehensive overview, see Scheffer, D., "Atrocity Crimes and the Responsibility to Protect", in *Case Western Reserve Journal of International Law*, vol. 40, pp. 111-135, 2007-2008.

³⁷⁴ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 10.

³⁷⁵ Brahimi, Lakhdar, Report of the Panel on UN Peace Operations, A/44/305-S/2000/809, 21 August 2000.

³⁷⁶ Henckaerts, J., "Study on Customary International Humanitarian Law: A Contribution to the Understanding and

situations as those are defined in IHL. However, contemporary interpretations of POC focus on large-scale and systematic violations of human rights³⁷⁷ and apply to situations of mass violence, including armed conflict, as well as serious and widespread internal tensions and internal disturbances.³⁷⁸ Thus, in this regard there is significant overlap between R2P and POC.

To illustrate, the civilian victims of war crimes and crimes against humanity perpetrated in times of armed conflict, could fall under both R2P and POC. The protection of civilians threatened from escalating armed conflict, if mass atrocities are not planned and committed as part of such armed conflict, would fall under POC but not R2P. To be sure, if the two warring parties observe the rules of law and do not commit crimes against humanity, R2P is not relevant, but POC is - civilians have to be protected from suffering even in purely *jus in bello* situations.³⁷⁹ An example of situation that would be covered by R2P, but not POC, would be, *inter alia*, ethnic cleansing or crimes against humanity, planned and committed without any link to an armed conflict or internal disturbance, as, for instance, happened in Cambodia in 1976-1979, when the Khmer Rouge regime of Pol Pot massively massacred innocent people.³⁸⁰ Notably, situations can rapidly change and what originally was not an armed conflict can escalate into such and trigger POC, as happened in Libya in 2011. This unique case will be discussed more thoroughly

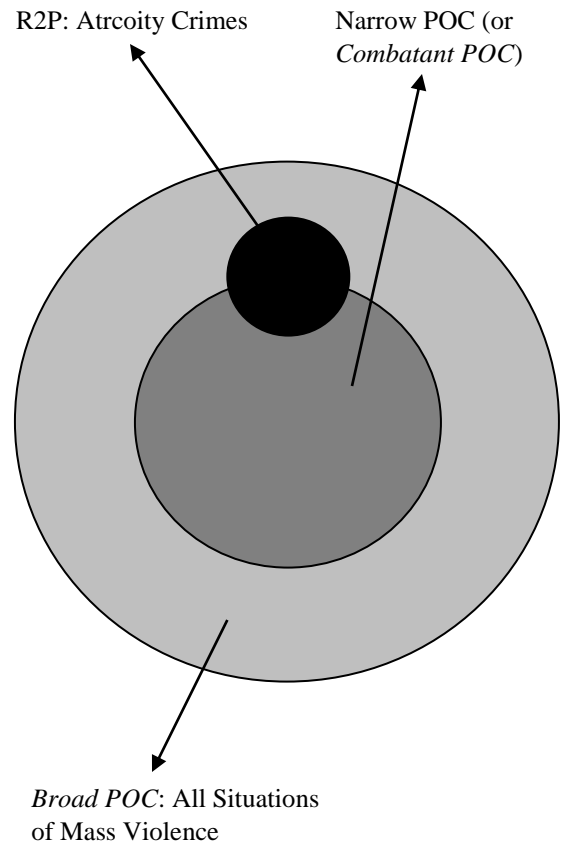


Figure 1: Scope of R2P and POC

Respect for the Rule of Law in Armed Conflict", in *International Review of the Red Cross*, vol. 87, pp. 175-212, 2005.

³⁷⁷ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 64, 2012.

³⁷⁸ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, pp. 12-15.

³⁷⁹ Popovski, V., Interaction of the Norms of Protection, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 272, 2012.

³⁸⁰ *Ibid.*

in Section 3.4.

Third, because R2P is narrower in scope, the responses it demands can be more diverse and multifaceted as was aptly articulated in the S-G's 2009 report under the rubric "narrow and deep".³⁸¹ One way this is so is in R2P's preventive dimension, that is, inhibiting atrocities from happening in the first place.³⁸² Importantly, POC does not neglect prevention as well,³⁸³ however, as Hunt emphasized, "aspects of the preventive components of R2P extend beyond POC".³⁸⁴ Since the very inception of R2P there has been a consistent awareness that when it comes to the most horrendous of atrocities, prevention is better than reaction.³⁸⁵ This feature of R2P was also taken into consideration by Ban Ki-moon in his "three pillars" approach to the doctrine, where only pillar three deals with response; the remaining pillars of R2P are pivotally concerned with prevention.³⁸⁶ Given to the narrowness of the scope of R2P, the prevention is viable in comparison with POC, which is primarily reactive in practice³⁸⁷ and where the prevention of armed conflict in general is too broad to give rise to any determinate tasks.³⁸⁸

Finally, it is worth adding that POC applies to crimes against civilians, while R2P covers crimes against populations.³⁸⁹ Concerning this distinction three points are vital. First, while POC's preoccupation with civilians includes isolated and small-scale attacks against individuals, R2P's concern is directed towards assaults of a much larger degree and with specific intention to persecute

³⁸¹ *Implementing the Responsibility to Protect*, para. 10 (c), 12 January 2009.

³⁸² Breakey, H., *The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 63, 2012.

³⁸³ For example, as far back as 1992 *An Agenda for Peace* identified the potential benefits of preventive deployment of PKOs. *An Agenda for Peace*, 17 June 1992. In addition, the UNSG's reports on POC refer to preventive strategies such as arms embargoes and action to counter hate media. UNSG, S/1999/957, 8 September 1999; UNSG, S/2010/579, 11 November 2010. Further, IHL also includes some provisions of a preventive nature: one example being the obligation to "avoid locating military objectives within or near densely populated areas". Protocol I, 1977, Art. 58(b).

³⁸⁴ Hunt, C., "Protection of Civilians and the Responsibility to Protect: Perspectives and Precedents in the Asia-Pacific", *Working Paper No. 2*, p. 8, 2009.

³⁸⁵ *The Responsibility to Protect*, ICISS, pp. 9, 20, 2001.

³⁸⁶ Breakey, H., *The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 65, 2012.

³⁸⁷ Sharma, S., "Toward a Global Responsibility to Protect: Setbacks on the Path to Implementation", in *Global Governance*, vol. 16, p. 131, 2010; Breau, S., "The Impact of the Responsibility to Protect on Peacekeeping", in *Journal of Conflict and Security Law*, vol. 11, p. 463, 2007.

³⁸⁸ Bellamy, A., *Responsibility to Protect: The Global Effort to End Mass atrocities*, pp. 98-99, 2009.

³⁸⁹ *Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts*, p. 16.

or destroy the group as such.³⁹⁰ Second, POC occurs primarily in situations where the distinction between civilians and combatants is material, especially concerning *narrow POC*. R2P crimes, on the other hand, take place either in times of war or peace and, consequently, the term “populations” is more apt in this regard.³⁹¹ Third, invoking the term “populations” implies that R2P atrocities can be committed against combatants if such crimes constitute part of a larger attack against population. For instance, the Genocide Convention and the Rome Statute of the ICC delineate the nature of the four atrocity crimes by articulating that these crimes apply not only to harms against “civilian populations” (in the case of crimes against humanity),³⁹² but also to “national, ethnic, racial or religious groups” (in the case of genocide)³⁹³ and to “combatants, wounded combatants *hors de combat* and nationals” (in the case of war crimes).³⁹⁴ By the virtue of POC’s explicit focus on civilians, violations of IHL against combatants will not be considered to be violations of POC.

3.1.3. Controversial Aspects

One of the most controversial distinctions drawn between R2P and POC is that the latter only applies in the context of armed conflict.³⁹⁵ After all, the acronym POC usually stands for “the protection of civilians in armed conflict”. The scope of *combatant POC*, as defined in IHL, is indeed limited to armed conflict. However, even here there are complexities. First, Common Article 3 of the Geneva Conventions is widely understood to contain a “minimum standard” of humanitarian treatment that is applicable even to civil strife outside of armed conflict.³⁹⁶ Second, the requirements for violence to be defined as “armed conflict” in the meaning of the Geneva Conventions are not particularly stringent, requiring only the presence of two parties that hold territory and have military command structure, the involvement of UN actors on the battlefield (e.g. peacekeepers) or the presence of international elements using force.³⁹⁷ Third, according to Common Article 2 of the Geneva Conventions, any even partial occupation of territory by an enemy force set

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² Rome Statute of the International Criminal Court, 1 July 2002, Article 7. The crime of ethnic cleansing is a subpart of crimes against humanity.

³⁹³ Genocide Convention, 9 December 1948, Article 2; Rome Statute of the ICC, Article 6.

³⁹⁴ Rome Statute of the International Criminal Court, 1 July 2002, Art. 8.

³⁹⁵ Strauss, E., "A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect", in *Global Responsibility to Protect*, vol. 1, pp. 291-323, 2009.

³⁹⁶ Gasser, H., "A measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct", in *International Review of the Red Cross*, vol. 28, pp. 38-58, 1988.

³⁹⁷ Kolb, R.; Hyde, R., *An Introduction to the International Law of Armed Conflicts*, pp. 75-76, 2008.

in motion application of the Conventions, even if there is no armed resistance to that occupation.³⁹⁸ In all, it is difficult to discern an exact definition of armed conflict and, consequently, any black and white limits of *combatant POC*.

The three remaining POC principles, in the meantime, are not limited to situations of armed conflict. For instance, *peacekeeping POC* is equally applicable to on-going armed hostilities as part of preventive deployment or generalized violence and post-conflict situations, which may not qualify as “armed conflict”,³⁹⁹ as part of a peace agreement. Equally wide scope applies to *Security Council POC*. The SC’s rationale for POC - that is, capacity of crimes against civilians to threaten international peace and security - is not limited to armed conflict. For instance, in its Resolution 1296 the SC spoke of protecting civilians under “imminent threat of physical violence”, without any referral to the situation as armed conflict.⁴⁰⁰ Even state repression can count as a POC case for the Council, if it rises to a sufficient threshold of violence.⁴⁰¹ Ultimately, *humanitarian POC* is preoccupied with large-scale violence, deprivation, dispossession and displacement, irrespective of whether these occur during armed conflict, post-conflict or civil strife.⁴⁰² All in all, the application of *combatant POC* may be restricted to situations of armed conflict, but remaining POC concepts will apply in all cases where R2P atrocity crimes are committed.

The second controversy relates to the claim that POC is a humanitarian principle governed by traditional humanitarian constraints such as neutrality and impartiality.⁴⁰³ R2P, on the contrary, is not neutral as it takes stand against evil-doers. However, it is not easy to differentiate ways in which POC is neutral and impartial and R2P is not. For example, the laws of *combatant POC* apply impartially to all combatants as much as prohibitions of R2P pillar one apply impartially to all state sovereigns.⁴⁰⁴ Similarly, *Security Council POC* parallels R2P’s pillar three at taking a determined

³⁹⁸ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 68, 2012.

³⁹⁹ Durch, W., "Cross-Cutting Issues in Protection of Civilians for UN Peace Operations", in *Challenges of Protecting Civilians in Multidimensional Peace Operations*, p. 3, 2010.

⁴⁰⁰ UNSC, S/RES/1296, p. 13, 19 April 2000.

⁴⁰¹ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 68, 2012.

⁴⁰² Slim, H.; Bonwick, A., *Protection: An AINAP Guide for Humanitarian Agencies*, p. 23, 2005.

⁴⁰³ Strauss, E., "A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect", in *Global Responsibility to Protect*, vol. 1, pp. 291-323, 2009.

⁴⁰⁴ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of*

stand against atrocity crimes perpetrators, as the case of Libya reaffirms.⁴⁰⁵

Concerning *peacekeeping POC*, in his report on the fall of Srebrenica, the S-G condemned the errors of judgement “rooted in a philosophy of impartiality and non-violence wholly unsuited to the conflict in Bosnia”.⁴⁰⁶ In the same vein, the Brahimi report advanced a non-traditional understanding of impartiality as distinct from neutrality, or equal treatment of all parties to the conflict, and characterized it as adherence to the principles of the UN Charter.⁴⁰⁷ The same attempt to distance PKOs from neutrality prized by humanitarian actors is visible in the works of other influential authors.⁴⁰⁸

The situation of *humanitarian POC* is more complex. Humanitarian neutrality may refer to: 1) non-discrimination in who will receive protection; 2) not being an agent of state policy; 3) not contributing to one military-political outcome rather than another; and 4) not speaking out against a particular side in relation to its breaches of IHL or IHRL.⁴⁰⁹ R2P may be viewed neutral in relation to the first and second aspect, but not in relation to the last two aspects. Thus there are significant differences in this regard between *humanitarian POC* and R2P. However, even this distinction is not straightforward, “as the more humanitarian organizations prioritize *humanitarian POC*, the more they will find themselves in conflict with these stronger versions of neutrality”.⁴¹⁰ Hence, while *humanitarian POC* may in certain cases stick to its strong visions of neutrality and impartiality, for the most part R2P and POC are equally neutral and impartial.

The third controversy lies with the claim that POC and R2P have a different status in law. For example, POC may be deemed a matter of law by the virtue of the customary and treaty status of the Geneva Conventions, while R2P is often characterized as a political commitment⁴¹¹ or “soft

Civilians and Their Interaction, p. 70, 2012.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *The Fall of Srebrenica*, UNSG, para. 499, 15 November 1999.

⁴⁰⁷ Brahimi, Lakhdar, Report of the Panel on UN Peace Operations, para. 50, 21 August 2000.

⁴⁰⁸ *United Nations Peacekeeping Operations: Principles and Guidelines*, DPKO/DFS, p. 33, 18 January 2008. See also Holt, V.; Berkman, T., *The Impossible Mandate? Military Preparedness, the Responsibility to Protect and Modern Peace Operations*, pp. 18, 143, 2006.

⁴⁰⁹ *Growing the Sheltering Tree: Protecting Rights through Humanitarian Action, Programmes and Practice Gathered from the Field*, IASC, pp. 8, 39, 2002.

⁴¹⁰ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 71, 2012.

⁴¹¹ Bellamy, A., “The Responsibility to Protect – Five Years On”, in *Ethics & International Affairs*, Vol. 24, p. 158, 2010.

law⁴¹². The problem with such a claim is that different elements of each principle may have very different links to international law. For instance, R2P's pillar one - primary state responsibility to protect its citizens from violence - is firmly rooted in IHRL and IHL⁴¹³ and, according to Bellamy and Reike, is a peremptory norm of international law⁴¹⁴. Pillar two – the duty to assist states to fulfil their obligations - has also a solid basis in existing legal framework, though the precise scope of this duty is vague.⁴¹⁵ International human rights conventions, the Genocide Convention as well as the 1949 Geneva Conventions place a number of obligations on states to cooperate to assist others to comply with the law but there is no consensus as to how this cooperation should be exercised. Legal quality of the pillar three is the most contentious and, arguably, does not impose legal duties on the international community to respond to atrocity crimes, albeit in light of the recent developments, state practice since 1990s and accumulated weight of *opinio juris*, as mentioned in this paper earlier, states are obligated to enhance cooperation in such situations.

Similarly to R2P pillars, each of the four concepts of POC has a different status in policy and law. Given its clear basis in IHL, *combatant POC* is the only version of POC that is undoubtedly a legal rule. Although *peacekeeping POC* is arguably approaching the status of a legal rule, since continuous attempts are being made to enhance protection, it is more appropriate to view it as a principle, since it does not impose stringent legal obligations on peacekeepers to protect civilians but requires the protection to be realized to the greatest extent possible and there are no external courts empowered to adjudicate it.⁴¹⁶ Nonetheless, some commentators have argued that the laws of occupation may apply to PKOs.⁴¹⁷ *Security Council POC* and *humanitarian POC* are more

⁴¹² Welsh, J.; Banda, M., International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, p. 119, 2010.

⁴¹³ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 8, 2008. See also Glanville, L., "The Responsibility to Protect beyond Borders", in *Human Rights Law Review*, p. 3, 2012; Rosenberg, S., "Responsibility to Protect: A Framework for Prevention", in *Global Responsibility to Protect*, Vol. 1, pp. 442-447, 2009.

⁴¹⁴ Bellamy, A.; Reike, R., The Responsibility to Protect and International Law, in Bellamy, A.; Davies, S.; Glanville, L. (eds.), *The Responsibility to Protect and International Law*, pp. 285-286. 2010.

⁴¹⁵ McClean, E., "The Responsibility to Protect: The Role of International Human Rights Law", in *Journal of Conflict and Security Law*, vol. 13, pp. 123-152, 2008; Nasu, H., "Operationalizing the 'Responsibility to Protect' and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict", in *Journal of Conflict and Security Law*, vol. 14, pp. 209-241, 2009. See also Rosenberg, S., "Responsibility to Protect: A Framework for Prevention", in *Global Responsibility to Protect*, Vol. 1, p. 461, 2009.

⁴¹⁶ Breakey, H., The Responsibility to Protect and the Protection of Civilians in Armed Conflict: Overlap and Contrast, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 73, 2012.

⁴¹⁷ However, the applicability of occupation law to peace operations is controversial. Except where a peacekeeping

vague and amorphous as it is still unclear what they actually require⁴¹⁸ and there is no judicial oversight. In this regard Bellamy suggested that if a “principle” connotes a shared understanding that can function as a basis for action, then the looser term “concept” may be more apt in this application.⁴¹⁹ Thus, there is no simple answer as to whether R2P or POC has a stronger status in law.

Ultimately, it is asserted that R2P justifies the use of non-consensual force to halt appalling human rights violations while POC does not. Pursuant to the WSOD, R2P explicitly allows, after the exhaustion of all peaceful means and the fulfilment of other conditions, for the SC to authorize the use of military force to protect populations from the most horrendous of atrocities. The recent NATO military intervention in Libya, for instance, is a clear case of the forcible means envisaged and endorsed by the R2P protection regime.⁴²⁰ POC, on the other hand, does not approach the question of the military action as a matter of explicit doctrine, albeit it is difficult to insist that it avoids it in practice. So far as the Offices of the S-G and the SC are concerned, non-consensual military engagement has always been considered as the last resort for POC.⁴²¹ Resolution 1296 of 2000 identified large-scale violations of IHRL as threats to international peace and security. As regards Resolution 1973 on Libya, the operative part of the resolution was couched in POC terms. Likewise, the international use of force in 2010 in Cote d’Ivoire⁴²² was authorized by the S-G pursuant to SC Resolutions 1962 and 1975 under the POC umbrella.⁴²³ As such, this alleged distinction between R2P and POC is more a matter of perception than legal substance.

3.2. Comparison of the Legal Sources of R2P and POC

There is a wide range of legal and quasi-legal frameworks that have implications for both R2P and POC responsibilities. The international legal protection regime of vulnerable persons consists of a

force is in occupation of the territory, international law recognizes no general relationship between the inhabitants and a state that is contributing troops to a PKO. Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, p. xxi, 2009.

⁴¹⁸ Breakey, H., The Protection of Civilians in Armed Conflict: Four Concepts, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 42, 2012.

⁴¹⁹ Bellamy, A., *Responsibility to Protect: The Global Effort to End Mass Atrocities*, p. 69, 2009.

⁴²⁰ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 11.

⁴²¹ *Ibid.*

⁴²² UNSC Res. 1933: *The Situation in Cote d'Ivoire*, S/RES/1933, 30 June 2010.

⁴²³ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts, p. 11.

large and overlapping variety of legal instruments and secondary sources that feel the gaps in different areas of protection left by others.⁴²⁴

The comparison between legal and normative frameworks for R2P and POC can be illustrated as follows:

Legal Sources	R2P	POC
UN Charter	+	+
1948 Genocide Convention	+	+
IHL: 1949 Geneva Conventions and 1977 Additional Protocols	+	+
1951 Refugee Convention	+	+
IHRL	+	+
1998 Rome Statute of the ICC	+	+
2005 WSOD, paras. 138-139	+	
1997 Ottawa Land Mines Convention		+
1993 Chemical Weapons Convention		+
1980 Conventional Weapons Convention		+
UNSC Resolutions	+	+
UNGA Resolutions	+	+

This table, albeit far from exhaustive, demonstrates how many commonalities there are between R2P and POC in terms of their legal sources. Few remarks are important in relation to some of the sources. The UN Charter, a legal source shared by the two principles, provides a normative linchpin for R2P, as the latter has its origins in the ICISS report referring to the human rights commitments of the Charter.⁴²⁵ Moreover, the concept of R2P is legally constrained to operate within the confines of the Charter’s collective security system (Chapters VI, VII and VIII), as was reaffirmed in the WSOD. Similarly, POC is tightly interwoven with the UN Charter and particularly relevant for the Charter’s determination to save generations from the “scourge of war”⁴²⁶ and to promote human

⁴²⁴ *Ibid.*, p. 26.

⁴²⁵ The Charter's Preamble calls for the commitments "to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small." These undertakings are then given concrete form in the Charter's human rights articles, including Articles 1(2), 1(3), 13(1), 55 and 56.

⁴²⁶ Charter of the United Nations, Preamble, 1945.

rights and international rule of law.⁴²⁷

As regards IHL, R2P's pillar one negative obligations not to commit atrocities stem from rules and principles of customary and treaty IHL.⁴²⁸ Of particular note is Article 3 common to the four Geneva Conventions, providing that those outside the combat be treated humanely. Additionally, R2P (pillar two) may be also seen as clarification of some of IHL's positive duties. What concerns POC, the Geneva Conventions and Additional Protocols form the very core of *narrow POC*. The bare legal minimum of POC for state armed forces and non-state actors is that they must respect the peacetime and wartime duties of IHL. Many of the key provisions of IHL form part of customary international law and, therefore, applicable to all parties to a conflict under all circumstances.⁴²⁹ Additionally, the ICRC now takes the view that "everyone in situations of armed conflict: states, organized armed groups, multi-national forces [including peacekeeping forces], civilians and the staff of private military/security companies" is bound by IHL.⁴³⁰ Thus, IHL is also pertinent for *peacekeeping POC*.

Provisions of the WSOD constitute a reflection of the obligations that states undertook under IHRL⁴³¹ which are, therefore, of particular significance to R2P. The ICISS had linked R2P with the human rights provisions of the UN Charter and the UDHR from the very beginning.⁴³² Moreover, one may draw a parallel between the terms "the responsibility to protect" and "the duty to protect". The latter, being a well-known concept in IHRL, provides, generally, that states have, apart from a negative duty not to encroach upon individuals' human rights, a positive duty in certain circumstances to prevent private actors from infringing on the rights of other individuals.⁴³³ The provisions of the key IHRL instruments on state's obligations, interpreted as having extraterritorial effect in cases of state's control over foreign territory or non-state actors, can be considered as

⁴²⁷ *Ibid.*, Article 3.

⁴²⁸ For more information on the subject, see Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 8, 2008. See also Glanville, L., "The Responsibility to Protect Beyond Borders", in *Human Rights Law Review*, p. 3, 2012; Rosenberg, S., "Responsibility to Protect: A Framework for Prevention", in *Global Responsibility to Protect*, Vol. 1, pp. 442-447, 2009.

⁴²⁹ For a comprehensive overview of the customary international humanitarian law, see Henckaerts J.; Dosweld-Beck, L., *International Committee of the Red Cross: Customary International Humanitarian Law*, 2005.

⁴³⁰ ICRC, Theme: Private Military Companies, in *International Review of the Red Cross*, Vol. 88, No. 843, 2006.

⁴³¹ Gierycz, D., *The Responsibility to Protect: A Legal and Rights-Based Perspective*, NUPI Report, no. 5, p. 8, 2008.

⁴³² *The Responsibility to Protect*, ICISS, p. 14, December 2001.

⁴³³ Buergenthal, T., "To Respect and to Ensure: State Obligations and Permissible Derogations" in Henkin, L. (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, pp. 72, 77-78, 1981. See also McClean, E., "The Responsibility to Protect: The Role of International Human Rights Law", in *Journal of Conflict and Security Law*, vol. 13, pp. 145-146, 2008.

constituting a legal base for the R2P's pillar two duties.⁴³⁴ The question of relationship between IHRL and POC is not as straightforward as with R2P, since it is sometimes asserted that IHRL is not applicable during armed conflicts. However, latest developments in law, especially in the interpretation of the international, regional and national courts, have affirmed that IHRL does have a bearing on situations of armed conflicts.⁴³⁵ Additionally, a broad understanding of POC (large-scale violence occurring outside an armed conflict) draws hardly on the existing international human rights framework.⁴³⁶ Thus, IHRL will be relevant, for instance, to POC actors when they exercise extraterritorial control over persons or territories.⁴³⁷

The Rome Statute of the ICC determines the legal scope and substance of war crimes, genocide and crimes against humanity (acts associated with ethnic cleansing can be characterized as war crimes or crimes against humanity)⁴³⁸ and provides an international legal framework criminalizing the violations of state's R2P pillar one duties⁴³⁹ as well as contributes to long-term (pillar two) structural prevention through putting an end to impunity for atrocity crimes.⁴⁴⁰ As regards POC, the Rome Statute's Article 8 provides for war crimes - that can include genocide and crimes against humanity committed in times of armed conflict - and triggers the application of IHL that is relevant to *narrow POC*. Importantly, the Statute has a substantiality requirement, responding only to gross breaches of IHL and, thus, does not cover all POC situations.⁴⁴¹

The last instrument worth of attention, the 1948 Genocide Convention, is the primary legal foundation for the concept of R2P and a legal framework that R2P specifies and makes operational.

⁴³⁴ See Wilde, R., "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", in *Israel Law Review*, Vol. 40, pp. 503-526, 2007; Costa, K., *The Extraterritorial Application of Selected Human Rights Treaties*, pp. 12-15, 42-89, 93-108, 255-273, 2012.

⁴³⁵ See, *inter alia*, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, paras. 102-142; *Bamaca Velásquez v. Guatemala*, IACtHR, Judgment of 25 November 2000, para. 207; *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, Judgement of 24 February 2005; *Cyprus v. Turkey*, ECtHR, Judgement of 10 March 2011; *Al-Skeini v. Secretary of State Defence*, UK House of Lords, Opinion of 13 June 2007.

⁴³⁶ *Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts*, p. 32.

⁴³⁷ Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, pp. 111-168, 2009.

⁴³⁸ See, e.g., the ICTY Trial Chamber Judgments in the cases of *Sikirica*, paras. 58, 89; *Jelusic*, paras. 68, 79; *Krstic*, para. 553; *Stakic*, paras. 518, 519; and *Tadic*, para. 697; as well as the Appeals Chamber Judgment in *Tadic*, para 305.

⁴³⁹ Fleck, D., "International Accountability for Violations of the *Jus in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law", in *Journal of Conflict and Security Law*, vol. 11, pp. 191-193, 2006; Stahn, C., "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", in *American Journal of International Law*, Vol. 101, p. 118, 2007.

⁴⁴⁰ *Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts*, p. 33.

⁴⁴¹ *Ibid.*

It places obligations on states to enact legislation and other measures to prevent and prohibit genocide⁴⁴², which corresponds to R2P’s pillar one commitments. Moreover, according to the ICJ’s interpretation in its *Bosnia v. Serbia* ruling, Article 1 of the Convention gives support to aspects of R2P’s pillars two and three duties (see Sections 2.1.3.2 and 2.1.3.3). POC, for its part, does not have the same intimate connection with the Genocide Convention as R2P, at least in its narrow form. The Convention, after all, explicitly refers to genocide as an atrocity crime committed in peacetime. Still, the provisions of the Convention inform other concepts of POC: actors with POC mandate are legally required to abide by the Convention and in some cases to take efforts to prevent genocide or to arrest or detain *genocidaires*.⁴⁴³

As is indicated in the table, there are legal instruments that are pertinent to R2P but do not have (at least substantial) implications for POC (the WSOD). Conversely, disarmament treaties, treaties prohibiting certain weapons, as chemical weapons, landmines, cluster munitions or some conventional weapons that cause excessive civilian suffering, have a bearing on POC but not on R2P.⁴⁴⁴

3.3. Comparison of the Actors Engaged with R2P and POC

The table below, though not exhaustive, demonstrates the similarities and differences between R2P and POC in terms of the actors engaged in the various types of protection.⁴⁴⁵

Key Actors	R2P	POC
States	Refrain from committing atrocity crimes in own and other jurisdictions. Undertake measures to prevent and protect people from gross human rights abuses. Assist with R2P missions.	Ratify and implement all IHL and IHRL treaties. Protect own population from violence. Assist with POC missions.
International Community	Assist states to fulfil their primary protection responsibilities. Take timely and decisive action when the host state has failed to shoulder its protection task.	Contribute to PKOs. Encourage others to be mindful of POC.

⁴⁴² Genocide Convention, Article 5, 1948.

⁴⁴³ Oswald, B.; Durham, H.; Bates, A., *Documents on the Law of UN Peace Operations*, pp. 76-80, 2010.

⁴⁴⁴ For a more precise overview of the legal sources that address POC in armed conflicts, see Fleck, D., *The Handbook of International Humanitarian Law*, pp. 27-35, 2008.

⁴⁴⁵ The table is taken from the policy guide “Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts”, p. 17.

UNSC	Consider the authorization of non-consensual means - sanctions, embargoes, military force - when states manifestly fail to discharge their protection mission.	Ensure the authorization and resource availability of PKOs in relation to POC. Act when large-scale atrocity crimes threaten international peace and security.
Regional Organizations	Develop intra-regional conflict resolution and mediation capacities. Contribute to regional PKOs and preventive deployments. Cooperate with the international community on issues of atrocity crimes.	Develop financial, logistical and human resources for PKOs.
Peacekeepers	With the consent of the host state, establish strategies to protect populations from grave human rights violations.	Protect civilians from imminent violence within areas of operation; support post-conflict rehabilitation.
Armed Forces	Protect people from atrocities. Do not commit atrocities in times of civil uprisings.	Follow IHL constraints on war. Protect state's civilians from third parties.
Humanitarian Actors	Monitor early warning. Identification of potential R2P's gaps that need to be addressed.	Promote observance of IHL. Provide for practical peaceful measures to reduce risks to local civilians.
UN Secretariat	S-G and OSAPG: Ensure an early warning of atrocity crimes, awareness raising. Advise SC on specific situations. Help with capacity-building to member states, regional organizations and civil society groups.	DPKO: Develop doctrine, strategies and training for PKOs.
ICC	Ensure accountability for perpetrating atrocity crimes.	Ensure accountability for committing grave human rights violations in conflict and post-conflict situations.

As the table indicates, there is a substantial overlap between the key R2P and POC actors. Considering the fact that there are different pillars of R2P and separate perspectives on POC, it is not easy to construe a one-size-fits-all scheme of the institutional and operational relationship between the two norms. Drawing with a broad brush, nonetheless, some inter-relations can be identified. For some actors R2P can be the progression of *broad POC* as conflict and violence escalate into the full-blown atrocity. In this vein, R2P can be perceived as *broad POC* applied to the specific and urgent case of atrocity crimes.⁴⁴⁶ For example, the SC's response to violence against

⁴⁴⁶ *Ibid.* p. 18.

civilians in Libya in 2011 (Resolutions 1970 and 1973) reflected how the Council's concern progressed from its engagement with R2P into POC agenda, with no sharp distinction in practice.

For some actors, nevertheless, different institutional, strategic and operational responses required to prevent atrocity crimes may suggest they might need to differentiate between their R2P and POC roles.⁴⁴⁷ For instance, PKOs with initial POC mandates require the use of *broad POC* doctrine and strategies. However, in certain situations PKOs may need a more specific atrocity-prevention tool to halt grave human rights violations, since the POC agenda might not be adequate enough. In addition, some actors might need to distinguish between different POC concepts. For instance, peacekeepers need to draw the distinction between *peacekeeping POC* - where host state consent is crucial - and the POC perspective employed by the SC, which can authorize the use of force against states' wills. There are also actors that have a pivotal role in one arena, but not in the other. A good example is the Office of the Special Advisor on the Prevention of Genocide (OSAPG) – a specialized R2P institution that is only concerned with the crime of genocide and, thus, is relevant to the R2P agenda only.⁴⁴⁸

3.4. R2P and POC Convergence and Controversy: Libya 2011

According to the majority view, the situation in Libya in February-March 2011 was a clear example of how both protection agendas, R2P and POC, can merge together. R2P quickly developed from pillar one protection to the whole amplitude of pillar three “timely and decisive response”, when Libya manifestly failed its protection mission. The subsequent categorization of the situation as civil war brought into action the POC protective framework by means of Resolution 1973 that became a landmark resolution for a parallel application of both POC and R2P.⁴⁴⁹

Libya 2011 was not the first time when R2P was applied by the SC. Previous cases, where R2P language was also utilized, include SC resolutions on Sudan (Darfur) and Cote d'Ivoire.⁴⁵⁰ Likewise, Libya was not the first country against which the SC has authorized the use of force to

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 7, 2011.

⁴⁵⁰ See, for instance, text from the Resolution 1962 (2010) on Cote d'Ivoire: "recalling that the Ivorian leaders bear primary responsibility for ensuring peace and protecting the civilian population in Cote d'Ivoire and demanding that all stakeholders and parties to the conflict act with maximum restraint to prevent a recurrence of violence and ensure the protection of civilians."

protect civilians. The SC-authorized attacking of Bosnian Serb military objectives around Sarajevo in 1995 was aimed primarily to protect Bosnian Muslim civilians.⁴⁵¹ Similarly, SC Resolutions 794 (1992) on Somalia⁴⁵² and 929 (1994) on Rwanda were the clear cases of the use of force for human protection against the nominal consent of a host state.⁴⁵³ However, the case of Libya is unique in terms of being the first real test of utilizing the two “sister” concepts, R2P and POC, through the SC Resolutions 1970 and 1973 to halt a mass slaughter of a civilian population.⁴⁵⁴

3.4.1. The War in Libya: An Overview and Evaluation of Convergence

On 17 December 2010 a young Tunisian man named Mohamed Bouazizi set himself on fire in a desperate protest against bureaucratic indifference and corruption in Tunisia. His horrific death commenced a chain of fierce anti-governmental demonstrations that forced President Zine el-Abidine Ben Ali to flee into exile. Inspired by the outcome of the Tunisian revolution, mass protests against governmental regimes erupted in Egypt, later in Bahrain, Yemen and other parts of the Middle East and North Africa.⁴⁵⁵

One of the most recent countries affected by the “Arab Spring” is Libya. Officially named the Great Socialist People’s Libyan Arab Jamahiriya, the country has been ruled by the authoritarian regime of Colonel Muammar el-Qaddafi since the military coup of 1969.⁴⁵⁶ In February 2011, the political climate of the country deteriorated due to the protests for governmental reform, democracy and participation.⁴⁵⁷ The first demonstrations demanding Gaddafi’s withdrawal took place in the city of Benghazi on 15 February and were harshly repressed. Since then the wide-spread violence against protesters escalated to the point of constituting crimes against humanity.⁴⁵⁸

⁴⁵¹ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 7, 2011.

⁴⁵² However, at the time when the action was taken, there was no central government in Somalia. Bellamy, A.; Williams, P., "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, p. 825, 2001.

⁴⁵³ *Ibid.*; Bellamy, A., "Libya and the Responsibility to Protect: The Exception and the Norm", in *Ethics & International Affairs*, vol. 25, 2011.

⁴⁵⁴ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 7, 2011.

⁴⁵⁵ Adams, S., "Libya and Responsibility to Protect", Global Centre for the Responsibility to Protect, Occasional Paper Series No. 3, p. 5, October 2012.

⁴⁵⁶ For more on the history of the Gaddafi's regime, see Vandewalle, D., *A History of Modern Libya*, 2012; Ronald, Bruce St John, *Libya: From Colony to Independence*, 2008.

⁴⁵⁷ For more details, visit Globalization 101, The Libyan Civil War and a Chance for R2P, available at <http://www.globalization101.org/the-libyan-civil-war-and-a-chance-for-r2p> (last visited 14 September 2013).

⁴⁵⁸ "Libya attacks may be crimes against humanity: UN", Reuters, 22 February 2011; UN press release, statement by the

Numerous pillar two attempts at peaceful, consensual resolution of the situation were unsuccessful. The SC invoked R2P immediately when on February 26 it passed Resolution 1970,⁴⁵⁹ underlining the Libyan authority's responsibility to protect its population; condemning "the widespread and systematic attacks" against civilian population, which it noted, "may amount to crimes against humanity"; deploring the gross systematic violations of human rights and expressing deep concerns at the deaths of civilians and the incitement to hostility by the Libyan government.⁴⁶⁰ Resolution 1970 insisted upon an immediate end to violence, urged Libya to act with maximum restraint, to respect human rights, and to ensure safety for foreign citizens, to allow safe provision of humanitarian and medical aid; and referred the situation to the ICC - an additional proof of the possibility that R2P crimes were committed.⁴⁶¹ It also inflicted Chapter VII sanctions on Libya, including an arms embargo; a travel ban against 16 Libyan officials involved in violence; and an indefinite asset freeze against six members of the regime⁴⁶².

When it became clear that such measures were not protecting the Libyan people - due to Gaddafi regime's blatant breaches of the resolution⁴⁶³ and, thus, a manifest failure to discharge its primary protection task - the League of Arab States (LAS) called on the SC to impose a non-fly zone on Libyan military aviation and to establish safe areas to protect the civilian population.⁴⁶⁴ This initiative was crucial and led to the adoption of the SC Resolution 1973 on 17 March 2011, which reiterated the Council's concern that crimes against humanity might have been committed; defined

UNSG Special Advisor on the Prevention of Genocide, Francis Deng, and the Special Advisor on the Responsibility to Protect, Edward Luck, on the situation in Libya, 22 February 2011. See also *Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians in Armed Conflicts*, p. 11.

⁴⁵⁹ UNSC Res. 1970, S/RES/1970, 26 February 2011.

⁴⁶⁰ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 8, 2011; Bellamy, A.; Williams, P., "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, p. 839, 2001.

⁴⁶¹ On 3 March, the ICC prosecutor announced that his office was investigating crimes against humanity that may have been committed by Gaddafi's regime.

⁴⁶² Bellamy, A.; Williams, P., "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, p. 840, 2001. See also Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 8, 2011.

⁴⁶³ Gaddafi's regime turned down the demands set out in Resolution 1970 and refused to permit humanitarian aid convoys into besieged cities such as Misrata and Ajdabiya. Bellamy, A.; Williams, P., "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, p. 840, 2001. See also Jones, B., "Libya and the Responsibilities of Power", in *Survival: Global Politics and Strategy*, vol. 53, pp. 53-54, 2011.

⁴⁶⁴ There is still a lack of good understanding of why the LAS, a long standing opponent of humanitarian intervention, came up with such a decision. The most credible explanation would be Gaddafi's unpopularity and lack of allies in the region. On Arab attitudes towards the use force on humanitarian grounds, see Gulf Research Centre, *Arab perspectives and formulations on humanitarian intervention in the Arab countries*, UAE, Gulf Research Council Event Papers, pp. 68-87, 2005; Kodmani, B., *The Imported, Supported and Homegrown Security of the Arab World*, in Crocker, C.;

the situation in Libya as a threat to international peace and security;⁴⁶⁵ and urged the parties to the armed conflict to “bear the primary responsibility to take all feasible steps to ensure *protection of civilians*”.⁴⁶⁶ Additionally, it reaffirmed the establishment of a no-fly zone and ban on flights; added additional designations of individuals subject to travel ban or the asset freeze; reinforced arms embargo⁴⁶⁷; and authorized the use of “all necessary measures [...] to protect civilians and civilian-populated areas while excluding a foreign occupation force of any form on any part of Libyan territory”.⁴⁶⁸

Although, this call for the protection of civilians was inherently based on the concept of R2P,⁴⁶⁹ the resolution expressly referred to POC, as the situation shifted from a riot to a civil war, or non-international armed conflict, in the language of the Geneva Conventions. This was a significant development as the SC could reinforce its decisions grounded on obligations under IHL and “add war crimes jurisdiction into what has already been established as R2P obligations in Resolution 1970 on the basis of potential crimes against humanity”.⁴⁷⁰ In Resolution 1973, thus, all the protective capacity of POC (applicable to armed conflict) supplements the force of R2P, triggered by the Resolution 1970.⁴⁷¹ It is not a coincidence here that in Resolution 1973 POC is an obligation of all parties in conflict, therefore it urges not only the Gaddafi’s regime, but the rebels (non-state actors) as well, to protect civilians, whereas R2P is a matter for states only.⁴⁷² Hence, the “sister” conceptions were synergised, their legal and political dimensions merged to urge the SC to use its power under Chapter VII, including the use of force - to protect the civilian populations. This timely and decisive action of the SC can be considered as a triumph of both POC and R2P⁴⁷³ and

Osler, Fen H.; and Aall, P. (eds.), *Rewiring Regional Security*, pp. 240-242, 2011.

⁴⁶⁵ Bellamy, A.; Williams, P., "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, pp. 843-844, 2001.

⁴⁶⁶ UNSC Res. 1973, S/RES/1973, 17 March 2011.

⁴⁶⁷ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 10, 2011.

⁴⁶⁸ UNSC Res. 1973, S/RES/1973, 17 March 2011.

⁴⁶⁹ Pommier, B., "The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya and Beyond", in *International Review of the Red Cross*, vol. 93, p. 2, 2011.

⁴⁷⁰ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in *Security Challenges*, vol. 7, p. 8, 2011.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*, 5.

⁴⁷³ *Ibid.*, p. 8, 2011. See also Evans, G., "Ending Mass Atrocity Crimes: The R2P Balance Sheet After Libya", Leo Back Centre, 31 July 2011; Bellamy, A.; Weiss, T.; Welsh, J., "Libya, RtoP, and Humanitarian Intervention", in *Ethics & International Affairs*, vol. 25, 2011.

“reflected a change in the SC’s attitude toward the use of force for human protection purposes”.⁴⁷⁴

The case of Libya, has proved, thus, that in certain situations and for certain actors, the principles will effectively converge, and including R2P language might add the normative justification for POC demands in the operational paragraphs of the UN mandates.⁴⁷⁵ With its initial determination of the existence of a direct link between mass assaults against civilians and international peace and security, and with abundant evidence of violations of the laws of war by Gaddafi, the SC’s Resolution 1973 was grounded in and concordant with its POC agenda. With Gaddafi’s regime having perpetrated crimes against humanity and planning more attacks on its own people, its claims to sovereignty and non-interference were abrogated, and the SC’s intervention was based on and consistent with the R2P obligations laid down in the WSOD.

3.4.2. Controversies and Fears Surrounding the Application of R2P and POC in Libyan Intervention

The ambiguous nature of the resolution on Libya - R2P in substance and POC in nature as it may be discerned - has caused considerable confusion among scholars. R2P and POC are separate principles and need to be treated differently regardless their close normative and operational links. There was a view expressed that equating POC and R2P may create resistance from member states to the promotion of POC in the peacekeeping context.⁴⁷⁶ The DPKO and other advocates of POC in PKOs raised concerns that R2P/POC connection can be problematic because R2P is seen by certain states to be a “Trojan horse” for intervention.⁴⁷⁷ PKOs are based on the fundamental principles of consent and impartiality, and risks might arise when countries start suspecting that there is an R2P agenda in the POC work of a UN agency.⁴⁷⁸

⁴⁷⁴ Bellamy, A., "Libya and the Responsibility to Protect: The Exception and the Norm", in *Ethics & International Affairs*, vol. 25, p. 263, 2011.

⁴⁷⁵ Thakur, R., "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism", in *Security Challenges*, vol. 7, p. 21, 2011.

⁴⁷⁶ Francis, A.; Popovski, V., The Responsibility to Protect and the Protection of Civilians: A View from the United Nations, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 88, 2012.

⁴⁷⁷ Bellamy, A., “Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq”, in *Ethics & International Affairs*, vol. 19, pp. 31-54, 2005.

⁴⁷⁸ Francis, A.; Popovski, V., The Responsibility to Protect and the Protection of Civilians: A View from the United Nations, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 88, 2012.

Additionally many POC champions fear the R2P agenda politicizing POC⁴⁷⁹ and are nervous to be cross-contaminated by the former because they incline to focus on the soft side of the POC doctrine, such as programmes to train peacekeepers and promote capacity-building, rather than the robust military action.⁴⁸⁰ One might remember the original ICISS report that implicitly indicated some doubts about relying on the SC to act as the “proper authority” for military action triggered by R2P, due to its frequent susceptibility to politicization and outlined procedures that would allow action to occur should the SC be paralyzed.⁴⁸¹ Similar attitudes were expressed by some states during the GA debate on S-G Ban Ki-moon’s report of 2009 on R2P when they maintained that the work of a body in which powerful states have vetoes will be subject to inconsistency and result in politically or economically implicated action.⁴⁸²

Given to the lack of the consensus on this issue, the SC Resolution 1973 borrowed the language of civilian protection, with the added caveat that NATO was free to employ “all necessary means” to achieve this objective. The dissonance between the principles of POC and NATO’s interpretation of “all necessary means” lead to “severe criticism, backlash and political posturing of the Libyan campaign.”⁴⁸³ What is more, some POC proponents fear that hard won consensus over peacekeeping’s protection-focused principles and mandates have been damaged by Libyan experience.⁴⁸⁴ Thus, there is a common view among UN agencies and NGOs that a careful and cautious approach should be taken not to simplify and equate R2P with POC so as not to undermine the work of UN agencies on the ground.⁴⁸⁵ Likewise, R2P proponents thought POC and R2P should not be conflated, since there was a tendency to consider POC as specific to peacekeeping mandates (except for *combatant POC*), whereas the tools for implementing R2P were viewed as applicable in much broader context, including where peacekeepers are not in

⁴⁷⁹ Welsh, J., "Implementing the Responsibility to Protect", Policy Brief, No. 1, pp. 1-9 , 2009.; See also Welsh, J., "Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP", in *Ethics & International Affairs*, vol. 25, p. 258, 2011.

⁴⁸⁰ Thakur, R., "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism", in *Security Challenges*, vol. 7, p. 21, 2011.

⁴⁸¹ *Responsibility to Protect*, ICISS, p. xiii, 2001.

⁴⁸² See the comments of different states during the Thematic Debate on the "Report of the Secretary-General on Implementing the Responsibility to Protect", A/63/677, 23 July 2009.

⁴⁸³ Gerber, Rachel, Peacekeeping and the Responsibility to Protect, in *The Interdependent*, 29 May 2012, available at <http://www.stanleyfoundation.org/resources.cfm?id=485> (last visited 2 October 2013).

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Francis, A.; Popovski, V., The Responsibility to Protect and the Protection of Civilians: A View from the United Nations, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 89, 2012.

place.⁴⁸⁶

There is still no clear-cut answer whether the international military action in Libya will promote consolidation or abuse of the “sister” norms. As the historical experience shows, there were inconsistencies in the response to political uprisings in Bahrain and Saudi Arabia where vital Western geopolitical and oil interests are directly involved, and with the failure to react with equally forceful military means in Yemen and Syria. Moreover, the lack of decisive action to defend the rights of Palestinians under Israeli occupation have been particularly damaging to the claims of the international community to promote human rights and counter humanitarian atrocities universally instead of selectively.⁴⁸⁷ On the other hand, had the world stood idly by in the face of the human rights crisis in Libya, the latter could have been the graveyard of the new R2P norm.⁴⁸⁸

Nonetheless, the biggest controversy surrounds the implementation of Resolution 1973 by NATO forces and the swiftness with which military targets seemed to steer towards enabling regime change.⁴⁸⁹ Critics contend that while protection is a legitimate activity it must not be equivalent to overthrowing a government.⁴⁹⁰ NATO air strikes to halt the attacks of Gaddafi’s forces on civilians in Benghazi, Misrata and elsewhere were more or less justifiable under “all necessary measures” in Resolution 1973 (albeit some critics pinpoint to the mandate “overstretch” and argue that the likely Benghazi death toll, with no international intervention, would have been much less than claimed, and the negotiations could have succeeded given more time).⁴⁹¹ However, as the civil war transformed into the battle between Gaddafi’s army and the rebel forces (Interim Transitional National Council), other forms of military intervention became clearly less concordant with the UN mandate. For example, despite arms embargo imposed by Resolutions 1970 and 1973, some countries supplied sizeable quantities of weapons to the rebels; provided battlefield leadership advice during final military operations on Tripoli and Sirte; assisted in training the rebel insurgents;

⁴⁸⁶ *Ibid.*

⁴⁸⁷ Thakur, R., "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism", in *Security Challenges*, vol. 7, p. 20, 2011.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians, Overview Document, p. 11; Gerber, R.; Porter, K., "Policy Memo: R2P: The Next Decade", p. 2, 2012.

⁴⁹⁰ Bellamy, A.; Williams, P., "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, p. 846, 2001. For more clues of what is meant by regime change, see Francis, A.; Popovski, V.; Sampford, C., *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 28-32, 2012.

⁴⁹¹ See Roberts, H., "Who said Gaddafi had to go?", in *London Review of Books*, pp. 8-18, 17 November 2011; Evans, G., "Responding to Atrocities: The New Geopolitics of Intervention", in *SIPRI Yearbook*, p. 26 2012.

and even contributed troops to fight against Gaddafi's forces.⁴⁹²

As a result, some SC members claimed that civilian protection might be used as a facade for other agendas.⁴⁹³ For instance, Brazil expressed its concerns in its Concept Note on *Responsibility while Protecting*, insisting that the concept of R2P might be abused for aims other than protecting civilians such as regime change.⁴⁹⁴ Similarly, it was argued that "excessively broad interpretation of the protection of civilians [...] could [...] create the perception that is being used as a smokescreen for intervention or regime change".⁴⁹⁵ The claim of Marcel Boisard, former Assistant of the S-G of the UN, was even more dramatic:

Nothing has been respected. No real negotiations towards a ceasefire have taken place. The exclusive control of the air was used to support the insurgents. Protection of civilians was the pretext to justify any operation [...] It was no longer a question of protection, but of regime change [...] The principle of 'responsibility to protect' died in Libya, just as 'humanitarian intervention' died in Somalia in 1992.⁴⁹⁶

To be sure, SC endorsement of Resolution 1973 was critical to the legality of the intervention, but the actions of the coalition forces appeared to take the intervention beyond resolution's prescriptions and, therefore, beyond what the UN Charter could be interpreted to allow.⁴⁹⁷ Even the fiercest international protagonists of R2P and POC have acknowledged the mandate being stretched to breaking point and maybe beyond it.⁴⁹⁸ Moreover, the nature of the military campaign raised the question whether it could have been taken a different form and still be equally effective. If so, then a more targeted and limited form of military action should have been preferred.⁴⁹⁹ Taken together, in referring to R2P criteria developed by the ICISS, "to be justified as an extraordinary measure of intervention in the case of Libya, 'Proper Authority' had been preserved but 'Proportional Means'

⁴⁹² Adams, S., "Libya and Responsibility to Protect", GCR2P, Occasional Paper Series No. 3, p. 12, October 2012.

⁴⁹³ See Bellamy, A.; Williams, P. "The New Politics of Protection? Cote d'Ivoire, Libya and the Responsibility to Protect", in *International Affairs*, vol. 87, p. 847, 2001.

⁴⁹⁴ *Responsibility while Protecting: Elements for the Development and Promotion of a Concept*, Concept Note, Brazil, A/66/551-S/2011/701, 11 November 2011.

⁴⁹⁵ Protection of Civilians in Armed Conflict, Security Council Report, S/PV.6531, p. 11, 10 May 2011.

⁴⁹⁶ Boisard, M., "La responsabilité de protéger, un principe jetable et à usage unique", in *Le Temps*, 28 October 2011.

⁴⁹⁷ Zifcak, S., "The Responsibility to Protect after Libya and Syria", in *Melbourne Journal of International Law*, Vol. 13, p. 12, 2012.

⁴⁹⁸ Evans, G., "Interview: The R2P Balance Sheet after Libya", in *The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention*, e-International Relations, pp. 34-41, November, 2011.

⁴⁹⁹ Zifcak, S., "The Responsibility to Protect after Libya and Syria", in *Melbourne Journal of International Law*, Vol. 13, p. 12, 2012.

was exceeded during the action and ‘Right Intention’ was abused.”⁵⁰⁰

On the other hand, it is possible to maintain that the success of the local rebel forces in Libya was a keystone in protecting civilians in civilian areas like the city of Benghazi, and NATO had no choice but to act as air support for the rebels.⁵⁰¹ For instance, this view is supported by Thakur who argues that the initial motivation behind intervention must not be defeating an enemy state, but “if defeat of a non-compliant state or regime is the only way to achieve the human protection goals, then so be it.”⁵⁰² In his opinion, the conflict in Libya was a case when the West’s strategic interests coincided with UN values and this does not mean that the latter is subordinated to the former.⁵⁰³

At present, there is no consensus as to how to solve this dilemma. There seems to be little, if any, criteria to distinguish between putting an end to the massacre of innocent civilians, which is what R2P and POC are for, and offensive support of rebel forces, which R2P and POC are not intended to do.⁵⁰⁴ As Martha Findlay aptly interrogated, “Where does one draw the line between foreign ‘occupation’ and foreign provision of funding, supplies, intelligence and weaponry to people, now no longer ‘innocent civilians’, using force to overthrow a sitting government?”⁵⁰⁵ In fact, any military intervention aimed to protect civilians against state or state-sponsored actors will have substantial consequences for the viability of the incumbent regime.⁵⁰⁶ In that case, one has no alternative but to accept that conditions on the ground may, in the end, trump all other considerations.⁵⁰⁷ As senior UN official succinctly summarised “Libya didn’t kill R2P [and POC]. But it raised a host of new and complex political and policy questions. We have a lot of work to do.”⁵⁰⁸ For now, therefore, there is a need to adequately limit the actions and military objectives of

⁵⁰⁰ Tarnogorski, R., "Libya and Syria: Responsibility to Protect at Crossroads", PISM Strategic File, No. 26, p. 4, November 2012.

⁵⁰¹ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians, Overview Document, p. 11.

⁵⁰² Thakur, R., "In Defence of the Responsibility to Protect", in *International Journal of Human Rights*, vol. 7, p. 163, 2003.

⁵⁰³ See Thakur, R., "Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism", in *Security Challenges*, vol. 7, p. 23, 2011.

⁵⁰⁴ Findlay, M., "Can R2P Survive Libya and Syria?", Canadian International Council, Strategic Studies Working Group Papers, p. 6, 2011.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ Breakey, H., The Responsibility to Protect: Game Change and Regime Change, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 29, 2012.

⁵⁰⁷ Gwertzman, B., "Will Syria Follow Libya?", Council on Foreign Relations, 1 September 2011, available at <http://www.cfr.org/syria/syria-follow-libya/p25745> (last visited 3 October 2013).

⁵⁰⁸ Interview with senior UN official, New York, November 2011. See also Welsh, J., "Civilian Protection in Libya: Putting Coercion and Controversy Back into R2P", in *Ethics & International Affairs*, Vol. 25, pp. 255-261, 2011.

intervening forces without inhibiting their capacity to provide genuine and timely protection to civilians at risk.⁵⁰⁹ Moreover, members of the SC and the international community more generally need to be realistic about the military intervention having implications for incumbent regimes but at the same time be sensitive to the ways this intervention can be operationally separated from the deliberate pursuit of regime change.⁵¹⁰

3.4.3. R2P and POC after Libya: Syrian Experience and the Way Forward

I watched a little baby die today. Absolutely horrific [...] No one here can understand how the international community can let this happen [...] There are just shells, rockets and tank fire pouring into civilian areas of this city, and it is just unrelenting.⁵¹¹

Many quarters of the international community⁵¹² share the view that the SC Resolutions 1970 and 1973 represent a triumph of R2P and POC, because for the first time since the R2P concept emerged 12 years ago, the fullest and deepest scope of its implementation was utilized.⁵¹³ Pillar one responsibility of the host state was referred to in Resolution 1970, and when the national government manifestly failed to protect its civilian population from massacres, the complementary responsibility shifted to the international community that engaged in the full range of pillar three measures: negotiations, diplomatic pressure, sanctions and, when all these efforts failed, the authorization for the use of military force by the SC. Despite all the controversies surrounding the joint application of R2P and POC, the failure to act on the part of the SC could damage considerably the status of both protection norms.

While in the context of Libya, the rapid reaction by the SC, exercising its power under Chapter VII to impose sanctions and “all necessary measures”, demonstrated the fullest opportunity and the triumph of R2P and POC, the slow and indecisive response to similarly grave violence, abuses and excessive use of lethal force by governmental agencies against civilian protesters in Syria illustrated

⁵⁰⁹ Enhancing Protection Capacity: Policy Guide to the Responsibility to Protect and the Protection of Civilians, Overview Document, p. 11.

⁵¹⁰ Breakey, H., The Responsibility to Protect: Game Change and Regime Change, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 11, 2012.

⁵¹¹ BBC News, ‘Journalist Marie Colvin in Homs: “I Saw a Baby Die Today”’, *Mid-East*, 21 February 2012, available at <http://www.bbc.co.uk/news/world-middle-east-17120484>> (last visited 3 October 2013).

⁵¹² See Evans, G., "Ending Mass Atrocity Crimes: The R2P Balance Sheet After Libya", the Second Renate Kamener Oration, Leo Back Centre, 31 July 2011; Bellamy, A.; Weiss, T.; Welsh, J., "Libya, RtoP, and Humanitarian Intervention", in *Ethics & International Affairs*, vol. 25, pp. 279-285, 2011.

⁵¹³ Popovski, V., "The Concepts of Responsibility to Protect and Protection of Civilians: 'Sisters, but not Twins'", in

the limits of the “sister” concepts⁵¹⁴ and may well “turn into a step back and diminish previous efforts, achievements and consensus.”⁵¹⁵

The violence being committed against Syrian population by their government is as horrific as, if not worse than, Gaddafi’s actions before the adoption of Resolution 1973. Over the crisis in Syria, more than 100,000 civilians have been killed since the beginning of the conflict on 15 March 2011. The current situation in Syria has reached the level of non-international armed conflict and the acts of violence against civilians should be treated as war crimes and crimes against humanity.⁵¹⁶ The natural conclusion is that it is a real test of R2P⁵¹⁷ and POC, and because at this stage of the conflict it is too late for preventive measures, the responsibility of the SC to take timely and decisive collective action is an integral part of the doctrine of R2P.⁵¹⁸

Despite on-going mass atrocity crimes, the SC’s initial recourse to R2P to protect civilians was paralyzed by the vetoes of Russia and China that feared any action being interpreted as a tool for regime change.⁵¹⁹ Neither sanctions nor military intervention could be agreed upon. It is against this background, that Popovski argues that R2P fiasco in Syria became “the collateral” victim of the proper exercise of R2P in Libya. What really happened was that Russia and China manipulated the Libyan situation, assimilating R2P and POC with regime change and threatened to use their veto continuously in the SC to keep the Bashar al-Assad’s regime in power.⁵²⁰ This double veto was an explicit challenge to the two concepts and brought the issue of selectivity into the centre of the political debate.⁵²¹ In this respect, Barnett argued that

All international norms are selectively applied, especially norms that include the use of force. If selectivity and inconsistent use doomed international norms, then there would probably be no international norms to speak of. The real measure of R2P’s success is

Security Challenges, vol. 7, p. 10, 2011.

⁵¹⁴ *Ibid.*

⁵¹⁵ Francis, A.; Popovski, V., *The Responsibility to Protect and the Protection of Civilians: A View from the United Nations*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 95-96, 2012.

⁵¹⁶ See *Protection of Civilians in Armed Conflict: Security Council Report's fifth Cross-Cutting Report*, pp. 16-17, 31 May 2012.

⁵¹⁷ Tarnogorski, R., "Libya and Syria: Responsibility to Protect at Crossroads", PISM Strategic File, No. 26, p. 4, November 2012.

⁵¹⁸ *Ibid.*, p. 5.

⁵¹⁹ *Protection of Civilians in Armed Conflict: Security Council Report's fifth Cross-Cutting Report*, p. 16, 31 May 2012. See also Zifcak, S., "The Responsibility to Protect after Libya and Syria", in *Melbourne Journal of International Law*, Vol. 13, pp. 19-20, 2012.

⁵²⁰ Popovski, V., *Interaction of the Norms of Protection*, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 275, 2012.

⁵²¹ Adams, S., "Libya and Responsibility to Protect", GCR2P, Occasional Paper Series No. 3, p. 16, October 2012.

whether it helps those marked for death.⁵²²

The biggest challenge relating to R2P and POC is the political one: finding the will to translate clear understanding of need, and available institutional capacity, into effective action.⁵²³ If the international community, represented through the UN and regional organizations, do not act with the same determination as they did in Libya, the danger of selectivity and case by case assessment in application of R2P and POC will continue to shadow international law. As Simon Adams rightly noted, “while tanks, troops and even warships have been unleashed against ordinary Syrians, the Security Council has so far failed in its responsibility to protect civilians. Syria has become a stain upon the conscience of the world.”⁵²⁴

In spite of all the criticism, there are some positive trends. Resolution 1973 and its implementation is a landmark experience of timely and decisive response aimed to protect the most vulnerable particularly when it comes to its deterrence effect towards other states with the weak human rights record. States that are violently attacking their populations now know that a reaction up to and including the use of non-consensual force against them is possible, even if not always probable. While it is not certain that Resolution 1973 paved the way for a new tendency towards greater use of force, especially given to the negative impact of Syrian crisis, it is still logical to assume that some state actors will explore the concept of prevention and other constitutive elements of R2P as well as actions of a coercive but non-violent type.⁵²⁵

There are two basic directions in which the discussion on military intervention for humanitarian purposes could now go. The first is mapped by David Rieff, who suggests that rather than trying to find a consensus on the new concept of R2P with its complicated multi-layered approach, “we could have simply stayed with the concept of just war”.⁵²⁶ Since he does not elaborate further, it is possible to presume that he referred to unilateral interventions without the SC authorization and relying on moral legitimacy rather than legality, as occurred in Kosovo in 1999. The second option

⁵²² Barnett, M., “The Responsibility to Protect: An International Norm Comes of Age,” *Carnegie Reporter*, Vol. 6, no. 3, 2011, available at <http://carnegie.org/publications/carnegie-reporter/single/view/article/item/287/> (last visited 3 October 2013).

⁵²³ Evans, G., “Responding to Atrocities: The New Geopolitics of Intervention”, in *SIPRI Yearbook*, p. 23, 2012.

⁵²⁴ GCR2P Media Release, “Syria at Crossroads: UN General Assembly Must Uphold their Responsibility to Protect”, 21 November 2011.

⁵²⁵ Pommier, B., “The Use of Force to Protect Civilians and Humanitarian Action: The Case of Libya and Beyond”, in *International Review of the Red Cross*, vol. 93, p. 1082, 2011.

⁵²⁶ Rieff, D., “Saints go marching in”, *National Interest*, July/August 2011, pp. 6-15.

would be not to abandon the R2P and POC concepts but to work at refining and further developing these norms of protection in the way that they are capable of producing consensus even in the most complicated situations.⁵²⁷ The latter alternative is more apt since it is based on a set of principles that allow for a stronger regulation of the use of force than is ever possible with humanitarian intervention. Perhaps, it would be even more reasonable (especially in light of the failure to protect the Syrian people) to stop viewing the concept of humanitarian intervention as contradictory in relation to other norms of protection but rather as a supplementary norm that can be used as a last resort in cases where conscience shocking mass atrocities are being committed and the SC is paralyzed by the vetoes of the P-5, driven by political considerations. Such a unilateral use of armed force should not be seen in this case as damaging the hardly-won consensus on R2P and POC but as reinforcing it by strengthening the same protection concern.

In concluding, R2P and POC would have a huge positive impact on the interpretation of the UN Charter and could even serve as a catalyst for advancing UN reform. But they must be treated carefully. The unfortunate case of Syria should not tip the balance against the protection capacity of the two principles but serve as a motive for further research in the field.

4. Interaction of the Norms of Protection

One of the most intriguing developments of the last decade in the field of international law has been the complex interaction between R2P and POC. Despite all the controversies surrounding R2P and subsequent fears among various states and actors in the POC field that linking R2P to the POC agenda may undermine consensus on civilian protection measures,⁵²⁸ there is a potential for R2P and POC to operate as mutually reinforcing principles and thereby to enhance the overall protection of civilians from violence. For instance, R2P has provided a powerful language to shape expectations about the role of the international community in cases when a state is unable or unwilling to protect its citizens. Furthermore, it has added a sense of urgency to what the UN should do in situations where threats to civilians achieve the level of atrocities.⁵²⁹ POC, in turn, had an impact on R2P by, arguably, lowering its threshold for what is to be defined as a mass atrocity

⁵²⁷ Evans, G., "Responding to Atrocities: The New Geopolitics of Intervention", in *SIPRI Yearbook*, p. 29, 2012.

⁵²⁸ Welsh, J., "Implementing the 'Responsibility to Protect': Where Expectations Meet Reality", in *Ethics and International Affairs*, vol. 24, pp. 415-430, 2007.

⁵²⁹ Megret, Frederic, "From Peacekeeping to R2P: The Protection of Civilians as the UN's New Raison d'être?", 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154968 (last visited 2 October 2013).

crime.⁵³⁰ This chapter scrutinizes the relationship between the distinct concepts of POC and the pillars of R2P in an attempt to consider whether and to what extent the former may reinforce the latter and *vice versa*.

4.1. Peacekeeping POC and R2P

One of the key debates in peacekeeping is whether there is a duty of peacekeepers to use force to protect civilians from genocide, war crimes, ethnic cleansing and crimes against humanity. Peacekeepers have long been involved in operations with the mandate to improve the security of civilians and promote human rights.⁵³¹ Yet, the idea that peacekeepers should intervene to protect civilians from imminent threat of physical violence arose in the aftermath of mass calamities in Rwanda and Srebrenica, which the international community failed to avert despite the presence of UN peacekeepers in the field. These disasters raised concerns about the utility of “peacekeeping” as a model for addressing conflict and crisis⁵³² as well as brought up the idea of the collective “responsibility to protect”. In response to such events, the 2000 Brahimi Report suggested that peacekeepers “who witness violence against civilians should be presumed to be authorized to stop it, within their means”.⁵³³ Such an interpretation is well concordant with the human rights provisions of the UN Charter that states that “all Members pledge themselves to take joint and separate action in cooperation with the Organization for achievement” of “universal respect for, and observance of, human rights and fundamental freedoms for all”.⁵³⁴ Moreover, the same commitment is envisaged in the key R2P document, the 2005 WSOD, that notes that “we are prepared to take collective action [...] should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.⁵³⁵

As a result of these developments, the practice of UN peacekeeping is developing not only into robust peacekeeping but also peace enforcement with a positive responsibility to protect civilians

⁵³⁰ *Ibid.*

⁵³¹ Månsson, K., "The Forgotten Agenda: Human Rights Protection and Promotion in Cold War Peacekeeping", in *Journal of Conflict and Security Law*, Vol. 10, pp. 379-403, 2005.

⁵³² Bellamy, A.; Williams, P.; Griffin S., *Understanding Peacekeeping*, p. 93, 2004.

⁵³³ Brahimi, Lakhdar, Report of the Panel on UN Peace Operations, A/44/305-S/2000/809, p. 11, 21 August 2000; Van Baarda T.; Van I., "The Uneasy Relationship between Conscience and Military Law: The Brahimi Report's Unresolved Dilemma", in *International Peacekeeping*, vol. 9, pp. 25-50, 2002.

⁵³⁴ Charter of the United Nations, Articles 55-56, 1948.

⁵³⁵ WSOD, para. 139.

within the field of operations⁵³⁶. While the former implies the use of force with the consent of states involved and can be compared to pillar two of R2P, the latter in principle lacks such a consent and is based on a strong Chapter VII mandate addressing serious human rights violations and threats against international peace and security of a certain state.⁵³⁷ It has much in common with pillar three of R2P and finds its normative and legal support in it.

Since the adoption of the WSOD, there were two occasions where R2P was referred to in relation to civilian protection: the SC Resolutions 1674 and 1706.⁵³⁸ The former appealed to the provisions of paragraphs 138 and 139 of the WSOD without any indication as to what this meant for the POC mandate given to peacekeepers.⁵³⁹ The latter, which was adopted in relation to Darfur, made an explicit reference to R2P, albeit in general terms in the preamble⁵⁴⁰ and, yet again, did not clarify how the POC mandate for this peacekeeping mission will be related to the international community's R2P.⁵⁴¹

In this regard, a change of the focus of humanitarian intervention from states' rights to their collective responsibilities, suggested by the R2P doctrine, could potentially have a dramatic effect on legal obligations of contributing states and peacekeeping forces. As to the former, contributing states cannot stop at a decision to intervene militarily (if other measures deemed ineffective) but must include a preparedness to make the intervention effective: they are obliged to ensure that the forces they deploy to secure protection have an appropriate mandate, resources and training to enable them to do so.⁵⁴² Against this background, Arbour has argued that R2P taken in conjunction with the Genocide Convention, may entail legal liability for states, especially the P-5, that fail to use their "tools of authority" to stop genocide; even more so when they exercise or threaten the use of a veto that "would block action that is deemed necessary by other members to avert genocide, or

⁵³⁶ Breau, S., "The Impact of the Responsibility to Protect on Peacekeeping", in *Journal of Conflict and Security Law*, vol. 11, p. 429, 2007.

⁵³⁷ Fleck, D., *The Handbook of International Humanitarian Law*, p. 639, 2008.

⁵³⁸ Nasu, H., Peacekeeping, Civilian Protection and the Responsibility to Protect, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 120, 2012.

⁵³⁹ Security Council Verbatim Records, 5430th meeting, 28 April 2006, S/PV.5430.

⁵⁴⁰ UNSC Res. 1706: *Reports of the Secretary-General on the Sudan*, S/RES/1706, pream. para. 2, 31 August 2006.

⁵⁴¹ Nasu, H., Peacekeeping, Civilian Protection and the Responsibility to Protect, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 121, 2012.

⁵⁴² Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, p. 252, 2009.

crimes against humanity”.⁵⁴³

Turning to obligations of peacekeeping forces, R2P has transformed POC from a desirable goal for peace into a more clearly defined legal/moral obligation in the sense that peacekeepers are no more allowed to stand idly by when grave human rights crimes are committed.⁵⁴⁴ Both IHL and IHRL require peacekeepers to protect from direct attack people that are in their immediate care within their capacity and to take measures to prevent attacks where these are clearly foreseeable.⁵⁴⁵ However, the extent of troops’ obligations to provide protection to the local population outside of their own areas of direct control is not that clear. IHRL does not always extend to these situations because there is generally insufficient basis to hold that the contributing State has jurisdiction (absent criterion of the effective control of territory).⁵⁴⁶ Furthermore, the ECtHR has stated in a number of cases that military operations that are authorized by the SC under Chapter VII are immune from its scrutiny.⁵⁴⁷ The R2P doctrine, therefore, could shape the scope of obligations of peacekeepers in relation to the four atrocity crimes in the sense that troops witnessing crimes against humanity, or being aware of such crimes and being in sufficiently close proximity to be able to respond, and having the capacity to do so, would be bound to react to such crimes, including by the use of armed force. The failure to do so would be equivalent to complicity and amount to war crimes or crimes against humanity subject to the adjudication of the ICC.

Importantly, as early as the 1960s, the then-S-G Dag Hammarskjöld argued that the principle that the use of force must be restricted to self-defence could not justify standing by in the face of serious atrocity crimes committed against civilian populations. In such circumstances “emphasis should be placed [...] on the protection of the lives of the civilian population in the spirit of the Universal Declaration of Human Rights and the Genocide Convention”.⁵⁴⁸ Neither of these instruments creates obligations directly binding on individual soldiers but, taken in conjunction with the R2P

⁵⁴³ Arbour, L., “The Responsibility to Protect as a Duty of Care in International Law and Practice”, in *Review of International Studies*, Vol. 34, p. 450, 2008.

⁵⁴⁴ Megret, Frederic, "From Peacekeeping to R2P: The Protection of Civilians as the UN's New Raison d'être?", 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2154968 (last visited 2 October 2013).

⁵⁴⁵ Common Article 1 of the Geneva Conventions requires the High Contracting Parties to “ensure” respect for the Conventions. Similarly, the effective control jurisdictional test applicable to human rights treaties may encompass protection of persons in the care of the State party, to the extent that this is feasible.

⁵⁴⁶ Wills, S., *Protecting Civilians: The Obligations of Peacekeepers*, p. 268, 2009.

⁵⁴⁷ *Behrami v. France and Saramati v. France, Germany and Norway*, Appl. Nos. 714112/01 and 78166/01, 2 May 2007; *Dusan Beric and Others v. Bosnia and Herzegovina*, Appl. Nos. 36357/04, 36360/04 and 38346/04; *Slavisa Gajic v. Germany*, Appl. No. 31446/02, 28 August 2007.

⁵⁴⁸ Annual Report of the UNSG on the Work of the Organization, June 16 1960-June 16 1961, 16th Session, p. 11.

norm, they do contribute to a moral and legal responsibility on the TCN and the UN to authorize their forces to stop such crimes if they are in the area and have the power to do so. Arbour has also argued that the R2P norm may create responsibilities for states that are in position to act.⁵⁴⁹ Additionally, as noted earlier in the paper, the ICJ in its *Bosnia v. Serbia* ruling invoked the responsibility of due diligence: a State has to take all measures reasonably available to it to prevent genocide and other atrocity crimes that constitute breaches of *jus cogens* norms. The scope of such reasonable measures might well include the responsibility to ensure that the peacekeeping troops are adequately mandated, trained and resourced to respond to the gross human rights violations.

Similarly, the Report by the S-G's High Level Panel on Threats, Challenges and Change, charged with the review of the whole range of collective security mechanisms, noted that it is now widely accepted that the self-defence norm is sufficiently broad to encompass use of force in the face of genocide and crimes against humanity.⁵⁵⁰ The Panel also supported the criteria for military intervention in the "responsibility to react" phase, including the just cause threshold, four precautionary principles and right authority, proposed by the ICISS. It argued in its report that the Chapter VII mandate should be given as "even the most benign environment can turn sour" and that there must be complete certainty that a mission can respond with force if necessary.⁵⁵¹ Although the 2005 WSOD made no mention of the criteria for the use of force, which, according to White, could resolve the long-standing debate about whether human rights violations were threats to the peace and security mandating a Chapter VII response,⁵⁵² the detailed recommendations in the earlier reports have already begun to have an impact on the practice of the UN.⁵⁵³

Just as R2P can enhance the *peacekeeping POC* agenda, the latter provides a legitimate and ready-made vehicle for implementing R2P.⁵⁵⁴ In fact, one may view peace operations with a POC mandate as reinforcing all three pillars of the R2P framework, though in varying degrees depending on the form and objectives of mission. At a strategic level, all UN peace operations are approached

⁵⁴⁹ Arbour, L., "The Responsibility to Protect as a Duty of Care in International Law and Practice", in the *Review of International Studies*, Vol. 34, p. 450, 2008.

⁵⁵⁰ *A More Secured World: Our Shared Responsibility*: report of the UNSG High-Level Panel on Threats, Challenges and Change, p. 68, 2 December 2004.

⁵⁵¹ *Ibid.*

⁵⁵² White, N., *Keeping the Peace*, pp. 44-45, 1990.

⁵⁵³ Wellemse, K., "The UN Security Council and New Threats to the Peace: Back to the Future", in *Journal of Conflict and Security Law*, vol. 8, p. 15, 2003. This article provides for an excellent overview of changes in the SC practice and the broadened notion of the threat to peace.

⁵⁵⁴ Hunt, C., "Mainstreaming the Responsibility to Protect in Peace Operations", Asia-Pacific Centre for the Responsibility to protect, BISA Annual Conference, 16 December 2009, p. 2.

as “pillar two” tool to help states under stress to protect their populations through direct security provision and local capacity building. In rare cases, peace operations such as the UN Interim Administration Mission in Kosovo undertake “pillar one” responsibility in the territory they administer. More frequently, POC-mandated PKOs operate under “pillar three” to secure protection when local governments prove unable and unwilling to do so.⁵⁵⁵

Thus, when a PKO is already deployed with a POC mandate, the international community’s responsibility to prevent can be operationalized with a greater clarity. Importantly, granting consent for the mission can be understood as evidence of a state exercising its pillar one responsibility.⁵⁵⁶ Moreover, by participating in PKOs, states can demonstrate that they meet their pillar two responsibilities.⁵⁵⁷ Under the POC mandate, peacekeepers will be able to collect intelligence, advance confidence-building between parties to the conflict and among civilians and signal early warnings in cases of renewed tensions and vulnerability to mass atrocity crimes.⁵⁵⁸

Additionally, acting under Chapter VII of the Charter, peacekeeping forces are also authorized to use military force to protect civilians before violence escalates into a full-blown mass atrocity (robust peacekeeping).⁵⁵⁹ In this respect, the S-G claimed in his report that “pillar two could also encompass military assistance to help beleaguered States deal with armed non-state actors threatening both the State and its population”.⁵⁶⁰ Such military assistance involves PKOs based on the host government’s consent, which can inevitably limit the operationalization of R2P when national authorities are manifestly failing to protect their people and especially when they are committing violence against civilian population themselves. However, considering the impact of the R2P doctrine on peacekeeping, peacekeepers may well find it justifiable to depart from the traditional notion of impartiality, when the host government is manifestly failing to discharge its

⁵⁵⁵ Gerber, Rachel, Peacekeeping and the Responsibility to Protect, in *The Interdependent*, 29 May 2012, available at <http://www.stanleyfoundation.org/resources.cfm?id=485> (last visited 2 October 2013).

⁵⁵⁶ Hunt, C., "Mainstreaming the Responsibility to Protect in Peace Operations", Asia-Pacific Centre for the Responsibility to protect, BISA Annual Conference, 16 December 2009, p. 9.

⁵⁵⁷ For more details on the forms of pillar two assistance, see *Implementing the Responsibility to Protect*, UNSG, A/63/677, pp. 9-15, 12 January 2009.

⁵⁵⁸ Holt, V.; Taylor, G.; Kelly, M., *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, pp. 8-10, 2009.

⁵⁵⁹ Nasu, H., Peacekeeping, Civilian Protection and the Responsibility to Protect, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 125, 2012.

⁵⁶⁰ *Implementing the Responsibility to Protect*, UNSG, A/63/677, para. 29, 12 January 2009.

default responsibility. The consensus reached in the 2005 World Summit may support this view.⁵⁶¹

When the environment is hostile and mass atrocity crimes are taking place, it is too late to exercise preventive measures. Pursuant to the 2001 ICISS report, the responsibility to react includes military and peaceful actions, available to the UN.⁵⁶² Likewise, the 2009 S-G's Report envisages a wide range of non-coercive measures together with more forcible steps constituting pillar three of R2P.⁵⁶³ Importantly, viewing the massive and systematic human rights violations as a threat to international peace and security triggers the application of Article 42 of the UN Charter, which envisages the use of lethal force "as may be necessary to maintain or restore international peace and security" and where the consent of the host state is immaterial. Thus, given the relatively wide scope of the responsibility to react or pillar three of R2P, it is viable to conceptualize the implementation of a POC mandate at this level (peace enforcement).⁵⁶⁴ Considering the limited applicability of R2P (four atrocity crimes), focusing on identifying and responding to the possible outbreak of mass atrocity crimes might provide peacekeepers with a clear standard of action in that they are only expected to resort to force in order to prevent the commission of these crimes. Thus, rather than reacting in every single case with armed force, peacekeepers can reserve their military capacities to mass atrocity crimes while in preventing phase, prior to the escalation of violence to the level of mass atrocities, playing supporting roles in information-gathering, logistical support and precautionary planning to reduce the risk of violence against civilians which may lead to mass atrocity crimes.⁵⁶⁵

To sum up, there is a huge potential for interaction between R2P and *peacekeeping POC*. While R2P crystallises and reinforces the obligation of peacekeepers to react in cases when mass atrocity crimes are committed against civilian population both inside and outside of their areas of direct control as well as the obligation of TCNs to ensure that they are capable to do so, POC, represents a fully operational framework for translating R2P from words to deeds.

⁵⁶¹ Nasu, H., Peacekeeping, Civilian Protection and the Responsibility to Protect, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 125, 2012.

⁵⁶² *The Responsibility to protect*, ICISS, pp. 29-31, 2001.

⁵⁶³ *Implementing the Responsibility to Protect*, UNSG, para. 51, 12 January 2009.

⁵⁶⁴ Nasu, H., Peacekeeping, Civilian Protection and the Responsibility to Protect, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 126, 2012.

⁵⁶⁵ Cottey, A.; Bikin-Kita, T., The Military and Humanitarianism: Emerging Patterns of Intervention and Engagement, in Wheeler, V.; Harmer, A. (eds.), *Resetting the Rules of Engagement: Trends and Issues in Military-Humanitarian Relations*, HPG Research Report 21, pp. 21-38, 2006.

4.2. Combatant POC and R2P

There are a considerable number of commonalities and differences between *combatant POC* and R2P, and understanding links between them may enhance the protection of those at risk. As was mentioned before, *combatant POC* has a strong basis in IHL and particularly in the Geneva Conventions and their Additional Protocols. The same is true for R2P, whose pillar one is firmly anchored in IHL. This chapter charts the similarities and differences between both protection norms with a particular focus on how R2P can be utilized to strengthen *combatant POC* and *vice versa*. The exclusive attention will be given to one category of atrocity crimes, namely, war crimes, since the main point of intersection between *combatant POC* and R2P can be found in this area. To be sure, genocide, ethnic cleansing and crimes against humanity do not necessarily require the threshold of armed conflict to be committed and in this sense would fall outside the purview of IHL.

By exploring states' obligations under IHL it is possible to discern some overlapping areas between the three-pillar conceptual framework of the S-G in his 2009 Report and the legal framework under the Geneva Conventions and Additional Protocols.⁵⁶⁶ Two issues are particularly apt in this respect: capacity to prevent the commission of war crimes (Article 1 of the Geneva Conventions and pillars one and two of R2P); and capacity for collective action to stop the commission of war crimes (Article 89 of the API and pillar three of R2P).⁵⁶⁷

4.2.1. Article 1 of the Geneva Conventions and Pillars One and Two of R2P

Under common Article 1 of the Geneva Conventions “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Undertake in this context is “to give formal promise, to bind or engage oneself, to give a pledge or promise, to agree to accept an obligation”.⁵⁶⁸ This duty is a positive one and the content of this duty could be determined by reference to the ICRC Commentaries on the Geneva Conventions which hold that it would not be enough “for State to give order or directives to the military authorities [...] The State

⁵⁶⁶ Durham, H.; Wynn-Pope, P., The Relationship between International Humanitarian Law and Responsibility to Protect: From Solferino to Srebrenica, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 189, 2012.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Bosnia Herzegovina v. Yugoslavia*, ICJ, para. 162, 11 July 1996.

must supervise their execution.”⁵⁶⁹ Moreover, it is not sufficient for a state to respect the law itself, but it is bound under the Conventions to “ensure” the respect for IHL by other states.⁵⁷⁰

In spite of the view expressed in the ICRC’s Commentaries, there are two approaches in interpretation of Article 1: a restrictive approach, according to which Article 1 only imposes a duty on states to ensure that the Conventions are respected within their jurisdictions and by their organs and private individuals, and extensive one, holding that, except for duty to “ensure respect” for the Geneva Conventions within their own jurisdictions, states are also obliged to “ensure respect” by other contracting parties.⁵⁷¹ While in case of the former, there is a direct parallel with pillar one of R2P, the latter has much in common with both pillar one and two of R2P and is a more widely accepted interpretation of Article 1⁵⁷².

Considering states obligations under the Geneva Conventions to ensure that war crimes are not committed, it is reasonable to interrogate an additional value of R2P in this regard. First, it is logical to assume that R2P, political commitment agreed at the highest level and endorsed by both the GA and the SC, reinforces the credibility of the extensive approach to interpretation of Article 1 as well as finds its legal basis in it. Second, according to Durham and Wynn-Pope, it is paragraph 139 of the WSOD that is the most significant element of R2P with respect to war crimes (though not a hard law) as it allows for the collective coercive measures under authorization of the SC for the prevention of atrocity crimes⁵⁷³ and will be spelled out in the next section.

4.2.2. Article 89 of the API and Pillar Three of R2P

Article 89 of the API is of particular interest in comparison between *combatant POC* and R2P as it allows for collective response by the international community to serious violations of the Geneva Conventions and the two Protocols. It states: “in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in

⁵⁶⁹ Uhler, O.; Coursier, H., *The Geneva Conventions of 12 August 1949: Commentary*, p. 25, 1958.

⁵⁷⁰ Durham, H.; Wynn-Pope, P., The Relationship between International Humanitarian Law and Responsibility to Protect: From Solferino to Srebrenica, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 190, 2012.

⁵⁷¹ Focarelli, C., "Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?", in *European Journal of International Law*, vol. 21, p. 130, 2010.

⁵⁷² Durham, H.; Wynn-Pope, P., The Relationship between International Humanitarian Law and Responsibility to Protect: From Solferino to Srebrenica, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 190, 2012.

⁵⁷³ *Ibid.*

cooperation with the United Nations and in conformity with the United Nations Charter.”

The wording resembles that of Article 56 of the Charter, which deals with cooperation for the universal respect for human rights and fundamental freedoms.⁵⁷⁴ As noted above, “undertake” in international law expresses a firm commitment to fulfil an obligation. While such an undertaking may be of a limited scope (for instance, by capacity or geography, as genocide), it is a strong obligation and should be interpreted as such.⁵⁷⁵ Pursuant to the ICRC Commentaries concerning Article 89, the actions envisaged by this article may include the use of lethal force and can only be undertaken where such situations constitute a threat to international peace and security.⁵⁷⁶

Importantly, such actions are similar to some of R2P’s pillar three activities, where in order to protect people from the most grievous of atrocities, the international community can resort to coercive measures, such as fact-finding missions, diplomatic or other sanctions and where these measures have proved ineffective, undertake the collective use of military force as a last resort and subsequent to the authorization by the SC.⁵⁷⁷ Thus, the overlap between Article 89 and pillar three of R2P is significant. However, while under Article 89 State Parties “undertake to act”, which is a clear obligation under international law, pillar three of R2P envisages that the international community is “prepared to take collective action”, which is rather a political commitment than legal obligation. In this sense, it is reasonable to speculate that *combatant POC* could enhance R2P by adding a legal dimension to the commitment to take a collective action when war crimes are committed, especially considering the fact that R2P draws its authority from existing international law, and with regard to war crimes, from IHL.

Thus, while R2P reinforces expansive interpretation of Article 1 of the Geneva Conventions and draws a significant legal support on it, Article 89 of the API provides a legal underpinning for contentious pillar three of R2P. Moreover, R2P is an extremely useful political and policy tool, based on elements of existing IHL and international criminal law and providing a “rallying call” for

⁵⁷⁴ Pictet, J., *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, Article 89, 1952.

⁵⁷⁵ Durham, H.; Wynn-Pope, P., The Relationship between International Humanitarian Law and Responsibility to Protect: From Solferino to Srebrenica, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 191, 2012.

⁵⁷⁶ *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, p. 1035, 1987.

⁵⁷⁷ Durham, H.; Wynn-Pope, P., The Relationship between International Humanitarian Law and Responsibility to Protect: From Solferino to Srebrenica, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 192, 2012.

a wide array of actions aimed to protect civilians.⁵⁷⁸

4.3. Humanitarian POC and R2P

“Protection” lies at the core of many civil agencies’ activities including humanitarian, political/developmental and human rights organizations⁵⁷⁹ with the ICRC and the UNHCR as the main protection actors.⁵⁸⁰ They do not contribute directly to protection but rather supplement the roles of other POC actors and, thereby, contribute to indirect protection through their targeted protection mandates and tasks and the partnerships they develop with recipient populations.⁵⁸¹ When a state is unable to protect its populations, the complementary responsibility lies with outsiders to assist. Such indirect engagement of humanitarian organizations, covered by pillar two of R2P, refers to activities that contribute to both the immediate and long-term physical and legal protection of civilians and their basic human rights.⁵⁸²

As was mentioned earlier in the paper, *humanitarian POC* is applicable to large-scale violations of human rights occurring in situations of armed conflict, protracted social conflict, post-conflict, famine and natural disasters. The latter is of particular interest for this chapter, which, first, asserts the applicability of the R2P doctrine to natural disasters and, afterwards, traces possible ways of interaction between R2P and protection of civilian populations caught in natural disasters as part of *humanitarian POC*.

4.3.1. R2P and Natural Disasters

On 2 May 2008, the severe natural cataclysm, Cyclone Nargis, struck Myanmar (also called Burma) causing enormous damage and human suffering, including an estimated death toll of 78,000 with an additional 56,000 people missing.⁵⁸³ This humanitarian crisis deteriorated even further when the totalitarian Myanmar regime, ill-equipped to respond to the crisis on its own, notoriously refused to

⁵⁷⁸ *Ibid.* p. 193.

⁵⁷⁹ Hunt, C., "Mainstreaming the Responsibility to Protect in Peace Operations", Asia-Pacific Centre for the Responsibility to protect, BISA Annual Conference, 16 December 2009, p. 13.

⁵⁸⁰ O'Callaghan, S.; Pantuliano, S., Protective Action: Incorporating Civilian Protection into Humanitarian Response, HPG Policy Brief 29, p. 1, December 2007.

⁵⁸¹ Hunt, C., "Mainstreaming the Responsibility to Protect in Peace Operations", Asia-Pacific Centre for the Responsibility to protect, BISA Annual Conference, 16 December 2009, p. 14.

⁵⁸² *Ibid.*, p. 13.

⁵⁸³ Johnson, C., *How Hard Will Neighbours Push Burma (Myanmar)?*, Christian Sci. Monitor, 20 May 2008.

allow a vital foreign aid to reach survivors.⁵⁸⁴ French Foreign Minister Bernard Kouchner raised the question of R2P's implementation by the UN in order to ensure the delivery of assistance notwithstanding the junta's resistance.⁵⁸⁵

The majority of the scholarly community considers R2P inapplicable to natural disasters.⁵⁸⁶ Indeed, the S-G in his 2009 report clearly articulated that "to try to extend [R2P] to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility."⁵⁸⁷ This argument carries an important practical significance: if R2P is about protecting everybody from everything, it will end up protecting nobody from anything.⁵⁸⁸

However, Kouchner's suggestion unleashed a storm of fierce debates. Supporters of the use of R2P in the Myanmar crisis insisted that there is no meaningful distinction between the failure to protect following natural disasters and the failure to protect from mass atrocities. According to "constructive interpretation" of the R2P doctrine, invoked by Wong, R2P applies not just to a government's failure to protect its people from affirmatively perpetrated mass atrocities but also from harm caused by its *omission* to act when that omission constitutes a crime against humanity under international law.⁵⁸⁹ Notably, the current work of the ILC on protection of persons in the event of disasters holds that the affected State has the duty not to arbitrarily withhold its consent to external assistance where its national response capacity is exceeded.⁵⁹⁰ The violation of this duty, given its consequences having impact on a large amount of population, can be considered as a serious breach of international law within the meaning of Article 40 of the ILC's Articles on State Responsibility and trigger the application of its Article 41 calling for the obligation of the

⁵⁸⁴ Wong, J., "Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism", in *Tulane Law Review*, Vol. 84, p. 221, 2009; Ford, S., "Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in The Aftermath of Cyclone Nargis", in *Denver Journal of International Law and Policy*, Vol. 38, pp. 3-5, 2010.

⁵⁸⁵ See Parsons, Claudia, *France Urges UN Council to Act on Myanmar Cyclone*, Reuters, 7 May 2008, available at <http://www.reuters.com/article/2008/05/07/idUSL07810481> (last visited 5 October 2013).

⁵⁸⁶ See, among others, Thakur, R., *To Invoke or Not To Invoke R2P in Burma*, HINDU, 20 May 2008, in 2008 WLNR 9452749; Nanda, Ved. P., "The Protection of Human Rights Under International Law: Will the UN Human Rights Council and the Emerging New Norm 'Responsibility to Protect' Make a Difference?", in *Denver Journal of International Law and Policy*, vol. 35, pp. 353, 356-366, 2007.

⁵⁸⁷ *Implementing the Responsibility to Protect*, UNSG, A/63/677, p. 8, 12 January 2009.

⁵⁸⁸ Evans, G., *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 65, 2008.

⁵⁸⁹ Wong, J., "Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism", in *Tulane Law Review*, Vol. 84, p. 223, 2009.

⁵⁹⁰ ILC's Draft Articles on protection of persons in the event of disasters, Draft Article 10, GA Res. A/66/10, 2011.

international community to cooperate to put an end to such breaches.⁵⁹¹

To determine that R2P is inapplicable simply because a natural disaster was involved would tarnish the doctrine and reduce it to an empty letter.⁵⁹² To the extent that R2P applies, it does so because of the state's deliberate failure to act to protect its people from harm in the wake of natural disaster and not because of deaths immediately caused by this disaster.⁵⁹³ When that failure to act accounts to a crime against humanity (a serious breach in the meaning of Article 40 of the ILC's Articles on State Responsibility), R2P applies squarely to the situation.

The Rome Statute of the ICC defines "crimes against humanity" as "any of the [...] acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" and include murder, extermination, apartheid and "other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".⁵⁹⁴ Following this definition, it is possible to assert that Myanmar's actions, or the lack thereof, meet all the essential requirements: failure of the Myanmar government to help its citizens and interception of the foreign aid could be characterized as mistreatment of the population, and therefore an "attack" in the meaning of Article 7(1) since it is widespread and systematic in that it affects a broad population, against which it is directed, and Myanmar is undoubtedly aware of its (in)action.⁵⁹⁵ Thus, it is reasonable to admit that the Myanmar government's response to Cyclone Nargis constituted a crime against humanity and R2P, therefore, is applicable to this case.

4.3.2. Interaction between R2P and Humanitarian POC in Cases of Natural Disasters

Having asserted the relevance of R2P to natural disasters when governments can be held responsible for failure to shoulder protection to their populations from harm caused by natural disasters when such omission is attributable to crimes against humanity, it is possible to construe a link between R2P and *humanitarian POC* and explore the ways how such an interaction could enhance an overall protection of civilians.

⁵⁹¹ See ILC's Articles on state responsibilities, Articles 40-41, 2001.

⁵⁹² See, *inter alia*, Axworthy, L.; Rock, A., *Responsibility to Protect? Yes*, in *Globe & Mail*, 9 May 2008, at A22 ("What is the moral distinction between closing the door of rescuing people from death by machete and closing the door of life-saving aid?").

⁵⁹³ Wong, J., "Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism", in *Tulane Law Review*, Vol. 84, p. 246, 2009.

⁵⁹⁴ Rome Statute of the International Criminal Court, 17 July 1998, Art. 7(1).

⁵⁹⁵ Wong, J., "Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism", in *Tulane Law Review*, Vol. 84, p. 251, 2009.

Given the vague nature of *humanitarian POC* and the lack of a solid legal basis, it is clear that the concept of R2P could assist in reframing the response of the international community to the gross human rights violations following natural disasters. So far, humanitarians mostly engage in pillar two responsibility including activities such as the deployment of aid workers in order to increase protection through presence; targeting assistance to specific locations or communities so as to reduce tensions and vulnerability; placing conditions on the delivery of assistance in order to encourage compliance with protection standards and other peaceful measures.⁵⁹⁶ Monitoring, reporting, advocacy are increasingly invoked as humanitarian agencies seek to inform, encourage and facilitate protection by other actors in recognition of their lack of capacity to protect directly.⁵⁹⁷ Such activities need consent of the host government and are subject to the principle of impartiality.

Notably, despite all the good these activities are designed to achieve, they become completely irrelevant if the national government does not consent to their deployment, as happened in Myanmar. This gap in protection could be filled by invoking the protection framework of R2P. Significantly, in this context, the R2P principle can only be referred to if state is unable to fulfil its pillar one responsibility and unwilling to accept assistance of the international community when such action/omission is equivalent to the commission of crimes against humanity given their systematic and widespread nature and awareness of the host government that these crimes are taking place. In other words, these are the situations that call for R2P's pillar three implementation where consent of the national authorities is immaterial, and the coercive measures under Chapter VII is the only option left to the international community.

Moreover, there are some important parallels between the case of Myanmar and that of Serbia,⁵⁹⁸ where the ICJ invoked the responsibility of due diligence of Serbia, a state that had not taken all measures that were reasonably available to it to prevent genocide. So too, presumably, might be Myanmar that refused to accept foreign aid to protect the victims of the Cyclone Nargis and, thereby, to prevent crimes against humanity from occurring. Additionally, the ICJ has acknowledged that positive obligations of due diligence are equally relevant to other mass atrocity crimes, which "protect essential humanitarian values, and which may be owed *erga omnes*."⁵⁹⁹

⁵⁹⁶ O'Callaghan, S.; Pantuliano, S., *Protective Action: Incorporating Civilian Protection into Humanitarian Response*, HPG Policy Brief 29, p. 6, December 2007.

⁵⁹⁷ *Ibid.*, p. 7.

⁵⁹⁸ *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ, Judgment of 26 February 2007.

⁵⁹⁹ *Ibid.*, para. 147.

Thus, R2P can strengthen *humanitarian POC* by providing for a wider range of possible measures exercised by the international community to protect civilians up to the use of force in situations where mass atrocity crimes are taking place in the aftermath of natural disasters given the failure of host states to respond appropriately to such disasters. Moreover, it is reasonable to assume that a full range of measures envisaged by R2P can be equally applicable to other *humanitarian POC* situations where the harm caused to civilians reaches the level of mass atrocities.

One may view this argument as extremely progressive and not affirmed by state practice. However, with increased recognition of the impact of crises on civilians, the international community can no longer turn a blind eye when gross human rights violations are occurring whether as a result of armed conflict, post-conflict situation, natural disaster or famine.

It is also worth of mention in this context that the growing importance of non-traditional security concerns in the Asia-Pacific region (tsunamis, floods, deadly earthquakes, pandemics and the like), spurred by the unfolding humanitarian catastrophe in Myanmar and increasing acceptance of R2P as an ethic of responsible sovereignty, enables a favourable environment for an alternative protection doctrine – the so-called “responsibility to provide” (R2Provide) which is guided by three principles: 1) the responsibility of affected countries to provide for humanitarian relief quickly and effectively to their people; 2) where necessary, disaster-hit countries should facilitate the entry of external assistance; 3) any external help should have the consent of the affected countries and fall under their control.⁶⁰⁰ This is a more “soft” version of R2P adjusted to the Asian needs, values and concerns over their territorial integrity and non-interference in domestic affairs. The key emphasis here is on provision rather than protection. This is a significant development, especially considering the general reluctance of Asian countries to fully accept R2P, largely out of concern over the doctrine’s endorsement of the use of military force. Needless to say, the overlap between *humanitarian POC* and the R2Provide is enormous, which creates a huge potential for the mutual reinforcement of the two norms in the Asian region.

5. Conclusion

The increasing rapprochement of R2P and POC is a clear consequence of the universal endorsement of R2P and the growing presence of POC in peacekeeping mandates. These developments gave

impetus to normative, operational and institutional cross-fertilization between both protection agendas with an ultimate goal to leave no gaps in protection of groups or individuals in the face of mass human rights violations. If properly understood, not confused and simplistically associated with military intervention, R2P and POC can ultimately ensure that humanitarian disasters witnessed in the twentieth century will never happen again.

This thesis provided for a detailed overview of the evolution and conceptual frameworks of the two norms of protection as well as their legal underpinnings. R2P was shown to develop rapidly from an “ambitious” idea to the universal political commitment to reframe the global concern over civilian populations facing genocide, war crimes, ethnic cleansing and crimes against humanity. However, despite its immense political value, the legal content of the doctrine remains controversial, which is illustrative in different legal qualities of its pillars. While pillar one of R2P is firmly anchored in IHRL and IHL and is undoubtedly a legal norm, the legal status of pillars two and three is less clear, albeit in light of the recent developments, discussed in the thesis, states are no more allowed to stand by in the face of mass atrocity crimes. POC, in the meantime, emerged as a part of IHL and is a matter of law in its narrow version. However, it increasingly involves more than a mere application of the laws of war and since the 1990s it has become a policy commitment by the SC, troop contributing states, peacekeepers and humanitarian organizations. This broad version of POC is ambiguous and it is still debated whether it imposes any legal obligations, including the use of lethal force, on states and the international community to protect civilians from wide-spread human-inflicted violence.

This thesis also illustrated how many similarities R2P and POC share in terms of their origin, evolution, scope of applicability, structural framework, legal basis and actors involved and, yet, how different these two principles are. Concerning commonalities, the two doctrines share the same fundamental concern – to protect the most basic rights of physical security from large-scale violence; impose a range of negative and positive obligations on states and non-state actors towards civilian populations; contain similar structural components – the four perspectives of POC and the three pillars of R2P – where less robust versions of the norm have the largest application, with more interventionists measures being narrower and limited to certain circumstances; engage various actors charged with specific functions to ensure a continuum of response; share similar legal

⁶⁰⁰ IISS Report of the Shangri-La Dialogue: The 7th IISS Asia Security Summit, Singapore, 30 May-1 June, London: IISS, 2008.

frameworks; and both (R2P and *broad POC*) emerged in response to the failure of the international community to respond appropriately to the humanitarian scourges of the 1990s.

As to the distinctions discussed in the thesis, the R2P regime is only applicable to the four atrocity crimes, namely, genocide, war crimes, ethnic cleansing and crimes against humanity irrespective of whether these occur in times of peace or war. POC, for its part, can apply to any discrete act committed in an armed conflict, post-conflict situations, internal disturbances, famine and natural disasters. Moreover, the framework of response, envisaged by R2P is deeper and more diverse than that of POC.

Given their substantial overlap, the two principles can support each other and, thereby, strengthen the overall protection of the most vulnerable. Such an interaction, seen by many as a major conceptual achievement and a strong practical opportunity⁶⁰¹, was traced in relation to *peacekeeping POC* and R2P, where, on the one hand, R2P has provided a powerful language to shape expectations about what peacekeeping forces are obliged to do in cases when egregious human rights violations are taking place both in the immediate vicinity of peacekeepers and in the areas located outside of their direct control when peacekeepers are aware of such crimes and are in sufficiently close proximity to be able to respond and have capacity to do so; as well as crystallizes the obligations of contributing states to ensure that their troops are appropriately mandated, trained and resourced to react adequately to the possible perpetrations of mass atrocity crimes. On the other hand, peace operations with a POC mandate were viewed as operationalizing all three pillars of the R2P concept.

Furthermore, a huge potential for mutual reinforcement was identified with regard to *combatant POC* and R2P. The main premise was that R2P added a political consensus to the expansive interpretation of Article 1 common to the Geneva Conventions according to which states are obliged not only to ensure the effective implementation of these Conventions within their jurisdictions but also to encourage other states to act likewise. Additionally, contentious pillar three of R2P finds its legal basis in Article 89 of the API, which justifies the collective action of the international community in response to war crimes.

Ultimately, the thesis examined points of interaction between *humanitarian POC* and R2P. Having

⁶⁰¹ See, for instance, Popovski, V., Interaction of the Norms of Protection, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 276, 2012.

identified the applicability of the R2P norm to natural disasters, the paper concluded that R2P could strengthen *humanitarian POC* by providing for a broader array of possible measures exercised by the international community to protect civilians including the use of military force in situations where crimes against humanity are taking place given the failure of the host state to respond appropriately to natural disasters. Should this opportunity for interaction fail to be realized in the Asian context due to the general reluctance in the Asia-Pacific region to fully endorse the R2P protection toolkit, an alternative road to the enhanced civilian protection runs through the R2Pprovide, specifically tailored to the Asian needs and concerns.

Regardless of this enormous potential for mutually beneficial interaction, the two norms are frequently misinterpreted and abused and there are complications in understanding their distinct roles. Such confusion was illustrated in the case of the Libyan war in 2011. While this case indicates how the full convergence of the two protection norms can generate the timely and decisive response of the international community to protect civilians, there are many controversies and fears surrounding the parallel application of the two protection principles, in particular those relating to the capacity of R2P and POC to serve as tools for regime change.

Thus, while R2P and POC can coexist in a mutually reinforcing relationship, the potential for misuse is present and continues to hinder the fullest scope of action of the international community in response to the egregious violations of human rights, as the case of Syria demonstrated. Nevertheless, the issue of selectivity brought by Syrian and other experiences should not be interpreted as a fiasco of the two protection norms but rather as an impetus for further research on how to respond effectively to the human rights emergencies even in the most complicated situations. In fact, Popovski observed that states and other actors may misinterpret the norms – either to avoid their obligations or to pursue selfish national interests – but this does not render the norms useless. Violating the law should not make the law disappear.⁶⁰²

In light of these reflections, it is possible to argue that the danger of irreconcilability between R2P and POC is much less than the benefit of their interaction. With a view to strengthen this benefit, Popovski, for instance, suggested the building of regional capacities that can be instrumental for both protection regimes.⁶⁰³ R2P is clearly articulated in Article 4(h) of the 2000 Constitutive Act of the AU, according to which member states of the AU can agree upon measures, including the use of

⁶⁰² *Ibid.*, p. 272.

coercive force, “in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”. Notably, Article 4(h) authorizes the AU to receive SC authorization subsequent to the military intervention. Similarly, R2P and POC have been mainstreamed within various institutions of the EU⁶⁰⁴ and have been recently advanced in the Asia-Pacific region.⁶⁰⁵ Thus, it would be very important for the further development of the two norms to include R2P and POC terminology in various regional organizations’ charters.

Another important task, suggested by Popovski, is to create greater clarity on specific capacities, measures and tools and to ensure policy coherence in relation to R2P and POC. There is also a need to develop different strategies applicable to the preventive and reaction phases. For instance, these would include enhancing early-warning systems; strengthening regional standby forces; empowering additional bodies, such as the Peacebuilding Commission, with mandates and resources; developing national R2P and POC implementation strategies; and increasing assistance in developing states’ capacities to prevent and protect.⁶⁰⁶ The cross-regional learning and assistance is crucial. Although transformation of R2P and POC into fully operational concepts is a long-term process, there are early indications of success, discernible in the work of the UN and other actors.

The last issue worth of note is the lack of the prosecution dimension in the normative framework of both agendas. R2P and POC place their focus at prevention and reaction falling short of demanding prosecution of perpetrators of violations. Even though the responsibility to rebuilt component of R2P as well as *Security Council POC* include some commitments to prosecute violators, the discussion and analyses of the civilian protection and the prosecution of those responsible for crimes “have hitherto proceeded along separate lines”.⁶⁰⁷ It would be crucial for an overall transformation of R2P and POC from words to deeds to treat the issues of international protection and prosecution as closely interrelated.

⁶⁰³ *Ibid.*, p. 276.

⁶⁰⁴ See Damien, H., “R2P, Africa and the EU: Towards Pragmatic International Subsidiarity?”, EU Institute for Security Studies, November 2008, available at http://www.iss.europa.eu/uploads/media/R2P_Africa_EU.pdf (last visited 15 October 2013).

⁶⁰⁵ See Lina, A., Enhancing the Capacities of State and Regional Institutions in Transforming Responsibility to Protect from Words to Deeds: The Case of Indonesia and ASEAN, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 234-248, 2012; Tan, S., Towards a ‘Responsibility to Provide’: Cultivating an Ethic of Responsible Sovereignty in Southeast Asia, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, pp. 249-267, 2012.

⁶⁰⁶ Popovski, V., Interaction of the Norms of Protection, in Francis, A.; Popovski, V.; Sampford, C. (eds.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and Their Interaction*, p. 276, 2012.

All in all, the evolution and development of R2P and POC from 1990s to the present is illustrative of various crises, successes and failures, experienced by the international community in the face of humanitarian catastrophes and is fraught with many uncertainties, controversies and fears. However, “this has been an impressively fast normative evolution – an academic formula that turned into a major global agreement on how to protect civilians and respond to mass atrocities”.⁶⁰⁸

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.*, p. 277.

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Extract from the 2005 World Summit Outcome Document

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.