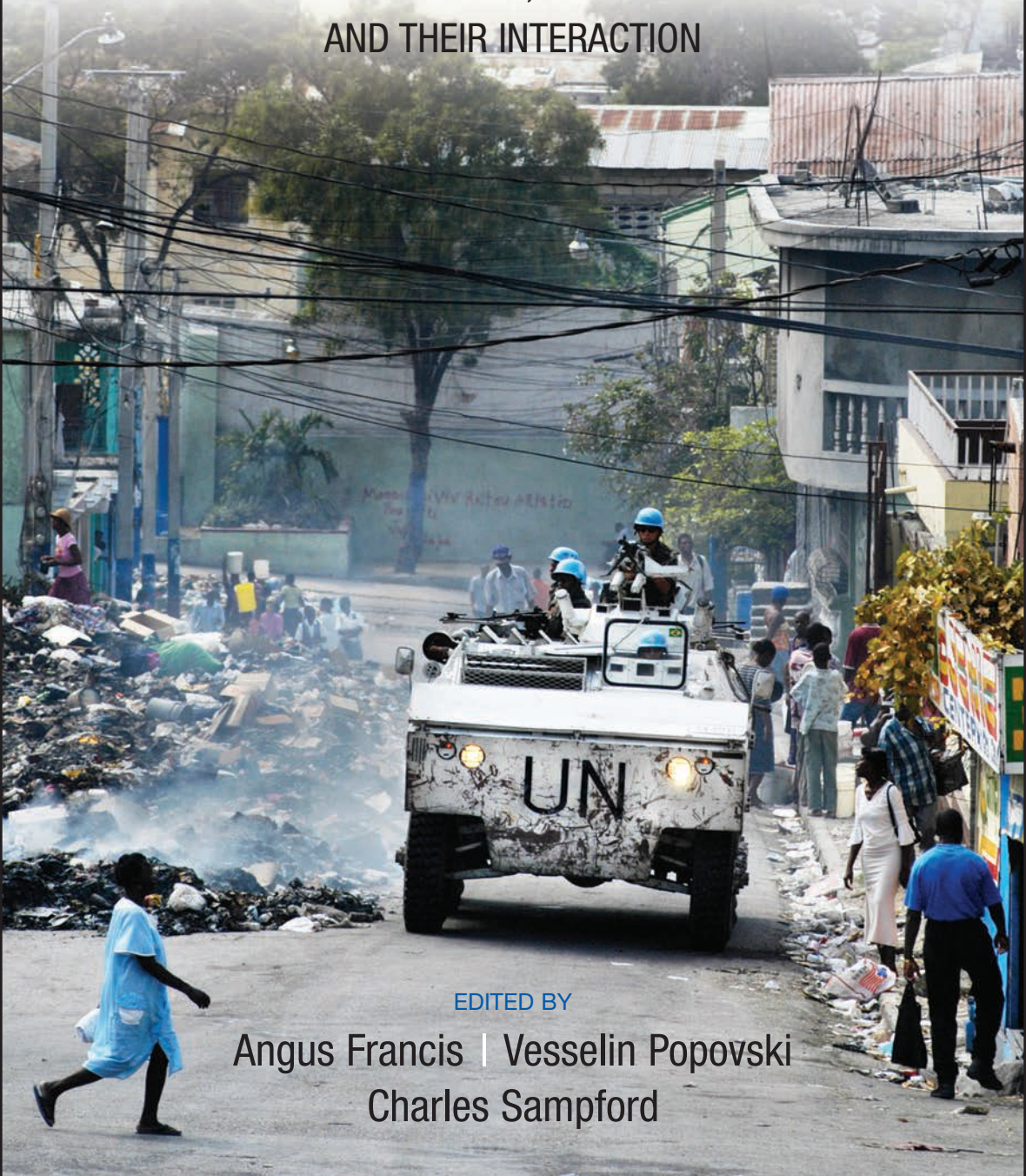


Norms of Protection

RESPONSIBILITY TO PROTECT, PROTECTION OF CIVILIANS
AND THEIR INTERACTION



EDITED BY

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FOREWORD BY RAMESH THAKUR

Norms of protection: Responsibility to protect, protection of civilians and their interaction

Edited by Angus Francis, Vesselin Popovski and Charles Sampford



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Introduction

Angus Francis and Charles Sampford

With intra-state conflict replacing inter-state conflict across the globe (Orchard, 2010: 38), “civilian-based civil wars” (Ferris, 2011) are exposing vulnerable populations to war crimes, ethnic cleansing and acts of genocide. The UN Secretary-General has highlighted the growing threats to women and children caught up in armed conflicts, as well as dangers faced by civilians forced to mix with combatants and armed elements in camps for refugees and the internally displaced. The vulnerability of civilians in conflict has been exacerbated by some governments’ reluctance to accept international assistance and the increasing number of attacks on humanitarian workers and UN staff (UNSG, 1999).

In the early 1990s, the international community’s reaction to this “crisis of protection” revolved around three main responses. The first was normative developments in humanitarian assistance through the intergovernmental legislative framework of the UN General Assembly (UNGA), the Economic and Social Council (ECOSOC) and the UN Security Council (UNSC). The second saw the evolution in organizational mechanisms for humanitarian coordination, such as the Inter-Agency Standing Committee (IASC). And third, there was an expansion of military and civil actors involved in the provision of humanitarian assistance and the protection of civilians.

However, a series of humanitarian tragedies in the 1990s (Somalia 1992–1994; Rwanda 1994; Srebrenica 1995; Kosovo 1999) demonstrated the failure of the international community to protect civilians in the context of complex emergencies involving multiple issues of access, internal

displacement, security of humanitarian workers and the relationship between civil and military actors. These events also undermined, to a large extent, the reaching of any consensus among UN members on the criteria for and means of intervention.

Since that time the UN Secretary-General, the UNSC, UN agencies and other humanitarian actors have renewed their efforts to ensure the effective protection of civilians from armed conflict. Among the strategies employed has been a human-rights-based approach to protection coupled with new protection endeavours, including: promotion of the protection of civilians (POC) in UN peacekeeping operations; greater inter-agency cooperation in the coordination of humanitarian responses to crisis situations; and promoting the responsibility to protect (R2P) principle as an overarching protection norm.

The emergence of POC as a core directive of humanitarian efforts

Explicit reference to the protection of civilians emerged in the UNSC from the late 1990s (Ferris, 2011). Over the last decade or more, POC has been endorsed in a series of reports by the UN Secretary-General to the Security Council (S/1999/957, S/2001/331, S/2002/1300, S/2004/431, S/2005/740, S/2007/643, S/2009/277), four UNSC resolutions (Res. 1265 in 1999; 1296 in 2000; 1674 and 1738 in 2006) as well as at least eight presidential statements (1999/6, 2002/6, 2002/41, 2003/27, 2004/46, 2005/25, 2009/1, 2009/9). A number of UNSC mandates have also incorporated POC – Afghanistan (UNAMA), Central African Republic (MINURCAT), Côte d'Ivoire (UNOCI), Darfur (UNAMID), Democratic Republic of Congo (MONUC), Haiti (MINUSTAH), Liberia (UNMIL) and Sudan (UNMIS).

These and other UN documents contain a range of recommendations for the better protection of civilians in conflicts, including: broadening the mandate of peacekeeping operations to allow troops to protect civilians under imminent threat of violence; protection of particularly vulnerable groups (women, children, refugees and internally displaced persons (IDPs) and humanitarian workers); closing gaps in existing international law; conflict prevention; confidence-building; humanitarian access; targeted sanctions; stressing the multidisciplinary nature of peacebuilding; cooperation with regional actors; separation of combatants and armed elements from civilians in IDP and refugee camps; disarmament and demobilization; and intervention in cases of genocide, crimes against humanity and war crimes (UNSC Res. 1265/1999, 1296/2000, 1674/2006, 1738/2006; UNSG S/1999/957, S/2001/331, S/2004/431).

Furthermore, as part of these initiatives, UN bodies have sought to entrench the protection of civilians in conflict in the obligations of parties

under international humanitarian, human rights and refugee law. UN bodies have repeatedly called upon states which are not a party to the major treaties of international humanitarian, human rights and refugee law to ratify those instruments. Once ratified, all states are called upon to take steps to implement these instruments within their jurisdictions through appropriate legislative, judicial and administrative measures.

Convergence of POC and UN reform

The emergence of POC has coincided with reforms to the UN humanitarian system. This process identified protection as a gap in humanitarian efforts and instigated institutional mechanisms to ensure that protection of civilians was a core component of humanitarian responses. Principals of the IASC established the “cluster approach” in 2005 whereby responsibilities are assigned to lead agencies in order to provide a more effective response to humanitarian emergencies, particularly those involving mass internal displacement. The Global Protection Cluster, chaired by the UN High Commissioner for Refugees, is the main forum at the global level for coordination of protection in humanitarian action (IASC, 2007). The development of the protection cluster is recognition that refugee flows, internal displacement and humanitarian crises can occur in complex emergencies where the state is unable or unwilling to protect civilians. The response must involve the combined efforts of an array of actors at national, regional and international levels.

The IASC has been instrumental in defining civil-military collaborations for the protection of civilians in conflict, which have increased in importance as the mandates of UN protection missions increasingly cover POC in conflict. The Global Protection Cluster approach and the principles and practices associated with POC are converging, as evident in the joint leadership of the protection cluster granted to UNHCR and the UN’s peacekeeping mission in the Democratic Republic of Congo (MONUC) (Murthy, 2007). The Protection Cluster in the DRC involved the participation of a number of international protection actors – UNHCR, MONUC, UNICEF, the Office for the Coordination of Humanitarian Affairs (OCHA), the International Committee of the Red Cross (ICRC) and international NGOs – alongside civil-military actors (Murthy, 2007).

The parallel emergence of the R2P principle

The responsibility to protect (R2P) principle arose alongside POC, beginning with the report of the International Commission on Intervention

and State Sovereignty (ICISS, 2001). The ICISS report turned humanitarian intervention on its head – shifting the focus from the rights of states (rights to intervene vs rights to territorial integrity) to the rights of individuals and the responsibility of states and, ultimately, the international community to protect those rights. Rather than the subject having to demonstrate fidelity to his sovereign, the state had to justify itself to its citizens (Sampford, 2009). This approach of emphasizing human rights, primary state responsibility and international backup brings what was previously called “humanitarian intervention” into line with other areas of international law.

The emergence of the R2P principle raises the issue of how POC and R2P interrelate. In keeping with the general move toward a more coordinated approach to the UN humanitarian system addressed in the Global Protection Cluster and elsewhere, the Report of the UN Secretary-General issued on 12 January 2009 entitled “Implementing the responsibility to protect” outlines a three-pillar strategy for operationalizing the R2P principle that adopts a cross-sectoral approach. This approach embraces other protection agenda (UNSG, 2009). This is reflected in the Report’s “narrow but deep” approach to the R2P principle’s implementation: “while the scope [of the R2P principle] should be kept narrow, the response ought to be deep, employing the wide array of prevention and protection instruments available to Member States, the United Nations system, regional and subregional organizations and their civil society partners” (ibid., para. 10(c)). The Report concludes by underscoring the need to forge “a common strategy” (ibid., para. 68).

Despite these initiatives many states suspect that R2P is just a means of legitimating military intervention¹ – a suspicion that has been accentuated by some of the traditional complaints about humanitarian intervention; the use of ICISS to justify the intervention in Iraq by an ICISS author; and unfortunate concentration on non-consensual intervention rather the prevention, reaction and rebuilding emphasized by the ICISS report. Accordingly, while R2P and POC have wide formal UN endorsement and support in international humanitarian law, human rights law and refugee law, this ongoing resistance to R2P emphasizes the importance of exploring its relationship with POC.

Developments in Libya and Côte d’Ivoire and the actions of the UNSC have given new significance to the relationship between R2P and POC. In both cases – though in different ways and under different types of Security Council mandates – robust international military force was used against belligerents in order to protect civilians. In Libya, Resolution 1973 (UNSC, 2011b) (preceded by Res. 1970 (UNSC, 2011a)) authorized the use of force to prevent Gaddafi’s troops attacking his people; the objective of the international action was expressly to protect the lives of

Libyan civilians. The Secretary-General (UNSG, 2011) did not shy away from expressing the overall resolution in terms of the R2P.

Additionally the recent use of robust force by the French in Côte d'Ivoire, authorized by the Secretary-General under the Protection of Civilians mandate in UNSC Resolutions 1933 (UNSC, 2010a), 1962 (UNSC, 2010b) and 1975 (UNSC, 2011c), extends the ever-growing links between POC and R2P. In Côte d'Ivoire robust military action was authorized without the Secretary-General requiring a special mandate beyond the initial Protection of Civilians clauses of prior Security Council resolutions. This use of force had a decisive influence on domestic authority and regime change – and this proved true also in Libya. Even as the principles are applied in one context, however, they may be resisted in another. At the time of writing, the attacks of the Syrian government on its own civilians have precipitated Security Council attention and a Presidential Statement, but no resolutions have been forthcoming.

To consider the relationship between R2P and POC, and their relationship with other protection norms, a research team from the Institute for Ethics, Governance and Law (IEGL,² through two of its affiliated centres³), the United Nations University (UNU) and the Australian Civil-Military Centre (ACMC) brought together engaged academics and reflective practitioners in November 2010. The project was funded by the Australian Responsibility to Protect Fund with support from ACMC, UNU and IEGL itself.

Dr Hugh Breakey, an IEGL Research Fellow, conducted an extensive review of the current literature on R2P and POC, covering relevant Security Council resolutions, Secretary-General Reports, international humanitarian and human rights law, and studies and reports on the operation of R2P and POC in humanitarian crises and with regard to peacekeeping operations. The full review is available on the IEGL and ACMC websites and is summarized in Chapters 1 to 3. In addition, the research team engaged in a series of interviews and roundtable discussions conducted by Dr Vesselin Popovski and Dr Angus Francis in Geneva and New York with key practitioners in the protection operations of UN intergovernmental bodies and NGOs. There followed an academic practitioner workshop in Sydney to flesh out and “road test” the ideas being developed, and leading to drafts of the essays in this volume. The project team has since facilitated capacity-building workshops throughout the Asia-Pacific region, engaging with policymakers, peacekeepers, humanitarians and civil society stakeholders on their understandings of and interaction with R2P and POC.

As well as this edited collection, the project is producing a *Guide to R2P and POC* aimed at enhancing the ability of governments, regional

and international organizations and civil society to protect civilians from conflict-related grave harm and mass atrocity crimes.

Themes

Building on prior work linking R2P and POC (APCR2P, 2009; Bergholm and Badescu, 2009; Holt and Berkman, 2006; Hunt, 2009; LaeGreid, 2008; Strauss, 2009), this book explains the relationships in law, practice and political theory between R2P and POC and other relevant humanitarian norms and identifies ways in which R2P can add practical, legal and normative value to the POC agenda and vice versa. Chapters 1 and 2 define in turn R2P and POC, tracing their respective histories, contemporary content and structure, overlap, gaps, areas of controversy and legal status. Just as R2P may be usefully divided into its “three pillars”, Breakey argues that the different roles and perspectives of key POC actors – combatants, peacekeepers, UN actors and humanitarians – give rise to four distinct but mutually reinforcing protection norms.

Chapters 3 and 4 investigate the links between R2P and POC, beginning with Breakey’s survey and critique of current understandings in the literature of the connection between the two norms, before turning to Francis and Popovski’s report of practitioners’ perspectives on the nature and interrelations between R2P and POC. This report is based on interviews with key actors and stakeholders in Geneva and New York, including Assistant Secretaries-General Edward Luck and Francis Deng and other key protection actors (the Department of Peacekeeping Operations (DPKO), OCHA and UNHCR). In Chapter 5, Charles Sampford then places the international norms of R2P and POC in their historical and cultural context. He argues that both are rooted in empathy and common humanity that are found in all cultures and religions and the claims by all leaders to protect their followers, and suggests that one way of strengthening R2P and POC is to look for “congruent” values within local cultures and religions and relate R2P and POC to them. He argues that concerns about the overreach and abuse of R2P (and POC) norms are legitimate and that similar concerns lay at the heart of the Westphalian system. However, he argues that these concerns can be addressed through international law and international institutions.

Chapter 6 by Hitoshi Nasu, Chapter 7 by Andrew Garwood-Gowers and Chapter 8 by Annie Herro and Kavitha Suthanthiraraj deal with the operationalization of R2P and POC. Nasu weighs the extent to which the mandating of peacekeeping operations to protect civilians may facilitate the process of operationalizing the R2P principle in practice. While seeing POC in this manner as a vehicle for R2P, Nasu warns of the difficul-

ties R2P's robust use of force may create for peacekeepers. Like Nasu, Garwood-Gowers sees peacekeeping forces as a crucial tool of R2P, but in his chapter he focuses particularly on what he sees as the signature contribution of R2P – its *preventive* aspect. Peacekeeping forces, regional organizations and UN organs are all considered in their capacities for developing improved early-warning mechanisms, which would in turn facilitate (with host state consent) preventive deployments of peacekeepers.

Picking up a thread touched upon by both Nasu and Garwood-Gowers – the limitations on the capacity of contemporary peacekeeping operations for swiftly deploying robust and well-equipped forces – Herro and Suthanthiraraj examine the prospects for a UN Emergency Peace Service. While not new, the idea of a ready-reaction UN force capable of timely and effective deployment promises to resolve ongoing gaps in civilian protection. Herro and Suthanthiraraj consider how the norms of R2P and (especially) POC might contribute to the realization and nature of such a force.

Chapter 9 by Helen Durham and Phoebe Wynne-Pope, Chapter 10 by Edwin Bikundo and Chapter 11 by Angus Francis develop the legal aspects and interrelations of R2P and POC and other humanitarian norms. Durham and Wynne-Pope begin by tracing the ways international humanitarian law (the Geneva Conventions and Additional Protocols) and the Genocide Convention give legal authority to key aspects of R2P's first two pillars. Importantly, they argue that Article 89 of Additional Protocol I requiring states to take collective action to prevent war crimes is stronger than that found in paragraph 139 of the *World Summit Outcome Document* – thus highlighting the need for R2P advocates not to overlook or ignore existing international legal obligations.

Taking a broader viewpoint, in his chapter Bikundo argues that recent developments in international law and Security Council action (especially with regard to Libya) suggest the emergence of the protection of civilians as the pre-eminent norm in the international legal regime. POC, on this footing, governs and shapes all legitimate use of force, and R2P is understood as a key means for furthering this overarching POC agenda. Turning to the application of R2P to refugee law and policy, Francis welcomes the R2P focus on the prevention of atrocity crimes, but gives a cautious appraisal of the extent to which military intervention improves prospects for at-risk communities. While “in-country” protection of displaced persons remains an obvious focus of contemporary measures, it should not obscure the necessity for planning and realizing the protection opportunities that can be afforded by neighbouring states.

In the next chapters, the role of regional capacities and perspectives on R2P and POC is gauged, with a specific focus on the Asia-Pacific region. In Chapter 12, Lina Alexandra considers what institutional capacities in

Indonesia and ASEAN might be utilized or enhanced to promote R2P, and what steps need to be taken to develop the capacity of states and regional organizations to react to mass atrocity crimes. While noting the capacities and gaps of current government and regional organs, Alexandra highlights one preventive mechanism often overlooked: the engagement of local civilian movements to stop and prevent further violence. In Chapter 13, See Seng Tan delves deeply into the notion of “sovereignty as responsibility” underpinning R2P as it is emerging in the region. He notes particularly the practice and concern for providing for one’s population and the population of neighbouring states (the “responsibility to provide”) as a potential entry point for the type of regional support envisaged by R2P.

In the final chapter, Vesselin Popovski reflects on the interaction of R2P and POC as two norms of protection that have been developing and interacting over the last decade. Both are deeply rooted in the empathy that human beings have for the suffering of others. Both have achieved high-level endorsement: R2P from the 2005 Global Summit and POC from Security Council resolutions – with 2011 seeing them both used in UNSC Resolution 1973 on Libya. Both raise concerns because of the sometimes sorry history of attempts by outsiders to protect civilians – concerns that did not start with claims of rights to humanitarian intervention in Kosovo but are based on similar seventeenth-century European concerns that were central to the development of Westphalian traditions of sovereignty and non-interference. The two norms are developing, sometimes in parallel, sometimes diverging and sometimes converging – with varying degrees of institutionalization and acceptance. This process is likely to continue for some time with crises, successes and failures enhancing or retarding that development.

Our hope is that this collection will be of use to those involved in this process: policymakers and actors (national, regional and UN); practitioners with protective roles (force commanders, military trainers and strategists and humanitarian actors); academics and researchers (in international relations, law, political theory and ethics); and NGO officials and other civil society R2P and POC advocates.

Notes

1. See Adebajo and Fakier (2007), Bellamy (2008, 2009), Benjamin (2007), Bessler and Seki (2006) and Newman (2009).
2. IEGL is a joint initiative of the United Nations University (UNU), Griffith University and Queensland University of Technology (QUT) in association with the Australian National University (ANU), the Center for Asian Integrity and O. P. Jindal Global University.

3. The Law and Justice Research Centre at QUT and the Key Centre for Ethics, Law, Justice and Governance at Griffith University.

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A series of humanitarian tragedies in the 1990s (Somalia, 1992–1994; Rwanda, 1994; Srebrenica, 1995; Kosovo, 1999) demonstrated the failure of the international community to protect civilians in the context of complex emergencies. These brought to life two norms of protection – Responsibility to Protect (R2P) and Protection of Civilians (POC) – both deeply rooted in the empathy that human beings have for the suffering of innocent people. The norms have achieved high level endorsement: R2P from the 2005 World Summit Outcome document (Art. 138–140) and POC from a series of Security Council resolutions. The two norms of protection were instrumental in adopting Security Council Resolutions 1970 and 1973 (Libya), and 1975 (Cote d'Ivoire) in 2011. Both norms raise concerns of misinterpretation and misuse. They are developing – sometimes in parallel, sometimes diverging and sometimes converging – with varying degrees of institutionalization and acceptance. This process is likely to continue for some time with successes and failures enhancing or retarding that development. This book engages in a profound comparative analysis of the norms and aims to serve policy-makers at various levels (national, regional and UN); practitioners with protective roles (force commanders, military trainers, strategists and humanitarian actors); academics and researchers (in international relations, law, political theory and ethics); civil society and R2P and POC advocates.

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